

122 FERC ¶ 61, 140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southeastern Power Administration

Docket No. RC08-1-000

ORDER REMANDING PROCEEDING TO ELECTRIC RELIABILITY
ORGANIZATION

(Issued February 21, 2008)

1. In this order, the Commission remands to the North American Electric Reliability Corporation (NERC), a decision in which NERC found that the Southeastern Power Administration (SEPA) was properly included on the NERC compliance registry as a transmission operator and resource planner, and thus subject to mandatory and enforceable Reliability Standards applicable to those functions. SERC Reliability Corporation (SERC), a NERC Regional Entity, registered SEPA as a transmission operator and resource planner. SEPA sought NERC review of SERC's decision and, after affirmation by NERC, appealed to the Commission to reverse the NERC determination. The Commission remands this proceeding to NERC for further consideration and to submit, within 60 days of the date of this order, a revised registration determination that addresses the Commission's concerns discussed below.

I. Background

A. Regulatory Background

2. In July 2006, the Commission issued an order certifying NERC as the Electric Reliability Organization (ERO) pursuant to section 215 of the Federal Power Act (FPA).¹ Subsequently, in April 2007, the Commission approved delegation agreements between

¹ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007); 16 U.S.C. § 824o (Supp. V 2005).

NERC and eight Regional Entities, including a delegation agreement between NERC and SERC.² Pursuant to that delegation agreement, NERC delegated to SERC the authority to enforce mandatory Reliability Standards within the SERC region.

3. In Order No. 693, the Commission approved 83 Reliability Standards, which became effective on June 18, 2007.³ Further, in Order No. 693, the Commission approved NERC's compliance registry process, including NERC's Statement of Compliance Registry Criteria (Registry Criteria), which describes how NERC and the Regional Entities will identify organizations that should be registered for compliance with mandatory Reliability Standards.⁴ NERC's Rules of Procedure also provide that an entity registered by a Regional Entity may seek NERC review of the registration decision and, ultimately, may appeal the registration decision to the Commission.

B. NERC Registry Criteria

4. According to NERC's Registry Criteria, the first step in the registry process is to determine whether an entity is a user, owner or operator of the Bulk-Power System and, hence, a candidate for organization registration. Section II of the Registry Criteria categorizes registration candidates under various functional entity types, including transmission operators and resource planners. In Section II, NERC defines a transmission operator as "[t]he entity responsible for the reliability of its local transmission system and operates or directs the operations of the transmission facilities."⁵ A resource planner is defined as "[t]he entity that develops a long-term (generally one year and beyond) plan for the resource adequacy of specific loads (customer demand and energy requirements) within a [planning authority] area."

5. Other relevant sections of the Registry Criteria are Section III, which identifies criteria for determining whether small entities should be registered, and Section IV, which provides for joint registrations.

² *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

³ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 72 Fed. Reg. 16,416 (April 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2007), *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁴ *Id.* P 92-95.

⁵ NERC Registry Criteria at 6.

C. SEPA

6. SEPA, the smallest of four federal power marketing administrations (PMAs), markets the federal power from twenty-two hydroelectric projects owned and operated by the U.S. Army Corps of Engineers (Corps) in ten southeastern states. SEPA has 492 customers, primarily municipal, cooperative and federal systems. SEPA has negotiated long-term contracts with eighteen transmission owners to transmit the power produced by the Corps hydroelectric projects to SEPA's customers. The SEPA balancing authority area contains 1,444 MW of capacity from three hydroelectric projects, which are owned and operated by the Corps.

II. Appeal of NERC Registry Decision

A. NERC's Decision

7. SERC registered SEPA as a balancing authority, a purchasing-selling entity, a transmission operator, and a resource planner.⁶ While SEPA assented to registration as a balancing authority and purchasing-selling entity, SEPA appealed to NERC the SERC decision to register it as a transmission operator and as a resource planner. SEPA claimed that it does not own any transmission facilities nor does it have the authority to operate transmission facilities and thus should not be registered as a transmission operator. SEPA also asserted that, while it provides data to SERC, the provision of data should not be interpreted as developing a long-term plan for resource adequacy. SEPA claimed that, because it serves no end use customers and has no responsibility to develop or forecast loads, it is not a resource planner.

8. On September 25, 2007, NERC denied SEPA's appeal of the SERC registry decision. NERC found that SEPA was properly registered as a transmission operator. NERC stated that ownership of transmission facilities is not necessary for an entity to be a transmission operator. NERC reasoned that SEPA "directs the operation of transmission facilities, and it does so by coordinating outages with interconnected utilities as requested by [the Corps], granting permission to [the Corps] to conduct outages or requesting [the Corps] to reschedule outages. These fall within the scope of activities contemplated under the [transmission operator] function."⁷ NERC indicated that SEPA's activities were pursuant to one or more Memoranda of Understanding between SEPA and the Corps.

⁶ SEPA was initially registered as a transmission service provider as well. SERC subsequently removed the transmission service provider function from SEPA's registration.

⁷ NERC decision at 7.

9. NERC also found that SERC had properly registered SEPA as a resource planner because SEPA provides data relevant to the resource planner function. NERC stated that SEPA has agreements with the reliability coordinator and the interconnected utilities that, if certain conditions exist on the transmission system, they will change generation schedules to prevent transmission overloads and have done this many times. NERC also relied on SERC's representation that SEPA provides relevant data pertaining to regional steady-state modeling as set forth in Reliability Standard MOD-010-1. NERC notes that SEPA actively participates in regional studies groups through which SERC conducts regional planning.

10. In addition, NERC justifies the inclusion of SEPA on the compliance registry as a transmission operator and resource planner based on SEPA's previous registrations prior to the enactment of section 215 of the FPA. NERC states that, according to SERC, its understanding of SEPA's functions has been upheld through numerous audits, evaluations and filings. Further, NERC states that SEPA is the only entity currently performing the functions of transmission operator and resource planner for the Southeastern Federal Power System and failure to register SEPA would result in gaps or exclusions in reliability. NERC explains:

the NERC Rules of Procedure provide a mechanism for joint registration and it may be the case that both the Corps and SEPA will be registered for the [transmission operator and resource planner] roles. In light of the fact that memorandums of understanding currently exist that obligate SEPA to provide the functions at issue here, SEPA may not merely renounce its obligations. Rather, SEPA must comply with the NERC Rules of Procedure before it can transfer or renounce its duties as a [transmission operator and resource planner].⁸

B. SEPA's Appeal of NERC's Decision

11. In its appeal to the Commission, SEPA argues that it has no statutory or regulatory authority over the Corps' operation or planning for the physical equipment required for the production of electric power. SEPA states that its relationship with the Corps is defined in the Flood Control Act of 1944, and that statute provides no basis to assume that SEPA has any control over Corps river management or personnel, or the Corps' operation of projects, switchyards, and other facilities.⁹ Rather, according to SEPA, the

⁸ NERC decision at 8.

⁹ The Flood Control Act of 1944, 16 U.S.C. § 825s (2000), provides that “[e]lectric power and energy generated at reservoir projects under the control of the Department of Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of Energy....”

Corps has ownership and complete control over all operations and physical equipment associated with the Corps-owned hydroelectric projects, including the switchyards. Also, SEPA asserts that the Corps has always maintained ultimate responsibility for the ownership and operations of its hydroelectric projects and switchyards. SEPA contends that its registration as a transmission owner or resource planner would place it at risk for penalties for the acts or omissions of Corps personnel, over which SEPA has no control.

12. SEPA explains that, historically, it has been the intermediary and facilitator between the Corps and the transmitting utilities regarding the flow of federal power to SEPA's 492 preference customers. SEPA claims that this has led to misconceptions by SERC and NERC regarding the marketing functions, authority and responsibilities of SEPA, as well as its interaction with the Corps.

13. SEPA argues that NERC erred in stating that SEPA was attempting to abandon its responsibility to operate Corps transmission facilities. SEPA argues that, while it agreed to perform some transmission operator functions under the voluntary pre-EPA 2005 regulatory regime, it should not be held to compliance with mandatory and enforceable Reliability Standards in regard to these functions. SEPA also argues that NERC erred in finding that SEPA was under an obligation to identify and obligate another entity to assume the transmission operator function before it could renounce its own transmission operator function. SEPA argues that it does not have ability to require a third party to either register for the transmission operator function, or to jointly register for that function. SEPA argues that the Corps should rightfully be registered as transmission operator in connection with the operation of the facilities in SERC.

14. With respect to its registration as resource planner, SEPA argues that it is SEPA's customers that have the obligation to plan and forecast for their native load growth and maintain resource adequacy. SEPA points out that it has no load or utility responsibility.

C. Interventions and Comments

15. Notice of SEPA's filing was published in the *Federal Register*, 72 Fed. Reg. 60,834 (2007), with interventions and protests due on or before November 14, 2007.

16. Timely motions to intervene were filed by NERC, SERC and the Southeastern Federal Power Customers, Inc. (SEPA Customers). SERC also submitted supporting documentation regarding its decision to register SEPA.

17. SEPA Customers, which represent 328 rural electric cooperatives and municipally-owned electric systems that purchase capacity and energy from SEPA, support SEPA's appeals. They argue that SEPA's role and function in the southeast is inconsistent with SEPA's registration and others are performing the functions of transmission operator and resource planner in the region. SEPA Customers state that the entities that SEPA relies on to transmit electricity generated at Corps facilities have

registered as transmission operators and that the designation of SEPA as a transmission operator is redundant.

18. SEPA Customers further state that, because SEPA remains subject to water conditions in the southeast and makes short term purchases of power to augment Corps deliveries, SEPA cannot make long term planning arrangements or function as a resource planner. Rather, they contend that the responsibility to plan for specific loads and to determine the adequacy of resources for those loads rests with SEPA's customers and not with SEPA. SEPA Customers emphasize that SEPA has an "extremely limited role" and, "at its core mission, [SEPA] is simply a power marketer that owns no generation or transmission assets."¹⁰

III. Discussion

A. Procedural Matters

19. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹¹ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

20. The Commission remands to NERC the SEPA registry determination for further consideration. While it appears that SEPA, consistent with the transmission operator function, coordinates outages and schedules maintenance, the record is unclear regarding SEPA's relationship with the Corps on these matters. Likewise, the Commission believes that a further development of the record regarding SEPA's function as resource planner is needed for the Commission to rule on SEPA's appeal. Because we remand this matter to NERC, SEPA will remain on the NERC compliance registry and responsible for compliance with mandatory Reliability Standards.¹² NERC should submit a registration determination that addresses the concerns discussed below within 60 days of the date of this order.

21. As a federal power marketer, SEPA's primary role is to market the excess electric power and energy generated at Corps hydroelectric facilities. This function is set forth in

¹⁰ SEPA Customers at 5.

¹¹ 18 C.F.R. § 385.214 (2007).

¹² See *Mosaic Fertilizer, LLC*, 121 FERC ¶ 61,058 at P 35 (2007). We note that SEPA has not challenged its registration in the SERC region as a balancing authority and purchasing-selling entity. Thus, SEPA is responsible for compliance with Reliability Standards that pertain to those functions.

the Flood Control Act of 1944.¹³ Based on the record in this proceeding, it appears that pursuant to one or more Memoranda of Understanding, SEPA has agreed to perform certain activities that extend beyond its role as a power marketer. Specifically, SEPA coordinates outages with interconnected utilities as requested by the Corps, grants permission to the Corps to conduct outages, and requests that the Corps reschedule outages. NERC and SERC indicate that these activities are consistent with the role of a transmission operator.

22. The Commission is concerned that the analysis of NERC and SERC focuses on SEPA's historical activities¹⁴ without considering the terms of the Memoranda of Understanding and whether the parties to the contract intended to convey responsibility to SEPA. NERC cursorily states that "[i]n light of the fact that memorandums of understanding currently exist *that obligate SEPA to provide the functions at issue here*, SEPA may not merely renounce its obligations."¹⁵ NERC, however, does not provide an analysis of the Memoranda of Understanding or point to specific language that obligates SEPA. SEPA, on the other hand, acknowledges that it performs the tasks but contends that the Memoranda of Understanding do not transfer responsibility to SEPA.¹⁶ The Memoranda of Understanding are not part of the record in this proceeding.

23. Intergovernmental Memoranda of Understanding vary in nature and purpose; it is possible that such documents do not contractually bind the signatory agencies or convey rights and responsibilities as would a bilateral contract between two private parties. Thus, the Commission is concerned that, if the Corps is responsible by statute as the owner and operator of its facilities and SEPA has not accepted contractual responsibility for the transmission operator activities that it performs, the Corps may be the appropriate entity to register as the transmission operator. Alternatively, the specific circumstances may justify a joint registration of both the Corps and SEPA.¹⁷ However, the record

¹³ *See supra* note 9.

¹⁴ NERC states that "SERC justifies its decision to register SEPA . . . based on SEPA's previous registrations and over ten years' operational practice. . . . Presently, SEPA is the only entity performing the functions as discussed herein."

¹⁵ NERC decision at 8 (emphasis added).

¹⁶ SEPA at 6-8.

¹⁷ NERC alludes to the possibility of a joint registration without elaboration. *See* NERC decision at 8 ("the NERC Rules of Procedure provide a mechanism for joint registration and it may be the case that both the Corps and SEPA will be registered for the [transmission operator and resource planner] roles").

before the Commission is not sufficient to make such a determination. Accordingly, we direct NERC to address these concerns in resubmitting its registration determination.

24. We note that, in an October 2007 registration decision, NERC remanded a matter to the Regional Entity regarding two entities that disagreed on which entity has contractual authority to take certain actions and, thus, should be registered. NERC suggested that NERC's "joint registration organization" process may provide an appropriate solution to resolve the matter and directed the Regional Entity to work with the entities to resolve the issues.¹⁸ NERC should consider whether a similar remand to SERC to work with the Corps and SEPA on a joint registration arrangement may be appropriate in the current proceeding.

25. On another but related matter, the record does not clearly indicate the transmission facilities that SEPA is operating (nor is this required in the registration process). It appears, however, that SEPA's registration as a transmission operator relates to its activities with respect to the switchyards used to connect Corps-owned hydroelectric facilities with transmission lines owned and operated by others. This appears to be SEPA's understanding as well.¹⁹ At this time, SERC has not registered the Corps as a transmission owner.²⁰ In these circumstances, it appears anomalous to register an entity as the transmission operator in relation to certain Bulk-Power System facilities, yet not register a corresponding transmission owner. We understand that the registration process is ongoing, and it may simply be a matter of time before all relevant users, owners and operators of the Bulk-Power System are registered in the SERC region pursuant to the NERC Registry Criteria. Nonetheless, NERC should address this matter in resubmitting its registration determination.²¹

26. Further, the Commission has questions regarding NERC's determination that SEPA is properly registered as a resource planner. NERC defines "resource planner" as "[t]he entity that develops a long-term (generally one year and beyond) plan for the resource adequacy of specific loads (customer demand and energy requirements) within a [planning authority] area." NERC registered SEPA as a resource planner because it directs the generating plants regarding their schedules and because it "provides data

¹⁸ See *NERC Registration Decision to Remand Appeal of Constellation Energy Commodities Group, Inc. to Texas Regional Entity* (October 22, 2007).

¹⁹ See SEPA at 5, 10.

²⁰ We also note that SERC has not registered the Corps as a generator owner or operator at this time.

²¹ Alternatively, NERC may submit this information in a concurrent, separate filing if NERC believes it is not appropriate or relevant to the SEPA determination.

relevant to the [resource planner] function.”²² However, the NERC determination does not clearly indicate why SEPA meets the definition of resource planner based on the facts that SEPA directs generating plants regarding their schedules and provides data relevant to the resource planner function. Further explanation by NERC on this matter would assist the Commission in making a determination regarding SEPA’s function as a resource planner.

27. Moreover, SEPA Customers indicate that SEPA makes only short term purchases of power on an as-needed basis and cannot make long-term planning arrangements or function as a resource planner. Rather, they contend that the responsibility to plan for specific loads and to determine the adequacy of resources of those loads rests with SEPA’s customers and not with SEPA. On remand, NERC should address SEPA Customers’ claims, including whether the customers are the appropriate entities to be registered as resource planners.

The Commission orders:

(A) The NERC registration determination regarding SEPA is hereby remanded to NERC for further consideration, consistent with the discussion in the body of this order.

(B) NERC is hereby directed to issue a registration determination with further explanation, within 60 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²² NERC decision at 7.