

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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PUBLIC SERVICE COMMISSION

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Acting General Counsel

JACLYN A. BRILLING
Secretary

October 5, 2007

SENT VIA ELECTRONIC FILING
Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. RM06-22-000 - Mandatory Reliability
Standards for Critical Infrastructure Protection

Dear Secretary Bose:

For filing, please find the Notice of Intervention and Comments of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

A handwritten signature in cursive script, appearing to read 'David G. Drexler'.

David G. Drexler
Assistant Counsel

Attachment

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mandatory Reliability Standards for) Docket Nos. RM06-22-000
Critical Infrastructure Protection)

NOTICE OF INTERVENTION AND COMMENTS OF
THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

NOTICE OF INTERVENTION

On July 20, 2007, the Federal Energy Regulatory Commission (FERC or Commission) issued a Notice of Proposed Rulemaking (NOPR) proposing to approve eight Critical Infrastructure Protection (CIP) reliability standards. The New York State Public Service Commission (NYPSC) hereby submits its Notice of Intervention in the above-captioned proceeding pursuant to the NOPR published in the Federal Register on August 6, 2007, and Rule 214 of the Commission's Rules of Practice and Procedure.

Copies of all correspondence and pleadings should be addressed to:

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INTRODUCTION AND SUMMARY

The Energy Policy Act of 2005 (EPAct) authorized the Commission to certify an Electric Reliability Organization (ERO) responsible for developing and proposing reliability standards for approval by FERC.¹ Subsequently, the North American Electric Reliability Council (NERC) was certified as the ERO.² According to EPAct, the Commission may approve or reject a reliability standard or modification to a reliability standard that is proposed by the ERO.³ Any reliability standard that is rejected must be remanded to the ERO for further consideration.⁴ Once a reliability standard is approved, it becomes mandatory and enforceable by the ERO, subject to the Commission's oversight.

The NOPR seeks comments on whether it is appropriate to adopt the eight CIP reliability standards proposed by NERC.⁵ The NYPSC supports adoption of the eight proposed reliability standards in order to avoid any gaps in such standards. The

¹ 16 U.S.C. §824o(c).

² Docket No. RR06-1-000, North American Electric Reliability Corporation, Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing, 116 FERC ¶61,062, (issued July 20, 2006).

³ 16 U.S.C. §824o(d) (2).

⁴ 16 U.S.C. §824o(d) (4).

⁵ The CIP reliability standards require certain users, owners, and operators of the Bulk-Power System to comply with specific requirements for safeguarding critical cyber assets.

Commission's NOPR, however, would go beyond the scope of its authority under EPAct by directing NERC to take specific actions that would rewrite the proposed reliability standards, such as by removing certain language, as a condition for approving such standards. Instead, consistent with EPAct, the Commission should direct the ERO to submit modifications to the reliability standards that address the Commission's specific issues or concerns.⁶ This approach is consistent with the purpose and intent behind EPAct to designate the ERO as the clearing-house for developing and modifying reliability standards, subject to the Commission's approval.

DISCUSSION

The Commission Should Direct The North American Electric Reliability Council To Address Any Issues Or Concerns

The NOPR proposes to direct that NERC take specific actions to rewrite the eight proposed CIP reliability standards as a condition for their approval. For instance, the Commission "proposes to direct that the ERO modify each of the proposed CIP Reliability Standards to remove references to the 'reasonable business judgment' language,"⁷ and the "'acceptance of risk'

⁶ 16 U.S.C. §824o(d)(5).

⁷ NOPR at ¶67.

option.”⁸ Similarly, the Commission suggests requiring NERC to “interpret the term ‘technical feasibility’ narrowly as applying to the technical characteristics of existing assets and having no relation to the considerations of business judgment.”⁹

The purported basis for these proposed modifications is the Commission’s authority to “order the [ERO] to submit...a proposed reliability standard or a modification to a reliability standard that addresses a specific matter” deemed appropriate.¹⁰ However, this authority merely allows the Commission to require NERC to file a proposal to establish a new reliability standard or to amend an existing standard, in order to address specific matters identified by the Commission. In other words, NERC, as the ERO, must decide in the first instance how the Commission’s specific concerns should best be achieved.

EPAct does not permit the Commission to prescribe how those concerns should be met and to direct the ERO to file a specific standard laid out by the Commission. To interpret the EPAct to include this authority would override the provision directing the Commission to remand to the ERO, for further consideration, any reliability standard that the Commission

⁸ NOPR at ¶77.

⁹ Id.

¹⁰ 16 U.S.C. §824o(d)(5).

disapproves of.¹¹ Moreover, such an interpretation would essentially render the ERO meaningless, as the Commission could simply direct the ERO to file whatever specific reliability standards it deems appropriate.

The Commission previously acknowledged concerns about the "prescriptive nature of...proposed modifications," and directed NERC to "address the underlying issue through the Reliability Standards development process without mandating a specific change to the Reliability Standard."¹² In directing modifications, the Commission emphasized that it was not mandating a particular outcome, but allowing the ERO to "respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is as effective or more effective" than the Commission's directive.¹³

When developing reliability standards, NERC engages in an effective stakeholder process that includes reasonable notice and opportunity for public comment, due process, openness, and the balancing of interests. This process should not be short-

¹¹ 16 U.S.C. §824o(d)(4).

¹² Docket No. RM06-16-000, Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, ¶¶185-86 (issued March 16, 2007) (agreeing that "a direction for modification should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process").

¹³ Id. at ¶31.

circuited by the Commission's directives. Therefore, consistent with the intent and purpose behind EPAct, the Commission should direct NERC to propose modifications to the reliability standards, instead of attempting to rewrite those provisions.

CONCLUSION

As discussed above, the Commission should approve the proposed reliability standards, while directing NERC to consider and propose modifications that address the Commission's issues and concerns.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Peter McGowan". The signature is written in a cursive, flowing style.

Peter McGowan
Acting General Counsel
Public Service Commission
of the State of New York

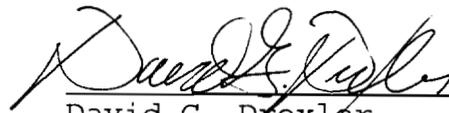
By: David G. Drexler
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(518) 473-8178

Dated: October 5, 2007
Albany, New York

CERTIFICATE OF SERVICE

I, David G. Drexler, do hereby certify that I will serve on October 5, 2007, the foregoing Notice of Intervention and Comments of the New York State Public Service Commission upon each of the parties of record indicated on the official service list compiled by the Secretary in this proceeding.

Dated: October 5, 2007
Albany, New York


David G. Drexler