UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation	**)** **)**	**Docket No. RR12-8-000**

ANSWER OF THE ISO/RTO COUNCIL

In accordance with Rule 213 of the Commission's Rules of Practice and Procedure, the ISO/RTO Council ("IRC")[1] respectfully submits this answer to the *Motion to Intervene and Comments of Occidental Energy Ventures Corp.* ("Occidental Comments").[2]

The IRC previously filed comments in this proceeding urging the Commission to accept the North American Electric Reliability Corporation's ("NERC") proposed new section 5.11 of Appendix 4.C of its Rules of Procedure ("ROP"). Section 5.11 would establish "Special Procedures for an Enforcement Action Against an ISO/RTO Where the Monetary Penalty May Be Allocated by the ISO/RTO to Other Entities." Occidental claims that section 5.11 is unlawful and discriminatory because it supposedly grants unduly preferential treatment to Independent

[1] The IRC is comprised of the Alberta Electric System Operator ("AESO"), the California Independent System Operator Corporation ("California ISO"), Electric Reliability Council of Texas ("ERCOT"), the Independent Electricity System Operator of Ontario, Inc., ("IESO"), ISO New England, Inc. ("ISO-NE"), Midwest Independent Transmission System Operator, Inc., ("MISO"), New York Independent System Operator, Inc. ("NYISO"), PJM Interconnection, L.L.C. ("PJM"), Southwest Power Pool, Inc. ("SPP"), and New Brunswick System Operator ("NBSO"). Because they are not subject to the Commission's jurisdiction, NBSO and, AESO do not join in this pleading. Further, these comments do not constitute agreement or acknowledgement by IESO or NBSO that they can be subject to the Commission's jurisdiction. The IRC's mission is to work collaboratively to develop effective processes, tools, and standard methods for improving the competitive electricity markets across North America. In fulfilling this mission, it is the IRC's goal to provide a perspective that balances Reliability Standards with market practices so that each complements the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers.

[2] Because the Occidental Comments are styled as "comments" the IRC may answer them as of right under Rule 213(a)(1). If the Commission were to conclude that the Occidental Comments were tantamount to a protest, the IRC respectfully requests that the Commission exercise its discretion to allow this answer.

System Operators ("ISOs") and Regional Transmission Organizations ("RTOs"). Occidental also asserts that NERC has failed to provide "any legal basis" for the supposedly "special treatment" that Section 5.11 would provide to ISOs/RTOs. It suggests that the provision would be unduly preferential because various non-ISO/RTO entities have contracts that authorize them to allocate part or all of a reliability penalty to others and would benefit if they were permitted to use procedures similar to those established by section 5.11.[3]

The Occidental Comments ignore a series of Commission precedents addressing the allocation of reliability penalty costs that are initially assessed against ISOs/RTOs to entities that actually caused a reliability standard violation. The Commission has expressly recognized that ISOs/RTOs are differently situated than other Registered Entities because they "may have insufficient reserves to pay penalties assessed pursuant to section 215 of the [Federal Power Act]." It has therefore established rules, uniquely applicable to ISOs/RTOs, which allow ISOs/RTOs to seek FERC permission to directly allocate reliability penalties if certain conditions are met.[4] One of the conditions is a due process requirement that entities potentially subject to a penalty allocation receive "notice and an opportunity to fully participate in the Compliance Monitoring and Enforcement Program conducted by NERC or NERC's Regional Entities."[5]

Accordingly, there is no merit to Occidental's challenge to section 5.11. The provision is not unduly discriminatory or preferential to ISOs/RTOs. It merely conforms NERC's procedures to Commission precedents that authorized the creation of unique ISO/RTO penalty allocation rules. The premise of these precedents was the Commission's recognition that ISOs/RTOs are not similarly situated to other entities when it comes to the recovery of penalty costs, ISO/RTOs

[3] Occidental Comments at 5-6.

[4] *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators,* 122 FERC ¶ 61,247 (2008).

[5] *PJM Interconnection, L.L.C.* 124 FERC ¶ 61,260 at P 12 (2008).

may be attributed violations that are due to the actions of other entities that are not registered or registered improperly and, as non-profit entities, they have no shareholder revenues from which to pay penalties. There is nothing unduly discriminatory about treating entities differently when they are not similarly situated.[6]

Occidental's claim that non-ISO/RTO entities might benefit if section 5.11 were applicable to them is irrelevant. Non-ISOs/RTOs do not have the characteristics that led the Commission to permit ISOs/RTOs to make direct allocations of penalty costs to other entities. Thus, there is no justification for non-ISOs/RTOs to be eligible to use the procedures under proposed section 5.11.

To the extent that Occidental is objecting to the Commission's ISO/RTO cost recovery precedents themselves, it is engaged in an untimely collateral attack on multiple Commission orders. Commission precedent clearly establishes that such collateral attacks are impermissible.[7]

Occidental is wrong to suggest that NERC failed to establish a "legal basis" for section 5.11. NERC's filing clearly stated that section 5.11 "implements a framework that was initiated by a 2008 Commission Guidance Order on recovery of Penalty costs by ISO/RTOs from third parties and furthered by subsequent Commission orders approving proposed tariff provisions of ISO/RTOs providing for the allocation to third parties of Penalties imposed on the

[6] *See, e.g., California Independent System Operator Corp.,* 119 FERC 61,061 at P 70 (2007).

[7] *See, e.g., San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.,* 134 FERC ¶ 61,229 at P 15 (2011) ("[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged."), *citing Entergy Nuclear Operations, Inc. v. Consolidated Edison Co.,* 112 FERC ¶ 61,117, at P 12 (2005), *EPIC Merchant Energy NJ/PA, LP v. PJM Interconnection, LLC,* 131 FERC ¶ 61,130 at P 20 (2010) (dismissing as an impermissible collateral attack a complaint that merely sought to re-litigate the same issues as raised in the prior case citing no new evidence or changed circumstances).

RTO/ISO."[8] The history of, and the rationale for, the development of section 5.11 was also described in detail by the IRC's comments in this proceeding.

Accordingly, the IRC respectfully requests that the Commission reject Occidental's request that proposed new Section 5.11 be deleted[9] and instead accept that provision as submitted by NERC, without any change or condition.

Respectfully submitted,

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[8] *See Petition of the North American Electric Reliability Corporation for Approval of Revisions to its Rules of Procedure* at 58.

[9] The Occidental Comments also ask that the Commission not accept NERC's proposed changes to section 1.1.24 of Appendix 4C but do not explain how this request is related to Occidental's request to delete section 5.11. *See* Occidental Comments at 6. To the extent that Occidental is directing the same invalid arguments that it made against section 5.11 against the proposed change to section 1.1.24 its challenge to the latter provision should be rejected by the Commission.

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Dated: June 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2011).

Dated at Washington, DC this 14th day of June, 2012.

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