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May 31, 2012

The Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Amended Motion to Intervene and Comments of the ISO/RTO Council
Docket No. RR12-8-000

Dear Secretary Bose:

On May 29, 2012, the ISO/RTO Council ("IRC") filed a Motion to Intervene and Comments ("Comments") in the above-referenced docket. A footnote in the Comments explained that the IRC had been unable to confirm whether one of its members, the Electric Reliability Council of Texas, Inc. ("ERCOT") was joining the filing before the Commission's 5:00 PM filing deadline. The IRC has now confirmed that ERCOT intended to join the Comments.

In addition, the Comments indicated that they were supported by the PJM Interconnection, LLC ("PJM") but did not specify a PJM representative to receive communications or list PJM as a signatory. These omissions were inadvertent.

The IRC is therefore submitting an amended version of the Comments that: (i) no longer includes a footnote regarding ERCOT's status; and (ii) includes contact information and a signature block for PJM. Beyond these ministerial corrections the amended version of the Comments is identical to the original.

The IRC respectfully requests that the Commission accept its Amended Motion to Intervene and Comments.

Respectfully Submitted,

/s/ Ted J. Murphy
Ted J. Murphy
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New York Independent System Operator, Inc.
On Behalf of the ISO/RTO Council

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**North American Electric Reliability
Corporation**

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Docket No. RR12-8-000

**AMENDED MOTION TO INTERVENE AND COMMENTS
OF THE ISO/RTO COUNCIL**

In accordance with Rules 212 and 214 of the Commission's Rules of Practice and Procedure, the ISO/RTO Council ("IRC") respectfully submits this amended motion to intervene and its comments in support of one component¹ of the *Petition of the North American Electric Reliability Corporation for Approval of Revisions to its Rules of Procedure* ("Petition"). Specifically, the IRC supports the Petition's proposed addition of a new provision to Appendix 4C, *i.e.*, the Compliance Monitoring and Enforcement Program ("CMEP") rules, of the North American Electric Reliability Corporation's ("NERC") Rules of Procedure ("ROP"). The new CMEP provision, Section 5.11, "Special Procedures for an Enforcement Action Against an ISO/RTO Where the Monetary Penalty May Be Allocated by the ISO/RTO to Other Entities," addresses an issue that has been a longstanding concern of the IRC. While the Commission has provided a means for ISOs and RTOs to involve entities in enforcement proceedings that may have an ISO/RTO penalty directly allocated to them, this has involved a petition to the Commission, and the NERC ROPs have not provided for a more-efficient solution to date.² Section 5.11 will help to ensure that there is an efficient means for specific participants within Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") to

¹ The IRC is not taking a position on the various other components of the Petition at this time.

² While the means afforded by the Commission is effective and has been utilized in one case to date, the proposed changes to the ROP will potentially streamline the process, while petition to the Commission remains an option where necessary.

participate in enforcement proceedings, which is a prerequisite of the Commission's orders allowing the allocation of the cost of NERC penalties among certain market participants, specifically where actions of a market participant, rather than the ISO/RTO, caused the penalty to be incurred. Section 5.11 is consistent with Commission policy and precedent, and with the dictates of due process, and should be approved as NERC requested.

I. COMMUNICATIONS

Correspondence and communications regarding this filing should be addressed to the undersigned as follows:

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II. MOTION TO INTERVENE

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, AESO, and ERCOT do not join in these comments. 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.

The IRC's members conduct their operations in compliance with the NERC Reliability Standards. ISOs/RTOs operate the bulk power system, administer the organized wholesale electricity markets, and act as the planning authorities within their respective regions. The Commission has recognized the importance of ISOs/RTOs in "providing transmission service, enhancing reliability and administering electric energy markets throughout the country." It has also acknowledged that ISOs/RTOs, "to the extent they operate as not-for-profit organizations funded by their customers, may have insufficient reserves to pay penalties assessed pursuant to section 215 of the [Federal Power Act]." Accordingly, the Commission has established special rules and procedures governing penalties assessed against ISOs/RTOs as Registered Entities under NERC procedures.

Proposed new Section 5.11 of the CMEP rules would conform NERC's procedural rules to the Commission's requirements regarding the recovery of ISO/RTO penalty costs. The IRC thus has a direct and material interest in this proceeding that cannot be adequately represented by any other party and should be permitted to intervene herein.

III. BACKGROUND

In its March 2008 *Guidance Order* the Commission created a "road map" for allowing the allocation of the costs of penalties assessed against an ISO/RTO under section 215(e) of the FPA for a violation of a mandatory reliability standard.³ The Commission provided further guidance in a September 2008 ruling on a related PJM filing.⁴ Together, the *Guidance Order*

³ *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) ("*Guidance Order*").

⁴ *See PJM Interconnection, L.L.C.* 124 FERC ¶ 61,260 (2008) ("*PJM Order*").

and the *PJM Order* established that ISOs/RTOs could seek to directly assign the costs of reliability-related penalties on a case-by-case basis. They give an ISO/RTO the ability to “directly allocate penalty costs, or a portion thereof . . . ,” to another entity that it deemed responsible for the underlying violation, if the following three conditions were satisfied:

- The target market participant receives notice and an opportunity to fully participate in the Compliance Monitoring and Enforcement Program conducted by NERC or NERC’s Regional Entities.
- The NERC Compliance Monitoring and Enforcement Program holds a proceeding that finds that the target Members at least in part “contributed . . . to the NERC Reliability Standards violation(s)”, and files this finding with the Commission.
- NERC also files a root cause filing with the Commission, “identifying the Member’s or Members’ conduct as causing or contributing to the Reliability Standards violation charged against PJM.”⁵

These reliability penalty cost recovery principles have subsequently been incorporated into the tariffs of multiple IRC members.⁶

In early 2009, the IRC identified several inconsistencies between the Commission’s rulings and the existing CMEP rules governing interventions in penalty proceedings. Most significantly, the CMEP rules prohibited entities other than respondents and compliance staff from intervening in enforcement hearings (absent a case-specific Commission authorization). When it accepted this rule, the Commission reasoned that third party interventions should generally not be allowed because reliability enforcement hearings would generally be non-public

⁵ *Id.* at P 12.

⁶ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 128 FERC ¶ 61,229 (2009); *New York Independent System Operator, Inc.*, 127 FERC ¶ 61,196 (2009); *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,260 (2008).

and “third-party contributions to such hearings would likely be minimal.”⁷ The Commission stated that it would be sufficient for it to review individual third party intervention requests on a case-by-case basis.⁸

Under this approach, however, if an ISO/RTO were alleged to have violated a reliability standard there would be no guarantee that a market participant that was actually responsible for the violation would be able to “fully participate” in an enforcement hearing without petition to the Commission. Accordingly, the CMEP intervention rule as drafted at the time had the potential to prevent ISOs/RTOs from satisfying the conditions that the Commission stated must be met before direct assignments of penalty costs would be permitted. Petition to the Commission has provided a means to address this issue under the existing CMEP. Nevertheless, revisions to the CMEP have the potential to be more efficient by conforming the CMEP process to recognize the Commission’s *Guidance Order*. Specifically, the proposed revisions would provide a process for participation in the enforcement proceedings by entities that may have caused an ISO/RTO to violate a standard and, may, therefore have a penalty directly allocated to them.

The IRC promptly raised its concern with NERC and a lengthy dialogue ensued. In 2011, the issue was addressed in a Commission proceeding regarding an attempt by FirstEnergy to intervene in a reliability enforcement hearing in which an RTO was the respondent but in which FirstEnergy was potentially implicated and subject to a direct assignment of penalty costs. The IRC filed comments supporting FirstEnergy’s intervention, which was ultimately permitted.⁹

⁷ *Monongahela Power Co., et al.*, 135 FERC ¶ 61,226 at P 4 (2011), citing *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 at P 160 (2007) (“Monongahela Power Co.”).

⁸ *Id.* at 5, citing *North American Electric Reliability Corp.*, 122 FERC ¶ 61,245 at P 82.

⁹ *Motion to Intervene Out-of-Time and Comments of the ISO/RTO Council*, Docket No. RC11-3-000 (filed June 7, 2011).

In its order, the Commission reiterated that the *Guidance Order* had “contemplated that an entity ‘targeted’ for a direct assignment” of a reliability penalty “should have an opportunity to participate in the underlying enforcement proceeding in which the RTO or ISO is a respondent.”¹⁰ It emphasized that a “targeted entity’s” due process rights included the ability to “participate in a regional Enforcement Hearing where its liability may be implicated.”¹¹

IV. COMMENTS

Proposed new Section 5.11 would allow ISOs/RTOs to ask the relevant Compliance Enforcement Authority to determine that one or more other entities were potentially responsible, in whole or in part, for the violation and should be permitted to participate in the enforcement process.¹² It states that the new rule would implement the framework established by the *Guidance Order* and subsequent Commission precedent. Appropriately, and consistent with the *Guidance Order*, the proposed Section 5.11 would also leave the actual determination as to whether an ISO/RTO will be permitted to directly assign penalty costs in a particular case to the Commission. That is, the proposed provisions only address the issue of participation in the enforcement proceedings and a Section 205 filing is required per the *Guidance Order* for an ISO or RTO to have any specific allocation approved. The Petition accurately notes that proposed Section 5.11 is the product of “extensive discussions between NERC and the [IRC]” as well as other NERC stakeholders.¹³ The various subsections of proposed Section 5.11 describe how the new intervention and cost-assignment related procedures would operate in detail.

¹⁰ *Monongahela Power Co.* at P 15, citing *Guidance Order* at PP 22-23.

¹¹ *Id.*

¹² *See* Petition at 57-58.

¹³ *Id.*

The IRC supports Section 5.11 in its entirety and urges the Commission to approve it without modification or condition.¹⁴ An allowance for third party interventions in ISO/RTO direct assignment cases under the NERC ROP is warranted as a potentially more efficient means to fulfill the purposes of the *Guidance Order*. While the Commission has provided a means for third parties to participate on petition as was utilized in the case of the PJM Order, the NERC ROP should conform, rather than conflict with the Commission's case law in this area. Section 5.11 is necessary to protect the due process rights of third parties that might be subject to direct assignments of penalty costs. It is also necessary to conform the CMEP to the procedures the Commission has prescribed to govern the recovery of ISO/RTO reliability penalty costs. Without Section 5.11, the CMEP could be inconsistent with the *Guidance Order* and later rulings.

¹⁴ The IRC notes that under the Petition, the CMEP would continue to allow third parties to intervene in reliability enforcement proceedings by order of the Commission without reference to determinations by a CEA under proposed new Section 5.11. *See* CMEP, Attachment II at section 1.2.21 (Petition at Attachment 4A). This is an appropriate procedural safeguard that should be approved by the Commission.

V. CONCLUSION

For the reasons specified above, the IRC respectfully requests that the Commission accept its motion to intervene, give due consideration to its comments, and accept proposed new Section 5.11 of the CMEP as submitted by NERC without change or condition.

Respectfully submitted,

/s/ Nancy Saracino

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Dated: May 31, 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 31st day of May, 2012.

By: /s/Catherine A. Karimi
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