124 FERC ¶ 61,072
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

U.S. Department of Energy, Portsmouth/Paducah Project Office — Docket No. RC08-5-000

ORDER ON APPEAL OF ELECTRIC RELIABILITY ORGANIZATION COMPLIANCE REGISTRY DETERMINATION

(Issued July 21, 2008)

1. In this order, the Commission denies the appeal of the United States Department of Energy, Portsmouth/Paducah Project Office (DOE Portsmouth) challenging the North American Electric Reliability Corporation (NERC) decision that ReliabilityFirst Corporation (ReliabilityFirst), a Commission-approved Regional Entity, properly included DOE Portsmouth on the NERC compliance registry as a transmission owner, transmission operator, and distribution provider. However, the order remands to NERC for further consideration on the issue whether DOE Portsmouth was properly registered as a load-serving entity and directs NERC to submit to the Commission, within 75 days of the date of this order, a revised registration determination that addresses the Commission's concerns discussed below.

I. Background

A. NERC's Compliance Program

2. In July 2006, the Commission certified 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 NERC and eight Regional Entities, including a delegation agreement between NERC and

[1] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *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 (2006).

ReliabilityFirst.[2] In that delegation agreement, NERC provided ReliabilityFirst with the authority to enforce mandatory Reliability Standards within its territory and add entities to the compliance registry.

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 entities that should be registered for compliance with mandatory Reliability Standards.[4] NERC's Rules of Procedure 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. NERC defines the bulk-electric system as:

> [T]he electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition.[5]

5. Section I of NERC's Registry Criteria provides that an entity that uses, owns or operates elements of the bulk electric system pursuant to NERC's definition above is a candidate for registration. Section II of the Registry Criteria categorizes registration candidates under various functional entity types including transmission owner, transmission operator, distribution provider and load-serving entity. Section II defines transmission owner as "the entity that owns and maintains transmission facilities" and transmission operator, "the entity responsible for the reliability of its local transmission

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[2] *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 at P 316, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

[3] *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

[4] Order No. 693 at P 92-95. NERC's amended Registry Criteria were approved by the Commission in *North American Electric Reliability Corp.*, 122 FERC ¶ 61,101 (2008).

[5] Order No. 693 at P 51; NERC Glossary of Terms Used in Reliability Standards, May 2007; NERC Registry Criteria, section I.

system and operates or directs the operations of the transmission facilities." Further, it defines a distribution provider as an entity which "provides and operates the 'wires' between the transmission system and the end-use customer." Finally, section II defines a load-serving entity as one which "secures energy and transmission service (and related interconnection services) to serve the electrical demand and energy requirements of its end-use customers." Section III of NERC's Registry Criteria identifies certain thresholds for registering entities that satisfy the criteria of sections I and II.

C. Description of DOE Portsmouth Facilities

6. DOE Portsmouth owns the Portsmouth Gaseous Diffusion Plant near Piketon, Ohio (Facility), a uranium enrichment plant. The Facility includes two 345 kV switchyards, X530 and X533, which have approximately 2,200 MW of capacity and are interconnected with the transmission system of the Ohio Valley Electric Cooperative (OVEC). These switchyards allow power to be directed to load-serving step-down transformers, to serve the Facility's load of approximately 45 MW, or be redirected to the regional power grid. DOE Portsmouth's predecessor and OVEC entered into a comprehensive power agreement in 1952, pursuant to which OVEC supplied the entire electrical requirements of the Facility from its coal-fired generating stations. At the time, the Facility required approximately 2,000 MW. Since going into cold stand-by mode in 2001, the Facility requires approximately 45 MW. The comprehensive power agreement was terminated in 2003, and OVEC currently provides power to the Facility under month-to-month contracts. According to DOE Portsmouth, the Facility's future configuration is uncertain, pending resolution of a decommissioning project.

7. As shown by DOE Portsmouth's supporting materials, the Facility includes two switchyards, X530 and X533. The switchyards operate with twenty-eight 345 kV – 13.8 kV transformers, connect to the OVEC system through ten 345 kV incoming lines and are fed through five 345 kV lines. The switchyards also include accompanying circuit breakers, step-down transformers, synchronous condensers, load-serving buses, a reserve bus and high-speed circuit breakers. OVEC's Sargents substation is also located on the DOE Portsmouth reservation and DOE Portsmouth owns transmission lines that connect the switchyards to OVEC's Marquis substation. Since the site load has been reduced, OVEC has used these switchyards as system tie points to transmit power across its system. According to DOE Portsmouth and OVEC, approximately 450 MW of energy flow through the switchyards. DOE Portsmouth states that it plans to shut down the X533 switchyard by October 2008, thus deactivating all lower voltage equipment and relocating the high voltage lines outside of the switchyard's footprint.

8. DOE Portsmouth leases the Facility to the United States Enrichment Corporation (USEC) as part of DOE Portsmouth's privatization of uranium enrichment. According to DOE Portsmouth, USEC has operational control of the X530 and X533 switchyards, and related systems, and is responsible for their maintenance. USEC currently conducts the cold standby/cold shutdown activities related to the plant, including surveillance and

monitoring of the facilities and uranium removal. USEC also is involved in a privately-funded next-generation uranium enrichment project to be constructed on the site, and will obtain additional power for the project's operational needs.

II. Appeal of NERC Registry Decision

A. NERC Registry Decision

9. On August 31, 2007, ReliabilityFirst notified DOE Portsmouth that it would be included in the NERC Compliance Registry. DOE Portsmouth challenged these findings under the NERC appeals process on October 16, 2007. DOE Portsmouth argued that the criteria were not properly applied because (1) the two switchyards and related facilities do not have a material impact on the reliability of the Bulk-Power System, and (2) even if the switchyards and related facilities were to have such impact, DOE Portsmouth leases the Facility to USEC and, therefore, USEC is the appropriate entity to register on the NERC registry. DOE Portsmouth supported its claim that it was not a transmission owner or operator because a 1976 report demonstrated that the operation of the two switchyards would not disrupt operations of the OVEC system.[6] In addition, DOE Portsmouth stated that it is not a distribution provider or a load serving entity because it is itself an end-use customer.

10. In its April 22, 2008 decision, NERC upheld in part and rejected in part DOE Portsmouth's inclusion on the NERC Compliance Registry.[7] NERC found that DOE Portsmouth had been properly included as a transmission owner, transmission operator, load-serving entity and distribution provider, but found that DOE Portsmouth is not a purchasing-selling entity.

11. NERC found that DOE Portsmouth is properly registered as a transmission owner and transmission operator because "there is no dispute that [DOE Portsmouth] owns the transmission facilities at the Portsmouth site, which consists of two 345 kV Substations and two 345 kV transmission lines, as well as other facilities."[8] NERC rejected DOE Portsmouth's claim that it had transferred its obligations to comply with the Reliability Standards to USEC. NERC found that "the agreement upon which [DOE Portsmouth] relies was executed 15 years ago – before the August 2003 Blackout, the Energy Policy

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[6] *Projected System and Plant Performance for a Portsmouth-ERDA Load of 1900 MW: 1976 Conditions* (1976 Report). The 1976 Report is attached as Attachment B to DOE Portsmouth's appeal.

[7] The NERC Decision is provided as Attachment C to DOE Portsmouth's appeal.

[8] NERC Decision at 8.

Act of 2005 and the new era of mandatory and enforceable Reliability Standards."[9] NERC found that the agreement did not assign responsibility for Reliability Standards and requirements to USEC. In the absence of further evidence, NERC held that DOE Portsmouth failed to demonstrate that a third party has assumed the transmission owner and transmission operator obligations on its behalf. NERC stated that "[b]ased on the record of the appeal, USEC has not assumed such responsibilities by written agreement and has not consented to be registered for these functions. The burden is on [DOE Portsmouth] to demonstrate otherwise." NERC found that DOE Portsmouth had failed to do so.[10]

12. NERC found that DOE Portsmouth is properly registered as a distribution provider because the substations and related facilities are used to serve end-user customers. Further, consistent with the NERC definition of "distribution provider,"[11] NERC found that DOE Portsmouth is the owner of the wires and it had not produced an agreement demonstrating the transfer of the functional responsibilities to a third party.

13. NERC also rejected DOE Portsmouth's arguments that it is not a load serving entity, finding that the X530 and X533 switchyards are directly connected to the Bulk-Power System, have approximately 450 MW of flow-through and DOE Portsmouth secures energy through a contract with OVEC for the Facility's load. As such, NERC found, DOE Portsmouth is properly registered as a load-serving entity.

B. DOE Portsmouth's Appeal to the Commission

14. In its appeal, DOE Portsmouth offers two arguments why it should not be registered. First, it claims that the operation and maintenance of the Portsmouth switchyard have no impact on Bulk-Power System reliability. Second, it asserts that ReliabilityFirst and NERC ignored the requirements of the functional categories for which DOE Portsmouth is registered.

1. Impact on the Bulk-Power System

15. According to DOE Portsmouth, NERC failed to properly consider evidence that the switchyards and related facilities do not have a material impact on the Bulk-Power

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[9] *Id.*

[10] *Id.* at 9.

[11] *See* NERC Registry Criteria at 4, explaining that a distribution provider "provides and operate the 'wires' between the transmission system and the end-use customer. For those end-use customers who are served at transmission voltages, the Transmission Owner also serves as the [distribution provider]."

System, as demonstrated by the 1976 Report and further attachments to DOE Portsmouth's appeal to NERC. DOE Portsmouth states that the information from the 1976 Report demonstrate that any single circuit or double tower circuit outage would always result in acceptable voltages and transmission system loadings. According to DOE Portsmouth, the supporting materials provide evidence of multiple zones of relay protection, which are effective in preventing any adverse effects on the Bulk-Power System.

16. DOE Portsmouth contends that ReliabilityFirst acted unreasonably in finding that the transient stability studies set forth in the 1976 Report were not valid because the studies were "run on a 1976 era computer requiring great simplification of the model used."[12] DOE Portsmouth maintains that the age of the computer is irrelevant and the models used in the study remain appropriate. Further, DOE Portsmouth asserts that NERC's decision does not evaluate DOE Portsmouth's position that the switchyards and related facilities have no impact on Bulk-Power System reliability.

17. DOE Portsmouth also notes that, since the appeal to NERC, one of the two switchyards at the Facility, the X533 switchyard, has been scheduled for closure by October 2008. It contends that the closure of the switchyard will result in five of the ten 345 kV lines no longer interconnecting the Facility to the Bulk-Power System, further reducing the impact on the Bulk-Power System.

2. Registration Criteria for Functional Categories

a. Transmission Owner and Transmission Operator

18. DOE Portsmouth asserts that NERC erred by finding that DOE Portsmouth meets the criteria as a transmission owner and transmission operator. DOE Portsmouth contends that it "does not own *and* maintain the switchyards at the [Facility]," and thus "is not responsible for the reliability of these switchyards."[13] DOE Portsmouth argues that, while it retains title to the switchyards, it has leased the Facility to USEC, which "holds and exercises maintenance and control over these leased facilities (a form of ownership)."[14] DOE Portsmouth asserts that functional maintenance and control of the switchyards is solely USEC's responsibility. DOE Portsmouth cites the language of its lease with USEC:

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[12] DOE Portsmouth appeal at 4 (quoting Reliability*First*).

[13] *Id*. at 5 (emphasis in original).

[14] *Id*.

> The Corporation [USEC] will, at its expense, throughout the Lease Term, maintain the Leased Premises in good and serviceable condition … . The Corporation shall repair any Leased Premises when in the Corporation's business judgment it is necessary to do so in order to maintain them in such condition or to meet the requirements of applicable Laws and Regulations.[15]

DOE Portsmouth claims that it has no ability to maintain or operate the switchyards and related facilities and any such operation and/or maintenance would be inconsistent with the terms of the lease. Accordingly, DOE Portsmouth asserts that it should not be registered as a transmission owner and transmission operator because the responsibility for compliance with NERC's Reliability Standards has been transferred to USEC.

19. DOE Portsmouth also argues that NERC has improperly applied "new and undocumented" criteria by requiring that DOE Portsmouth demonstrate that a third party has accepted responsibility for the performance under the Reliability Standards. DOE Portsmouth asserts that NERC bears the burden of demonstrating that DOE Portsmouth meets the criteria for inclusion on the NERC Compliance Registry. Further, DOE Portsmouth asserts that NERC has introduced additional criteria because the NERC decision "improperly seems to require" that any agreement predating the August 2003 Blackout, EPAct 2005 and NERC's new Reliability Standards can only be effective if the "third party has the subjective understanding that it has assumed [transmission owner and transmission operator] standards."[16] DOE Portsmouth argues that NERC should have instead given effect to the plain meaning of the agreement between DOE Portsmouth and USEC, regardless of the agreement's date and whether Reliability Standards are explicitly contemplated in such agreement.

b. Distribution Provider

20. DOE Portsmouth asserts that it is the end-use customer of the electricity at the Facility and, as such, is not a distribution provider. It claims that NERC's finding that DOE Portsmouth is a distribution provider is based on its finding that DOE Portsmouth is the transmission owner of the wires serving the Facility. Since DOE Portsmouth is not a transmission owner, it asserts that it also is not a distribution provider. Finally, DOE Portsmouth argues that NERC erred by concluding that DOE Portsmouth had not transferred its obligations to a third party when, in fact, the lease between DOE

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[15] *Id*. An excerpt of the lease is provided as Attachment F to the DOE Portsmouth appeal. DOE Portsmouth states that the lease defines "Laws and Regulations" as "all laws and regulations … and other requirements of Government Authority … which apply to the Department or the Corporation as the case may be." *Id*. at 5-6.

[16] *Id*. at 6-7.

Portsmouth and USEC transfers to USEC responsibility to comply with the Reliability Standards that apply to distribution providers. DOE Portsmouth references its arguments made in response to the transmission owner and transmission operator designations, as supporting its position on the distribution provider designation.

c. Load-Serving Entity

21. DOE Portsmouth argues that NERC erred by finding that DOE Portsmouth is properly registered as a load-serving entity since it is the end-user of energy. Additionally, DOE Portsmouth asserts that it does not secure energy and transmission services; rather, these services are provided by OVEC pursuant to a contract between DOE Portsmouth and OVEC. DOE Portsmouth states that it does not provide capability for load curtailment and does not determine pricing, contrary to NERC's findings.

C. Interventions and Comments

22. The Public Utilities Commission of Ohio (Ohio PUC) filed a notice of intervention and comments. NERC, ReliabilityFirst, and OVEC filed timely motions to intervene with accompanying comments, and the American Public Power Association filed a timely motion to intervene. On June 27, 2008, DOE Portsmouth filed an answer to the comments filed by NERC, OVEC and ReliabilityFirst. On July 10, 2008, OVEC filed an answer to DOE Portsmouth's answer.

1. NERC

23. NERC defends its determination that DOE Portsmouth properly meets the Registry Criteria as a transmission owner, transmission operator, load-serving entity and distribution provider. NERC notes that the transmission owner/operator criteria apply to any entity owning or operating an integrated transmission element at 100 kV or above, unless responsibilities for such compliance have been transferred in writing to a third party. NERC states that DOE Portsmouth owns the Facility, which includes two 345 kV substations, two 345 kV transmission lines and associated facilities. Even with the shut-down of the X533 switchyard, NERC states, DOE Portsmouth will continue to own one 345 kV substation and one 345 kV transmission line. Therefore, DOE Portsmouth will still own facilities operating at 100 kV or above.

24. In response to DOE Portsmouth's argument that USEC is responsible for the operation and maintenance of the Facility, NERC states that pursuant to the Registry Criteria and NERC Rules of Procedure, DOE Portsmouth must demonstrate that responsibility for compliance with NERC Reliability Standards and associated requirements has been transferred to a third party. Specifically, NERC notes, sections 501 and 507 of the Rules of Procedure require that the parties to such a contract agree in writing to the specific transfer of responsibilities. The lease between DOE Portsmouth and USEC, although in writing, does not explicitly provide for the transfer of

responsibilities for compliance with Reliability Standards and requirements. NERC notes that it lacks authority to order DOE Portsmouth to enter into a new agreement with USEC to transfer such responsibilities.

25. In response to DOE Portsmouth's appeal of its registry as a distribution provider, NERC states that the switchyards and related electric facilities are used to serve both USEC's and the Facility's load. Because the lease between DOE Portsmouth and USEC does not explicitly provide for a transfer of responsibilities from DOE Portsmouth to USEC, NERC argues that DOE Portsmouth has been properly registered as a distribution provider.

26. In response to DOE Portsmouth's argument that it should not be registered as a load-serving entity because it is an end-use customer, NERC notes that it registered DOE Portsmouth as a load-serving entity because DOE Portsmouth enters into bilateral contracts with OVEC to procure power for the site. NERC states that DOE Portsmouth confirmed this function in its appeal to the Commission.

27. NERC further argues that it did not apply any new or undocumented criteria in evaluating DOE Portsmouth's assertion that it had transferred responsibility over reliability compliance to USEC. NERC asserts that DOE Portsmouth misunderstood section III(d) of the Registry Criteria, as well as sections 501 and 507 of the NERC Rules of Procedure, which require that an entity agree, in writing, to accept the reliability functions for which they will be responsible. The agreement must further clearly specify the contracting parties' responsibilities and this information must be provided annually to the Regional Entity. If DOE Portsmouth seeks to transfer its responsibilities and no other party has notified NERC that it is taking on such responsibilities, NERC asserts that DOE Portsmouth bears the burden of demonstrating such transfer.

28. Finally, NERC argues that ReliabilityFirst expressly rejected DOE Portsmouth's claim that the Facility does not have a material impact on the Bulk-Power System. In response to DOE Portsmouth's claims that the 1976 Report demonstrates the presence of protective systems to prevent harm to the Bulk Power System, NERC asserts that such protective systems are not sufficient to render the switchyards and related electric facilities immaterial to Bulk-Power System reliability.

2. ReliabilityFirst

29. ReliabilityFirst supports NERC's decision to include DOE Portsmouth on the NERC Compliance Registry. ReliabilityFirst comments that, although DOE Portsmouth supplied the 1976 Report as evidence that the Facility does not have an impact on the Bulk-Power System, that study is out-of-date, did not use detailed power system models and was conducted for 1976 peak demand levels. Therefore, according to ReliabilityFirst, the study's assumptions and conclusions may no longer be valid. Further, ReliabilityFirst asserts, DOE Portsmouth has not provided any documentation

demonstrating the transfer of ownership of the X530 and X533 switchyards, nor has it presented an agreement clearly delegating responsibility for compliance with Reliability Standards to another entity. ReliabilityFirst claims that it reviewed the lease between DOE Portsmouth and USEC but could not clearly identify language that places the responsibility for compliance with Reliability Standards on USEC. Further, ReliabilityFirst states that, in conversations with USEC, USEC indicated that there was no mutual understanding between DOE Portsmouth and USEC obligating USEC to comply with Reliability Standards, nor was such contemplated.

30. ReliabilityFirst argues that DOE Portsmouth has not provided a written agreement transferring its functional responsibilities as a distribution provider to any third party. It comments that it registered DOE Portsmouth as a load-serving entity because it enters into bilateral contracts with OVEC for the procurement of power to serve its load.

3. Ohio PUC

31. Ohio PUC urges the Commission to include DOE Portsmouth on the NERC Compliance Registry, so as to ensure reliability in southern Ohio. Ohio PUC comments that the switchyard and related facilities are connected to the OVEC transmission system, and the systems of Columbus Southern Power, Daytona Power & Light, Duke Energy – Ohio and Ohio Power. Ohio PUC asserts that the switchyard and transmission facilities are an integral part of the interconnected power grid. It states that failure to include DOE Portsmouth on the compliance registry could place energy consumers at risk if, for example, an error were made by a non-certified operator during an unforeseen reliability event.

4. OVEC

32. OVEC also supports NERC's registration of DOE Portsmouth. OVEC cites a transmission interconnection agreement that will govern the interconnection of OVEC's transmission system with DOE Portsmouth's transmission facilities.[17] OVEC states that a review of recent major outages shows that these outages are usually the combination of smaller events and failures of transmission system components which contribute to cause a larger outage. According to OVEC, failure of components at the Facility's switchyards under certain circumstances could result in the failure to clear a fault in a timely manner, or could result in the isolation of part of the transmission system. As long as one or both of the Facility's switchyards remain in operation, OVEC asserts, they remain a material part of the Bulk-Power System and DOE Portsmouth must comply with applicable Reliability Standards.

[17] The transmission interconnection agreement was filed with the Commission on October 1, 2007 in Docket No. ER08-5-000. The Commission accepted the agreement in a June 24, 2008 letter order.

33. OVEC asserts that DOE Portsmouth clearly fits within the definition of a load-serving entity because its facilities are used to deliver a peak load of approximately 45 MW, and an average load of 29 MW, through a direct connection greater than 100 kV to the Bulk-Power System. OVEC explains that its sales of power and energy to the Facility are governed by bilateral, short-term agreements between OVEC and DOE Portsmouth. Pursuant to these agreements, DOE Portsmouth determines how much power and energy it wishes to purchase and from whom. These agreements may be terminated by either party with 30-days' notice. OVEC asserts that it merely purchases the power and delivers it to the interconnection with DOE Portsmouth. OVEC also notes that, in the past, DOE Portsmouth has sought offers to purchase power not only from OVEC but from other wholesale and retail suppliers.

34. OVEC comments that the Commission must take into account the relative abilities of the parties to satisfy reliability compliance requirements. OVEC notes that, as a neighboring transmission owner and counter-party to short-term power agreements, OVEC is not in a position to satisfy Reliability Standard requirements on DOE Portsmouth's behalf.

5. DOE Portsmouth's Answer

35. DOE Portsmouth filed an answer in response to NERC, ReliabilityFirst and OVEC. It asserts that OVEC presented examples of the impacts of potential failures in the DOE Portsmouth switchyards but did not show how compliance with Reliability Standards would prevent such impacts. According to DOE Portsmouth, current operations and maintenance plans and procedures would prevent such failures. Further, DOE Portsmouth asserts that, contrary to OVEC's statements that DOE Portsmouth supplies power to independent third parties, USEC and the Uranium Disposition Services Corporation (UDS) are performing work for DOE Portsmouth pursuant to contracts and all of the power goes to serve a government function, except for a small amount temporarily used by USEC for the American Centrifuge Project.

36. In its answer, OVEC maintains that DOE Portsmouth is properly registered as a load-serving entity. OVEC contends that USEC and UDS are independent entities and disagrees with DOE Portsmouth's assertion that USEC and UDS perform work on behalf of DOE Portsmouth pursuant to contract.

III. Discussion

A. Procedural Matters

37. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[18] the timely, unopposed motions to intervene and notice of intervention serve to make the entities that filed them parties to this proceeding.[19]

38. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[20] prohibits an answer to an answer or protest unless otherwise permitted by the decisional authority. In this case, we find that DOE Portsmouth's and OVEC's answers have assisted the Commission in its decision-making process.[21] Therefore, we will accept them.

B. Commission Determination

39. The Commission denies DOE Portsmouth's appeal and affirms NERC's decision to register DOE Portsmouth as a transmission owner, transmission operator and distribution provider. We conclude that NERC adequately supported the proposed registration under NERC's Registry Criteria for these functions. Moreover, DOE Portsmouth did not support an exception based on a determination that the switchyards and related facilities are not material to the reliability of the Bulk-Power System. Nor did DOE Portsmouth provide the documentation required by NERC to establish that it had transferred its Reliability Standard obligations to another entity. The Commission, therefore, affirms NERC's finding that DOE Portsmouth is properly registered consistent with the Registry Criteria as a transmission owner, transmission operator and distribution provider.

40. However, the Commission is concerned with the adequacy of NERC's determination that DOE Portsmouth is properly registered as a load-serving entity. The Commission believes that a further development of the record regarding DOE Portsmouth's function as load-serving entity is needed for the Commission to rule on this aspect of DOE Portsmouth's appeal. As discussed below, the Commission remands this

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[18] 18 C.F.R. § 385.214 (2008).

[19] In its May 13, 2008 appeal, DOE Portsmouth requests a stay of the NERC registry decision pending Commission action on the appeal. Because the Commission denies DOE Portsmouth's appeal, the request for stay is moot.

[20] 18 C.F.R. § 385.213(a)(2) (2008).

[21] *See, e.g., Midwest Independent System Operator Corp.*, 121 FERC ¶ 61,132, at P 12 (2007); *Westar Energy, Inc.*, 121 FERC ¶ 61,108, at P 18 (2007).

aspect of NERC's registry decision and directs NERC to submit to the Commission a registration determination that addresses the concerns discussed below within 75 days of the date of this order.

1. Registry Criteria

a. Transmission Owner and Transmission Operator

41. Section III(d)(1) of NERC's Registry Criteria establishes the terms for registering a transmission owner or transmission operator as follows: "[a]n entity that owns/operates an integrated transmission element associated with the bulk power system 100 kV and above, or lower voltage as defined by the Regional Entity necessary to provide for the reliable operation of the interconnected transmission grid."[22] DOE Portsmouth's facilities are rated above 100 kV and form part of the looped path used to transmit power over OVEC's system. Thus, we find that the facilities are integrated transmission elements associated with the Bulk-Power System, consistent with the Registry Criteria.

42. DOE Portsmouth does not dispute that the switchyard and related facilities at the Portsmouth site exceed the 100 kV threshold set forth in the Registry Criteria. Rather, it contends that it does not own and operate these facilities because it transferred these functions to USEC.[23]

43. The Commission rejects DOE Portsmouth's reliance on language in its lease and operations contract to support its assertion that it has transferred responsibility for compliance with Reliability Standards to USEC. As noted above, DOE Portsmouth provided an excerpt of its lease with USEC that requires USEC to maintain the leased premises in good and serviceable condition and perform repairs necessary to maintain the

[22] NERC Registry Criteria, section III(d)(1).

[23] DOE Portsmouth argues that it does not meet NERC's definition of transmission owner, i.e., an entity that "owns and maintains transmission facilities," because it does not *maintain* the facilities at issue. The transmission interconnection agreement between DOE Portsmouth and OVEC indicates otherwise. *See supra* P 32, n.17. Section 3.1(b) of the interconnection agreement provides "[t]he Parties shall maintain and operate their respective systems in a safe and reliable manner, so as to minimize, in accordance with Good Utility Practice and Applicable Laws, Regulations and Reliability Standards, the likelihood of a disturbance . . . ." Likewise section 3.1(d) states that "DOE shall be responsible for the operation of the Project Interconnection Facilities and the testing and maintenance thereof . . . ." DOE Portsmouth is clearly responsible for maintaining the switchyard and related facilities and satisfies the NERC definition of transmission owner. The remaining question is whether DOE Portsmouth transferred by contract, not only the task, but the *responsibility* for operating and maintaining the facilities.

premises "in such condition to meet the requirements of applicable Laws and Regulations."[24] The remainder of the lease has not been filed with the Commission in this proceeding. Based on the language provided by DOE Portsmouth, it does not appear that USEC has agreed to undertake responsibility for complying with obligations such as Reliability Standards. The lease excerpt pertains to the maintenance and repair of the leased premises. The Reliability Standards for which DOE Portsmouth has been registered do not address, except perhaps in an indirect way, whether the facilities are in "serviceable condition." They likewise are not relevant to USEC's duty to make repairs. Rather, Reliability Standards impose different and more extensive obligations on the transmission owner and operator, for example, related to critical infrastructure protection and communications. We therefore cannot conclude that the excerpt of the lease cited by DOE Portsmouth supports its contention that the obligation to comply with Reliability Standards has been assigned to USEC. The Commission finds that NERC's decision is reasonable in determining that the language upon which DOE Portsmouth relies is ambiguous and does not clearly contemplate that DOE Portsmouth has transferred to USEC responsibility for compliance with future regulatory obligations such as mandatory Reliability Standards.

44. The Commission also rejects DOE Portsmouth's assertion that NERC has applied "new, unpublished criteria" by requiring DOE Portsmouth to bear the burden of demonstrating that it has transferred its responsibilities for compliance with Reliability Standards to a third party. Having otherwise satisfied the Registry Criteria for registration as a transmission owner and transmission operator, DOE Portsmouth must comply with applicable Reliability Standards in the absence of an agreement transferring responsibility to another entity. Section III.d of NERC's Registry Criteria provides that "a transmission owner/operator will not be registered based on these criteria if responsibilities for compliance ... have been transferred by written agreement to another entity ..."[25] Thus, contrary to DOE Portsmouth's assertion that NERC has applied new criteria, NERC's Registry Criteria and Rules of Procedure explicitly require that an otherwise responsible entity set forth in writing the transfer of compliance responsibility to another entity. In such circumstances, NERC appropriately required DOE Portsmouth to present a written agreement demonstrating the transfer of such responsibility.

[24] DOE Portsmouth appeal, Attachment F. In addition, Attachment G of the appeal provides a two-page excerpt from a contract. However, DOE Portsmouth provides no explanation of this excerpt and it is not even clear whether this excerpt is from the same lease agreement or a different contract.

[25] *See also* section 501.1.2.7 and 507.2 of NERC's Rules of Procedure, which contemplate a written agreement that specifies each party's responsibilities.

45. Accordingly, the Commission finds that NERC properly registered DOE Portsmouth as a transmission owner and transmission operator.

b. Distribution Provider

46. The NERC Registry Criteria define a distribution provider as an entity that:

> provide[s] and operate[s] the 'wires' between the transmission system and the end-use customer. For those end-use customers who are served at transmission voltages, the Transmission Owner also serves as the [distribution provider]. Thus the [distribution provider] is not defined by a specific voltage, but rather as performing the Distribution function at any voltage.[[26]]

NERC concluded that DOE Portsmouth meets the criteria of a distribution provider, since it serves more than 25 MW of peak load that is directly connected to the Bulk-Power System.

47. The Commission finds that NERC adequately supported its determination that DOE Portsmouth is a distribution provider. As NERC explains, DOE Portsmouth owns the wires which provide service from the two substations connected to the Bulk-Power System to the Portsmouth site. Further, DOE Portsmouth serves peak load greater than 25 MW that is directly connected to the Bulk-Power System. The Commission rejects DOE Portsmouth's claims that it is not a distribution provider by virtue of its transfer of responsibility for the distribution facilities to USEC for the same reasons discussed above regarding the registration of DOE Portsmouth as a transmission owner.

c. Load-Serving Entity

48. The Commission is concerned whether the record in this proceeding adequately supports NERC's determination that DOE Portsmouth is properly registered as a load-serving entity. The Commission directs NERC to submit to the Commission, within 75 days of the date of this order, a registration decision that more fully addresses this aspect of the registry decision. Alternatively, if NERC after further consideration determines that DOE Portsmouth should not be registered as a load-serving entity, NERC should notify the Commission of that determination and the Commission will terminate this proceeding.

49. The Registry Criteria define a load-serving entity as an entity that "[s]ecures energy and transmission service (and related interconnected operations services) to serve

[26] NERC Registry Criteria, section II (definitions).

the electrical demand and energy requirements of its end-use customers." The Commission has a threshold concern whether DOE Portsmouth meets this definition.

50. The NERC registry decision concludes that DOE Portsmouth is properly registered as a load-serving entity based on the following rationale:

> The [NERC Board of Trustees Compliance Committee] further finds that DOE/PPPO is properly registered as an LSE. Section III.a.1 states "Load-serving entity peak load is > 25 MW and is directly connected to the bulk power (> 100 kV) system." Here, the DOE-Portsmouth switchyards operate at 345 kV with twenty eight (28) 345 kV – 13.8 kV transformers and are connected through ten (10) 345 kV incoming lines to the BPS … The switchyards presently have approximately 450 MW of flow through. DOE secures energy through its contract with OVEC on behalf of the load at the DOE site. Therefore, the DOE is properly registered as a LSE.[27]

The Commission cannot ascertain from the NERC registry decision whether DOE Portsmouth, in fact, procures energy to serve end-use customers, as set forth in NERC's definition of load-serving entity.

51. First, it is unclear whether DOE Portsmouth has any end-use customers.[28] While the NERC registry decision states that "DOE secures energy through its contract with OVEC on behalf of the load at the DOE site," this statement is ambiguous. DOE Portsmouth claims that it is the end-use customer. DOE Portsmouth and OVEC argue whether USEC and UDS are DOE Portsmouth's end-use customers. However, these arguments are not addressed in the registry decision and the correct answer is not evident from the pleadings in this proceeding. Further, it is not clear whether the NERC registry decision intends that DOE Portsmouth is a load-serving entity because it serves its *own* load. NERC's definition of load-serving entity, which applies to an entity serving its end-use customers, seems to exclude this scenario. In any case, without further elaboration by NERC, the Commission cannot determine this matter.

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[27] NERC Decision at 10.

[28] The NERC Decision at 1, "Statement of Appeal" notes that "Power consumed by individual facilities on site is metered by DOE. However, the metering is not used to sell power to others. Rather the metering is used to calculate each organization's portion of the total DOE bill."

52. Moreover, while the NERC registry decision states that "DOE secures energy through its contract with OVEC" it is not clear to the Commission whether DOE Portsmouth's contract with OVEC is determinative that DOE Portsmouth is properly registered as a load-serving entity. Entering into bilateral contracts with a transmission and generation service provider for the procurement of power or seeking an alternate power supplier in a competitive market do not establish that DOE Portsmouth is a load-serving entity, as opposed to a service-taking customer.[29] DOE Portsmouth's actions in determining its load profile when it solicits power could be viewed as consistent with the actions of a large industrial customer seeking to purchase transmission service and power from a service provider.

53. The remaining facts cited by NERC are inconclusive regarding DOE Portsmouth's registration as a load-serving entity. The switchyard configuration information is not determinative and the cited power flow-through appears dedicated to loads other than DOE Portsmouth.

54. Therefore, the Commission finds that NERC has not adequately supported its determination that DOE Portsmouth is properly registered as a load-serving entity.

2. Materiality of the Facility

55. As discussed above, DOE Portsmouth contends that it should not be registered because the operation and maintenance of the switchyards and related facilities have no impact on the Bulk-Power System. The context of this argument is not clear from DOE Portsmouth's pleading. As indicated in NERC's Registry Criteria, the criteria and notes set forth in that document are used to identify which users, owners and operators are material to the reliable operation of the Bulk-Power System.[30] Thus, the Commission's

[29] The Commission notes that OVEC, in its Order No. 890 compliance filing, stated that it was formed for the express purpose of supplying the electric power requirements of DOE Portsmouth and describes DOE Portsmouth as its sole bundled retail customer served under the short-term, arranged power service agreement approved by the Ohio PUC. OVEC, Open Access Transmission Tariff, Attachment M, Transmission Planning Process, Sheet No. 404, Docket No. OA08-19-000 (filed December 7, 2007).

[30] The Registry Criteria provide that "[o]rganizations will be responsible to register and to comply with approved reliability standards to the extent that they are owners, operators, and users of the bulk power system, perform a function listed in the functional types identified in section II of this document, and are *material to the reliable operation of the interconnected bulk power system as defined by the criteria and notes set forth in this document*." Registry Criteria at 1 (emphasis added).

determination that DOE Portsmouth is properly registered pursuant to the Registry Criteria is tantamount to a finding that DOE Portsmouth's facilities are needed for Bulk-Power System reliability.

56. With that understanding, we note that NERC's Registry Criteria provide the following exclusion for an entity that otherwise meets the criteria:

> [T]he Regional Entity may exclude an organization that meets the criteria described above as a candidate for registration if it believes and can reasonably demonstrate to NERC that the bulk power system owner, operator, or user does not have a material impact on the reliability of the bulk power system.[[31]]

57. Based on the record before us, the Commission concludes that DOE Portsmouth has not demonstrated that it qualifies for the exclusion. The 1976 Report provided by DOE Portsmouth is insufficient to demonstrate that the Facility does not have an impact on the reliable operation of the Bulk-Power System. The 1976 Report analyzes the transmission system and load existing in 1976. DOE Portsmouth did not establish that the study's assumptions regarding these factors remain valid in 2008, 32 years after the study was prepared. As indicated by NERC and ReliabilityFirst, there may have been substantial changes to the transmission grid in the area surrounding the Facility, as well as changes to the area's load. Moreover, DOE Portsmouth acknowledges that the Facility's peak load decreased from 1,900 MW to 45 MW and that OVEC currently uses the Facility's substations to transmit power from its generators to its load.[32] DOE Portsmouth also states that significant upgrades have been made over the years to the Facility.[33] As such, the 1976 Report is insufficient to demonstrate that the Facility does not have a material impact on the Bulk Power System.

58. Further, based on the materials provided by DOE Portsmouth, NERC and OVEC, it appears that DOE Portsmouth's switchyards and transmission lines not only support the Facility's operations; they also form part of the transmission path over which OVEC transfers power from its generating facilities to its members and other systems. This arrangement may be unusual insofar as it features an entity that is primarily a customer owning integrated transmission facilities and the switchyard and related facilities comprise only a discrete portion of the system. However, the facts that the transmission facilities are rated greater than 100 kV, forms a link in the transmission system and are used to transmit a portion of the system power, place these facility well above the bright-

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[31] *Id*. at 8, section III notes.

[32] DOE Portsmouth appeal at 2.

[33] *Id.*

line test in the registry criteria, which renders unnecessary a further demonstration that the facilities are material to Bulk-Power System reliability. Further, the 1976 Report appears to examine only the impact of serving DOE Portsmouth's load, but does not examine impacts from the operations of the switchyards and related facilities or potential operational events on the Bulk Power System. Of particular concern, the 1976 Report does not consider the potential impact of the switchyard and related facilities' current use to transmit OVEC's power. The Commission therefore finds that DOE Portsmouth has failed to support its claim that the Facility is not material to the reliable operation of the Bulk-Power System.

IV. Conclusion

59. In conclusion, the Commission finds that NERC has adequately supported its determination that DOE Portsmouth is properly registered as a transmission owner, transmission operator, and distribution provider. Accordingly, the Commission denies DOE Portsmouth's appeal of NERC's registry decision for these functional categories. This conclusion is without prejudice to any future agreement explicitly transferring some or all of the foregoing reliability responsibilities from DOE Portsmouth to USEC, as discussed in the body of this order.

60. In addition, the Commission remands to NERC for further consideration the determination whether DOE Portsmouth is a load-serving entity, as discussed in the body of this order.

The Commission orders:

(A) The Commission hereby affirms NERC's decision allowing ReliabilityFirst to register DOE Portsmouth's as a transmission owner, transmission operator and distribution provider, as discussed in the body of this order.

(B) The Commission hereby remands the determination whether DOE Portsmouth is a load-serving entity for further consideration, and denies DOE Portsmouth's appeal of NERC's registration determination in all other respects, as discussed.

(C) NERC is hereby directed to issue a registration determination with further explanation regarding DOE Portsmouth's registration as a load-serving entity and submit it to the Commission (or provide notice of an alternate determination), within 75 days of the date of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.