

Statement of FERC Chairman Joseph T. Kelliher on Reliability NOPR

“I would like to make a few comments about the reliability Notice of Proposed Rulemaking (NOPR) in Docket No. RM05-30-000 that the Commission acted on two weeks ago. That was a major action that was taken before this Open Meeting, frankly, because we did not think we could wait under the deadlines under the law. But now, during this Open Meeting, we can discuss our reasons why we acted two weeks ago. The reliability NOPR was something the Commission acted on very swiftly to implement the Energy Policy Act of 2005, and what we proposed were rules to establish the Electric Reliability Organization (ERO), set reliability standards, and provide for enforcement. I think we all want the electric reliability organization to be a strong organization. But from my point of view, the NOPR must be prepared for the prospect that that might not be the case, and the Commission must be prepared to be a strong reliability standard enforcer.

“This NOPR proposes a strong enforcement role for the Commission that is consistent with the law. We have been studying the self regulating organization model at other federal agencies to see how they coordinate enforcement actions with self regulating organizations that they oversee, such as the Security and Exchange Commission's oversight of the New York Stock Exchange or the Commodity Futures Trading Commission's review of enforcement actions by NYMEX and the other commodities exchanges.

“I just wanted to comment briefly on a couple aspects of the reliability NOPR. One is that the NOPR permits the electric reliability organization applicant or applicants to attach proposed reliability standards. Under a strict reading of the bill, the bill would imply that there is a two step process: first, there is a proceeding to establish an electric reliability organization, then there is a subsequent proceeding to establish reliability standards. In the NOPR, we clarified that we would permit the electric reliability organization applicant to attach proposed reliability standards in their application to be certified as an ERO. That would permit us to start review of reliability standards sooner and would permit us to establish reliability standards sooner than if we took a very strict reading of the language and required a two step process. So, under our interpretation, we would accelerate the establishment of reliability standards.

“I also want to clarify that the law obligates the Commission to review proposed reliability standards individually. I want to dispel any expectation that the Commission will blindly approve the Version Zero standards or any other standards that are submitted and then work to improve them over time. At least from my point of view, if the Version Zero standards fall short of the statutory standards, I would expect they will be rejected or set for hearing.

“Now I am operating under the assumption that the Version Zero standards are what will

be proposed, and we have had some discussion about whether we should have a process to start review of some of those standards in advance of the ERO filing itself in order to expedite review of the standards when they are under review.

“One other aspect of the proposed rule is that we included some language on decertification of the electric reliability organization, and we did that out of a faithful reading of the law. The law provides for certain criteria for establishment of an electric reliability organization, and we interpreted those as entailing a continuing obligation to meet those criteria. Otherwise, it seemed to be a perverse outcome if the ERO had to meet the criteria at one point in time on one day and then compliance was irrelevant from that point forth. That seemed to be a perverse reading of the law. So instead, we required a continuing obligation to comply with the certification criteria, and if they fail to comply with those criteria, there is a possibility of decertification.

“We also clarified an area that was a little ambiguous at least, provided an interpretation of an area that was a little bit ambiguous in the legislation, and that had to do with penalties -- the penalties that the electric reliability organization can impose for violations. The legislation is ambiguous as to whether the ERO could impose higher penalties than the Commission itself can under its new penalty authority. We interpreted the new law, the new penalty provisions, as applying to ERO enforcement actions, once an ERO is certified and standards are established. Otherwise, it again would seem to be a perverse outcome for these self regulating organizations to propose higher penalties than the federal government itself could.

“So, if you take a careful reading of the new penalty provisions in the law that govern violations of the Federal Power Act, the reliability standards themselves are set under the Federal Power Act, under the new section 215. Therefore, a violation of those reliability standards is a violation under the Federal Power Act, and the FPA civil penalty caps would govern ERO actions as well as Commission actions.

“The NOPR also helped define the role of regional entities. The law provides a rebuttable presumption for delegations of authority to interconnection wide regional entities. If they were to receive delegated authority, they would have authority to propose standards to the ERO not directly to the Commission, but to the ERO, and they would have authority to enforce standards directly.

“But I want to clarify that in the event there is an interconnection wide reliability entity, the standards that they propose ultimately would be ERO standards, since it is the ERO, not the regional entity that would be the applicant to the Commission.

“Now outside an interconnection, there is no rebuttable presumption in favor of delegation and the burden is on the applicant to demonstrate that they meet the standards in the law. So as to those regional entities, other than the interconnection wide bodies, the

role of the regional entity would be limited to an enforcement role.

“Finally, one last comment. I just want to observe that there are certain U.S. Canada bilateral principles that have been established, and the Commission was encouraged to consider those in the proposed rule. The proposed rule does include many of the bilateral principles, and it seeks comment and asks questions on the remainder.”

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