

120 FERC ¶ 61,280
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Direct Energy Services, LLC	Docket No. RC07-4-000
Sempra Energy Solutions LLC	Docket No. RC07-6-000
Strategic Energy, L.L.C.	Docket No. RC07-7-000

ORDER ESTABLISHING TECHNICAL CONFERENCE

(Issued September 26, 2007)

1. On September 11, 2007, Direct Energy Services, LLC (Direct), Sempra Energy Solutions LLC (Sempra) and Strategic Energy, L.L.C. (Strategic), each filed with the Commission an appeal of a determination by the North American Electric Reliability Corporation (NERC) that each of them were properly registered as load-serving entities (LSE) by ReliabilityFirst Corporation (ReliabilityFirst), a Commission-approved Regional Entity. Direct, Sempra and Strategic, which are authorized by the Commission to sell energy at market-based rates, assent to their registration as purchasing-selling entities, but object to their registration as LSEs. In this order, the Commission establishes a technical conference to address the common issues raised by the three appeals.

Background

A. Regulatory History

2. Pursuant to section 215 of the Federal Power Act,¹ in July 2006, the Commission certified NERC as the Electric Reliability Organization (ERO).² In the *ERO*

¹ 16 U.S.C. § 824o.

² See *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 (*ERO Certification Order*), order on reh'g and compliance, 117 FERC ¶ 61,126 (2006).

Certification Order, the Commission found NERC's compliance registry process to be a reasonable means "to ensure that the proper entities are registered and that each knows which Commission-approved Reliability Standard(s) are applicable to it."³ The Commission also approved NERC's Rules of Procedure, including section 500 (Organization Registration and Certification), subject to certain revisions.

3. Pursuant to the registration process, NERC, with the assistance of the Regional Entities, identifies users, owners, and operators of the Bulk-Power System that must comply with specific Commission-approved Reliability Standards based on the functional activities of the user, owner or operator. Further, NERC developed a Statement of Compliance Registry Criteria (Compliance Registry Criteria) that describes how NERC will identify organizations for registration, including guidelines for determining when an entity should be excluded. Most relevant to these proceedings, NERC defines an LSE as an entity that "secures energy and transmission service (and related interconnected operations services) to serve the electrical demand and energy requirements of its end-use customers."⁴ The NERC Compliance Registry Criteria provide that LSEs will be registered if "Load-serving entity peak load is > 25 MW and is directly connected to the bulk power (>100 kV) system"⁵

4. Subsequently, in Order No. 693, the Commission formally approved NERC's compliance registry process and the related Compliance Registry Criteria when it addressed NERC's initial submission of proposed Reliability Standards.⁶ The Commission explained that it would rely on the NERC registration process to identify the set of entities that are responsible for compliance with particular Reliability Standards.⁷

³ *Id.* at P 689.

⁴ NERC Compliance Registry Criteria, section II.

⁵ *See id.*, section III.a.1. The criteria also provide that a LSE with an underfrequency load shedding program or undervoltage load shedding program may be registered. NERC does not indicate that these criteria are applicable with regard to the three marketers at issue here.

⁶ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 92-96, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁷ Order No. 693 at P 95.

5. In April 2007, the Commission approved the delegation agreements between NERC and each of the eight Regional Entities, including ReliabilityFirst.⁸

B. NERC Determination

6. On August 21, 2007, NERC issued three written determinations finding that ReliabilityFirst properly registered Direct, Sempra and Strategic as LSEs. The basis for NERC's finding is the same for each of the three entities.

7. According to NERC, Direct, Sempra and Strategic are retail power marketers that sell energy to retail end-use customers within the ReliabilityFirst region. NERC refers to its registration criteria for LSEs and states that each of these retail marketers has a peak load that exceeds 25 MW. Further, while these retail power marketers are not directly connected to the Bulk-Power System, the load they serve is considered directly connected to the Bulk-Power System. NERC acknowledges that retail power marketers typically do not own transmission, distribution or generation assets, but NERC also states that Direct, Sempra and Strategic each performs LSE tasks, such as securing energy, transmission services and required reserves to serve the electrical demand and energy requirements of its end-use customers.

8. According to NERC, these retail power marketers have assumed the role of providing power in place of a "hosting entity," and their registration as LSEs is necessary to ensure that load data is reported as required by the Reliability Standards. Exclusion of these retail power marketers would result in "gaps and exclusions" in monitoring the applicable Reliability Standards. NERC adds that approximately 280 requirements of the Reliability Standards apply to LSEs and, while recognizing that many of those requirements may not be applicable to retail power marketers, NERC believes that they should be responsible for a subset of those requirements.

9. NERC's Compliance Registry Criteria also provide that a class of entities, each of which would be individually excluded, may be registered based on their aggregate impact on Bulk-Power System reliability.⁹ NERC states that, within ReliabilityFirst, the aggregate material impact and risk of the class of retail power marketers can be significant and therefore should be considered in the aggregate. In this regard, NERC

⁸ See *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on rehearing*, 120 FERC ¶ 61,260 (2007).

⁹ NERC Compliance Registry Criteria, at 9, provides that "[i]f an entity is part of a class of entities excluded based on the criteria above as individually being unlikely to have a material impact on the reliability of the bulk power system, but that in aggregate have been demonstrated to have such an impact[,] it may be registered for applicable standards and requirements irrespective of other considerations."

explains that the ReliabilityFirst region includes several states with retail access and the aggregate MWs associated with this class of LSE can be significant.

Petitions for Commission Review

10. Direct, Sempra and Strategic seek Commission review of NERC's determinations that ReliabilityFirst properly registered them as LSEs.¹⁰ The retail power marketers argue that ReliabilityFirst and NERC are attempting to fit a square peg into a round hole. They contend that, while they are appropriately registered as purchasing-selling entities, the LSE designation does not make sense in the context of a marketer that does not own or operate any physical assets. They state that the NERC registry criteria for LSEs (peak load is > 25 MW and *directly connected* to the Bulk-Power System) contemplate the ownership or operation of physical assets. Further, NERC acknowledges that many of the requirements of the Reliability Standards that apply to LSEs are not pertinent to retail power marketers, yet NERC fails to specify which requirements apply to retail power marketers. According to Direct, Sempra and Strategic, such uncertainty unfairly exposes them to risk of non-compliance and possible penalties.

11. Direct, Sempra and Strategic also contend that NERC failed to provide adequate support for its conclusion that the loads of retail power marketers are directly connected to the Bulk-Power System. Likewise, they contend that NERC has not adequately supported its finding that the aggregate impact of retail power marketers in the ReliabilityFirst region is material to Bulk-Power System reliability. Direct, Sempra and Strategic also emphasize the inconsistency that results from their LSE registration in ReliabilityFirst, while other Regional Entities registered them as purchasing-selling entities and affirmatively declined to register them as LSEs. They contend that NERC does not provide an adequate justification for this unique treatment within ReliabilityFirst.

Commission Determination

12. NERC indicates that, when a retail power marketer serves load that was traditionally served by a "hosting entity," a gap in reliability may occur if the retail power marketer is not considered an LSE. NERC has determined that it is appropriate to address this gap within the ReliabilityFirst region by registering retail power marketers as LSEs. NERC recognizes that retail power marketers typically do not own any physical assets and cannot comply with each and every Reliability Standard requirement that applies to LSEs. However, NERC has not identified with specificity those requirements that apply to a retail power marketer registered as an LSE. Nor is it clear why retail

¹⁰ Section 501.3.4 of NERC's Rules of Procedure provides that an entity may "appeal" a NERC registration determination to the "applicable governmental authority."

power marketers are being registered as LSEs in the ReliabilityFirst region, but not in any other region.

13. The Commission shares the concern of ReliabilityFirst and NERC that any gap in Bulk-Power System reliability should be addressed in an appropriate manner. However, the Commission also believes that the retail power marketers raise legitimate questions regarding consistency and fairness in the application of the registration criteria and the adequacy of support for NERC's determination. The Commission, therefore, will establish a staff-led technical conference to further explore the issues raised in this proceeding and to provide an adequate record for the Commission to make a determination on this matter. Issues to be addressed in the technical conference include:

- The nature and extent of any gap in reliability that may result from a retail power marketer not being registered as an LSE.
- The circumstances within the ReliabilityFirst region that justify the registration of retail power marketers as LSEs, while other Regional Entities have registered retail power marketers only as purchasing-selling entities.
- The identification of the Reliability Standard requirements that would apply to a retail power marketer registered as an LSE.
- Support for the conclusions (i) that the loads served by Direct, Sempra and Strategic are directly connected to the Bulk-Power System and (ii) that retail power marketers within the ReliabilityFirst region, in the aggregate, impact Bulk-Power System reliability.
- Alternative solutions for addressing any reliability gaps that may be identified.

14. The Commission hereby directs staff to convene a technical conference within 45 days of the date of this order. Notice of the technical conference will be announced at a later date.

The Commission orders:

Commission staff is hereby directed to convene a technical conference to further explore the registration of retail power marketers in the ReliabilityFirst region as LSEs, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.