

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rules Concerning Certification of the Electric) Docket No. RM05-30-000
Reliability Organization; and Procedures for the)
Establishment, Approval, and Enforcement of)
Electric Reliability Standards)

Comments of the Organization of MISO States
to the Second Technical Conference

The following responses are offered to the questions posed for Panel II: State and Provincial Role in Reliability. The Organization of MISO States (OMS) is a regional state committee with one provincial and fourteen state members formed in 2003 to address multi-jurisdictional issues in the region served by the Midwest Independent Transmission System (MISO). The OMS appreciates the invitation to participate in the technical conference and regrets that weather-related travel delays prevented our attendance.

The notice of the technical conference asks panelists to address several questions. While the OMS has responded to each question, the experience of the OMS is most closely related to the question about Regional Advisory Bodies. The OMS points out the difficulties in sustaining a multi-jurisdictional body and urges the Commission to allow flexibility in implementing Section 215(j).

• **What role should states and provinces play with regard to reliability standards?**

States and Provinces (S&P's) have developed several and usually differing models for acting on reliability issues. Some S&P's actively set standards. Many more S&P's allow standards to be developed within the current reliability organizations, reviewing these actions through a process of continuing surveillance. In this process, regulators maintain liaison with the standards process and step in with respect to a regulated utility only if the self-governing process produces a troublesome result.

At least for now, the OMS anticipates that S&P's will continue to follow both models. S&P's that actively set standards may well continue to do so, as the Energy Policy Act of 2005 (EPAcT) envisions. States using a surveillance model are likely to continue that approach, monitoring or participating in the development of standards within the Electric Reliability Organization or Regional Reliability Organizations (ERO/RRO), where they do now, and accepting or deferring to the outcomes of that process. This could change. For example, depending on whether a capacity market construct is adopted and the form of that market, S&P's may reconsider their historic approaches. There is an added opportunity provided by the EPAcT to participate through comments in the Commission's review of standards proposed by the ERO.

• **How should the Commission receive input for approval of reliability standards from the states, provinces, Regional Entities, and ERO?**

The EPAct requires the Commission to give affirmative approval of proposed standards. The process of approving a proposed standard or a change to a standard is closely analogous to other Commission approval procedures, such as tariff filings and revisions and amendments to natural gas certificates or hydro licenses. Because those procedures are familiar to the agency's practitioners and regulated entities, it seems convenient for the Commission to borrow those with any necessary modifications. The Commission's determination is not bound by a time limitation. The Commission could therefore allow less stringent periods for responsive pleadings, hearings if needed, and decision.

Some process improvements could help all parties use the limited time to best advantage. First, the ERO should be required to consult with states, provinces, and regional advisory bodies prior to filing. Second, the Commission should require the ERO to provide electronic service to states, provinces, and regional advisory bodies the same day the filing is made at the Commission. Those two steps will improve the quality and timeliness of the initial filings, which in turn simplifies reply filings and facilitates the Commission's review.

- **What test should the Commission use to determine whether a state-or-province - developed rule conflicts with reliability standards?**

The EPAct contemplates a process in which the ERO or another entity would submit an application to the Commission to determine that a conflict exists. If this view is correct, the ERO would initiate the enquiry with a filing that would have to contain three elements. The first element is the identification of a particular state action, which could be an adjudicated finding, an adoption of a rule, or another 'act' taken by a state agency. The second element is the identification of the particular ERO or RRO standard it claims is in conflict. The third element is an explanation of the inconsistency and its consequences.

Time intervals for comments and replies should be adjusted to meet the 90-day limit for the Commission's action. A comment schedule would ideally allow 30 days for comments and 15 days for replies, leaving the Commission 45 days to consider the comments and adopt an order.

The key test for the Commission to make is the finding that the state or provincial action is "inconsistent" with a Commission-approved standard. This finding could be supported with a pre-emption analysis, most likely on the grounds that the applicant 'cannot satisfy both requirements.' The analysis should not turn on economic considerations such as the relative costs of complying with different standards, but rather on actual interference with a regulated entity meeting the ERO/RRO standard. The hardest tests may prove to be those where the measures are not directly comparable.

- **When should Regional Advisory Bodies be convened and for what purpose?**

The experience of the OMS during its formation in 2003 and in operation since that time may offer the Commission some insights on some of the considerations involved in formation of a multi-jurisdictional entity like the regional advisory bodies contemplated by

EPAAct. Under EPAAct, the initiative rests with the states to create and convene a regional advisory body.

A threshold question in establishing a regional body is the definition of a region. As pointed out in the comments of the National Association of Regulatory Utility Commissioners (at 20-21), it will often be desirable to have a regional advisory body geographically aligned with the area served by the regional reliability organization. Under Section 215(j) of EPAAct, however, the initiative for establishing a regional advisory body rests with the states, who can self-define regions and may choose a configuration recognizing other factors. We note that in addition to the reliability bodies, EPAAct invites formation of interstate/provincial compacts for siting purposes and that regional committees have been formed in several regions to address issues related to transmission operations. Practical requirements of maintaining a multi-jurisdictional organization may lead S&P's to minimize the number of such organizations they form and must sustain. The OMS would advise the Commission not to restrict the opportunities of states and provinces to configure regional bodies as they believe will be most effective. Certainly, even without a formal agreement or compact, it may be possible for individual S&P's to cooperate in such things as working together to process applications for siting and construction of interstate transmission facilities.

In the creation of a formal multi-jurisdictional body, organization and structure are potentially difficult issues. The bylaws of an organization need to address governance, funding, liability, voting, and decisional authority.

In the experience of the OMS, there are two key elements for success of a multi-jurisdictional entity. First, the purposes must be such that the member S&P's find it important to dedicate the time and talent of their leadership and staff to the work of the organization on a sustained basis. The second critical element is funding. Expenses are inevitably incurred to maintain effective liaison with the counterpart industry group and to form and provide well-founded advice. These expenses primarily involve travel and the cost of conference calls, webcasting, and communications. Sufficient long-term funding may be difficult to achieve through state budgets.

Given these concerns, S&P's may choose to house some of these regional functions in a single organization, or to decline to establish a formal regional advisory body for reliability issues that could create costs and administrative responsibilities, or may duplicate those already being incurred for other issue areas.

The OMS would advise against too much speculation about questions with respect to formation of regional advisory bodies, and recommends instead that the Commission honor reasonable proposals it receives from S&P's. In the end, the important distinction is whether a body is organized on an Interconnection-wide basis and thereby qualifies for deference. The OMS is accustomed to operating under a 'no deference' model: useful and well-reasoned analysis carries its own weight.

- **What role should the states, provinces, Regional Entities, ERO, and the Commission play in determining resource adequacy?**

Resource adequacy generally deals with generation adequacy, which the Power Act reserved to state authority. The EPAct largely continues that division of authority. State regulatory agencies, as discussed above, have accepted the contributions of the reliability organizations with respect to planning and operating margins, and will likely continue to welcome those contributions while exercising the authority given them by their legislatures and reserved by the Power Act.

The OMS submits these comments because a majority of the members have agreed to generally support them. The following members generally support these comments. Individual OMS members reserve the right to file separate comments regarding the issues discussed in these comments:

- Illinois Commerce Commission
- Indiana Utility Regulatory Commission
- Iowa Utilities Board
- Kentucky Public Service Commission
- Manitoba Public Utilities Board
- Michigan Public Service Commission
- Minnesota Public Utilities Commission
- Missouri Public Service Commission
- Montana Public Service Commission
- Nebraska Power Review Board
- North Dakota Public Service Commission
- South Dakota Public Utilities Commission
- Wisconsin Public Service Commission

The Pennsylvania Public Utility Commission and the Public Utilities Commission of Ohio abstained.

The Minnesota Department of Commerce and the Iowa Consumer Advocate, as associate members of the OMS, participated in these comments and generally support these comments.

Respectfully Submitted,

William H. Smith, Jr.

William H. Smith, Jr.
Executive Director
Organization of MISO States
100 Court Avenue, Suite 218
Des Moines, Iowa 50309
Tel: 515-243-0742

Dated: December 16, 2005