

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability  
Corporation

Docket No. RD24-5-000

**MOTION FOR LEAVE TO ANSWER AND  
ANSWER OF THE TRANSMISSION ACCESS  
POLICY STUDY GROUP**

Pursuant to Rules 212 and 213(a)(3) of the Federal Energy Regulatory Commission’s (“FERC” or the “Commission”) Rules of Practice and Procedure,<sup>1</sup> the Transmission Access Policy Study Group (“TAPS”)<sup>2</sup> submits this Motion for Leave to Answer and Answer to the March 21, 2024 protest filed by the ISO/RTO Council (“IRC”)<sup>3</sup> on NERC’s Petition for Approval of Proposed Reliability Standard EOP-012-2.<sup>4</sup>

The IRC asks the Commission to “disapprove and remand” EOP-012-2.<sup>5</sup> The Commission should not do so. The proposed standard, while it may not be perfect in all eyes, is a significant step forward, and meets the Commission’s directives regarding modifications to EOP-012-1.<sup>6</sup> In addition, consistent with its determination in the

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<sup>1</sup> 18 C.F.R. §§ 385.212 and 385.213(a)(3).

<sup>2</sup> TAPS filed a motion for leave to intervene out of time in this proceeding on March 26, 2024.

<sup>3</sup> Protest of the ISO/RTO Council (March 21, 2024), eLibrary No. 20240321-5268 (“IRC Protest”).

<sup>4</sup> Petition of the Northern American Electric Reliability Corporation for the Approval of Proposed Reliability Standard EOP-012-2 and Request for Expedited Action (Feb. 16, 2024), eLibrary No. 20240216-5277 (“Petition”).

<sup>5</sup> IRC Protest at 1.

<sup>6</sup> *N. Am. Elec. Reliability Corp.*, 182 FERC ¶ 61,094 (“Phase 1 Order”), *on reh’g*, 183 FERC ¶ 61,222 (2023) (“Phase 1 Rehearing Order”).

context of EOP-012-1, the Commission should find that cost recovery is beyond the scope of this proceeding and reiterate that generators, ISOs, and others may submit appropriate filings under sections 205 and 206 of the Federal Power Act<sup>7</sup> to the extent they believe existing rates and market structures do not provide generators an adequate opportunity to recover compliance costs.

## **I. MOTION FOR LEAVE TO ANSWER**

Rule 213(a)(2)<sup>8</sup> of the Commission's Rules generally prohibits answers to protests. The Commission, however, has accepted otherwise impermissible answers that provide information that assists the Commission in its decision-making process.<sup>9</sup> TAPS asserts that this answer will aid in the Commission's understanding of the issues initially presented in the Petition and the issues broached in the IRC's Protest. TAPS therefore respectfully requests that the Commission grant this motion for leave to answer.

## **II. ANSWER**

### ***A. The definition of Generator Cold Weather Constraint is adequately clear and auditable.***

EOP-012-2 uses a proposed new term, Generator Cold Weather Constraint, which "would define the conditions that may preclude a Generator Owner from implementing one or more corrective actions in conformance with" EOP-012-2.<sup>10</sup> While some TAPS members expressed concerns regarding the clarity of the definition during the development of the standard, we believe that, particularly with guidance from NERC to

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<sup>7</sup> 16 U.S.C. §§ 824d, 824e.

<sup>8</sup> 18 C.F.R. § 385.213(a)(2).

<sup>9</sup> *See, e.g.*, Phase 1 Order P 33.

<sup>10</sup> Petition at 56.

ensure consistent continent-wide application, the definition is auditable, and improves upon the approach in EOP-012-1.

The IRC protests the Generator Cold Weather Constraint definition's inclusion of economic constraints. As set out in NERC's Petition, the definition states, in pertinent part, that:<sup>11</sup>

Criteria used to determine a constraint include practices, methods, or technologies which, given the exercise of reasonable judgment in light of the facts known at the time the decision to declare the constraint was made: . . . [c]ould not have been implemented at a reasonable cost consistent with good business practices, reliability, or safety. A cost may be deemed "unreasonable" when implementation of selected freeze protection measure(s) are uneconomical to the extent that they would require prohibitively expensive modifications or significant expenditures on equipment with minimal remaining life.

In response to comments on the proposed definition, the standard drafting team explained<sup>12</sup>:

A reasonableness standard is often a benchmark used in a legal setting when reviewing decisions. The reasonableness standard is typically an objective test that looks at the average decision maker's conduct under the particular facts and circumstances present and if they exercised average care, skill, and judgement. The [standard drafting team] considered adding specific criteria, but is of the opinion that the standard must be adaptable as facts and circumstances change and new solutions are identified and brought to market. The last half of the constraint definition refers to "unreasonable costs" as requiring cost-prohibitive modifications or significant expenditures that could lead to

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<sup>11</sup> *Id.*, Ex. A, Proposed Reliability Standard EOP-012-2 – Clean at 2-3 ("EOP-012-2") (definition of Generator Cold Weather Constraint).

<sup>12</sup> *See, e.g., id.*, Ex. F, Summary of Development History and Complete Record of Development, Jan. 10, 2024 – Jan. 22, 2024 Consideration of Comments at 50 (Feb. 5, 2024) (Standard Drafting Team response to comments of Kennedy Meier - Electric Reliability Council of Texas, Inc., ISO/RTO Council Standards Review Committee ("SRC")).

premature retirement of equipment. The [standard drafting team] agrees with [the North American Generator Forum's] comments regarding NERC's responsibility to ensure consistent interpretation of the constraint definition in all regions and across all resource types.

The definition of economic constraints is quite narrow, including *only* “prohibitively expensive modifications or significant expenditures on equipment with minimal remaining life.” As commenters noted during development of the definition, it does *not* permit a balancing of costs against benefits.<sup>13</sup> Thus, a disproportionate, but not prohibitive, expense to achieve a one-degree improvement in generator performance would not qualify as a Generator Cold Weather Constraint.

1. The cost component should not be removed from the Generator Cold Weather Constraint definition.

The IRC claims that “the cost component of Generator Cold Weather Constraints is effectively unauditible and could easily be used excessively, resulting in EOP-012-2 failing to address the Commission’s concerns regarding the ambiguity of constraint declarations and meet the Commission’s directives to ‘capture[] all bulk electric system generation resources needed for reliable operation and exclude[] only those generating units not relied upon during freezing conditions’ and ‘include auditable criteria on permissible constraints.’”<sup>14</sup>

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<sup>13</sup> See, e.g., *id.* Ex. F, Summary of Development History and Complete Record of Development, Jun. 5, 2023- Jul. 20, 2023 Consideration of Comments at 16-17 (Oct. 27, 2023) (Standard Drafting Team response to comments of Donald Lock -Talen Generation, LLC); *id.*, Ex. F, Summary of Development History and Complete Record of Development, Jun. 5, 2023- Jul. 20, 2023 Consideration of Comments at 29 (Oct. 27, 2023) (Standard Drafting Team response to comments of Collin Chilcoat - Invenergy LLC). See also *id.*, Ex. F, FAQ Document at 3 (“the SDT does understand that this particular standard may require investment beyond other standards. Even so, the SDT does not believe a full cost benefit analysis is warranted for each individual freeze protection measure”).

<sup>14</sup> IRC Protest at 10 (footnotes omitted).

The IRC's proposed solution—to remove the cost component from the Generator Cold Weather Constraint definition entirely—might improve the definition's clarity; but any such improvement would come at the expense of making the definition, and thus EOP-012-2, unreasonable, contrary to the requirements of section 215(d)(2) of the Federal Power Act.<sup>15</sup> The IRC's approach would result in EOP-012 mandating winterization at any cost, no matter how unjustifiable. Many things are feasible if cost is no object; it does not necessarily follow that all costs are reasonable. TAPS appreciates and supports the need to mandate significant improvements to avoid future cold weather events. And, recognizing the impact that rising electric rates have on ratepayers, particularly low-income consumers, it is important that those investments be made *wisely*, with some backstop to avoid mandatory gold-plating.<sup>16</sup> As the standard drafting team explained:

The concept of the commercial exception is that there will be certain freeze protection measures that are so egregiously expensive (i.e. replacing the combustion turbine itself) that it would not serve the overall reliab[ility] of the grid *as it would take inordinate amounts of capital that may be better spent expanding the overall quantity of dispatchable generation for instance*. Another instance where an exception would be warranted is if the generating unit is slated for retirement in the near future and the additional freeze protection measures would only be in service for a very short time period. *This capital may be better served to be spent on units that will be relied upon over many winter periods for extreme cold weather operation.*

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<sup>15</sup> 16 U.S.C. § 824o(d)(2).

<sup>16</sup> Petition Ex. F, FAQ Document at 3 (emphasis added):

IRC's nod to the importance of generator cost recovery,<sup>17</sup> while doubtless reassuring to generators, may be less so to the consumers who would ultimately foot the bill for unreasonably costly winterization measures.

2. The definition of Generator Cold Weather Constraint is not unduly vague.

The IRC also objects more generally to the Generator Cold Weather Constraint definition's "reasonableness" standard.<sup>18</sup> The IRC argues that "ambiguity" in the definition "provides far too much discretion *to the entities required to comply* with the proposed Reliability Standard."<sup>19</sup> But the IRC itself concedes elsewhere that "[a] standard that contains an exception process that revolves around subjective terminology . . . leaves the ultimate practical definition of those terms to *the NERC audit and enforcement processes*."<sup>20</sup> In other words, any vagueness in a reliability standard or definition gives discretion to *enforcers*, not to entities subject to compliance, as registered entities are well aware.

While TAPS members strongly prefer the regulatory certainty provided by more concrete language, there are instances when some flexibility is unavoidable, as is illustrated by the IRC's own proposals.<sup>21</sup> In its Petition, NERC explains that "[t]he

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<sup>17</sup> IRC Protest at 12.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.* at 13 (emphasis added); *see also id.* at 9 ("the proposed language invites Generator Owners to define for themselves what constitutes a 'reasonable cost,' a 'prohibitively expensive modification,' a 'significant expenditure,' or 'minimal remaining life'").

<sup>20</sup> *Id.* at 11-12 (emphasis added).

<sup>21</sup> *See, e.g., id.* at 15 (asking the Commission to require that the standard make "clear that freeze protection measures are 'intended to include practices, methods, or technologies that would *reasonably* be expected to result in effective facility performance while operating at the Extreme Cold Weather Temperature'") (emphasis added); *id.* at 26 (requesting that "the Commission direct NERC to revise the standard to include a requirement that Generator Owners 'document the generator's *best efforts* to *promptly* implement all immediate and near-term actions that it can *reasonably* undertake prior to the next upcoming winter season

standard drafting team determined that the proposed definition [of Generator Cold Weather Constraint] should remain flexible to support the adoption of new freeze protection practices, methods, or technologies as they are developed.”<sup>22</sup>

***B. Cost recovery is beyond the scope of this proceeding.***

The IRC urges the Commission to direct the removal of the Generator Cold Weather Constraint definition’s limited consideration of costs, and instead “indicate its intention to allow for cost recovery and direct its Office of Energy Market Regulation to survey those markets within its jurisdiction to determine whether there are sufficient vehicles for cost recovery of winterization costs.”<sup>23</sup> TAPS requests that the Commission find, consistent with its determination in the context of EOP-012-1, that cost recovery is outside the scope of the current proceeding,<sup>24</sup> and reiterate that “[t]o the extent competitive generators”—or members of the IRC—“believe that their existing rates do not offer an opportunity to recover the costs associated with Reliability Standard EOP-012-[2], they may make appropriate filings under FPA sections 205 and 206.”<sup>25</sup>

As TAPS and the American Public Power Association noted in reply comments on EOP-012-1, “[t]o the extent that market rules limit the range of a competitive

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to winterize the generating unit(s) to operate at its calculated Extreme Cold Weather Temperature”) (emphasis added). The quotations here illustrate that even the IRC itself, which emphasizes the importance of avoiding vagueness, finds it necessary to fall back on more flexible terms.

<sup>22</sup> Petition at 57.

<sup>23</sup> IRC Protest at 12.

<sup>24</sup> Phase 1 Order P 83; Phase 1 Rehearing Order P 31.

<sup>25</sup> Phase 1 Rehearing Order P 16. For example, the New England Power Generators Association recognizes that the appropriate remedy for generators’ asserted inability to reflect capital costs in market bids under the current ISO-NE tariff is “for ISO-NE, Generator Owners, and other NEPOOL stakeholders to work together to ensure cost recovery opportunities exist under the ISO-NE Tariff.” Comments of New England Power Generators Association, Inc. at 2 (Mar. 21, 2024), eLibrary No. 20240321-5253.

generator's potential bids based on its costs, *prudently-incurred* reliability standards compliance costs should of course be factored in like any other cost.”<sup>26</sup> The IRC's members have the authority to propose changes to their market rules to remove any such limitations.

As also set out in the reply comments of TAPS and APPA,<sup>27</sup> however:

adopting a separate cost-recovery mechanism for competitive generators' reliability compliance costs would be inconsistent with the Commission's market-based rate framework. Providing competitive generators a cost-based revenue stream on top of market-based rates risks distorting the markets and could lead to recoveries in excess of the just and reasonable rate, as established by the competitive market. Indeed, the Commission cannot grant market-based rates absent “empirical proof” that “existing competition would ensure that the actual price is just and reasonable.”

TAPS and APPA went on to note that “[c]ompetitive generators are not guaranteed recovery of any of their costs, including reliability compliance costs,”<sup>28</sup> quoting the Commission's statement that<sup>29</sup>

[A]s in all markets, regardless of what “investment-backed expectations” a resource may have had at the time that it chose to enter the ISO-NE markets, each market entrant was aware of the possibility that at some times, it might earn substantially more than a traditional cost-based rate, but that at other times, it might earn less than its costs.<sup>182</sup> . . . In a competitive market, the Commission is

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<sup>26</sup> Motion for Leave to Answer and Answer of the American Public Power Association and the Transmission Access Policy Study Group at 3 n.10, Docket No. RD23-1-000 (Dec. 23, 2022), eLibrary No. 20221223-5139 (“TAPS/APPA Comments”).

<sup>27</sup> *Id.* at 8 (quoting *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1510).

<sup>28</sup> *Id.*

<sup>29</sup> *ISO New England Inc.*, 135 FERC ¶ 61,029, P 254 & n.182 (2011) (internal quotations and citations omitted); *see also, e.g., CXA La Paloma, LLC v. CAISO*, 165 FERC ¶ 61,148, P 71 (“The Commission has been clear that suppliers in competitive wholesale electricity markets are not guaranteed full cost recovery, but only the opportunity to recover their costs”).

responsible only for assuring that a resource is provided the opportunity to recover its costs, not a guarantee of cost recovery.

<sup>182</sup> If we were to allow a rate that recovered more than a traditional cost-based rate when the market rate exceeded that traditional cost-based rate, but then allowed a traditional cost-based rate when the market rate dropped below that traditional cost-based rate, such a “higher of cost or market” regime would inevitably produce a rate that not only would guarantee cost recovery (not just the opportunity for cost recovery), but likely would guarantee more than cost recovery. Such a rate would be unjust and unreasonable.

It is significant that the IRC is asking the Commission to commit to “allow for cost recovery” and embark on an investigation of all markets under its jurisdiction, despite citing no evidence that the Commission’s longstanding reliance on competitive markets to ensure just and reasonable rates will fail with respect to these particular costs. TAPS requests that the Commission not entertain this suggestion. Instead, it should find, consistent with its previous orders, that cost recovery is beyond the scope of this proceeding and that generators, ISOs, and others are free to make filings pursuant to sections 205 and 206 of the Federal Power Act if they believe their existing rates or market structures are inadequate.

***C. Exceptions from Requirements R2, R3, and R6 for generators not committed or obligated to operate in winter are appropriate.***

EOP-012-1 is applicable to Bulk Electric System (“BES”) Blackstart Resources and any BES “generating unit that[] commits or is obligated to serve a Balancing Authority load pursuant to a tariff obligation, state requirement as defined by the relevant electric regulatory authority, or other contractual arrangement, rule, or regulation, for a continuous run of four hours or more at or below a temperature of 32 degrees

Fahrenheit.”<sup>30</sup> Finding the standard’s applicability section unclear and ambiguous, the Commission directed NERC to “modify Reliability Standard EOP-012-1 to ensure that it captures all bulk electric system generation resources needed for reliable operation and excludes only those generation resources not relied upon during freezing conditions,” noting that “the directive is to clarify the language of the applicability section to align with NERC’s explanation of the entities that should comply.”<sup>31</sup> And the Commission directed NERC to revise the standard so that information regarding the “expected limitations of . . . generating units during local forecasted cold weather” remains available from “generating units that do not typically operate during the winter.”<sup>32</sup>

EOP-012-2 has been revised consistent with the Commission’s directives, which the IRC now argues are insufficient. To comply with the Commission’s directives, the applicability section of EOP-012-2 has been simplified; the standard is now applicable to all BES generators. The description of exempt generators—now exempt from only three requirements—has been clarified: “Generating unit(s) that do not self-commit or are not required to operate at or below a temperature of 32 degrees Fahrenheit . . . , but may be called upon to operate in order to assist in the mitigation of BES Emergencies, Capacity Emergencies, or Energy Emergencies during periods at or below a temperature of 32 degrees Fahrenheit.”<sup>33</sup> Such generators are subject to the remainder of the standard, including (as directed by the Commission)<sup>34</sup> the requirement that they “identify their cold

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<sup>30</sup> Phase 1 Order P 51.

<sup>31</sup> *Id.* P 58.

<sup>32</sup> *Id.* P 60.

<sup>33</sup> EOP-012-2 Requirements R2 n.1, R3 n.2, and R6 n.4.

<sup>34</sup> Phase 1 Order P 60.

weather operating parameters, which would then be exchanged with the Reliability Coordinator, Transmission Operator, and Balancing Authority for planning and operations under the data specification standards, Reliability Standards TOP-003-5 and IRO-010-4 (or their approved successor versions).”<sup>35</sup>

The IRC claims that the Commission’s directives regarding EOP-012-1 were inadequate, and asks the Commission to direct that Requirements R2, R3, and R6 be made applicable to generators that are not committed to operate in freezing conditions but may be called on during emergencies. The IRC argues that “[d]uring BES emergencies, ISOs and RTOs should not have to take additional steps to identify which of the generating units it can call upon for assistance might actually be able to respond to that call. If a unit can be called upon to help mitigate a wintertime BES emergency, that unit may be required to operate during freezing conditions and should not be exempt from having to winterize.”<sup>36</sup> But, as noted above, due to EOP-012-2’s revisions to the applicability section of EOP-012-1, the system operator should already have requested and received operational limitation data from each BES generator in its footprint; there is thus no additional “step” for an ISO or RTO to take to identify which generating units can operate under particular conditions. Consistent with the Commission’s directive, EOP-012-2 “captures all bulk electric system generation resources needed for reliable operation and excludes only those generation resources not relied upon during freezing conditions,”<sup>37</sup> as system operators should know the minimum operating temperatures of

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<sup>35</sup> Petition at 32.

<sup>36</sup> IRC Protest at 18.

<sup>37</sup> Phase 1 Order P 58.

the BES generators in their footprints, and not “rel[y] upon” un-committed generators to operate outside those conditions.

### CONCLUSION

For the foregoing reasons and those set out in NERC’s Petition, the Commission should find that EOP-012-2 meets its directives. Consistent with its previous orders, the Commission should decline to address recovery of Reliability Standard compliance costs as outside the scope of this docket, and should reiterate that generators and other utilities, including members of the IRC, are free to make appropriate filings under sections 205 and 206 of the Federal Power Act if they believe that their existing rates and market mechanisms do not offer an opportunity to recover the costs of compliance with EOP-012-2.

Respectfully submitted,

*/s/ Rebecca J. Baldwin*

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Cynthia S. Bogorad  
Rebecca J. Baldwin  
SPIEGEL & MCDIARMID LLP  
1875 Eye Street, NW  
Suite, 700  
Washington, DC 20006

*Attorneys for  
Transmission Access Policy Study  
Group*

April 5, 2024

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.

Dated on this 5th day of April, 2024.

*/s/ Rebecca J. Baldwin*

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Rebecca J. Baldwin

Law Offices of:  
Spiegel & McDiarmid LLP  
1875 Eye Street, NW  
Suite 700  
Washington, DC 20006  
(202) 879-4000