

119 FERC ¶ 61,248  
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.

North American Electric Reliability  
Corporation

Docket No. RR06-1-007

ORDER ON COMPLIANCE FILING

(Issued June 7, 2007)

1. On March 19, 2007, the North American Electric Reliability Corporation (NERC) submitted a filing in response to the Commission's January 18, 2007<sup>1</sup> and March 9, 2007<sup>2</sup> orders requiring NERC to further modify its Rules to comply with the Commission's July 20, 2006 Order<sup>3</sup> certifying NERC as the Electric Reliability Organization (ERO) for the United States under section 215 of the Federal Power Act (FPA).<sup>4</sup> In this order the Commission approves the NERC filing, except as specifically discussed below where we direct particular modifications or submissions. We require NERC to submit a further compliance filing on these matters within 60 days of the date of this order. In addition, we require NERC to submit a compliance filing containing violation severity levels by March 1, 2008.

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<sup>1</sup> *North American Electric Reliability Corp.*, 118 FERC ¶ 61,030 (*January 2007 Compliance Order*), *order on reh'g*, 119 FERC ¶ 61,046 (2007).

<sup>2</sup> *North American Electric Reliability Corp.*, 118 FERC ¶ 61,190 (2007) (*March 2007 Compliance Order*).

<sup>3</sup> *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006) (*October 2006 Compliance Order*), *order on compliance*, 118 FERC ¶ 61,030, *order on compliance*, 118 FERC ¶ 61,190, *order on reh'g*, 119 FERC ¶ 61,046 (2007).

<sup>4</sup> 16 U.S.C. § 824o (2000).

## I. Background

2. In the *Certification Order*, the Commission found that NERC generally satisfies the criteria to become the ERO responsible for developing and enforcing mandatory Reliability Standards for the United States under Order No. 672.<sup>5</sup> The Commission also directed NERC, as the certified ERO, to provide additional information and make revisions to its Bylaws and Rules of Procedure. On September 18, 2006, in Docket No. RR06-1-002, NERC submitted a compliance filing limited to matters pertaining to its governance and balanced decision-making. On October 30, 2006, the Commission issued an order that approved most of NERC's September 18 filing, but directed NERC to modify its Rules of Procedure regarding the makeup of NERC committees and subgroups.<sup>6</sup>

3. On October 18, 2006, NERC submitted a second compliance filing with respect to the *Certification Order*, in which NERC provided additional information and revisions to its Rules of Procedure with respect to matters other than governance and balanced decision-making. The Commission generally approved this compliance filing in the *January 2007 Compliance Order*, but directed a further compliance filing within 60 days.

4. On January 12, 2007, NERC submitted a filing in compliance with the *October 2006 Compliance Order*. On March 9, 2007, the Commission issued the *March 2007 Compliance Order*, which conditionally approved NERC's compliance filing and directed NERC to submit within 60 days an additional compliance filing to amend section 1302 of its Rules of Procedure with respect to improved sector representation on ERO committees.

## II. Procedural Matters

5. Notice of NERC's March 19, 2007 filing was published on March 21, 2007, with comments due on or before April 18, 2007. Allegheny Power and Allegheny Energy Supply Company, LLC (collectively Allegheny Energy), Edison Electric Institute (EEI),

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<sup>5</sup> *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

<sup>6</sup> *North American Electric Reliability Corp.*, 117 FERC ¶ 61,126 (2006).

Midwest Reliability Organization (MRO), and Xcel Energy Services Inc. (Xcel) filed timely motions to intervene and comments. On May 3, 2007, NERC filed an answer to the comments.

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NERC's answer because it has provided information that assisted us in our decision-making process.

### **III. Discussion**

7. NERC's compliance filing addresses each of the outstanding issues presented in the *January 2007 Compliance Order* and the issue of improved sector representation on ERO Committees in the *March 2007 Compliance Order*. Below, we address only those issues raised by intervenors or by our review of NERC's filing. The Commission approves NERC's filing with minor modifications as specified below.

#### **A. NERC Compliance and Certification Committee**

##### **1. Monitoring NERC and Regional Entity Compliance**

8. In the *Certification Order*, the Commission held that NERC's stakeholder compliance and certification committee should monitor NERC's compliance with its Rules of Procedure.<sup>7</sup> In its October 19 compliance filing, NERC proposed that the compliance and certification committee monitor NERC's compliance with the Rules of Procedure for the compliance enforcement and organization registration and certification programs, while NERC's standards committee should monitor NERC's compliance with the Rules of Procedure regarding development of Reliability Standards. In the *January 2007 Compliance Order*, the Commission found that the compliance and certification committee, rather than the standards committee, should monitor NERC's compliance

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<sup>7</sup> *Certification Order* at P 354.

with the Reliability Standards development process because the compliance and certification committee is independent of that process and is generally responsible for monitoring NERC's compliance with the Rules of Procedure that govern the compliance enforcement program.<sup>8</sup>

9. In the *January 2007 Compliance Order*, we also directed NERC to modify its Rules of Procedure to provide that the ERO will comply with each Reliability Standard that identifies the ERO as an applicable entity, identify the component of NERC that would monitor NERC's compliance with these Reliability Standards and state that non-compliance with such a Reliability Standard would violate NERC's Rules of Procedure and subject NERC to any consequences of such a violation.<sup>9</sup>

10. The *January 2007 Compliance Order* held that NERC, in its compliance filing, should clarify the role of the compliance and certification committee and respond to the following concerns: whether the compliance and certification committee charter provided appropriate checks and balances to support a fully independent compliance enforcement program; whether the compliance and certification committee should report to the compliance committee of NERC's board, rather than to the NERC board itself; how NERC's compliance with the Rules of Procedure, other than those governing the Reliability Standards development process, will be audited and reported to the Commission; whether any hearing body under the compliance and certification committee that hears disputes between NERC and Regional Entities will consist of fewer members than the compliance and certification committee itself; whether the compliance and certification committee charter should explicitly reference any procedures in the hearing process that the Commission ultimately approves in a Uniform Compliance Program; and whether the compliance and certification committee should utilize the NERC standards committee's nominations and elections procedures.<sup>10</sup>

**a. General Issues**

11. In the March 19 compliance filing, NERC responds that it considered the issues raised in the *January 2007 Compliance Order* and received comments on the charter of

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<sup>8</sup> *January 2007 Compliance Order* at P 64, *reh'g denied*, 119 FERC ¶ 61,046 at P 20-25.

<sup>9</sup> *Id.* at P 65.

<sup>10</sup> *January 2007 Compliance Order* at P 162.

the compliance and certification committee and other NERC committees, and that it is submitting a compliance and certification committee charter with revisions. NERC modifies sections 306 and 405 of its Rules of Procedure and the compliance and certification committee's charter to provide that the compliance and certification committee, rather than the standards committee, should monitor NERC's compliance with the Reliability Standards development process. NERC further proposes to amend section 100 of its Rules of Procedure to state that NERC (and each Regional Entity) will comply with all Reliability Standards where the ERO, NERC or the Regional Entity is identified as an applicable entity and to state that a violation of such a Reliability Standard will constitute a violation of the Rules of Procedure. NERC states that at present, the only Reliability Standards that list NERC as an applicable entity are the cybersecurity (CIP) Reliability Standards NERC filed for Commission approval in Docket No. RM06-22-000.<sup>11</sup> NERC proposes that the compliance and certification committee monitor NERC's compliance with Reliability Standards applicable to it. According to NERC, that monitoring effort will require self-reports by NERC's Information Technology (IT) department of any violation of such Reliability Standards and the use of outside contractors to conduct periodic compliance audits of NERC's compliance.

**b. Responsive Pleadings**

12. MRO is concerned that NERC's revised compliance and certification committee charter is confusing and may overlap with the NERC board's current authority over functions included within the charter. MRO advocates that the charter be clarified to state that the compliance and certification committee's role shall not conflict with the NERC board's responsibilities regarding the ERO and its function. MRO also suggests revising the compliance and certification committee charter to state that nothing in it conflicts with the terms and conditions of an approved Delegation Agreement between NERC and a Regional Entity and that, in the event of such a conflict, the Delegation Agreement would prevail over the compliance and certification committee charter.

13. EEI asks that the Commission reject NERC's revised compliance and certification committee charter. Specifically, EEI disagrees that the compliance and certification committee should monitor NERC's compliance with applicable Reliability Standards and with its Rules, because that function should be vested in the board as a matter of corporate governance, not conducted by a stakeholder committee with vested interests in

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<sup>11</sup> NERC's application for acceptance of the CIP Reliability Standards is currently pending before the Commission.

the outcomes. EEI recommends that the Commission require NERC to delete section 405 of its Rules of Procedure, use board committees to oversee NERC compliance with applicable Reliability Standards and all of its Rules, and engage an independent auditor with technical expertise to oversee NERC's compliance with any Reliability Standards governing cybersecurity. EEI believes that NERC should use the nominations and election process for its standards committee for the compliance and certification committee, rather than the members committee's nomination and election procedures as NERC proposes.

14. EEI opposes NERC's proposal that its IT department self-report NERC's violations of Reliability Standards. Instead, EEI argues that the NERC board should be able to use all the tools available under the Uniform Compliance Program to assess NERC's compliance.

15. Finally, MRO recommends substituting the term "Regional Entity" for "Regional Reliability Organization" in the proposed compliance and certification committee charter, such as in provisions that would permit Regional Reliability Organizations to nominate committee members.

16. In its answer, NERC reiterates that the NERC board directed NERC staff to consider the comments of all the entities that were submitted concerning the charters of the NERC committees, including the comments filed by EEI in Docket No. RR06-1-003 concerning the compliance and certification committee charter at its February 2007 meeting. Further, NERC states that its board met with representatives of EEI on March 1, 2007, to further discuss the issues EEI raised concerning the compliance and certification committee charter. As indicated in NERC's compliance filing, certain of the changes suggested by EEI were incorporated into the revised compliance and certification committee charter, and others were not. NERC states that it intends to monitor the operations of all its committees over the coming months and will take into account the need for further revisions to the compliance and certification committee and other committee charters in light of NERC's new and evolving responsibilities as the ERO in monitoring and enforcing compliance with mandatory Reliability Standards. Rather than require NERC to make further revisions to the compliance and certification committee charter at this time – which NERC claims could be disruptive to the operations of the compliance and certification committee – NERC asks that the Commission accept the compliance and certification committee charter submitted with the Compliance Filing.

17. NERC disagrees with EEI's objections to sections 2(3) of the compliance and certification committee charter and section 403 of the Rules of Procedure, which allow the compliance and certification committee to monitor NERC's compliance with the Reliability Standards and the Rules of Procedure. NERC maintains that, in the

*January 2007 Compliance Order*, the Commission “accept[ed] NERC’s modification to section 405 of the Rules of Procedure that identifies the compliance and certification committee as the body responsible for monitoring NERC’s compliance with the Rules of Procedure for the compliance enforcement program.”<sup>12</sup>

18. Additionally, NERC notes that only a limited number of Reliability Standards will apply to NERC. Therefore, it claims that the compliance and certification committee’s monitoring function will be correspondingly limited in scope. Finally, NERC maintains that the function of the compliance and certification committee to establish and implement procedures to monitor NERC’s compliance with Reliability Standards that apply to NERC, and NERC’s proposal to retain an independent auditor to perform oversight of NERC’s compliance with the CIP Reliability Standards, are in no way inconsistent, but rather are fully complementary.

19. Finally, NERC agrees with MRO that references to “Regional Reliability Organization” in section 3, Membership, of the compliance and certification committee Charter should be eliminated, so that section 3 refers only to Regional Entities.

**c. Commission Conclusion**

20. We approve NERC’s proposed charter for the compliance and certification committee, subject to the following modifications. We conclude that arguments by EEI and Xcel that bodies other than the compliance and certification committee should monitor NERC’s compliance with its Rules of Procedure constitute collateral attacks on our holding in the *January 2007 Compliance Order* that the compliance and certification committee is the appropriate entity to conduct these functions. The forum to raise these arguments was on rehearing of the *January 2007 Compliance Order*.

21. Moreover, in our April 19, 2007 Order on clarification and rehearing of the *January 2007 Compliance Order*, we rejected similar arguments that the compliance and certification committee should not monitor NERC’s compliance with its procedures for developing Reliability Standards. We concluded that the compliance and certification committee’s expertise in the area of compliance gives it the ability to monitor effectively NERC’s implementation of the Reliability Standard development process.<sup>13</sup> Similarly, as discussed more fully below, under NERC’s proposed charter the compliance and certification committee will possess sufficient expertise in compliance matters to monitor

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<sup>12</sup> *January 2007 Compliance Order* at P 63.

<sup>13</sup> 119 FERC ¶ 61,046 at P 21.

effectively NERC's compliance with the Rules of Procedures and Reliability Standards. Likewise, we affirmed in the April 19 Order that the compliance and certification committee's separation from the Reliability Standards development process gives it the necessary independence to monitor that process.<sup>14</sup>

22. The Commission approves NERC's proposal to have the compliance and certification committee monitor its compliance with the Reliability Standards. As discussed more fully below concerning compliance and certification committee membership, the compliance and certification committee will be sufficiently independent of NERC and composed of members with sufficient expertise in compliance matters to monitor effectively NERC's compliance with the Rules of Procedures and Reliability Standards.

23. We disagree with MRO that a modification is required to the compliance and certification committee charter concerning conflicts with an approved Delegation Agreement. MRO's concern is speculative. The Commission will resolve any conflict based on concrete circumstances presented in an actual dispute.

24. We agree with NERC that it should monitor the operations of all its committees for the need to further revise the compliance and certification committee and other committee charters in light of NERC's new role as the ERO in developing, monitoring and enforcing compliance with mandatory Reliability Standards.

25. We agree with MRO and NERC that NERC should substitute the term "Regional Entity" for "Regional Reliability Organization" in the proposed compliance and certification committee charter, such as in provisions that would permit regional reliability organizations to nominate committee members.

## **2. Compliance and Certification Committee Membership and Oversight**

26. NERC proposes in Attachment A to the committee charter that the compliance and certification committee consist of 34 members, 24 of which may vote on the committee. Two members are chosen from each of the following sectors: (i) investor-owned utility; (ii) state/municipal utility; (iii) cooperative utility; (iv) federal or provincial utility/power marketing administration; (v) transmission dependent utility; (vi) merchant electricity generator; (vii) electricity marketer; (viii) large end-use electricity customer; (ix) small end-use electricity customer; (x) independent system operator/regional transmission

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<sup>14</sup> *Id.* at P 23.

organization; and (xi) U.S. states. Further, NERC proposes that each regional reliability organization will have one member; but that the group of regional reliability organizations will have a weighted two votes. Finally, the U.S. federal government, the Canadian federal government and the Canadian provinces will each be allowed one non-voting member.

27. The compliance and certification committee will create a nominating subcommittee yearly to identify, qualify and recommend individuals to fill sector representative vacancies on the committee. The nominating subcommittee will present the recommended committee membership slate to the Board for approval. If the Board approves the recommended committee slate each member on the slate is appointed. The Board may also appoint members individually as needed to meet membership balance and fill vacancies. In NERC's view, the compliance and certification committee should report directly to the NERC board because it appoints compliance and certification committee members, rather than report to NERC's board compliance committee.

28. NERC proposes to base member nomination and election procedures on those procedures applying to NERC's members committee, rather than the nomination and election procedures for the standards committee. Section 3(8)(b) of the compliance and certification committee charter provides that the NERC board must either approve or disapprove the entire slate of nominees that the committee's nominations subcommittee submits. NERC asserts that allowing nominations of qualified individuals to be reviewed by the compliance and certification committee's nominating committee, with subsequent approval by the NERC board, is most appropriate, especially since open elections may not yield sufficient compliance and certification committee members with the requisite expertise in compliance matters. Members of the compliance and certification committee would serve three-year terms, with no limit on the number of terms a member may serve.

29. Section 5(2) of the compliance and certification committee charter provides that the compliance and certification committee shall retain a five-person "executive" composed of the compliance and certification committee's chair, vice chair, the Director of Compliance, and two other members. Compliance and certification committee charter section 5(1) states that the chair and vice chair are voting members of the compliance and certification committee. Section 5(4) states that the NERC Director of Compliance will select a member of NERC staff to serve as the compliance and certification committee's staff coordinator and secretary. Although not a member of the compliance and certification committee and without a vote in the committee, the secretary is to manage the day-to-day operations of the compliance and certification committee under the direction of the compliance and certification committee executive, which includes the Director of Compliance.

30. Section 3(13)(a) of the compliance and certification committee charter would preclude any Regional Entity staff member who administers any portion of the Regional Entity's compliance program, registration program, readiness program or certification program from compliance and certification committee membership.

**a. Responsive Pleadings**

31. EEI proposes that section 5 of the compliance and certification committee charter should be amended to provide that NERC's Director of Compliance may attend compliance and certification committee meetings but may not serve as a member of the compliance and certification committee "executive" or make decisions on whether to hold compliance and certification committee meetings in closed session. EEI asserts that it is inappropriate for NERC staff to play a decision-making role on a committee whose function is to provide the staff with technical advice.

32. Xcel argues that, because Order No. 672 states that an inherent conflict of interest exists if an entity is responsible for overseeing its own compliance, and the compliance and certification committee is responsible for monitoring NERC's compliance with its own procedures and with Reliability Standards, the compliance and certification committee should not report to the NERC Board of Trustees, be appointed by the board or serve at its pleasure. Xcel suggests that NERC ensure independence between the compliance and certification committee and NERC's board by engaging an independent consulting firm to screen, interview and appoint compliance and certification committee members, or by identifying a different body to monitor or adjudicate NERC's compliance with Reliability Standards and its own Rules.

33. EEI disagrees with NERC's proposal to lengthen compliance and certification committee members' terms from two to three years and asks the Commission to limit the terms to two years, similar to other NERC standing committees. Xcel asks that the Commission require NERC to modify the charter so that a member may only serve two three-year terms, or a total service time of six years. According to Xcel, this change would encourage addition of new compliance and certification committee members and new member viewpoints.

34. MRO asserts that the Commission should require NERC to modify section 3(13)(a) of the compliance and certification committee charter so that, rather than precluding certain Regional Entity staff members from serving on the committee, the provision would state that no compliance and certification committee member may have a conflict of interest which would impair his or her ability to fulfill obligations under the compliance and certification committee charter.

35. Finally, EEI suggests that all compliance and certification committee members should be required to execute confidentiality agreements and conflict of interest statements.

**b. Commission Conclusion**

36. The Commission finds that the compliance and certification committee will possess sufficient expertise in compliance matters to monitor effectively NERC's compliance with the Rules of Procedures and Reliability Standards. Section 2(3) of the compliance and certification committee charter specifically provides that persons who are qualified for compliance and certification committee membership include senior level industry experts with particular familiarity and knowledge in the area of compliance, compliance enforcement, compliance administration and management, organization responsibilities and registration and organization certification. Further, charter section 3(6)(c) states that the compliance and certification committee nominating committee will seek to engage individuals who provide the compliance and certification committee with a level and breadth of expertise sufficient to achieve its goals and fulfill its scope and responsibilities. We believe that the compliance and certification committee charter fully addresses this necessary aspect of the committee's monitoring activities.

37. Here, we determine whether the compliance and certification committee is sufficiently independent of NERC's administration of its Rules of Procedure governing its compliance, registration and certification programs and its functions subject to Reliability Standards. In the *Delegation Agreement Order*,<sup>15</sup> we examined, in the context of the organization of particular Regional Entities, the independence of a compliance monitor from the entity that it monitors. We observed that certain Regional Entities would be affiliated with transmission operation or reliability coordinator functions that would be subject to applicable Reliability Standards. In that context, we emphasized that Regional Entity compliance monitors must possess a "strong separation of functions" with respect to affiliated functions for which the monitors would assess compliance with Reliability Standards.<sup>16</sup> We observe in this respect that compliance and certification committee members, as members of a stakeholder committee, must themselves be individually financially independent from the NERC board. Compliance and certification committee members will be senior industry representatives with substantial experience who possess independent expertise with respect to compliance. They must not

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<sup>15</sup> *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007) (*Delegation Agreement Order*).

<sup>16</sup> *Id.* at P 396, *citing* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 698-700.

themselves engage in, supervise or have any control over NERC's activities that the compliance and certification committee will monitor. For this reason, we reject EEI's contention that the NERC board itself, as a matter of corporate governance, should monitor NERC's compliance with Rules of Procedure or applicable Reliability Standards.

38. However, we reject Xcel's contention that compliance and certification committee members should not report to the NERC board. We believe that the compliance and certification committee should report to the NERC board because the board has responsibility for monitoring compliance with the Reliability Standards as well as for taking action to improve NERC's compliance with its Rules of Procedure and applicable Reliability Standards. A direct reporting relationship between the compliance and certification committee and the NERC board will enable the board to act most expeditiously on the compliance and certification committee's observations and recommendations.

39. Moreover, we reject Xcel's argument that the NERC board should not appoint compliance and certification committee members and that compliance and certification committee members should not serve at the pleasure of the board. NERC explains that it is appropriate for the NERC board to appoint compliance and certification committee members because election of compliance and certification committee members may not result in a committee with the requisite expertise in compliance. We note in this regard that section 5 of the committee charter provides that the Committee's membership structure will be modeled upon the structure of NERC's member representatives committee, which provides for sector representation as shown on the chart of committee membership structure in Attachment A to the committee charter. Charter section 5 further provides that the membership structure will have "an appropriate balance of entities subject to compliance with the NERC Reliability Standards and NERC's compliance program, and others affected by the standards and the Compliance program." Thus, like the member representatives committee and the standards committee, the compliance and certification committee will include members from each stakeholder sector. Section 3(8)(b) of the committee charter provides that the NERC board must either approve or disapprove the entire slate of nominees that the committee's nominations subcommittee submits. We view these provisions as requiring NERC's board to appoint a balanced committee that has substantial compliance expertise. As a result, the NERC board cannot abuse its appointment power to deny committee membership to a specific nominee. Under these conditions, we find NERC's power to approve the slate of committee members to be a reasonable approach to development of an effective compliance and certification committee.

40. As we noted above, section 3(10)(d) of the compliance and certification committee charter permits the NERC board to request the resignation of, remove or replace a

member from the compliance and certification committee as the board deems appropriate. We believe that this provision of the committee charter is appropriate because the NERC board should be able to remove for cause members of the compliance and certification committee if the board is empowered to appoint them. Further, the NERC board's ability to remove at any time a compliance and certification committee member is consistent with the need for the compliance and certification committee to maintain independence from the NERC functions for which it is to monitor compliance. Should the NERC board determine, for example, that a committee member is acting in derogation of the expectation in section 3(4)(c) of the committee charter that a member adjudicate in a fair and unbiased manner when participating in hearing procedures, the board should be able to remove and replace that member to preserve the committee's independent and unbiased conduct of its functions.

41. We agree in part with EEI's concerns regarding the role that NERC's Director of Compliance will play with respect to the compliance and certification committee. We understand that the Director of Compliance supervises NERC's compliance, entity registration, certification and readiness functions. Section 5 of the compliance and certification committee charter, which provides that the Director of Compliance will be included in the compliance and certification committee "executive," is not clear whether the Director of Compliance may become an actual member of the compliance and certification committee or possess a vote in the committee. Participation of the Director of Compliance in the compliance and certification committee "executive" appears to be beneficial by ensuring that the compliance and certification committee retains direct access to current information on NERC's functions that implement the Rules of Procedure. We conclude, however, that, to ensure the independence of the compliance and certification committee from the NERC functions it is to monitor, the Director of Compliance cannot be a compliance and certification committee member or retain authority to vote on compliance and certification committee business. We direct NERC to clarify the compliance and certification committee charter in that respect. To help further the compliance and certification committee's independence, we believe that the Director of Compliance and the secretary of the compliance and certification committee must be recused from participating in any compliance and certification committee activity that involves monitoring of NERC's compliance with any Rule of Procedure or activity that the Director of Compliance oversees.

42. We disagree with MRO that the specific prohibition in compliance and certification committee charter section 3(13)(a) against compliance and certification committee membership by Regional Entity staff members who administer any compliance registration, certification or readiness evaluation program should be replaced by a general prohibition against a compliance and certification committee member's possession of a conflict of interest that would impair his or her ability to fulfill

obligations under the compliance and certification committee charter. For the same reason that we concluded that NERC's Director of Compliance should not be a member of the compliance and certification committee, Regional Entity staff members involved in compliance, registration, certification or readiness activities should not be permitted as committee members. Therefore, we reject MRO's proposed deletion of the specific prohibition in charter section 3(13)(a). However, because MRO's proposed general prohibition against possession of a conflict of interest by a committee member is an appropriate addition to the committee charter, we direct NERC to insert the prohibition into the charter. We do not interpret MRO's proposed general prohibition from precluding a compliance officer of a transmission operator from service as a member of the compliance and certification committee, although the prohibition would preclude the compliance office from participating in any matter relating to his or her employer or any of its affiliates, subsidiaries, and/or business partners or on a hearing panel involving any of those entities.

43. We do not agree with MRO that the compliance and certification committee charter need be amended to eliminate overlap with the NERC board's authority over functions included within the charter, to state that the compliance and certification committee's role shall not conflict with the NERC board's responsibilities or with an approved Delegation Agreement. MRO does not provide any examples of such potential overlap or conflict; nor have we been able to ascertain any.

44. In our view, EEI has not provided adequate justification for setting a two-year term for compliance and certification committee members. Likewise, Xcel has not provided adequate rationale for setting a limit on the number of terms a compliance and certification committee member may serve. To the contrary, because NERC suggests that it may be difficult to attract sufficient committee members with expertise on compliance, term limits on committee membership may dilute that expertise.

45. Because EEI has not provided any justification for its suggestion that all compliance and certification committee members execute confidentiality agreements and conflict of interest statements, we see no need to require them except when appropriate on a case-by-case basis. For example, it may be appropriate that a compliance and certification committee member acting as a mediator between NERC and a Regional Entity should be required to keep the mediation confidential. We agree with EEI that, in addition to self-reports by NERC's IT department of any violations of Reliability Standards, the compliance and certification committee and the NERC board should be able to use all tools available under the Uniform Compliance Program to assess NERC's compliance. For instance, the compliance and certification committee should be able to

address a complaint that NERC has violated a Reliability Standard applicable to it. The current committee charter does not prevent the use of these additional tools and, thus, no amendment is needed to address this issue.

### **3. Compliance and Certification Committee Hearings and Mediation**

46. NERC states that it has amended section 8(2) of the compliance and certification committee charter to provide that, unless specifically identified elsewhere in the charter, the compliance and certification committee's hearings will follow the hearing procedure mandated and approved by jurisdictional authorities for use by NERC and Regional Entities in the Uniform Compliance Program. Under section 8(3) of the charter, a compliance and certification committee hearing panel in a particular matter will include five compliance and certification committee voting members, chosen by the compliance and certification committee from members "at arms' length" from the parties to the hearing who are nominated or volunteer for the panel.

#### **a. Responsive Pleadings**

47. EEI disagrees with NERC's proposal that the compliance and certification committee function as a hearing body with respect to compliance disputes between NERC and Regional Entities. Instead, according to EEI, hearings on violations of Reliability Standards should take place under the Uniform Compliance Plan procedures. EEI and MRO oppose NERC's proposal that the compliance and certification committee mediate disagreements about NERC's performance audits of a Regional Entity's compliance program. MRO asserts that it is inappropriate for the compliance and certification committee to serve these functions because it is a stakeholder committee with Regional Entity participation. Instead, MRO and EEI believe that provisions of the Delegation Agreement between a Regional Entity and NERC should govern disputes, hearings and mediations between the Regional Entity and NERC. In the alternative, EEI asserts that such disputes may be settled by the Commission.

48. In its answer, NERC states that section 2(4) of the committee charter provides that the compliance and certification committee acts as hearing body in the enumerated situations "as directed by the NERC Board,"<sup>17</sup> so, if a particular adjudication arises in

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<sup>17</sup> The compliance and certification committee will serve as a hearing board when a Regional Entity is alleged to have violated a Reliability Standard, where there is no Regional Entity for the area or where the Regional Entity has defaulted, and where NERC monitors and enforces a registered entity for compliance by agreement with the Regional Entity.

which it would be inappropriate for the compliance and certification committee to act as hearing body, the board can appoint a hearing body other than the compliance and certification committee. Additionally, according to NERC, neither EEI nor MRO suggests an alternative to the compliance and certification committee to act as the hearing body in the situations enumerated in section 2(4). Nor, in NERC's view, does EEI explain why hearings before the compliance and certification committee would not be conducted in accordance with the hearing procedures set forth in Attachment 2 to the Uniform Compliance Program. In fact, NERC maintains that, with respect to MRO's concern, section 2.0 of Attachment 2 to the Uniform Compliance Plan would require a compliance and certification committee member appointed to serve on a hearing body who has a conflict of interest to recuse himself or be subject to a motion for recusal. NERC states that, as the Commission noted in the *January 2007 Compliance Order*, the compliance and certification committee's "hearing and recusal procedures are included in NERC's uniform compliance monitoring and enforcement program."

49. NERC states that EEI's assertion that many disputes between Regional Entities and NERC are likely to be of a contractual nature under the regional delegation agreements and should be settled by the parties or by the Commission is irrelevant to the specific hearing topics in section 2(4) of the compliance and certification committee charter. Finally, NERC notes that the compliance and certification committee function to act as the hearing body with respect to violations of Reliability Standards by Regional Entities was included in section 409 of the Rules of Procedure that NERC submitted with its ERO certification application and was accepted by the *Certification Order*.

50. NERC further maintains that the role of a mediator is simply to attempt to bring parties to a negotiated resolution of differences or disputes, not to adjudicate disputes or enforce compliance. According to NERC, under section 2(5), the compliance and certification committee has no compulsory or adjudicatory powers in the referenced area of disagreements between NERC and a Regional Entity. NERC agrees that the terms of the regional delegation agreement will control, in whole or in part, the process for resolution of disagreements between NERC and a Regional Entity, but that does not preclude a role for the compliance and certification committee to act as a mediator in attempting to bring the parties to a negotiated resolution. In any event, NERC asserts that the compliance and certification committee would act as mediator only "as directed by the NERC Board," so the NERC Board will have the ability in each situation to evaluate all the circumstances – including the views of the Regional Entity – in determining whether to direct the compliance and certification committee to act as mediator.

**b. Commission Conclusion**

51. We accept NERC's proposal with regard to the compliance and certification committee's hearing and mediation procedures. We agree with EEI that the compliance

and certification committee's function as a hearing body with respect to compliance disputes between NERC and Regional Entities should take place under the hearing procedures of the Uniform Compliance Plan. Section 8(2) of the proposed compliance and certification committee charter provides that hearings will be held in accordance with the Uniform Compliance Program, therefore we see no need to amend the charter further. Further, as noted by NERC in its answer, EEI does not explain why hearings before the compliance and certification committee would not be conducted in accordance with the hearing procedures set forth in Attachment 2 to the Uniform Compliance Program. Finally, as noted by NERC, EEI's assertion that the compliance and certification committee should not serve as the hearing body with respect to violations of Reliability Standards by Regional Entities is a collateral attack on the *Certification Order*.

52. Although we agree with MRO that the compliance and certification committee is a stakeholder committee with Regional Entity participation, we do not perceive any inherent conflicts that would prevent a compliance and certification committee hearing panel to serve as the hearing body for compliance issues between NERC and a Regional Entity. As noted previously, section 8(3) of the compliance and certification committee charter precludes persons who are chosen for a hearing panel from having a conflict of interest or other bias that would prevent them from rendering an impartial decision, and we are directing NERC to insert into the charter MRO's proposed general prohibition against conflicts of interest on the part of committee members. We do not perceive any conflict between the role of the compliance and certification committee in mediating disputes on NERC performance audits of Regional Entity compliance programs and the provisions of Delegation Agreements, so long as the compliance and certification committee mediators have no conflicts of interest and are precluded from serving on compliance and certification committee hearing panels that would resolve the dispute if the mediation were unsuccessful.<sup>18</sup> However, because the compliance and certification committee charter does not address how it would serve as a mediator in such matters, we direct NERC to so amend the charter.

#### **4. Compliance Administration Elements**

53. NERC provides in section 2(6) of the compliance and certification committee charter that the committee will develop "compliance administration elements" for

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<sup>18</sup> See *Delegation Agreement Order* at P 577 (members of a compliance advisory panel designated by a Regional Entity to seek settlements of matters in notices of alleged violation must not have any conflicts of interest and may not serve on a hearing body that presides over any subsequent hearing in the matter).

proposed Reliability Standards under development or proposed revisions to such standards as requested and authorized by NERC's standards committee.

**a. Responsive Pleadings**

54. MRO contends that the compliance and certification committee should only advise the NERC board on "compliance administration elements" for proposed Reliability Standards, rather than developing them.

55. In its answer, NERC states that the compliance and certification committee has no authority to "establish" compliance administration procedures for proposed Reliability Standards. The compliance and certification committee is responsible, when requested by the standards committee, for developing compliance administration elements during the development of a proposed Reliability Standard or proposed revision to a Reliability Standard through the NERC Reliability Standards development process. According to NERC, the proposed Reliability Standard must go through the entire Reliability Standard development process, and then must be approved by the Commission, before becoming mandatory and enforceable. Further, NERC maintains that any negative comments on the proposed Reliability Standard, including on the compliance administration elements, that are received during the ballot process must be addressed in accordance with the Reliability Standards development procedure. It is unclear to NERC how the compliance and certification committee could "establish compliance administration procedures which may conflict with responsibilities of NERC and the [Regional Entities] under the Delegation Agreements or other authorities, including the Commission," but in the event the compliance and certification committee were to do so, NERC maintains that the Reliability Standards development process provides ample safeguards and opportunities for stakeholder input to identify and resolve any such conflicts before the proposed Reliability Standard becomes mandatory and enforceable.

**b. Commission Conclusion**

56. We reject MRO's contention that the compliance and certification committee should not develop "compliance administration elements" for proposed Reliability Standards. We believe that this activity is desirable because it uses the compliance expertise of the compliance and certification committee membership. Further, as discussed in NERC's answer, the Reliability Standards development process provides sufficient opportunity to resolve any concerns with a compliance administration element developed by the compliance and certification committee. However, we expect that compliance and certification committee members who participate in the development process for Reliability Standards would not participate in the compliance and certification committee's monitoring of that process.

## **B. Procedures for Auditing Regional Entity Compliance Programs**

57. EEI asks that NERC remove from its Rules of Procedure Appendix 4A, which establishes procedures under which NERC staff is to audit Regional Entity compliance programs. EEI states that NERC could use the compliance audit procedures in the Uniform Compliance Program for this purpose, making the existence of separate compliance audit procedures in Appendix 4A and the Uniform Compliance Program confusing. EEI argues that any relevant elements in Appendix 4A should be inserted into the Uniform Compliance Program. In particular, EEI questions why Appendix 4A requires that the team leader for a NERC audit of a Regional Entity compliance program must be a member of the compliance and certification committee, because such a requirement limits the number of potential audit team leaders.

58. In its answer, NERC states that the Uniform Compliance Plan, which the Commission accepted in the *Delegation Agreement Order*, does not provide for compliance audits of Regional Entities' implementation of the compliance monitoring and enforcement program, and that NERC has no procedures other than Appendix 4A for conducting compliance audits of the performance of Regional Entities in carrying out their responsibilities in implementing the compliance monitoring and enforcement program. According to NERC, Appendix 4A provides the procedures for conducting such audits, is specifically tailored to this purpose, fills a unique role, and should be retained.

### **1. Commission Conclusion**

59. Because NERC submitted Appendix 4A with its October 18, 2006 second compliance filing to the *Certification Order*, it was approved by the *January 2007 Compliance Order* and is not subject to reconsideration in this proceeding. Further, we accept NERC's explanation that the Uniform Compliance Plan does not cover NERC's audits of Regional Entities' compliance programs. We observe in this regard that NERC may obtain information on Regional Entity compliance programs pursuant to section 403.10.2 of its Rules of Procedure, which provides that Regional Entities, when requested, shall report information to NERC promptly and in accordance with NERC procedures. Accordingly, NERC will have full access to Regional Entity information should NERC find it necessary to perform a compliance audit on or inquire into Regional Entity programs.<sup>19</sup> For these reasons, we deny EEI's requests concerning Appendix 4A.

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<sup>19</sup> We also note that the Commission itself can audit or investigate a Regional Entity's compliance program.

### C. Significant System Events

60. In section 807 of the Rules of Procedure, concerning the analysis of significant system events, NERC deletes references to “major blackouts and other system disturbances or emergencies” as matters that would trigger technical analysis by NERC and Regional Entities. NERC replaces this phrase with a proposed definition of “significant system event” that includes: large or repeated frequency excursions that exceed the High or Low Frequency Trigger Limits; loss of significant amounts of generation or load; system separation (islanding); protection system misoperations that cause or contribute to Bulk-Power System disturbances; inter-area oscillations; or cascading outages.

#### 1. Responsive Pleadings

61. In EEI’s view, NERC’s insertion of a definition of “significant system event” was not required in NERC’s compliance filing. EEI asserts that although this definition potentially could have broad implications, stakeholders have not reviewed it and it does not include cyber or other security-related events. EEI believes that such definitions should be established through NERC’s Reliability Standards development process. Therefore, EEI asks that the Commission both require NERC to clarify the need for the definition and direct NERC to develop other basic definitions through the Reliability Standards development process.

62. EEI also questions how section 807.6 of the Rules of Procedure, which states that after analyzing a significant system event NERC can disseminate “operations and equipment alerts” that can require specific actions by Bulk-Power System users, owners and operators, relates to remedial actions authorized in the Uniform Compliance Program. EEI asks that the Commission require NERC to explain the difference between section 807 and the Uniform Compliance Program or delete section 807.6.

#### 2. Commission Conclusion

63. We agree with EEI that we did not require NERC to insert a definition of “significant system event” in section 807 as an element of its compliance filing. Nor does NERC explain its rationale for inserting this definition. We, therefore, reject NERC’s proposed amendments to section 807.<sup>20</sup> However, we disagree with EEI that NERC is in any way required to develop definitions or any other aspect of its Rules of

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<sup>20</sup> If NERC chooses to resubmit this definition in an appropriate filing, it should explain why this definition is not limiting the ERO’s discretion unduly.

Procedure through the Reliability Standards development process. Section 1400 of the Rules of Procedure, rather than the Reliability Standards development process, governs amendments to those Rules.

64. The Commission dismisses EEI's request to require NERC to explain the difference between operations and equipment alerts and remedial action directives. The Commission did not require NERC to make any modifications to section 807.6 in the *January 2007 Compliance Order*. Therefore, this section is a settled matter and its acceptance should have been raised on rehearing, but was not. Further, the Commission believes that NERC should issue an operations and equipment alert requiring specific actions only under NERC's remedial power.<sup>21</sup>

#### **D. Confidentiality**

65. In the *January 2007 Compliance Order*, we directed NERC to amend several provisions of section 1500 of its Rules of Procedure governing the confidentiality of information received by a "receiving entity" – the ERO or a Regional Entity. As applicable here, we required NERC to remove a provision from section 1503.1 that would have required a person who seeks information from NERC or a Regional Entity to show that it has a "demonstrable legal right" to obtain that information.<sup>22</sup> We also required NERC to delete the adverb "presumptively" from the first sentence of section 1505 that provided that a request to NERC or a Regional Entity from the Commission for reliability information is "presumptively authorized under section 215 of the FPA."<sup>23</sup> Finally, we directed NERC to amend its Rules of Procedure to state that it will maintain information it reports to the Commission as confidential until such time as the Commission authorizes public disclosure.<sup>24</sup>

66. In response, NERC deleted from section 1503.1 the requirement that a requestor show a demonstrable legal right to information it seeks, and restated the sentence in question as, "A receiving entity shall make information available only to one with a

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<sup>21</sup> See Order No. 672 at P 476-77, *see also* Rules of Procedure, Appendix 4B, Sanctions Guidelines, section 6

<sup>22</sup> *January 2007 Compliance Order* at P 193.

<sup>23</sup> *Id.* at P 207.

<sup>24</sup> *Id.* at P 183.

demonstrated need for access to the information from the receiving entity.” NERC amended the first sentence of section 1505 to state, “A request from FERC for reliability information with respect to owners, operators and users of the [bulk] power system within the United States is authorized by section 215 of the Federal Power Act.” NERC indicates that it believes that the Commission does not assert a right to obtain information from NERC regarding Canadian matters that might be within NERC’s possession. Finally, in response to the third directive discussed above, NERC inserted into its Rules of Procedure a new section 1505.2, which provides, “Each receiving entity shall continue to treat as confidential all confidential information that it has submitted to NERC or to FERC or another appropriate ERO governmental authority, until such time as FERC or the other appropriate governmental authority authorizes disclosure of the information.”

### **1. Responsive Pleadings**

67. Allegheny Energy comments that NERC’s new section 1505.2 is ambiguous because it requires, among other things, that a receiving entity treat as confidential information it has submitted to NERC until FERC or another appropriate ERO governmental authority authorizes disclosure. Allegheny Energy contends that NERC should clarify section 1505.2 because it places the burden of maintaining confidentiality on an entity that provides information to NERC, rather than on NERC itself.

### **2. Commission Conclusion**

68. While NERC has complied with our directive to remove the requirement that one who requests reliability information relating to section 215 of the FPA from NERC or a Regional Entity show a demonstrable legal right to the information, NERC has substituted a requirement that the requestor demonstrate a need for access to the information. We are mindful that, in the *January 2007 Compliance Order*, the Commission stated that NERC and the Regional Entities are to “look with disfavor on frivolous, overly broad or unreasonable requests for information.”<sup>25</sup> While NERC’s new “demonstrated need for access” requirement arguably comports with our statement, we remain concerned how NERC and the Regional Entities can differentiate the new requirement from the prior “demonstrable legal right to access” requirement. Nor has NERC indicated what showing it or a Regional Entity would require for the new requirement or how a requestor may meet it. Accordingly, we direct NERC to clarify these issues in its compliance filing.

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<sup>25</sup> *January 2007 Compliance Order* at P 193.

69. We approve NERC's amendment to the first sentence of section 1505 that provides that a request from the Commission for reliability information with respect to users, owners and operators of the Bulk-Power System within the United States is authorized by FPA section 215. We do not interpret this provision as precluding the Commission from working with Canadian and Mexican governmental authorities to develop a process for the exchange of information that is sourced from a foreign country and in the possession of the ERO or a Regional Entity.

70. We do not agree with Allegheny Energy that new section 1505.2 requires clarification. That provision does not place the burden of maintaining the confidentiality of information NERC receives upon an entity that provides the information to NERC. As noted above, NERC defines (in section 1502.1 of the Rules of Procedure) a "receiving entity" as NERC or a Regional Entity. Thus, new section 1505.2 only places an obligation of maintaining confidentiality on NERC or a Regional Entity.

**E. Maximum Base Penalty Amount**

71. In the *Certification Order*, the Commission directed NERC to incorporate in its Base Penalty Amount Table a maximum Base Penalty Amount equal to the statutory maximum penalty established in the FPA.<sup>26</sup> In the *January 2007 Compliance Order*, we found that NERC's second compliance filing did not conform to this directive because NERC's filing would have permitted determination of a Base Penalty Amount of \$1 million per monitoring period, which might last as long as a year. We reiterated that NERC clarify that all amounts in the Base Penalty Amount Table be stated as per violation, per day, so NERC or a Regional Entity could calculate a Base Penalty Amount of \$1 million per violation, per day.<sup>27</sup>

72. In response to this directive, NERC amended section 4 of its Sanction Guidelines to include the following statement, "Figures listed in the Base Penalty Amount Table are germane to the determination of penalties on both a simple per occurrence basis and as the basis for the determination of an appropriate 'per day in violation' [amount] as warranted by NERC or the Regional Entity and supported by the nature of the Reliability Standard(s) requirements violated and the characteristics of the violation(s) as discussed above."

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<sup>26</sup> *Certification Order* at P 447.

<sup>27</sup> *January 2007 Compliance Order* at P 87.

73. Prior to submitting its March 19, 2007 compliance filing, NERC sought clarification of the *January 2007 Compliance Order* directive. In the April 19, 2007 Order on clarification and rehearing of the *January 2007 Compliance Order*, we granted clarification regarding the scope and meaning of the \$1 million “per day, per violation” provision, and directed NERC to modify its Sanction Guidelines in accordance with that clarification.<sup>28</sup> Accordingly, as to this issue, NERC’s March 19, 2007 compliance filing is moot.

#### **F. Violation Severity Levels**

74. In the *January 2007 Compliance Order*, the Commission observed that, to determine a Base Penalty Amount for a particular violation, section 4 of NERC’s Sanction Guidelines provides that the first step is for a Regional Entity or NERC to determine an initial range for the Base Penalty Amount. To do so, NERC will assign a violation risk factor for each requirement of a Reliability Standard that relates to the expected or potential impact of a violation of the requirement on the reliability of the Bulk-Power System. For that requirement, NERC will define up to four violation severity levels – Lower, Moderate, High and Severe – as measurements for the degree to which the requirement was violated in a specific circumstance. For a specific violation of a particular requirement, NERC or the Regional Entity will establish the initial value range for the Base Penalty Amount by finding the intersection of the applicable violation risk factor and violation severity level in the Base Penalty Amount Table in Appendix A of the Sanction Guidelines. In the *January 2007 Compliance Order*, the Commission expressed concern that NERC had not yet submitted for Commission approval violation severity levels for any requirement of a Reliability Standard. Because it was not clear whether violation severity levels are equivalent to the existing levels of non-compliance that correlate to many, but not all, of the requirements of the Reliability Standards the Commission had then proposed to approve, we directed NERC to describe the differences, if any. We also stated that if NERC does not submit violation severity levels

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<sup>28</sup> *North American Electric Reliability Corp.*, 119 FERC ¶ 61,046 at P 38-44 (2007). While we did not at that time direct a specific date on which NERC was to file this amendment of the Sanction Guidelines for our approval, we would expect NERC to submit this filing on or before the date for filing the 60-day compliance filing responsive to this order.

in sufficient time for their use when NERC's enforcement program is to become effective in June 2007, we reserve the ability to take appropriate action to ensure that the penalty-setting process described in the Sanction Guidelines is operative.<sup>29</sup>

75. In its compliance filing, NERC states that violation severity levels described in the Sanction Guidelines are closely related to but not fully equivalent to levels of non-compliance that NERC has included as part of Reliability Standards. NERC describes the levels of non-compliance as support for the application of sanctions to violations of voluntary Reliability Standards pursuant to an earlier penalty matrix that NERC used. According to NERC, the levels of non-compliance are numeric (levels 1-4) and do not provide clear and consistent descriptions of the extent to which a Reliability Standard requirement was violated. For example, NERC's practice was to assign levels of non-compliance to groups of requirements in a particular Reliability Standard, rather than on a per-requirement basis. In contrast, NERC describes violation severity levels as more descriptive and applicable to a single requirement in a Reliability Standard, rather than to a group of requirements. NERC characterizes the assignment of levels of non-compliance to particular groups of requirements as being "adequate for NERC's pre-ERO sanctioning practices," but as "not adequately support[ing] sanctioning on a 'per-requirement' level going forward in an ERO environment."<sup>30</sup> NERC states that assignment of violation severity levels for each requirement of each Reliability Standard is part of NERC's three-year Reliability Standards development work plan. NERC asserts, "[U]ntil such time as Violation Severity Levels are assigned individually for each requirement of each Reliability Standard, the existing Levels of Non-Compliance will serve as the basis of or, when warranted, be used 'as is' as, Violation Severity Levels for sanctioning pursuant to the Sanctioning Guidelines."<sup>31</sup>

### 1. Responsive Pleadings

76. EEI asserts that NERC has not yet responded to the request for an explanation of the Violation Severity Levels. It further comments that NERC should expedite the development of violation severity levels as a basic feature of the Sanction Guidelines and that NERC should allow stakeholder participation.

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<sup>29</sup> *January 2007 Compliance Order* at P 93.

<sup>30</sup> Compliance Filing at 33.

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

77. In its answer, NERC disagrees with EEI that it did not respond to Commission's request for further explanation of the function of Violation Severity Levels in Reliability Standards. NERC asserts that it responded at pages 32-33 of its compliance filing. NERC asserts that EEI's comments do not refer to NERC's response in the compliance filing or identify any way in which NERC's response was insufficient or incomplete.

## 2. Commission Conclusion

78. As noted above, in the *January 2007 Compliance Order*, we reserved authority to take action to ensure that NERC's penalty-setting process as described in the Sanction Guidelines would be operative when the Reliability Standards the Commission has approved become effective in June 2007. We believe that use of this authority is appropriate at this time to address two issues. First, NERC has not developed any violation severity levels and, therefore, none have been filed for our approval. Second, the Base Penalty Amount Table uses both violation risk factors, which have been developed and approved by the Commission for each requirement of an approved Reliability Standard,<sup>32</sup> and violation severity levels in order for penalty amounts to be assessed for Reliability Standard violations. Thus, until NERC develops violation severity levels for each requirement of each approved Reliability Standard, and we approve them, an important aspect of the Base Penalty Amount Table will not be available after Reliability Standards become mandatory.

79. To resolve this matter, and to enable appropriate determinations of penalty amounts for violations of Commission-approved Reliability Standards when they become effective in June 2007, the Commission believes that it is appropriate to adopt, as an interim measure, NERC's proposal to use levels of non-compliance in Commission-approved Reliability Standards as a substitute for the violation severity levels in determining Base Penalty Amount ranges. During this interim period, when applying the adjustment factors set forth in the Sanction Guidelines to the initial Base Penalty Amount range, Regional Entities and the ERO may consider on a case-by-case basis how closely particular levels of non-compliance track individual requirements of Reliability Standards that have been violated.

80. NERC acknowledges that the existing levels of non-compliance are not assigned individually for each Requirement of each Reliability Standard. NERC explains that this is one of the primary reasons for transitioning to the violation severity levels. While we approve NERC's proposal to rely on the levels of non-compliance as an interim solution, we agree with EEI that development of violation severity levels is inadequate. Therefore,

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<sup>32</sup> *North American Electric Reliability Corp.*, 119 FERC ¶ 61,145 (2007).

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we direct NERC to develop violation severity levels for each requirement and sub-requirement of each Reliability Standard, either through the Reliability Standards development process or through another expedited process, and submit them to the Commission by March 1, 2008. Although NERC proposes to develop violation severity levels over the next three years, we cannot accept NERC's proposal. NERC itself admits that the existing levels of non-compliance are not sufficient "going forward in an ERO environment." Because of this, we direct NERC to replace them with violation severity levels at the earliest possible date. We are requiring that violation severity levels be developed and submitted for approval no later than March 1, 2008 so that the Commission can act on them prior to the 2008 summer period.

The Commission orders:

(A) The Commission approves NERC's March 19, 2007 compliance filing in this proceeding, subject to the modifications and submissions required in this order.

(B) NERC shall submit a compliance filing as to the modifications and submissions required in this order within 60 days of the date of its issuance.

(C) NERC shall submit a compliance filing containing violation severity levels by March 1, 2008.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.