

121 FERC ¶ 61,033
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. RR06-1-010

ORDER ON COMPLIANCE FILING

(Issued October 18, 2007)

1. On August 6, 2007, the North American Electric Reliability Corporation (NERC) submitted a filing in response to the Commission's June 7, 2007 order (*June 2007 Compliance Order*)¹ and April 19, 2007 Order on Clarification and Rehearing (*April 2007 Rehearing Order*).² Those orders directed NERC to modify its Rules to be consistent with our prior orders reviewing NERC's certification as the Electric Reliability Organization (ERO) for the United States pursuant to section 215 of the Federal Power Act (FPA).³ In this order, the Commission approves NERC's August 6 compliance filing consistent with the *June 2007 Compliance Order* and *April 2007 Rehearing Order*, 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 30 days of the date of this order.

¹ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,248 (*June 2007 Compliance Order*), clarified on other grounds, 120 FERC ¶ 61,239 (2007) (addressing NERC's previous compliance filing ordered by *North American Electric Reliability Corp.*, 118 FERC ¶ 61,030 (*January 2007 Compliance Order*), order on reh'g, 119 FERC ¶ 61,046 (2007) (*April 2007 Rehearing Order*) and *North American Electric Reliability Corp.*, 118 FERC ¶ 61,190 (2007)).

² *April 2007 Rehearing Order*, 119 FERC ¶ 61,046 at P 38-44.

³ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*Certification Order*), order on reh'g and compliance, 117 FERC ¶ 61,126 (2006). The order certified NERC as the ERO under FPA section 215, 16 U.S.C. § 824o.

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. 672.⁴ The *Certification Order* and subsequent orders directed NERC, as the certified ERO, to provide additional information and revise its Bylaws and Rules of Procedure. NERC submitted a March 19, 2007 compliance filing in Docket No. RR06-1-007 to address compliance and enforcement issues such as oversight of Regional Entities, confidentiality, penalty determinations and violation severity determinations. The *June 2007 Compliance Order* approved most of NERC's March 19 filing but directed NERC to make additional changes to NERC's information disclosure procedures and compliance and certification committee charter. In addition, the *April 2007 Rehearing Order* directed NERC to clarify the scope and meaning of its maximum base penalty provisions.⁵ In response, NERC submits the current compliance filing.

II. Procedural Matters

3. Notice of NERC's August 6, 2007 filing was published on August 9, 2007, with comments due on or before August 27, 2007. Transmission Access Policy Study Group (TAPS) filed a timely motion to intervene and protest. On September 14, 2007, NERC filed an answer addressing the concerns raised in the TAPS protest and incorporating clarifications negotiated by NERC and TAPS.

4. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), 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.

⁴ *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, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁵ *April 2007 Rehearing Order*, 119 FERC ¶ 61,046 at P 38-44.

III. Discussion

5. The *June 2007 Compliance Order* and *April 2007 Rehearing Order* directed NERC to make several revisions to its Rules of Procedure, Sanction Guidelines, compliance committee charter and related documents. In this order, we approve NERC's August 6, 2007 compliance filing subject to the revisions concerning penalty calculations, discussed below. In addition, this order discusses the issues raised in the TAPS protest and accepts NERC's revisions to its information disclosure process. The remaining issues not discussed in this order are summarily accepted.

A. Maximum Base Penalty Amount

6. In the *Certification Order*, we directed NERC to reflect in its Base Penalty Amount Table a maximum Base Penalty Amount equal to the statutory maximum penalty established in the FPA.⁶ 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 the calculation of a Base Penalty Amount of \$1 million for an entire monitoring period, which might last as long as a year. We reiterated that NERC must clarify that all amounts in the Base Penalty Amount Table be stated so that NERC or a Regional Entity could calculate a Base Penalty Amount of \$1 million "per violation, per day."⁷

7. The *April 2007 Rehearing Order* clarified the scope and meaning of the \$1 million per violation, per day calculation. Accordingly, we directed NERC to amend its Sanction Guidelines to clarify that the maximum penalty it or a Regional Entity may impose within the United States is the maximum amount provided by the FPA. That is, should the conduct at issue so warrant, NERC or a Regional Entity would impose a penalty of \$1 million for each violation of a requirement of a Reliability Standard for each day that the violation continues.⁸ We noted that some Reliability Standards may result in multiple violations on a given day, each of which would be subject to a maximum \$1 million penalty.⁹ For other Reliability Standards, a single violation is measured in cumulative

⁶ *Certification Order*, 116 FERC ¶ 61,062 at P 447.

⁷ *January 2007 Compliance Order*, 118 FERC ¶ 61,030 at P 87.

⁸ *April 2007 Rehearing Order*, 119 FERC ¶ 61,046 at P 38-44.

⁹ *Id.* (citing multiple events that exceed interconnection reliability operating limits leading to multiple violations of requirements of Reliability Standard TOP-007-0).

acts over time, so that multiple acts are measured as a single violation.¹⁰ We directed NERC to address these situations in its revisions to its Sanction Guidelines.

8. Furthermore, we distinguished violations over time from violations that reflect a continuing failure to comply with a discrete requirement (such as the failure to prepare a vegetation management program pursuant to Requirement 1 (R1) of Reliability Standard FAC-003-1).¹¹ To clarify the appropriate treatment for the two situations, we noted that failure to complete a task by a required date would result in a finding that a violation occurred on the first day of non-compliance and would continue for each day until the required task was completed.¹² For violations that require measurement over an extended time period, we suggested, at a minimum, that NERC consider each month of non-compliance to be a separate violation.¹³ In this way, the penalties would impose a meaningful cost on the violator, and provide meaningful deterrents. The *June 2007 Compliance Order* directed NERC to address these scenarios on or before the date that it submitted its compliance filing in response to that order.

1. Compliance Filing

9. In response, NERC proposes to add section 3.21 to its Sanction Guidelines, which adopts the \$1 million per violation, per day maximum penalty and proposes specific terms to address the scenarios discussed in the *April 2007 Rehearing Order*: i) multiple violations per day, ii) violations that result from cumulative failures over time, and iii) discrete violations of periodically monitored criteria. NERC's revised guidelines state that it need not impose identical penalties for each violation in a group of multiple violations, nor for each day for protracted violations. Also, section 3.21 adopts the Commission's suggestion that violations resulting from cumulative failures over time be subject to penalties imposed, at a minimum, each month. As for specific penalty determinations for particular Reliability Standard violations, NERC proposes to revise each Reliability Standard for which a violation is cumulative over time to specify the minimum period in which a violation could occur and establish when a violation begins.

¹⁰ *Id.* P 40 (citing multiple failures to meet ten-minute average control error to achieve 90 percent compliance over a month, which constitutes a single violation of Requirement 2 (R2) of Reliability Standard BAL-001-0).

¹¹ *Id.* P 43.

¹² *Id.*

¹³ *Id.* P 42.

Prior to those revisions, NERC proposes to construe potential ambiguities “conservatively” so that a violator will be held to have committed one violation per measurement period (subject to the monthly minimum).¹⁴ Finally, NERC proposes to add language to Sanction Guidelines, section 4 to reflect the addition of section 3.21.

2. Commission Conclusion

10. We accept NERC’s proposed revisions to its Sanction Guidelines subject to the following clarifications. The third paragraph of proposed section 3.21 of the Sanction Guidelines states:

Some Reliability Standards may not support the assessment of penalties on a “per day, per violation” basis. Where NERC or the regional entity deems that a monetary penalty is warranted, or where NERC or the regional entity is monetizing (Section 3.19) the value of a non-monetary sanction, for the violation of such a standard NERC or the regional entity shall determine the penalty or monetized amount consistent with the following: [. . .]

11. In addition, section 4 of the Sanction Guidelines clarifies that assessing penalties on a per violation, per day basis is the default for penalty calculations. The relevant provisions of proposed section 4 state:

Unless NERC or the regional entity deems alternative frequency or duration is warranted[,] penalties shall be assessed on a per violation per day basis. Where NERC or the regional entity deems that alternative penalty frequency or duration is warranted[,] the Notice of Penalty associated with the violation will clearly identify this and provide the rationale for it.

Where NERC or the regional entity has not deemed that alternative penalty frequency or duration is warranted and the Reliability Standards in question may not support the assessment of penalties on a “per day, per violation” basis, penalties shall be determined in accordance with Section 3.21 of this document.

¹⁴ See *id.* P 41.

12. We have several concerns with the proposed language in these three paragraphs. First, the *April 2007 Rehearing Order* clarified penalty calculations for three situations where a violation may not conveniently fit into the abbreviated designation of a per violation, per day penalty. First, there may be multiple violations of the same requirement that occur on the same day, and each such violation would be subject to a maximum potential penalty of \$1,000,000. Second, a violation may involve discrete events that are monitored only periodically. In this situation, if a requirement states that a discrete event constitutes a violation, then a violation arises when that event occurs and continues each day until remedied, regardless of the monitoring period for such an activity. Third, certain other requirements of the Reliability Standards are measured not on the basis of discrete acts, but of cumulative acts over time. Section 3.21 is intended to clarify penalty calculations for these situations.

13. As proposed by NERC, the latter paragraph of section 4 quoted above would permit NERC or a Regional Entity to calculate penalties pursuant to section 3.21 for violations of requirements that do not fall into any of these categories but that otherwise “may not support” the default per violation, per day penalty calculations. NERC has not submitted any information that indicates what or why other types of Reliability Standard requirements would fail to support per violation, per day penalty calculations. In the absence of any such justification, we direct NERC in its compliance filing to delete the latter paragraph of section 4 quoted above, without prejudice to NERC making a subsequent filing on this issue. Further, NERC should indicate in the first paragraph of section 4 above, that where NERC or the Regional Entity deems that alternative penalty frequency or duration is warranted, penalties shall be determined in accordance with section 3.21 of the Sanction Guidelines.

14. Second, although section 4 uses the phrase “alternative penalty frequency or duration,” that phrase is not defined. Section 3.21 clarifies penalty calculation for violations where different interpretations are possible under the per violation, per day designation. While NERC’s reference in section 4 to “alternate penalty frequency or duration” calculations may imply that these calculations are not on a per violation, per day basis, this is not necessarily the case. For example, where there are multiple violations of the same requirement that occur on the same day, assessing a separate penalty for each such violation is consistent with the “per violation, per day” penalty basis. With this understanding, we accept NERC’s use of the phrase “alternate penalty frequency or duration” to refer to the clarifying penalty calculations in section 3.21. However, section 3.21 does not refer to the clarifications as such. Therefore, we direct NERC to insert into the paragraph of section 3.21 quoted above the phrase “alternative penalty frequency or duration” as set forth below to make the connection clear and eliminate any ambiguity:

Some Reliability Standards may not support the assessment of penalties on a ‘per day, per violation’ basis, but instead should have penalties calculated based on an alternative penalty frequency or duration.

15. Finally, section 3.21 allows NERC and the Regional Entities to apply different penalty amounts for each day of a violation. We understand that different circumstances may warrant either downward or upward adjustments in per-day penalties and approve this provision.

B. Revisions to Information Disclosure Procedures

16. In the *June 2007 Compliance Order*, the Commission reviewed NERC’s proposal to revise its information disclosure procedures in section 1503.1 of its Rules of Procedure to weed out frivolous, overly broad and unreasonable requests for information. NERC attempted to set out its policy for limiting such requests with the statement, “A receiving entity shall make information available only to one with a demonstrated need for access to the information from the receiving entity.” The Commission found this statement consistent with the *January 2007 Compliance Order*¹⁵ but directed NERC to address concerns with the new language by describing its review process and indicating what showing would support a request for the production of information.¹⁶

1. Compliance Filing

17. NERC responded by revising section 1503.2.2 of its Rules of Procedure to address the Commission’s directive. The revised section 1503.2.2 states:

The request must identify the individual or entity that will use the information, explain the requester’s need for access to the information, explain how the requester will use the information in furtherance of that need, and state whether the information is publicly available or available from another source or through another means.

18. In the filing letter accompanying the Rule changes, NERC states that it “anticipates that its response to each request for disclosure of information that has been

¹⁵ *January 2007 Compliance Order*, 118 FERC ¶ 61,030 at P 193.

¹⁶ *June 2007 Compliance Order*, 119 FERC ¶ 61,248 at P 68.

designated will depend on the particular facts and circumstances associated with the information and the request.”¹⁷ NERC states that it will balance the requester’s need for disclosure presented in the request with the confidentiality interests of the entity originally supplying the information, and evaluate whether the request for information is “frivolous, overly broad or unreasonable.” NERC states that its proposal is consistent with the *June 2007 Compliance Order* because it will not require any individual or entity requesting information to demonstrate that it is legally entitled to the information.

2. TAPS Protest and NERC Answer

19. TAPS initially protested NERC’s revision, arguing that NERC’s response amounts to an inappropriate balancing test if applied to requests for public information, and sought a clarification that a requester’s description of the use to which it intends to use the information is not binding and does not limit the potential use of the information.¹⁸ Thereafter, NERC and TAPS discussed the disclosure rules, and, in response, NERC submitted a September 14, 2007 clarification that no balancing test would apply to disclosures of public information, which requests would be met so long as they are not “frivolous, overly broad or unreasonable.”¹⁹ NERC also clarified that the description of the anticipated use of public information would not limit the potential use or distribution of that information once disclosed.²⁰ NERC states that this clarification resolved the concerns raised in the TAPS protest.²¹

3. Commission Conclusion

20. We accept NERC’s revised disclosure rules, subject to the explanation in its answer. Section 1503 applies both to information designated as confidential as well as non-confidential, public information. As clarified, section 1503 will not apply a balancing test to requests for public information, so long as such requests are not frivolous, overly broad or unreasonable. We previously approved section 1503.4, which governs NERC’s authority to review requests for information that is designated

¹⁷ NERC August 6, 2007 filing letter at 4-5.

¹⁸ TAPS Protest at 4.

¹⁹ NERC September 14, 2007 Answer at 6.

²⁰ *Id.* at 7.

²¹ *Id.*

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confidential, subject to appropriate protections and internal appeal procedures. Therefore, we find that NERC has addressed all concerns raised in the TAPS protest and provided a sufficient description in its filing letter of its review process for requests for information disclosure. We accept the proposed changes to the disclosure provisions contained in section 1503 of the NERC Rules of Procedure.

The Commission orders:

(A) NERC's August 6, 2007 compliance filing is approved, subject to the modifications required in this order.

(B) NERC shall submit a compliance filing as to the modifications and submissions required in this order within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.