

Summary of Proposed Revisions to the NERC Rules of Procedure

Proposed Revisions to Rules of Procedure and Appendix 2 (Definitions) and Appendix 4C (Compliance Monitoring and Enforcement Program)

Introduction

The current North American Electric Reliability Corporation (NERC) Rules of Procedure (ROP) contemplate that hearings to resolve contested noncompliance, mitigation plans, remedial action directives, penalties, or sanctions may be held at each Regional Entity (RE). NERC is proposing the introduction of a Consolidated Hearing Process, which would allow REs the *option* to move the hearing process to NERC. The proposed revisions are designed to streamline costs, enhance consistency, and increase efficiencies. As noted below, the composition of the consolidated Hearing Body, which would include members appointed by the RE, would ensure that a regional perspective is maintained.

Proposed Consolidated Hearing Process Summary

Under the proposed process, the consolidated Hearing Body will generally be composed of five members, including the Hearing Officer. Up to two members may be nominated by the RE from which the case originates. The NERC Board of Trustees Compliance Committee (BOTCC) will appoint two members chosen among NERC Trustees not serving on the BOTCC at the time of the request for hearing. A Hearing Officer will be selected by the four Hearing Body members. If an RE chooses to appoint one or no representative, then the BOTCC will select additional members to fill those vacancies among NERC Trustees not serving on the BOTCC at the time of the request for hearing. In the event an RE chooses not to appoint members to the Hearing Body and there are not four NERC Trustees available to participate in the Hearing Body, as determined by the BOTCC, the Hearing Body may be composed of three members (three NERC Trustees not serving on the BOTCC). If two stakeholder members are appointed by the RE, the stakeholders shall not represent the same industry segment.

Unless noted below, the conduct of the hearing under either the RE Hearing Process or the Consolidated Hearing Process would follow the existing rules, among others, relating to timing of activities, filings, service, participation, and evidence.

In addition, under either hearing process, the decision of the Hearing Body would be appealable as a matter of right to the NERC BOTCC. The appealed issues would be reviewed under a *de novo* standard, meaning the NERC BOTCC would act as if it were hearing the case for the first time, affording no deference to the Hearing Body's decision. In the Federal Energy Regulatory Commission's (FERC) order certifying NERC as the Electric Reliability Organization (ERO), FERC directed NERC to review appealed matters *de novo*.¹ The BOTCC would generally have one hundred and eighty (180) days to render its decision.

¹ "[T]he ERO should have *de novo* review authority on appeal in matters where consistency is desirable, such as the interpretation of standards, the application of penalty factors to specific facts, and whether the factual record supports a particular penalty or

REs will select either the existing RE Hearing Process or the proposed Consolidated Hearing Process. The selection will be in effect for each RE for a minimum of six months. Hearings will be conducted under the process in effect at the RE at the time the registered entity submits a hearing request. A RE may change its selected process by giving notice to NERC six (6) months prior to the change becoming effective.

Benefits of the Consolidated Hearing Process

The key benefits of the proposed Consolidated Hearing Process are increased efficiency and reduced cost to the ERO Enterprise. The proposed process allows the ERO Enterprise to centralize the hearing process, eliminating duplicative processes at the RE level. At the same time, the proposed process preserves the regional perspective by having up to two members on the Hearing Body nominated by the RE. Moreover, to the extent that the REs select this proposed Consolidated Hearing Process, it also provides the ERO Enterprise with increased consistency of process.

There are also additional cost savings from consolidated training sessions for potential Hearing Body members. Rather than each RE developing and implementing training on the hearing process to its Board members and staff, there could be joint training sessions. This would also allow for consistent messaging regarding the hearing process.

Another benefit of a consolidated Hearing Body is the elimination of *ex parte* communication restrictions within the RE in connection with matters on appeal. During a hearing, RE staff involved in the development of the case may be precluded from discussing matters related to that case with its Board members responsible for deciding the case. Instead, the proposed Consolidated Hearing Process would allow RE staff to discuss freely the case with its Board members, except any Board member that is selected to participate on the Hearing Body at the time.

If approved by the FERC, these revisions will be filed with the applicable governmental authorities.

Each of the revisions is addressed below.

Section-by-Section Revisions

As described below, the majority of the proposed changes to ROP Sections 403, 407, 408, 409, 412, 413, and 414 relate to consistency with terminology. The proposed revisions also describe the RE Hearing Process and Consolidated Hearing Process, in addition to inserting explicitly the standard of review related to appeals and a time frame for the BOTCC to render a decision on an appeal. The disposition of certified questions is also clarified. The proposed revisions to Section 400 are summarized below:

remedial action.” *Order Certifying N. Am. Elec. Reliability Corp. as the Elec. Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 1,062 at P 491 (2006).

- Section 403.4 provides that the RE Board or compliance panel reporting directly to the RE Board will designate a “Hearing Body” (with appropriate recusal procedures) that will be vested with the authority for conducting all compliance hearings under the selected process under Section 403.15.
- Section 403.15 would require REs to select either the RE Hearing Process or the Consolidated Hearing Process to conduct all hearings. Section 403.15 also provides that a RE may change its selected hearing process by giving notice to NERC six (6) months prior to the modification becoming effective. Sections 403.15A and B, respectively, propose the composition of the Hearing Body involved in each hearing process.
- The proposed revisions to numerous Section 400 rules remove references to the defined term “Regional Entity Hearing Body” and replace it with the defined term “Hearing Body,” which is discussed further below.
- Section 409.1 sets forth that the BOTCC shall render a decision on an appeal from a final decision of a Hearing Body within one hundred and eighty (180) days, subject to an extension for good cause, following the receipt by NERC’s Director of Enforcement.
- Section 409.5 provides that the BOTCC would review an appeal of a Hearing Body’s decision under a *de novo* standard.
- The proposed revisions to Section 412.1 added references to the “Compliance Committee” to be consistent with existing references to the “Compliance Committee” in Section 412, among other relevant provisions, including Sections 408.8, 409.5, and 414.4.

Appendix 2 (Definitions) Revisions

The proposed modifications to Appendix 2 definitions are as follows:

- “Clerk” is revised to include explicitly NERC as a Compliance Enforcement Authority that can assign an individual to perform administrative tasks relating to the conduct of hearings as described in Attachment 2, Hearing Procedures, to Appendix 4C.
- “Confirmed Violation” is modified to delete reference to the RE Hearing Body and replace it with Hearing Body.
- “Consolidated Hearing Process” is added for clarity. Consolidated Hearing Process means the process under Section 403.15B used to conduct hearings and issue decisions concerning disputed compliance matters in accordance with Attachment 2, Hearing Procedures, of Appendix 4C.
- “Director of Enforcement” is added because the ROP references Director of Enforcement, among other instances, in Section 409 (appeals from final decisions of hearing bodies) and Section 414 (appeals of decisions of hearing bodies granting or denying motions to intervene in hearing body proceedings). Director of Enforcement means the NERC Director of Enforcement or of the Compliance Enforcement Authority, as applicable, or another individual designated by the Compliance Enforcement Authority who is responsible for the management and supervision of Enforcement staff, or his or her designee.

- “Hearing Body” is revised to mean the body designated by the Compliance Enforcement Authority to conduct hearings and issue decisions concerning disputed compliance matters in accordance with Attachment 2, Hearing Procedures, of Appendix 4C.
- “Hearing Officer” is revised to refer to, among others, an individual employed or contracted by the Compliance Enforcement Authority or NERC to preside over hearings conducted under Attachment 2, Hearing Procedures, of Appendix 4C.

Appendix 4C (Compliance Monitoring and Enforcement Program) Revisions

The proposed revisions to Appendix 4C account for both hearing processes in the hearing procedures. Among others, the following revisions were made in Appendix 4C:

- Section 1.1.1(b) was revised to reflect both hearing processes, including clarifying that Hearing Body decisions, under either hearing process, would require a majority vote to be consistent with other provisions addressing interlocutory reviews (1.4.4(e)) and Hearing Body final orders (1.7.8(b)).
- Section 1.1.4(b) regarding the interpretation of hearing procedures was deleted because it was no longer consistent with the proposed composition of hearing bodies under both hearing processes.
- The definitions contained in Section 1.1.5 were deleted and intentionally left blank because they were duplicative of the definitions contained in Appendix 2.
- Several proposed revisions relate to modifying procedural rules to incorporate both hearing processes involving issues such as the submission of documents (1.2.3), service (1.2.4), computation of time (1.2.5), location of hearings (1.2.10), disqualification (1.4.5), *ex parte* communications (1.4.7(b)(4)), and documents that may be withheld by staff (1.5.7(b)).
- Section 1.3.1(h) was added to incorporate explicitly the Consolidated Hearing Process in the procedural rules governing initiation of the hearing process. Likewise, Section 1.9.1(c) was added to incorporate the Consolidated Hearing Process in the initiation of a remedial action directive hearing.
- Section 1.3.4(h) regarding the shortened hearing procedure, to conform the language to ROP Section 409.1, was revised to require that the Hearing Body issue a final order within one hundred and twenty (120) days of the notice of hearing, subject to an extension for good cause.
- Section 1.4.3(7) was added to provide that if the Compliance Enforcement Authority has adopted the Consolidated Hearing Process under ROP Section 403.15B, the Hearing Officer will cast the deciding vote in the event any Hearing Body vote results in a tie.
- Section 1.5.12 adds references to the “Compliance Committee” to be consistent with ROP Section 412.1 that provides that the BOTCC considers and resolves certified questions.
- Section 1.7.8(c) governing the Hearing Body final order, to conform the language to ROP Section 409.1, was revised to require that the Hearing Body issue a final order within thirty (30) days following the last to occur of the initial opinion, exceptions or replies thereto, or oral argument, subject to an extension for good cause.