

UNITED STATES OF AMERICA
before the
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation	Docket No. RR06-1-012
Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT	Docket No. RR07-1-002
Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization	Docket No. RR07-2-002
Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc.	Docket No. RR07-3-002
Delegation Agreement Between the North American Electric Reliability Corporation and ReliabilityFirst Corporation	Docket No. RR07-4-002
Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation	Docket No. RR07-5-002
Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc.	Docket No. RR07-6-002
Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council	Docket No. RR07-7-002
Delegation Agreement Between the North American Electric Reliability Corporation and Florida Reliability Coordinating Council.	Docket No. RR07-8-002
North American Electric Reliability Corporation	Docket No. RR06-3-004

**MOTION TO ANSWER AND ANSWER OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
TO COMMENTS ON COMPLIANCE FILING
IN RESPONSE TO APRIL 19, 2007 ORDER**

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Rick Sergel
President and Chief Executive Officer
David N. Cook
Vice President and General Counsel
North American Electric Reliability
Corporation
116-390 Village Boulevard
Princeton, NJ 08540-5721
(609) 452-8060
(609) 452-9550 – facsimile
david.cook@nerc.net

Owen E. MacBride
Debra Ann Palmer
Schiff Hardin LLP
1666 K Street, N.W., Suite 300
Washington, DC 20036-4390
(202) 778-6400
(202) 778-6460 – facsimile
omacbride@schiffhardin.com
dpalmer@schiffhardin.com

Rebecca J. Michael
Attorney
North American Electric Reliability
Corporation
1120 G Street, N.W., Suite 990
Washington, D.C. 20005-3801
(202) 393-3998
(202) 393-3955 – facsimile
rebecca.michael@nerc.net

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I. INTRODUCTION

On October 30, 2007, the North American Electric Reliability Corporation (“NERC”) filed a compliance filing in response to the Commission’s April 19, 2007 Order in the captioned dockets.¹ The October 30 Compliance Filing included among other things a revised *pro forma* Delegation Agreement between NERC and Regional Entities; a revised uniform Compliance Monitoring and Enforcement Program (“CMEP”) which included revised and expanded Hearing Procedures (Attachment 2 to the uniform CMEP); revised Delegation Agreements with each of the eight Regional Entities and related supporting documents;² several proposed changes to the NERC Rules of Procedure; and narrative responses by NERC and the Regional Entities to specific directives in the April 19 Order concerning the Delegation Agreements, the CMEP, the Hearing Procedures and other matters. On or about November 30, 2007, several entities filed protests and/or comments on the October 30 Compliance Filing.³ All of the November 30

¹Compliance Filing of the North American Electric Reliability Corporation in Response to April 19, 2007 Order (October 30, 2007) (“October 30 Compliance Filing”). The Commission’s April 19, 2007 Order is North American Electric Reliability Council and North American Electric Reliability Corporation, Docket No. RR06-1-004; Delegation Agreements Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT, Midwest Reliability Organization, Northeast Power Coordinating Council: Cross Border Regional Entity, Inc., ReliabilityFirst Corporation, SERC Reliability Corporation, Southwest Power Pool, Inc., Western Electricity Coordinating Council, and Florida Reliability Coordinating Council, Docket Nos. RR07-1-000, RR07-2-000, RR07-3-000, RR07-4-000, RR07-5-000, RR07-6-007, RR07-7-000, and RR07-8-000, respectively; and North American Electric Reliability Corporation, Docket No. RR06-3-000, 119 FERC ¶61,060 (2007) (“April 19 Order”).

²The eight Regional Entities are Florida Reliability Coordinating Council (“FRCC”), Midwest Reliability Organization (“MRO”), Northeast Power Coordinating Council, Inc. (“NPCC”), ReliabilityFirst Corporation (“ReliabilityFirst”), SERC Reliability Corporation (“SERC”), Southwest Power Pool, Inc. (“SPP”), Texas Regional Entity (“Texas Regional Entity”), a Division of Electric Reliability Council of Texas (“ERCOT”), and the Western Electricity Coordinating Council (“WECC”).

³Protests and/or other comments were filed by the American Public Power Association (“APPA”), Edison Electric Institute and National Rural Electric Cooperative Association (“EEL-NRECA”), Georgia System Operations Corporation (“GSOC”), New York Independent System

Comments addressed items in the revised uniform CMEP and Hearing Procedures included in the October 30 Compliance Filing, with the vast majority of the comments addressed to the Hearing Procedures. NERC now seeks leave to file this Answer to the November 30 Comments.

II. MOTION FOR LEAVE TO FILE ANSWER

The Commission's rules do not permit the filing of answers to protests. *See* 18 C.F.R. §385.213(a)(2). However, the Commission has granted motions for leave to file such answers if they will clarify issues in dispute, ensure a complete and accurate record or otherwise provide information to assist the Commission in its decision-making process.⁴ NERC's Answer will clarify certain concerns about the October 30 Compliance Filing that were raised in the November 30 Comments and provide information that will assist the Commission in its decision-making process. Further, this Answer has been prepared collaboratively by NERC and the eight Regional Entities; NERC is authorized to state that this Answer represents the views of the Regional Entities and that they endorse its submission and its consideration by the Commission. The Commission should, therefore, permit NERC to submit this Answer.

Operator ("NYISO"), Transmission Access Policy Group ("TAPS") and Transmission Agency of Northern California ("TANC") (collectively, the "November 30 Comments").

⁴*San Diego Gas & Electric v. Sellers of Energy and Ancillary Services*, 108 FERC ¶61,219, at P14, n. 7 (2004) (answer was accepted as it "provided information that assisted [FERC in its] decision-making process"); *see also Michigan Electric Transmission Co.*, 106 FERC ¶61,064, at P 3 (2004) (the permitted answer "provides information that clarifies the issues"); *North American Electric Reliability Corporation, Order Certifying NERC as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶61,062, at P 24 (2006) (reply comments of NERC and others accepted "because they have provided information that assisted us in our decisionmaking process"); *North American Electric Reliability Corporation, Order Conditionally Accepting 2007 Business Plan and Budget of the North American Electric Reliability Corporation, Approving Assessments to Fund Budgets and Ordering Compliance Filings*, 117 FERC ¶61,091, at P 18 (2006) (same); *North American Electric Reliability Corporation*, 119 FERC ¶61,248 (2007) at P 6 (same).

III. ANSWER

A. Overview

All the November 30 Comments addressed either the revised uniform CMEP or the revised Hearing Procedures, with over 75% of the comments addressed to the Hearing Procedures. As detailed in §III.B below, the revised and expanded Hearing Procedures submitted in the October 30 Compliance Filing were largely developed through a collaborative process at the Regional Entity level, taking into account the specific directives and the more general concerns of the Commission in the April 19 Order, the needs of the Regional Entities and their stakeholders for an efficient, detailed hearing process that provides due process to Registered Entities, and stakeholder input at the Regional Entity level. The revised Hearing Procedures were developed to also blend seamlessly with the Commission's enforcement and hearing processes. Further, in an effort to take into account existing self-regulatory organization ("SRO") models, NERC and the Regional Entities drew on the existing hearing processes of the National Association of Securities Dealers and the Public Company Accounting Oversight Board.

As a result, NERC and the Regional Entities believe the revised Hearing Procedures (as well as the revised CMEP) should be approved by the Commission as filed in the October 30 Compliance Filing (with the specific revisions identified below). The Regional Entities have been preparing to conduct compliance enforcement hearings using these Hearing Procedures and educating stakeholders in their regions concerning the Hearing Procedures. The Regional Entities already have alleged violations of Reliability Standards in various stages of analysis and due process, with the need to begin conducting hearings on alleged violations anticipated in the near future. The Regional Entities are now fully prepared to use the revised Hearing Procedures

in conducting hearings. With the legwork that has been conducted, significant changes to the Hearing Procedures at this time may impede the ability of the Regional Entities and NERC to effectively communicate those changes, and may cause confusion and delay for Regional Entities and Registered Entities who have alleged violations in process with the expectation of resolving the alleged violations using the vetted and filed Hearing Procedures.

However, if the Commission concludes, based on its review of the November 30 Comments, that changes should be made to certain provisions of the CMEP or the Hearing Procedures, then NERC and the Regional Entities request the Commission not to direct specific, textual revisions to be made, but rather that the Commission identify its areas of concern and direct NERC and the Regional Entities to submit a further filing addressing these areas of concern within a reasonable time period such as 150 days after issuance of the Commission's order. This approach will enable NERC and the Regional Entities to employ an orderly, stakeholder process, consistent with the expectations of a SRO, in the development and consideration of changes to the CMEP or Hearing Procedures in response to the Commission's concerns, without disruption to current activities or compromising a broader discussion of issues and concerns.

NERC and the Regional Entities do acknowledge that certain of the November 30 Comments identified specific inconsistencies in provisions of the CMEP and/or Hearing Procedures, which can and should be corrected.⁵ These specific items are discussed in §III.C.

⁵NERC notes, with respect to the APPA Comments at 6, that the Commission's regulations and the terms of NERC's certification as the electric reliability organization require NERC to conduct a self-assessment of its performance and an assessment of each Regional Entity (which are to include opportunity for stakeholder input) three years after certification and every five years thereafter, and to submit reports of these assessments to the Commission which will be posted for public comment. 18 C.F.R. §39.3(c); *see North American Electric Reliability Corporation*, 116 FERC ¶61,062 (2006), at PP 715-716. These reviews will encompass the

B. The Revised Hearing Procedures Are the Product of an Extensive NERC-Regional Entity Collaborative Process That Included Opportunities for Stakeholder Participation and Input at the Regional Entity Level

The Hearing Procedures, Attachment 2 to the uniform CMEP, that NERC submitted with the October 30 Compliance Filing are completely revised and significantly expanded in scope, detail and complexity.⁶ Further, as described in the October 30 Compliance Filing, the revised Hearing Procedures resulted from a joint and collaborative process initiated by the six Regional Entities in the Eastern Interconnection⁷ to develop a more detailed and informative set of hearing procedures to be used in their compliance enforcement hearings. (The Regional Entity level is, of course, the logical place for the Hearing Procedures to be developed and refined, since the bulk of the compliance enforcement hearings are expected to be held at the Regional Entity level, with NERC primarily acting in oversight and appellate roles.) These six Regional Entities submitted a draft of their proposed Hearing Procedures to NERC in May 2007. NERC reviewed and commented on the Regional Entities' draft Hearing Procedures, suggesting substantive and format changes. Among other things, NERC reviewed the Regional Entities' draft hearing procedures to determine that they addressed the directives in the April 19 Order for revisions to NERC's original Hearing Process document, and provided revisions or additional text for the Hearing Procedures where necessary to address these directives. NERC and the Regional Entities engaged in further discussions concerning the Hearing Procedures and exchanged

NERC Rules of Procedure including the uniform CMEP and Hearing Procedures, which are part of the Rules of Procedure. NERC and the Regional Entities point out, however, with respect to the EEI-NRECA Comments at 3, that while the three-year and five-year assessments will also encompass the NERC-Regional Entity Delegation Agreements, the Delegation Agreements are not part of the NERC Rules of Procedure (and therefore are not subject to Section 1402 of the Rules of Procedure).

⁶October 30 Compliance Filing at 22.

⁷FRCC, MRO, NPCC, ReliabilityFirst, SERC and SPP.

subsequent drafts, until a document was arrived at that NERC concluded it could adopt.⁸

Additionally, during this period, WECC developed a similar set of Hearing Procedures and coordinated throughout the process with NERC and the Eastern Interconnection Regional Entities to ensure the results of their efforts were generally consistent. The coordination and interaction among NERC and the Regional Entities necessary to arrive at mutually-acceptable revised Hearing Procedures, within the compliance filing time period, was extensive, substantial, and resulted in a responsive product for the October 30 Compliance Filing.⁹

NERC acknowledges that, as noted in certain of the November 30 Comments, an extensive stakeholder review and comment process was not conducted at the NERC level for the revised Hearing Procedures.¹⁰ However, the vast majority of the compliance enforcement hearings will be conducted at the Regional Entity level, and there was extensive stakeholder review and participation and opportunity for public input at this level as the revised Hearing Procedures were being developed and progressed through several iterations. For example:

- Extensive stakeholder and public participation occurred at ReliabilityFirst in connection with development of the revised Hearing Procedures. Overviews of the draft revised Hearing Procedures were presented at two seminars conducted by ReliabilityFirst that were attended by 192 persons representing over 100 separate companies or organizations. Additionally, drafts of the revised Hearing Procedures were posted for comment on the ReliabilityFirst web site for a minimum of 30 days on two separate occasions. Detailed discussions concerning the Hearing Procedures occurred during a series of ReliabilityFirst Compliance Committee meetings and conference calls which were open to public and stakeholder participation. The Compliance Committee, which includes both independent and industry stakeholder

⁸October 30 Compliance Filing at 23.

⁹The six Regional Entities in the Eastern Interconnection adopted the resulting Hearing Procedures with no, or only limited, exceptions, while Texas Regional Entity and WECC adopted somewhat more modified versions of the revised Hearing Procedures due to issues specific to those Regional Entities. See October 30 Compliance Filing at 23-24, 39, 41-44.

¹⁰APPA Comments at 6; EEI-NRECA Comments at 2-3.

members, actively participated in the drafting and review process for the Hearing Procedures and provided approval and endorsement of the final Hearing Procedures document. The final, revised Hearing Procedures document was approved by the Reliability *First* Board of Directors in August 2007.

- SERC conducted a mock hearing, presided over by a retired Commission Administrative Law Judge, on May 17, 2007. The mock hearing was based on an actual compliance case and was used, among other purposes, to evaluate proposed revisions to the Hearing Procedures. Attendance at the mock hearing was open to registered entities within SERC (as well as to NERC staff and staffs of other Regional Entities). Over 60 stakeholders attended and observed the mock hearing and provided comments based on their observations. The SERC Board Compliance Committee initially approved the revised Hearing Procedures on June 1, 2007, after reviewing and commenting on several previous draft versions. The Hearing Procedures were posted for comment by SERC members and Registered Entities for 30 days prior to approval by the Board Compliance Committee. Subsequent to June 1, the revised Hearing Procedures have been posted on the SERC web site for public review and download. Finally, the revised Hearing Procedures have been a topic covered in several compliance seminars held within SERC during 2007.
- MRO posted drafts of the Hearing Procedures prior to adoption by the MRO Board. MRO also participated in the mock hearing conducted by SERC on May 17, 2007, and benefited from the comments of the stakeholder attendees. The MRO Board initially approved the revised Hearing Procedures on June 19, 2007, after reviews and comments from several previous draft versions. Subsequent to June 19, the revised Hearing Procedures have been posted on the MRO web site for public review and download. Additionally, the provisions of the revised Hearing Procedures have been communicated to MRO stakeholders through various other methods, including two compliance workshops held and co-sponsored by MRO, trade associations and NERC which drew broad attendance by stakeholders in the MRO region.
- NPCC actively participated, along with other Regional Entities, in the development of the revised and expanded Hearing Procedures. The revised Hearing Procedures developed through this joint effort were distributed to the sector-based NPCC Compliance Committee for review and comment. All comments received were addressed by the NPCC Compliance Staff and the NPCC Compliance Committee. The Hearing Procedures agreed to by the Regional Entities and NERC were included in the Amended and Restated NERC-NPCC Delegation Agreement that was presented to and approved by the sector-based NPCC Board of Directors.
- SPP Regional Entity staff participated in the development of the revised Hearing Procedures along with the other Regional Entities and NERC. At various points in the process, drafts of the revised Hearing Procedures were provided to the SPP Regional Entity Trustees for review and comment. The final version of the revised Hearing Procedures was submitted to the SPP Board of Directors as part of the revised CMEP, which the Board of Directors approved in its entirety.

- FRCC staff participated in the development of the revised Hearing Procedures along with the other Regional Entities and NERC. At various points, drafts of the revised Hearing Procedures were provided to the FRCC Compliance Committee for review and comment. The final version of the revised Hearing Procedures was reviewed and voted on by the Compliance Committee and then submitted to the FRCC Board of Directors as part of the revised CMEP, which the Board of Directors approved in its entirety.
- Texas Regional Entity provided for stakeholder and other interested party participation and input in the development of revised Hearing Procedures in a number of ways. First, multiple drafts were provided to the Legal Division of the Public Utility Commission of Texas (“PUC”) for review, comment and discussion.¹¹ Concurrently, Texas Regional Entity provided drafts of revised Hearing Procedures to its FERC counsel for review and comment. Finally, Texas Regional Entity posted its proposed revised Hearing Procedures and related documents on the ERCOT/Texas Regional Entity web site and sent a notice to industry participants and other potential responsible entities for review and comments. Each of these sources of input in fact asked questions and provided suggestions, many of which were incorporated into the final product in Exhibit D to the Amended and Restated Delegation Agreement (*i.e.*, the CMEP) and Attachments 1 and 2 thereto (the Texas Regional Entity Hearing Process and Rules of Procedure, respectively). Texas Regional Entity used experienced counsel knowledgeable in federal and state dispute resolution and administrative procedures to assist in the drafting of the documents and the consideration and incorporation of the comments of stakeholders and other interested parties. The final product of this process was made available in complete form for all Texas Regional Entity stakeholders by the posting of the agenda for the September 18, 2007 Texas Regional Entity Board meeting and related materials on the web site. The Texas Regional Entity Board, which is the same as the ERCOT Board and is composed of both independent members and stakeholder members, voted approval of the revised Texas Regional Entity Hearing Procedures in the open session of its September 18 meeting.
- The WECC Governance and Nominating Committee developed a Compliance Hearing Body (“CHB”) Charter, including an outline of hearing procedures, which the WECC Board adopted in April 2007. WECC discussed the CHB Charter and an overview of the hearing process in a series of workshops for stakeholders throughout the Spring of 2007. Following the April 19 Order and in consultation with other Regional Entities, WECC developed more detailed draft hearing procedures that addressed the requirements of the April 19 Order, were patterned after the Commission’s Rules of Practice and Procedure, were consistent with the CHB

¹¹Unlike the other Regional Entities, Texas Regional Entity will use its state PUC as its Hearing Body. Therefore, Texas Regional Entity has drawn heavily from the Texas PUC’s procedural rules in the drafting of the Texas Regional Entity procedures. Obtaining the Texas PUC’s perspective was, therefore, very valuable.

Charter, and provided the flexibility and simplicity to handle a dynamic and uncertain hearing workload. The WECC CHB Charter and draft Hearing Procedures were discussed with WECC stakeholders over a period of months. The revised CMEP, including the new Hearing Procedures, were noticed, posted for comment and, as revised, approved by the WECC Board on October 4, 2007.

Without belaboring this point with further detail, therefore, NERC and the Regional Entities submit that there was sufficient opportunity for stakeholder and public participation and input at the Regional Entity level in connection with the development of the revised and expanded Hearing Procedures. NERC exercised reasonable judgment in relying on the Regional Entity processes, again recognizing that the bulk of the hearings under the revised Hearing Procedures will be conducted at the Regional Entities. Further, the revised Hearing Procedures have been adopted by the Board or by the appropriate Board committee of each Regional Entity, either separately or in connection with approval of the Regional Entity's revised Delegation Agreement with NERC.¹²

Additionally, although four¹³ of the November 30 Comments addressed specific provisions of the revised and expanded Hearing Procedures, the November 30 Comments generally supported the fact that the revised Hearing Procedures submitted with the October 30 Compliance Filing are significantly expanded in scope, detail and complexity and represent significant improvement over the Hearing Process document originally submitted by NERC. For example, APPA states that the hearing procedures originally proposed by NERC on November 29, 2006 "were bare-bones at best, leading APPA and others to request a number of clarifications of the filed procedures," that the revised Hearing Procedures are "generally a substantial

¹²As noted earlier, some of the Regional Entities adopted certain deviations to the uniform Hearing Procedures. Deviations are noted in Exhibit D to the Regional Entities' Delegation Agreements with NERC submitted in the October 30 Compliance Filing.

¹³The comments submitted by TAPS and TANC addressed certain provisions of the uniform CMEP and did not address provisions of the Hearing Procedures.

improvement over the more skeletal hearing procedures submitted in November 2006,” and that “APPA agrees that it is urgent to have clear, coherent hearing procedures in place in the very near future, to govern the conduct of hearings that may be necessary should Registered Entities elect to contest alleged compliance violations, mitigation plans, or proposed sanctions and penalties.”¹⁴ EEI and NRECA “commend the strong leadership of the Regional Entities in advancing the development of the hearing procedures and additional due process procedures as reflected in the proposed CMEP. This is an excellent example of the commitment of the Regional Entities to ensuring a strong and effective compliance and enforcement program.”¹⁵ NYISO states that “In general, the expanded scope, detail and specificity of the Hearing Procedures is an improvement over the prior version of the CMEP hearing procedures.”¹⁶ GSOC states that the revised Hearing Procedures constitute “a significant improvement over the previously filed version, that it substantially addresses the concerns the Commission expressed over the previous filing, and that the Commission should review and approve the use of the revised Hearing Procedures in their entirety.”¹⁷ GSOC adds that “Although the revised Hearing Procedures are not perfect, their adoption will provide a much needed framework for NERC and the Regional Entities to begin carrying out their enforcement responsibilities.”¹⁸

None of the November 30 Comments raise any issue that the revised Hearing Procedures conflict with the specific directives in the April 19 Order (which NERC and the Regional

¹⁴APPA Comments at 3-4 and 5.

¹⁵EEI-NRECA Comments at 2.

¹⁶NYISO Comments at 2.

¹⁷GSOC Comments at 4.

¹⁸GSOC Comments at 4.

Entities believe encompassed the Commission's specific concerns about the provision of adequate due process in the Hearing Procedures). Instead, the November 30 Comments suggest ways in which the Hearing Procedures (and in a few specific instances, the CMEP) can be further improved.

Accordingly, NERC and the Regional Entities urge the Commission to approve the revised Hearing Procedures (as well as the revised CMEP itself), as submitted in the October 30 Compliance Filing, in their entirety (with the few specific revisions noted in §III.C below), so that NERC and the Regional Entities may utilize them for hearings. Compliance enforcement activity with respect to mandatory Reliability Standards is now ongoing; further, it is undisputed in the November 30 Comments that the revised Hearing Procedures represent a significant improvement over the Hearing Process document filed as Attachment 2 to the CMEP in November 2006. Although additional iterations of the Hearing Procedures would undoubtedly continue to draw requests for changes to specific provisions from specific stakeholders, NERC and the Regional Entities submit that, viewed in their entirety, the Hearing Procedures submitted with the October 30 Compliance Filing are quite sufficient in their clarity, detail and comprehensiveness; respond fully and appropriately to the specific directives in the April 19 Order¹⁹ as well as to the general desire expressed by the Commission in that Order that the procedural rules have sufficient detail and specificity to give clear guidance to potential participants in compliance enforcement hearings as to the procedures to be followed and what will be expected of them in the hearing process;²⁰ and will provide due process for participants in the Regional Entity and NERC hearing processes. The Hearing Procedures (and the revised

¹⁹See October 30 Compliance Filing at 58-67.

²⁰See October 30 Compliance Filing at 24-25.

CMEP) should be approved as filed (with the few specific revisions noted below).

However, should the Commission conclude, based on its review of the November 30 Comments, that any concerns have been raised that warrant consideration of changes to specific provisions of the CMEP or the Hearing Procedures, then NERC and the Regional Entities respectfully request the Commission not to direct specific textual changes to the documents. NERC and the Regional Entities request that instead, in such event, the Commission issue an order identifying its areas of concern and directing NERC and the Regional Entities to review and consider the Commission's concerns and to submit a further filing within 150 days after the Commission's order, with further revisions to the CMEP and/or Hearing Procedures, as applicable, to address the Commission's concerns. It will be more efficient if NERC and the Regional Entities are given the opportunity to address any areas of concern noted by the Commission, or suggestions for further improvements, in order to permit adequate evaluation of inter-related issues and analyze trade-offs among competing concerns. This approach will allow NERC and the Regional Entities to engage in a collaborative process in considering the Commission's concerns and developing solutions, consistent with the approach followed in developing the revised Hearing Procedures submitted with the October 30 Compliance Filing, and to provide opportunities for stakeholder participation and input.

C. Responses to Certain Specific November 30 Comments on the Hearing Procedures and CMEP

Although NERC and the Regional Entities advocate the approach described in §III.B above in addressing the November 30 Comments, in the short time available after receipt of the November 30 Comments, NERC and the Regional Entities have consulted concerning the November 30 Comments and are providing specific responses to a small number of them.

1. Hearing Procedures

a. Intervention/third party participation in compliance enforcement hearings.

Several of the November 30 Comments suggested the need for provisions concerning how interventions would be authorized in a compliance enforcement hearing under the Hearing Procedures, and how a Registered Entity would request participation of a third party in a hearing.²¹ In the April 19 Order, the Commission concluded, in response to similar comments, that interventions and other third-party participation in “Attachment 2 hearings” would rarely be warranted, and only where specifically authorized by the Commission on a case-by-case basis:

We reject Progress Energy’s and Xcel’s arguments regarding the need for procedures addressing the participation of third parties in an attachment 2 hearing. We find that, generally, third parties should not be permitted to intervene. In most cases, the contributions from third parties regarding the development of the record would likely be minimal, given the fact that the record will have been compiled largely during the investigative process. Second, attachment 2 hearings will generally be non-public. As such, participation by third parties could make it more difficult for the hearing to remain non-public. There are, however, exceptions to this general rule that should be recognized. For instance, more than one registered entity may receive a notice of alleged violation for the same event or transaction, and it may be necessary, under these circumstances, to examine the actions of both entities in a single hearing. Circumstances may also occur when it would be appropriate and in the public interest to hold public hearings or permit third parties to intervene. In Order No. 672, the Commission stated that it must authorize, in advance, interventions in proceedings in which a Regional Entity or NERC determines whether to impose a penalty. We will consider such matters on a case-by-case basis. If we permit interventions in such cases, we will address at that time any particular procedures relating to intervenors that would be appropriate.²²

If two or more Registered Entities have received Notices of Alleged Violations for the same event or transaction and it is necessary or appropriate to examine the actions of these Registered Entities in a single, consolidated hearing, the Hearing Body can determine that a

²¹EEI-NRECA Comments at 4-5 and 6-7; GSOC Comments at 5-6; NYISO Comments at 5-7.

²²April 19 Order at P 150.

consolidated hearing should be held (as the Commission recognized in P 150 of the April 19 Order).²³ This would entail combining two or more hearings involving common issues of fact or Reliability Standards application (in contrast to allowing a third party to intervene in another Registered Entity's hearing).

With respect to the comments suggesting the need for procedures by which an entity would obtain Commission authorization to intervene in a hearing, NERC and the Regional Entities are not in a position to propose or establish such procedures. As it is clear in P 150 of the April 19 Order that only the Commission can authorize interventions in a proceeding in which NERC or a Regional Entity determines whether to impose a penalty, any specific procedures for obtaining authority for such an intervention would need to be promulgated by the Commission. Similarly, with respect to comments suggesting the need for procedures to compel the appearance of third parties at compliance enforcement hearings (*e.g.*, to provide testimony or produce documentary evidence), it is unclear to NERC and the Regional Entities what source of authority they would have to compel the appearance of third parties (particularly individuals, such as former employees of a Registered Entity) at a compliance enforcement hearing. Instead, it would appear necessary that such authority be exercised by the Commission, pursuant to its existing procedures or procedures it would develop.

Further, NERC and the Regional Entities fully agree with the Commission that interventions in compliance enforcement hearings should be limited. As the Commission stressed in P 150 of the April 19 Order, compliance hearings will generally be non-public. In fact, the entire compliance enforcement process is to be confidential, and entirely between the Compliance Enforcement Authority and the Registered Entity, up to the time a Confirmed

²³Paragraph 1.4.10 of the Hearing Procedures.

Violation is publicly posted by NERC and reported to the Commission. (*See* CMEP §8.0) Making compliance enforcement hearings readily accessible to third parties is fundamentally inconsistent with the non-public nature of the process.

b. Obligation of Compliance Staff to produce exculpatory information. Two comments proposed that Paragraph 1.5.7(b)(2) of the Hearing Procedures should be modified to place an affirmative obligation on the Compliance Enforcement Authority Staff to produce all exculpatory materials to a Respondent.²⁴ NERC and the Regional Entities believe this suggested revision is unnecessary. Paragraph 1.5.7 of the Hearing Procedures requires Compliance Staff to make available to the Respondent, very shortly after issuance of the notice of hearing, a broad range of documents in the possession of Compliance Staff, with very limited exceptions (listed in subparagraph 1.5.7(b)(1)) as to what must be produced. Further, Paragraph 1.5.7(b)(2) of the NERC uniform Hearing Procedures states, “Nothing in Subparagraph (b)(1) authorizes Staff to withhold a document, or a part thereof, that contains exculpatory evidence.”

c. Impact of failure to produce documents. On a similar point, one commenter suggested that Paragraph 1.5.7(g) of the Hearing Procedures, which places the burden on the Respondent to show that a failure by the Compliance Staff to produce documents it should have produced was not harmless error, should be revised to require reconsideration of any decision in connection with which the Compliance Staff failed to produce any documents as required by the Hearing Procedures, unless the Compliance Staff shows its failure to produce such documents was harmless.²⁵ Such a revision is unnecessary and inappropriate and could lead to extensive efforts at relitigation based on inconsequential failures to produce documents. Further,

²⁴EEI-NRECA Comments at 7; NYISO Comments at 9.

²⁵GSOC Comments at 6-7.

regardless of the statement of the “burden of proof” on this point in the Hearing Procedures, it is ultimately up to the Hearing Body (or to NERC or the Commission in an appellate role) to determine if a failure of Compliance Staff to produce documents was so detrimental to the Respondent’s ability to present its case, and so critical to the determination reached on the merits, as to warrant reconsideration of the decision or relitigation of the proceeding.

d. Time period for a Registered Entity to contest a Remedial Action Directive.

NERC and the Regional Entities agree that Paragraph 1.9.1 of the Hearing Procedures should be revised to state that a Registered Entity must file its written notice to contest a Remedial Action Directive within two *business* days following *receipt* (not issuance) of the Remedial Action Directive.²⁶ As presently written, Paragraph 1.9.1 is inconsistent with Section 7.0 of the CMEP, which states: “Once the Compliance Enforcement Authority has given the Registered Entity notice of the Remedial Action Directive, the Registered Entity may contest the Remedial Action Directive by giving written notice to the Compliance Enforcement Authority within two (2) business days following receipt of notice of the Remedial Action Directive.” Accordingly, the third sentence of the second paragraph of Paragraph 1.9.1 of the Hearing Procedures should be revised to state: “The Registered Entity must provide such notice within two (2) business days following receipt of the Remedial Action Directive.”

2. Uniform CMEP

a. Reopening of Regional Entity decisions if altered by NERC. TAPS pointed out that §5.5 of the CMEP states that if NERC directs a Regional Entity to revise a decision, “any participant may reopen the proceedings on any issue,” whereas §5.6 states that if NERC directs a Regional Entity to revise a penalty determination, “any participant may reopen the

²⁶See NYSIO Comments at 12.

proceedings on any issue, irrespective of whether the issue was previously litigated, settled or opposed.”²⁷ NERC and the Regional Entities agree these provisions should be made consistent. Accordingly, the phrase “irrespective of whether the issue was previously litigated, settled or opposed” should be added to the end of the last sentence in §5.5 of the CMEP.²⁸

b. NERC rejection of a Mitigation Plan that was approved by the Regional Entity. TAPS states CMEP §6.5 should be modified to provide that where NERC rejects a Mitigation Plan that had been accepted by the Regional Entity, the Registered Entity should not be subject to violations and penalties for the period during which the Mitigation Plan was under consideration by the Regional Entity and NERC, so long as the Registered Entity then timely submits a Mitigation Plan complying with NERC’s directives.²⁹ NERC agrees that if the Regional Entity has accepted the Registered Entity’s Mitigation Plan, but the Mitigation Plan is then rejected by NERC, the Registered Entity should not be subject to violations and penalties during the time the approved Mitigation Plan was under consideration by NERC and for a reasonable period after NERC’s decision if the Registered Entity submits a revised Mitigation Plan complying with NERC’s directives during that period. Accordingly, the following sentence should be inserted in the second paragraph of §6.5, following the existing third sentence:

The Registered Entity shall not be subject to findings of violations of Reliability Standards or to imposition of penalties or sanctions for such violations with

²⁷TAPS Comments at 5.

²⁸EEI-NRECA proposed a separate revision to CMEP §5.5 and §5.6 that would limit the ability of parties to reopen the proceedings to issues related to the basis on which NERC remands or revises the Regional Entity decision or penalty determination. EEI-NRECA Comments at 14-15. Assuming the Commission concludes this proposal should be pursued, it will require more analysis than NERC and the Regional Entities can provide in a time frame consistent with filing this Answer.

²⁹TAPS Comments at 6-7.

respect to the period of time the Mitigation Plan was under consideration by NERC and for a reasonable period following NERC's disapproval of the Mitigation Plan, so long as the Registered Entity promptly submits a modified Mitigation Plan that addresses the concerns identified by NERC.

c. Time Period for NERC consideration of a Mitigation Plan that has been approved by the Regional Entity. TANC suggests CMEP §6.5 should provide for NERC to complete within thirty days its review of a Mitigation Plan that has been approved by a Regional Entity.³⁰ NERC agrees a specific time period should be established for its review, and believes thirty days is a reasonable period for this purpose. Accordingly, the second sentence of the second paragraph of §6.5 should be revised as follows:

NERC will review the accepted Mitigation Plan and, within thirty (30) days following its receipt of the Mitigation Plan from the Regional Entity, will notify the Regional Entity, which will in turn notify the Registered Entity, as to whether the Mitigation Plan is approved or disapproved by NERC.

d. Figure 6.1. Finally, TANC points out that Figure 6.1, "Mitigation Plan Process," of the CMEP has not been revised to be consistent with revised §6.5, including the NERC review of a Mitigation Plan after it has been accepted by the Regional Entity.³¹ NERC will revise Figure 6.1 to be consistent with the text.

3. Other Items – Process for obtaining interpretations of Reliability Standards.

One commenter suggested there may be a need for a process by which an entity may request an interpretation of a Reliability Standard to guide its compliance efforts and operations.³² NERC, working with the Regional Entities, has an informal process which can be more appropriately formalized in the future through the NERC Rules of Procedure. However, this process would

³⁰TANC Comments at 7-10.

³¹TANC Comments at 7, note 16.

³²EI-NRECA Comments at 4.

not be appropriate for inclusion in the CMEP or the Hearing Procedures.

IV. CONCLUSION

The North American Electric Reliability Corporation respectfully requests that the Commission (1) allow this Answer to the November 30 Comments, and (2) consider the points made by NERC and the Regional Entities in this Answer in determining whether to approve the uniform Compliance Monitoring and Enforcement Program and Attachment 2 – Hearing Procedures submitted as part of NERC’s October 30 Compliance Filing.

Respectfully submitted,

/s/ Rick Sergel
Rick Sergel
President and Chief Executive Officer
David N. Cook
Vice President and General Counsel
North American Electric Reliability Corporation
116-390 Village Boulevard
Princeton, NJ 08540-5721
(609) 452-8060
(609) 452-9550 – facsimile
david.cook@nerc.net

/s/ Owen E. MacBride
Owen E. MacBride
Debra Ann Palmer
Schiff Hardin LLP
1666 K Street, N.W., Suite 300
Washington, DC 20006
(202) 778-6400
(202) 778-6460 – facsimile
omacbride@schiffhardin.com
dpalmer@schiffhardin.com

Rebecca J. Michael, Attorney
North American Electric Reliability
Corporation
1120 G Street, N.W., Suite 990
Washington, D.C. 20005-3801
(202) 393-3998
(202) 393-3955 – facsimile
Rebecca.michael@nerc.net

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Chicago, Illinois this 14th day of December, 2007.

/s/ Owen E. MacBride
Owen E. MacBride

*Attorney for North American Electric
Reliability Corporation*

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