

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation )

Docket No. RR06-1-003

**REQUEST OF THE  
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION  
FOR CLARIFICATION, OR IN THE ALTERNATIVE, FOR REHEARING,  
OF ORDER ON COMPLIANCE FILING**

**I. INTRODUCTION**

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713, the North American Electric Reliability Corporation ("NERC") requests clarification of the Commission's January 18, 2007, order<sup>1</sup> that approved, in part, and required further changes to the proposed Rules of Procedure NERC filed with the Commission on October 18, 2006, in compliance with the Commission's July 20, 2006, order certifying NERC as the electric reliability organization ("ERO") under Section 215 of the Federal Power Act ("FPA").<sup>2</sup> NERC is requesting clarification, or in the alternative rehearing, with respect to two elements of the January 18 Order, and is requesting only clarification with respect to a third element of the January 18 Order.

**II. REQUEST FOR CLARIFICATION**

NERC requests clarification with respect to three elements of the January 18 Order.

**Issue 1: NERC seeks clarification that when the Commission orders development of a reliability standard addressing a specific matter and/or sets specific deadlines, NERC may use its standards development process to develop the reliability standard specified by the Commission, but with modifications to the standards development process to meet the Commission's timing directives.**

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<sup>1</sup> *North American Electric Reliability Corporation*, 118 FERC ¶ 61,030 (2007) (the "January 18 Order").

<sup>2</sup> *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 (2006) (the "ERO Certification Order").

NERC requests clarification that this is the Commission's intention, which as shown in Section IV.A below is consistent with the Commission's statutory authority under Section 215 of the FPA. NERC summarizes in this filing how it intends to comply with this portion of the January 18 Order, assuming NERC's understanding of this portion of the January 18 Order is correct.<sup>3</sup> NERC believes its planned compliance actions will fully comply with both the spirit and the specific requirements of this portion of the January 18 Order.

**Issue 2: NERC seeks clarification that under the terms of the January 18 Order, NERC may continue to use its standards development process to develop violation risk factors if that process works to produce timely results, so long as NERC also amends its Rules of Procedure to establish an alternative procedure that ensures violation risk factors are available when needed.**

NERC describes below (in Section IV.B) how it plans to comply with this portion of the January 18 Order, assuming NERC's understanding of this portion of the January 18 Order is correct.

**Issue 3: NERC seeks clarification that the Commission's directives to include in the Base Penalty Amount Table the statutory maximum penalty of \$1,000,000 per violation per day and to state all penalty amounts in the table on a per violation, per day basis do not prevent NERC or the regional entities from imposing penalties based on a different time period where a particular reliability standard calls for that result.**

The January 18 Order directs NERC to modify the Base Penalty Amount Table to include the statutory maximum penalty of \$1,000,000 per violation per day and to state all penalty amounts on the table on a per violation, per day basis.<sup>4</sup> As described in Section IV.C below, NERC will comply with this directive, but requests clarification that the Commission does not intend that strict application of "per violation per day" will be required where a particular reliability standard calls for a different result. For example, violation of a requirement in a standard that is stated on the basis of a monthly average should not result in imposition of the statutory

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<sup>3</sup> NERC's compliance filing is due on or before March 19, 2007. January 18 Order, P 1.

<sup>4</sup> January 18 Order, PP 87, 88.

maximum penalty amount for every day of the month in which the required monthly average was not achieved by the registered entity.

## **II. STATEMENT OF ISSUES/SPECIFICATION OF ERROR FOR ALTERNATIVE REQUEST FOR REHEARING**

If the Commission disagrees with NERC's requested clarifications on Issues 1 and 2, then NERC, in the alternative, requests rehearing on these issues. Pursuant to 18 C.F.R. § 395.713(c)(1) and (2), NERC seeks, in the alternative, rehearing on the following issues:

1. **Issue 1:** In P 27 and footnote 18 of the January 18 Order, the Commission has erroneously (i) stated that the Commission may prescribe the substantive contents of a reliability standard and order the ERO to adopt that standard, without allowing the ERO to use a standards development process that meets the requirements of Section 251(c) of the FPA, and (ii) required NERC, as the ERO, to have procedures in place to enable it to promulgate and adopt a reliability standard on a Commission-specified topic, within a limited time frame, without using a standards development process that meets the requirements of Section 215(c). These provisions of the January 18 Order are contrary to Sections 215(c) and (d) of the FPA and to Sections 39.3(b)(2)(iv) and 39.5(c) of the Commission's regulations, which (i) require the ERO to use a standards development process that provides for "reasonable notice and opportunity for public comment, due process, openness and balance of interests"; (ii) authorize the Commission to approve or disapprove proposed reliability standards submitted by the ERO, but do not authorize the Commission itself to promulgate reliability standards, and (iii) require the Commission, in considering proposed reliability standards submitted by the ERO, to give due weight to the technical expertise of the ERO with respect to the content of the standards. The Commission should grant rehearing and revise this portion of the January 18 Order.

2. **Issue 2.** In P 91 of the January 18 Order, the Commission has erroneously required NERC to develop violation risk factors for reliability standards through the procedure described in Section 1400 of the NERC Rules of Procedure, and has precluded NERC from using its standards development process to develop and adopt violation risk factors. Because developing violation risk factors is an integral part of developing the reliability standards to which the violation risk factors apply, this provision of the January 18 Order is contrary to Section 215(c) of the FPA and to Sections 39.3(b)(2)(iv) and 39.5(c) of the Commission's regulations, which (i) require the ERO to use a standards development process that provides for "reasonable notice and opportunity for public comment, due process, openness and balance of interests"; and (ii) require the Commission, in considering proposed reliability standards submitted by the ERO, to give due weight to the technical expertise of the ERO with respect to the content of the standards. The Commission should grant rehearing and revise this portion of the January 18 Order.

#### IV. ARGUMENT

- A. Issue 1: NERC seeks clarification that when the Commission orders development of a reliability standard addressing a specific matter and/or sets specific deadlines, NERC may use its standards development process to develop the reliability standard specified by the Commission, but with modifications to the standards development process to meet the Commission's timing directives.**

**Request for Clarification.** The January 18 Order, in the "Commission's Conclusion" under "Urgent Action on Standard Development," contains the following two statements:

Finally, NERC's expedited urgent action process does not make it clear that the Commission can order expedited standard development in a specific time frame and that NERC must adhere to that time frame and still allow for due process.<sup>5</sup>

When NERC receives a Commission directive ordering the development of a standard, NERC is required to file a standard within the time prescribed by the Commission. If NERC disagrees with the Commission's directive, it should timely seek rehearing of the Commission's order.<sup>6</sup>

NERC understands the Commission to be stating that it can direct NERC, as the ERO, to develop a reliability standard on a particular topic specified by the Commission, and to submit it for Commission approval, within a time frame stated by the Commission, and that in these circumstances NERC must develop and submit a standard on the particular topic within the required time frame. Such directives, of course, would be consistent with Section 215(d)(5) of the FPA and Sections 39.5(f) and (g) of the Commission's regulations. NERC further understands the Commission to be concluding that NERC presently does not have procedures that will enable NERC to satisfy such directives, and that NERC should submit, in its compliance filing, revised or additional procedures that will enable NERC to do so. Additionally, NERC does not understand the Commission to be stating that in such circumstances, NERC will be required to depart from use of its Reliability Standards

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<sup>5</sup> January 18 Order, at P 27.

<sup>6</sup> January 18 Order, fn. 18.

Development Procedure; rather, NERC understands the Commission to be stating that NERC may continue to use the standards development process, but must have provisions in place to allow the development process to be exercised in a time frame that meets the Commission's directive. If NERC has correctly interpreted these provisions of the January 18 Order, then NERC does not dispute them and, as described below, will submit a timely compliance filing that satisfies these provisions.

In response to the Commission's concerns and directives regarding NERC's standards development process in the section of the January 18 Order on "Urgent Action on Standard Development", NERC plans to do the following in its compliance filing:

- (1) NERC will include a provision(s) in its Rules of Procedure<sup>7</sup> under which NERC will set schedules and deadlines as necessary, in both the regular and the expedited standards development procedures, to meet specific deadlines imposed by the Commission in remand orders and in orders directing the development of reliability standards.
- (2) NERC will provide in its Rules of Procedure for expedited standards development in "extraordinary circumstances" without further limitation.
- (3) NERC will provide in its Rules of Procedure for either the Commission or the NERC board of trustees to determine that "extraordinary circumstances" exist requiring expedited standards development.
- (4) NERC will provide in its Rules of Procedure that, when NERC adjusts timelines and establishes expedited schedules to meet Commission-imposed deadlines, NERC must still allow for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards.
- (5) NERC will specifically address in its Rules of Procedure how NERC will initiate the development of a new or revised reliability standard in response to a Commission directive separate from the standards authorization request process.
- (6) Finally, NERC will include a provision(s) in its Rules of Procedure clearly specifying that making an urgent action reliability standard permanent, replacing it, or withdrawing it, are all subject to Commission approval and, to the extent necessary, the approval of other governmental authorities with oversight over the ERO.

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<sup>7</sup> NERC's Rules of Procedure include its Reliability Standards Development Procedure which is Appendix 3A to the Rules of Procedure. The revisions and new provisions described herein may be placed in an existing or new provision of Section 300 of the Rules of Procedure, in the Reliability Standards Development Procedure, or in both places, as necessary.

NERC believes its proposed compliance actions will fully address what NERC understands to be the concerns the Commission expressed in the January 18 Order regarding the ERO's ability to comply with a Commission directive to adopt a reliability standard on a particular topic within a time frame set by a Commission order. Importantly, with these modifications, when the Commission orders NERC to develop a new or modified reliability standard that addresses a specific matter, NERC will still be able to use a standards development process compliant with the requirements of Section 215 to bring the technical expertise of the ERO to bear on the issue and to propose alternatives to the substantive requirements (if any) contained in the Commission's order. This will enable NERC to, for example, point out that the Commission's proposed solution may be incompatible with other reliability requirements and to present an alternative solution to the issue that does not conflict with other reliability requirements.

Accordingly, NERC requests clarification from the Commission that NERC is correctly interpreting these elements of the January 18 Order, so that NERC may proceed with its proposed compliance actions, including the revisions to its Rules of Procedure described above.

**Alternative Request for Rehearing.** If, however, the Commission is stating in P 27 and footnote 18 of the January 18 Order (i) that it may prescribe the substantive contents of a reliability standard and order the ERO to adopt that standard, or (ii) that NERC must have procedures in place that enable it to promulgate and adopt a reliability standard on a Commission-specified topic, within a limited time frame, without using a standards development process conforming to the requirements of Section 215 of the FPA, then the Commission's conclusion is contrary to Section 215 and the Commission's regulations in Part 39. If this is the Commission's conclusion, the Commission should, for the reasons presented below, grant

rehearing on this issue and modify the January 18 Order. NERC's alternative request for rehearing is occasioned by two aspects of the language from the January 18 Order.

*First*, the statement in P 27 that “NERC must adhere to that time frame and still allow for due process” omits the other requirements imposed by Section 215 of the FPA and Part 39 of the Commission's regulations on the nature of the ERO's standards development process. Specifically, Section 215(c)(2)(D) of the FPA and Section 39.3(b)(2)(iv) of the Commission's regulations<sup>8</sup> require that the ERO's standards development process provide for “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.” In the ERO Certification Order, the Commission found NERC's reliability standards development process satisfies these requirements.<sup>9</sup> NERC is concerned that by omitting reference to any of these requirements other than due process, the quoted language from the January 18 Order could be read to say that when the Commission orders expedited development of a standard, NERC must depart from using a consensus-based standards development process as required by the FPA and the Commission's regulations, and follow some other unspecified process that, in the interests of expedition, will not provide for “reasonable opportunity for public comment, . . . openness and balance of interests” as does the NERC standards development procedure.

*Second*, footnote 18 of the January 18 Order states that “When NERC receives a Commission directive ordering the development of a reliability standard, NERC is required to file a standard within the time prescribed by the Commission.” That language could be read to say that when the Commission directs NERC to develop a reliability standard within a particular

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<sup>8</sup> 18 C.F.R. §39.3(b)(2)(iv).

<sup>9</sup> ERO Certification Order, P 250. As NERC has pointed out in previous filings in this docket and as the Commission recognized in the ERO Certification Order, NERC's standards development process has been accredited by the American National Standards Institute as a valid consensus-based process. *See* ERO Certification Order, P 252.

timeframe, NERC is obligated to propose such a standard to the Commission, without using the ERO's standards development process, without the opportunity for NERC, as the ERO, to bring its technical expertise to bear on the problem at hand, and without the opportunity for the ERO to suggest alternative solutions. NERC submits that a Commission directive to the ERO to adopt a reliability standard with prescribed substantive content (rather than using the ERO's standards development process to develop a standard addressing a *subject matter* specified by the Commission), would be contrary to Section 215(c) and (d) of the FPA and Section 39.3(b)(2)(iv) of the Commission's regulations. Similarly, the Commission must also abide by the FPA's directives as to the *process* that the ERO is to use in developing reliability standards, including standards directed by the Commission.

When it passed the Energy Policy Act of 2005<sup>10</sup>, Congress made a deliberate choice about how reliability standards were to be developed. Section 215 specifies the following about the development and adoption of reliability standards:

- (i) The rules of the ERO must provide for reasonable notice and comment, due process, openness, and balance of interests in developing reliability standards.<sup>11</sup>
- (ii) The Commission may approve a reliability standard proposed by the ERO that meets the statutory requirements, but is required to remand to the ERO a standard that the Commission disapproves.<sup>12</sup>
- (iii) The Commission must give due weight to the technical expertise of the ERO, but shall not defer with respect to the effect of a standard on competition.<sup>13</sup>
- (iv) The Commission may also order the ERO to submit a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out Section 215.<sup>14</sup>

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<sup>10</sup> Pub. L. No. 109-58, 119 Stat. 594, August 8, 2005.

<sup>11</sup> Section 215(c)(2)(B)(iv).

<sup>12</sup> Section 215(d)(2) and (4).

<sup>13</sup> Section 215(d)(2)(B).

<sup>14</sup> Section 215(d)(5).

The Commission's implementing regulations mirror these requirements. 18 C.F.R. §§ 39.3(b)(v) and 39.5(c), (e) and (f).

Equally important is what the statute does not say. Section 215 does not give the Commission authority to rewrite a standard proposed by the ERO. The absence of authority in Section 215 for the Commission to rewrite a proposed reliability standard stands in sharp contrast to the Commission's authority with respect to rates and tariffs under Section 206 of the FPA, where the Commission is given explicit authority to change or "fix" the rate or practice to be thereafter observed by the electric utility. Moreover, Section 215 contains no grant of authority to the Commission to write reliability standards itself and specifies no process for the Commission to use in developing reliability standards. The reason for these omissions is clear: Congress never intended for the Commission itself to develop reliability standards, but rather only for the Commission to approve or reject reliability standards developed and proposed by the ERO through a process satisfying the requirements of Section 215(c).

During consideration of the proposed energy legislation in 2002, the Senate had an extended debate over the nature of the reliability legislation. Senator Bingaman, then chairman of the Senate Energy and Natural Resources Committee, sponsored a bill that included reliability language that would have given the Commission direct authority to set reliability standards:<sup>15</sup>

**SEC. 215. ELECTRIC RELIABILITY STANDARDS.**

(a) DUTY OF THE COMMISSION.— The Commission shall establish and enforce one or more systems of mandatory electric reliability standards to ensure the reliable operation of the interstate transmission system, which shall be applicable to—

- (1) any entity that sells, purchases, or transmits, electric energy using the interstate transmission system, and

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<sup>15</sup> "Energy Policy Act of 2002," S. 1766, 107<sup>th</sup> Congress, introduced by Senators Daschle and Bingaman, Dec. 5, 2001, § 207.

(2) any entity that owns, operates, or maintains facilities that are a part of the interstate transmission system.

(b) STANDARDS. -- In carrying out its responsibilities under subsection (a), the Commission may adopt and enforce, in whole or in part, a reliability standard proposed or adopted by the North American Electric Reliability Council, a regional reliability council, a similar organization, or a State regulatory authority.

However, Senator Bingaman's language did not pass. Instead, following a floor debate, the Senate adopted a substitute amendment sponsored by Senator Thomas that was in all material respects the same as the reliability language ultimately adopted in the Energy Policy Act of 2005.<sup>16</sup> With respect to developing reliability standards, the Thomas amendment and Section 215, as enacted, are identical: The rules of the ERO must provide for notice and comment, due process, openness, and a balance of interests in developing reliability standards.<sup>17</sup> These are the hallmarks of a consensus-based process for developing reliability standards.<sup>18</sup>

Moreover, Section 215, as enacted, contains no exceptions to the process the ERO must use in developing reliability standards. Notably, reliability legislation similar to what ultimately was adopted in 2005 was first introduced in Congress on May 17, 1999; that original legislation had similar requirements to Section 215 for the development of reliability standards, but also contained the following language: "except that the procedures may include alternative

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<sup>16</sup> The Thomas Amendment (S.A. No. 3012) was adopted by the Senate by voice vote on March 14, 2002, after withstanding a point of order raised by Senator Bingaman against the amendment under the Congressional Budget Act. *See* 148 Cong. Rec. S1872-S1882; S1884-S1892; S1896-S1897 (daily ed., March 14, 2002).

<sup>17</sup> Senator Bingaman expressly acknowledged during the floor debate that the reliability language in Senator Thomas' amendment did not provide authority for the Commission to write reliability standards. *See* the remarks of Senator Bingaman during floor debate on March 14, 2002. 148 Cong. Rec. S1874-S1877; S1879-S1881; S1895-S1896 (daily ed. Mar. 14, 2002). *Compare* the remarks of Senator Thomas in support of legislation that eventually became Section 215 of the FPA. 148 Cong. Rec. S1873ff. (daily ed. Mar. 14, 2002).

<sup>18</sup> Not coincidentally, these were also the characteristics of the standards development process NERC already had in place at the time the Congress passed the Energy Policy Act of 2005.

procedures for emergencies.”<sup>19</sup> The language authorizing exceptions to or deviations from the required standards development process in event of emergencies was not carried forward in the reliability legislation Congress adopted in 2005. Accordingly, as the ERO, NERC must abide by the processes required by the statute when it develops reliability standards, including “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.”

As stated above, Section 215(d)(5) does give the Commission authority to order the ERO to submit a proposed reliability standard that addresses a specific matter. The questions raised by the statements from the January 18 Order quoted above are (1) can the Commission dictate the specific content of a proposed reliability standard, and (2) can the Commission order the ERO to depart from the standards process required by Section 215(c) to adopt a standard on a specified topic or within a time frame specified by the Commission. In light of what Congress said, and what Congress considered but did not say, in Section 215, these questions must be answered “no.”

Two important policy considerations support Congress’ decision not to authorize the Commission to write reliability standards. *First*, the bulk power system is a very large, complex machine with its parts spread across the entire continent. No one person or entity possesses the knowledge and technical expertise to “know” what the right standard is, or what the right modification to a standard would be. Congress required the Commission to give due weight to the technical expertise of the ERO with respect to the content of the reliability standards. Congress also mandated the use of a standards development process that, by providing for “reasonable notice and opportunity for public comment, due process, openness, and balance of interests” would enable (indeed require) the ERO’s standards process to encompass the

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<sup>19</sup> See §601(a) of the “Comprehensive Electricity Competition Act,” H.R. 1828, 106<sup>th</sup> Congress (1999), proposing a new Section 218(e)(4)(G) of the FPA.

collective technical expertise of the entire industry, from all sectors, operators and users alike, and from the variety of experiences that stakeholders possess.

*Second*, the bulk power system is international in scope. It is a very large machine spanning the international border that must operate to a common set of rules. Congress recognized the international nature of the bulk power system, because Section 215(c)(2)(B)(v) requires the ERO to seek recognition in Canada and Mexico. The Commission's rules implementing Section 215 impose that same requirement.<sup>20</sup> Having the ERO (rather than the Commission) develop reliability standards provides a forum wherein the interests of parties on both sides of the border can be aired and reflected in the standards development process. The principles adopted by the Bilateral Electric Reliability Oversight Group in 2005 mandated that the ERO have sufficient Canadian participation in all its committees and standards development efforts so as to ensure that Canadian interests are sufficiently reflected in the development of the reliability standards NERC proposes. NERC's Rules of Procedure relating to standards development reflect that principle.<sup>21</sup> If the Commission were to prescribe the specific, substantive content of a reliability standard, the required opportunity for direct Canadian participation (and in the future, for Mexican participation) in the development of the standard would be lost.

The Commission has also directed the ERO to work with government authorities in Canada to coordinate development and approval of reliability standards.<sup>22</sup> NERC is concerned that if the Commission asserts the right to dictate the specific, substantive content of a reliability

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<sup>20</sup> 18 C.F.R. § 39.3(b)(2)(v).

<sup>21</sup> NERC Rules of Procedure, Section 306.3.

<sup>22</sup> *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104 (2006), P 400.

standard, other jurisdictions may assert the same right. Should that occur, the ERO, rather than having a coordinated set of integrated reliability standards, could be faced with a set of conflicting requirements on the standards to be adopted (and, ultimately, enforced) by the ERO.

The question remains, nevertheless, whether, in the face of a declared emergency, there is authority or justification to depart from the policy choices Congress made as to the author of reliability standards and the process by which standards are to be developed. As noted above, although an earlier version of the reliability legislation contained an express authorization for use of something other than the full standards development process in response to emergencies, Congress chose not to include such an exception in the final statutory language. Further, emergency situations are not the time to be developing new standards or changing existing standards. Because of the highly integrated nature of the bulk power system and the entire set of reliability standards that govern its operation, changing reliability standards in the midst of an emergency risks serious unintended consequences. The reliability coordinators and others with operational responsibility for the reliability of the bulk power system already have the obligation to take whatever steps are necessary to protect the reliability of the system. In addition, remedial action directives issued by NERC and the regional entities, and compliance orders issued by the Commission, are a far better and more efficient way of proceeding in the event of an emergency situation where the needed actions are clear-cut.

If the Commission sets a deadline when it exercises its authority to remand a standard or to order the ERO to submit a standard addressing a specific matter, the deadline must be reasonable in light of the requirements Section 215 and the Commission's regulations impose on the ERO in developing reliability standards. Adoption or modification of reliability standards requires careful consideration of the impact of the proposed change, lest a hastily imposed

“solution” create unintended consequences that could increase the risk to the reliability of the system. NERC has proposed ways of expediting its standards process when circumstances warrant.<sup>23</sup> But the statute provides no authority for the ERO to depart, or to be required to depart, from the standards process altogether. In short, the words of the statute matter, and necessity (in the event of an emergency) does not convey authority.

In this alternative request for rehearing, NERC has perhaps posited an extreme interpretation of the Commission’s intention in the January 18 Order. But we are at the outset of the implementation of Section 215, and it is important to get the rules right at the beginning. An emergency situation, should one arise, would be the worst time to be having a dispute about who has what authority.<sup>24</sup>

- B. Issue 2: NERC seeks clarification that under the terms of the January 18 Order, NERC may continue to use its standards development process to develop violation risk factors if that process works to produce timely results, so long as NERC also amends its Rules of Procedure to establish an alternative procedure that ensures violation risk factors are available when needed.**

**Request for Clarification.** Determination of the penalty to be imposed for violation of a reliability standard is a function of, among other factors, the violation risk factor associated with violations of the reliability standard. In the January 18 Order, the Commission directed NERC “to develop the Violation Risk Factors through the procedure described in section 1400 of its

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<sup>23</sup> As directed in the January 18 Order, in its compliance filing NERC will revise its rules of procedure to include the Commission’s ability to declare an emergency triggering shortened standards procedures.

<sup>24</sup> The statement in footnote 18 of the January 18 Order that, “If NERC disagrees with the Commission’s directive, it should timely seek rehearing of the Commission’s order,” is not a sufficient answer. In an emergency situation, legal proceedings ought not to be the preferred course of action. Moreover, the 30-day rehearing period is not conducive to the careful technical analysis that changes to the complex set of reliability standards demands.

Rules of Procedure.”<sup>25</sup> The Commission expressed concern that using the NERC standards development process would not produce violation risk factors in sufficient time for Commission review and approval before reliability standards become effective on June 1, 2007.<sup>26</sup> NERC requests clarification that it may continue to use its standards development process to develop violation risk factors, as long as the process works to produce the factors in a timely manner, with the understanding that NERC will also include in its Rules of Procedure an alternative process if the standards process does not yield violation risk factors in a timely manner.

In the compliance filing it makes on or before March 19, 2007 in response to the January 18 Order, NERC will propose an amendment to its Rules of Procedure adopting such a process. NERC will base the alternative process on the procedures set forth in Section 1400 of the Rules of Procedure.<sup>27</sup> However, NERC should not be prohibited from using the standards development process for developing and adopting the violation risk factors, if that process works, and therefore requests clarification that this is not the Commission’s intent.

Development of the violation risk factors calls for application of the same technical expertise and judgment as does development of the reliability standards themselves. The most appropriate time to bring that expertise and judgment to bear is in conjunction with development of the standards. Contrary to the statement in the January 18 Order<sup>28</sup>, NERC’s standards development process does include the violation risk factors within the standards development

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<sup>25</sup> January 18 Order, P 91.

<sup>26</sup> January 18 Order, PP 90-93.

<sup>27</sup> The Section 1400 procedures include notice and an opportunity for public comment, followed by approval by the NERC board of trustees. The procedures do not include a vote by the registered ballot body.

<sup>28</sup> January 18 Order, P 91.

process.<sup>29</sup>

NERC also believes the standards process will be able to produce the violation risk factors in the time frame required. NERC's standards ballot body has now voted by a sector-weighted vote of 88.2 % to approve the violation risk factors for the Version 0 reliability standards, and NERC's board of trustees approved those violation risk factors on February 13, 2007. NERC will file the Version 0 violation risk factors with the Commission during the week of February 19, 2007. The violation risk factors for the Version 1 reliability standards are now being balloted, with the first ballot being held from February 14 to February 23, 2007, and the second ballot scheduled to be held from February 26 to March 7, 2007. Assuming a successful ballot, the final results will be available for consideration and approval by the NERC board of trustees during the week of March 12, 2007, and therefore ready for filing with the Commission on March 19, 2007, as part of or contemporaneous with NERC's compliance filing to the January 18 Order. For the future, NERC expects that violation risk factors will be developed at the same time the associated reliability standards are being developed, so that the Commission will no longer be faced with the prospect of being asked to approve a reliability standard that does not have the appropriate violation risk factors associated with it.

**Alternative Request for Rehearing.** If it is the Commission's intention in P 91 of the January 18 Order to prohibit NERC from using the standards development process to develop the violation risk factors, then NERC asks the Commission to grant rehearing on this issue and modify the January 18 Order to provide that NERC may continue to use its standards development process to develop violation risk factors, as long as the process works to produce the factors in a timely manner, with the understanding that NERC will also include in its Rules of

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<sup>29</sup> NERC Rules of Procedure, Appendix 3A, "Reliability Standards Development Procedure," Version 6.0, p. 7.

Procedure an alternative process if the standards process does not yield violation risk factors in a timely manner (which, as noted above, NERC will include in its March 19 compliance filing). As explained above, development of the violation risk factors is an integral part of developing the standards to which they apply. For the reasons described in NERC's alternative request for rehearing on Issue 1 in this Petition, the development of standards by the ERO for adoption and submission to the Commission for approval must be accomplished through a process that meets the requirements of Section 215(c) of the FPA. Requiring the ERO to develop the violation risk factors – which are a component of the reliability standards -- through a process that does comport with the requirements of Section 215(c) (and Sections 39.3(b)(2)(iv) and 39.5(c) of the Commission's regulations) would violate those provisions.

**C. Issue 3: NERC seeks clarification that the Commission's directives to include in the Base Penalty Amount Table the statutory maximum penalty of \$1,000,000 per violation per day and to state all penalty amounts in the table on a per violation, per day basis do not prevent NERC or the regional entities from imposing penalties based on a different time period where a particular reliability standard calls for that result.**

The January 18 Order directs NERC to modify the Base Penalty Amount Table to include the statutory maximum penalty of \$1,000,000 per violation per day and to state all penalty amounts in the table on a per violation, per day basis.<sup>30</sup> In its compliance filing, NERC will modify the Base Penalty Amount Table as directed. However, for some reliability standards, imposing penalties on a “per violation, per day” basis will not make sense in the context of the requirements of the standard – certain standards may warrant application of penalties on either a more frequent or less frequent basis than “per violation, per day.” NERC therefore requests clarification from the Commission that a strict application of “per violation per day” will not be required where a particular reliability standard calls for a different result.

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<sup>30</sup> January 18 Order, PP 87, 88.

As an example, standard BAL-001-0, “Real Power Balancing Control Performance,” establishes the requirements to balance load and generation thereby maintaining system frequency. Requirement 2 in this standard, commonly known as Control Performance Standard or CPS 2, specifies that “Each Balancing Authority shall operate such that its average ACE for at least 90% of clock-ten-minute periods (6 non-overlapping periods per hour) during a calendar month is within a specific limit.” If a registered entity violates the Control Performance Standard for a particular month, that situation would be treated as a single violation (failure to meet the required monthly average) and not thirty one-day violations.

As a second example, if a registered entity violated standard TOP-007-0, “Reporting System Operating Limit and Interconnection Reliability Operating Limit Violations,” which establishes requirements for returning the system to a safe operating state if an Interconnection Reliability Operating Limit is exceeded, on two occasions on the same day, this would be treated as two separate violations and could be penalized as such, even though the violations occurred on a single day. Sanctions for those two violations would not be subjected to a single “per violation per day” limit.

Accordingly, NERC requests clarification that in PP 87-88 of the January 18 Order, the Commission is only requiring that the “per violation per day” specification in the Base Penalty Amount Table mean that where a violation continues for more than one day, each day can be considered a separate violation; and that the Commission is **not** requiring (i) that a failure to meet a requirement measured on the basis of an average for a month or other period longer than a day must result in imposition of the penalty amount for each day in the measurement period, or (ii) that multiple violations of a standard on a single day can only be considered as one violation for purposes of imposing the penalty amount.

## V. Conclusion

For the reasons set forth in this filing, NERC requests that the Commission issue an amendatory or supplemental order to the January 18 Order clarifying the intent of the January 18 Order in a manner consistent with NERC's understanding of the January 18 Order on the three issues addressed herein. Alternatively, if NERC's understanding of either of the two elements of the January 18 Order addressed in Issues 1 and 2 is not correct, then for the reasons set forth in this filing, the Commission should grant rehearing as to that element(s) and should modify it in accordance with the points raised by NERC herein.

Respectfully submitted,

/s/ 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 08540-5731  
(609) 452-8060  
(609) 452-9550 – facsimile  
[rick.sergel@nerc.net](mailto:rick.sergel@nerc.net)  
[david.cook@nerc.net](mailto: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 20036-4390  
(202) 778-6400  
(202) 778-6460 – facsimile  
[omacbride@schiffhardin.com](mailto:omacbride@schiffhardin.com)  
[dpalmer@schiffhardin.com](mailto:dpalmer@schiffhardin.com)

February 20, 2007

**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 Washington, DC, this 20th day of February, 2007.

/s/ Debra Ann Palmer  
Debra Ann Palmer  
Schiff Hardin LLP  
1666 K Street, NW  
Suite 300  
Washington, DC 20006

*Attorney for  
North American Electric Reliability Corporation*