City of Austin dba Austin Energy
Comments Regarding Proposed Changes to NERC Rules of Procedure
Submittal: December 22, 2011

City of Austin dba Austin Energy ("AE") appreciates the opportunity to provide comments to the North American Electric Reliability Corporation ("NERC") on proposed changes to the NERC Rules of Procedure (ROP).

NERC ROP SECTIONS 100-1600

Section 200 – Definition of Terms
202 – AE disagrees with the definition of a "Confirmed Violation" because a settlement agreement does not confirm that a violation occurred. In fact, most of the settlement agreements currently in existence indicate the Registered Entity did not concede that a violation occurred.

Section 400 – Compliance Enforcement
403, Item 6, Regional Entity Compliance Staff Independence, indicates the RE Staff shall determine penalties, sanctions, *mitigating activities* and remedial action directives. Registered entities determine the mitigating activities they deem appropriate while the Regional Entity *approves* those activities. Furthermore "mitigating activities" is not defined and could cause confusion. It should be defined or removed from this section. AE also recommends that it be removed from all other sections of the ROP unless it is clarified, in which case it must be reviewed in a future revision of the ROP where it can be determined if the use is appropriate.

403, Item 15 – This item allows a Regional Entity to appeal the outcome of its own hearings. This is contrary to normal due process and does not seem logical. In effect, the Regional Entity would be appealing its own decision. If the Regional Entity's own hearing body does not uphold the proposed penalty or violation, there should be no further action.

408, Item 1 – Similar to 403, reference to the Regional Entity having opportunity for appeal should be removed.

409, Item 1 – Similar to issues in 403 and 408, reference to the Regional Entity being entitled to appeal a decision of the hearing body should be removed.

NERC proposes to modify Section 409 of the ROP to allow a regional entity acting as the compliance enforcement authority to appeal a final decision of a its hearing body. AE does not support such a change. Under the current ROP, only a registered entity may appeal the decision of a regional entity hearing body. This is because the entire appeals process at the regional entity level is built around the notion that the regional entity hearing body will issue the final decision for the region. Any position to the contrary flies in the face of the *title* of Section 409—Appeals

from Final Decisions of Regional Entities. It makes no sense to provide the regional entity the right to appeal its own decision.

Providing the regional entity with the same appeal rights given to registered entities runs counter to the spirit of the enforcement process set forth in Section 215 of the Federal Power Act. Under section 215, the appeal process begins when penalties are assessed. The entity against whom penalties are assessed can appeal those penalties. No other right to appeal or basis for appeal is provided. This makes sense because the statutory structure provides the entities subject to enforcement appropriate due process, while securing the finality of the decision-making process. Appeals from a regional entity to NERC should be no different. It is inappropriate to modify the ROP in a manner that would allow the regional entity to file an appeal with NERC every time that it disagrees with the finding of a regional entity hearing body.

As section 403.15 provides, the hearing body is established by the regional entity itself to provide a "fair, independent, and nondiscriminatory process for hearing contested violations and any penalties or sanctions levied." If the regional entity's own hearing body does not uphold the proposed penalty or violation, the dispute should not continue. To establish a procedural mechanism through which a regional entity can appeal *its own decision* provides the regional entity an advantage not given to registered entities (*i.e.* "two bites at the apple") which is an inappropriate and unfair advantage in the enforcement process.

Providing the regional entities appellate rights undermines the due process rights of registered entities. Because registered entities do not have unlimited resources, the decision to take a matter to hearing will rarely be taken lightly, given the cost of the procedure and the enormous penalties that may result in the event of an adverse outcome. Allowing a regional entity to appeal the decision of a regional entity hearing body eliminates any possibility of a timely resolution of the issues and creates a strong disincentive for registered entities to pursue their rights. Indeed, as a practical matter, the proposed changes may render the hearing process meaningless by compelling registered entities to risk spending limited time and resources in endless litigation when a regional entity files an appeal.

As a technical matter, AE notes that, under the proposed revisions to ROP section 409.3, the regional entity would be required to file the entire record of the regional entity hearing body process with NERC's director of enforcement, with a copy *to the entity filing the notice of appeal*. If the regional entity files the notice of appeal, it appears the regional entity would have not duty to provide the registered entity a copy of the entire record. If NERC approves the appeal right for the regional entity, it should clarify that all participants in the proceeding before the regional hearing body must receive a copy of the entire record.

AE objects to other similar changes in the ROP and Compliance Monitoring and Enforcement Program in Appendix 4C to the ROP (CMEP) that would allow the Compliance Enforcement Authority (CEA) to appeal findings of a hearing body.

Section 800 – Reliability Assessment and Performance Analysis
807 c. – The proposed additional language is not necessary because Reliability Standard EOP-004 already contains the requirement the entities report the information required by that reliability standard within the time periods specified in EOP-004.

807 e. – AE believes the referenced manual -- if it seeks to impose obligations on registered entities -- should be subject to stakeholder review through the standards process prior to putting it in place or revising it.

808, Item 3 -- The proposed additional language is not necessary because Reliability Standard EOP-004 already contains the requirement the entities report the information required by that reliability standard within the time periods specified in EOP-004.

Section 1400 – Amendments to the NERC Rules of Procedure
1401 – AE believes increasing the requirement to fifty members to request an amendment or repeal of the Rules of Procedure is not warranted. We would consider a change if compelling evidence indicates there is a need to make a change. Without such evidence, AE believes the requirement should remain at ten members.

Appendix 4C – Compliance Monitoring and Enforcement Program
1.1.9 – AE disagrees with the definition of a "Confirmed Violation." A settlement agreement does not, by itself, confirm that a violation occurred. In fact, most settlement agreements state that the registered entity does not admit to a violation.

3.1.4.2 – AE recommends a statement be added to read "The beginning date of a Compliance Audit will not be before the end date of the prior Compliance Audit." There should also be no expectation that an entity will retain documents past the required retention period in each standard. However, the final sentence in this section sets an expectation that there will be *some* method to demonstrate compliance for every standard. This is not in accordance with the Reliability Standard requirements approved by FERC; therefore, it should be stricken.

3.1.6 – Although compliance audits are thorough, they in no way allow an audit team to understand all the business and operational circumstances to know the best way to resolve issues within the registered entity's organization. Recommendations by the team, therefore, should remain non-binding. To ensure clarity, the sentence noting "recommendations should be considered non-binding" should remain.

> The audit team shall develop a draft audit report that shall include a description of the objective, scope, and methodology of the Compliance Audit; identify any evidence of potential noncompliance with Reliability Standards by the Registered Entity found by the audit team; identify any Remedial Action Directives, Mitigation Plans or other mitigating activities which have been completed or pending in the year of the Compliance Audit; and identify if any Confidential Information has been redacted. The report may also state areas of concern and recommendations identified by the audit team. Any recommendations contained in that document will be considered non-binding. The draft report will be provided to the Registered Entity for comment.

3.4.1 – AE is confused by the wording in this section. If registered entities have the ability to object to the participation of a specific NERC or FERC staff members on a Compliance Investigation team, we have no concerns.

5.4 – Thirty days is not adequate for responding to proposed penalties or sanctions. Instead, the Registered Entity should have sixty days to respond.

5.6 – This section adds the statement that the "Compliance Enforcement Authority may terminate settlement negotiations at any time." This introduces the possibility that the CEA could use this authority to force a settlement. Without having further information on why or how this authority will be used, AE recommends eliminating this from section 5.6.

5.7 – Similar to those references found in Section 400 (403, 408, 409), the Compliance Enforcement Authority should not be allowed to appeal the decision of the Regional hearing body.

6.0 – AE objects to the language in this section giving the Compliance Enforcement Authority unfettered authority to collect documents, data and information "in the manner it deems most appropriate, including removing [such documents, data and information] from the Registered Entity's location in accordance with appropriate security practices." Methods already exist to allow the CEA access to the information it needs to perform its role. The entire first sentence should be stricken.

Attachment 1, Page 2, paragraph one – Typo: "seasonable" should be "reasonable".

Attachment 1, Page 2, Steps 1 and 2 – In each case, five (5) business days should be changed to ten (10) business days to allow reasonable opportunity for proper response.

Attachment 2, Section 1.4.5, item (d) – Retain the limitation to add only the number of members required to create a quorum.

Appendix 8 – NERC Event Response Procedures

AE's primary concern with Appendix 8 is the introduction of new obligations imposed on the registered entities associated with the Event Analysis Process. While the Event Analysis Process was to be voluntary, used for collecting data and communicating lessons learned throughout the industry, the process described in the Rules of Procedure Appendix 8 is written as a compulsory reporting requirement. For example, the table included in Appendix 8 sets forth "Required Reports" a registered entity must provide by a specific deadline that involve specific, detailed analysis and explanation. Further, with respect to compliance, Appendix 4B indicates that if the violator is "cooperative in the event analysis process and performs an appropriate compliance self-analysis," the violator's actions will be considered as a mitigating factor in determining penalties or sanctions.

AE recognizes NERC's role in conducting periodic assessments of the reliability and adequacy of the bulk-power system. Pursuant to that authority, NERC's Rules of Procedure already provide for a reliability assessment and performance analysis program that authorizes NERC to collect from registered entities certain information necessary to analyze and report on major and off-normal events.[1] The changes proposed to the Rules of Procedure expand the criteria and circumstances under which NERC may seek information from registered entities and introduce mandatory and burdensome reporting obligations not required by Reliability Standards.

The Rules of Procedure provide procedural guidance for NERC processes. In this case, we believe it is being used inappropriately to address an issue that is not procedural in nature, but instead introduces substantive requirements that should be addressed more appropriately through the Standards Process. By using the Rules of Procedure rather than Reliability Standards to impose these obligations, it appears NERC would be able, in the future, to impose any number of obligations on registered entities regardless of whether those actions are warranted or optimal to address legitimate reliability concerns.

Under its grant of authority from both Congress and the FERC, NERC's primary responsibility is to develop and enforce reliability standards.[2] NERC is statutorily authorized to enforce reliability standards that have been approved by the FERC.[3] To be approved, standards must go through a process that allows for reasonable notice and opportunity for public comment,

[1] NERC Rules of Procedure, "Section 800, Reliability Assessment and Performance Analysis" (Apr. 12, 2011); *see* "NERC Blackout and Disturbance Response Procedures, Appendix 8 to the Rules of Procedure," (Oct. 18, 2007).

[2] *See* 16 U.S.C. § 824o(c) (providing that FERC may certify a person as the Electric Reliability Organization ("ERO") to develop and enforce reliability standards that provide for an adequate level of reliability of the bulk power system); *Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 61,062, p. 61 (2006).

[3] 16 U.S.C. § 824o(e).

openness and balance of interests.[4] We believe the standards process is the appropriate place for these increased obligations to be introduced and vetted by all stakeholders.

AE recommends that the changes proposed in Appendix 8 be rejected in their entirety and further recommends that this Appendix be re-written to include only a high level discussion of NERC's and the Regional Entities' roles in response to BPS events.

[4] 116 FERC ¶ 61,062, p. 65. *See generally* "Standards Process Manual, Appendix 3A to the Rules of Procedure," (Sept. 3, 2010).