

**RELIABILITYFIRST CORPORATION'S
COMMENTS ON PROPOSED REVISIONS TO THE NERC RULES
OF PROCEDURE SECTION 100-1600, APPENDICES 4B, 4C, 5A, and 8**

ReliabilityFirst Corporation (“ReliabilityFirst”) respectfully submits these comments in response to the Notice of Proposed Changes to Rules of Procedure issued by the North American Electric Reliability Corporation (“NERC”) on November 7, 2011, and to the Notice of Proposed Changes to the NERC Rules of Procedure – Appendix 4C with Revised new Sections 1.1.24 and 5.11, issued by NERC on November 22, 2011.

I. INTRODUCTION

ReliabilityFirst fully supports NERC’s efforts to improve the Rules of Procedure (“RoP”), and generally supports the revisions made to date. Any changes to the RoP should result in greater clarity and efficiency for Registered Entities and Regional Entities. Therefore, ReliabilityFirst does, however, respectfully question the need to, at this time, open and revise rules impacting and relating to the hearing process given the Regional Entities’ collective inexperience with the hearing process to date.¹ ReliabilityFirst suggests that NERC consider allowing the Regional Entities to obtain experience with the hearing process so an understanding of any current rule deficiencies, to the extent that there are any, may be better identified and future revisions may be developed simultaneously and considered from a more informed basis.

To the extent NERC feels an immediate need to proceed with the suggested revisions impacting and relating to the hearing process, ReliabilityFirst has two primary concerns with the current version of the suggested revisions.

II. EXPLANATION OF RELIABILITYFIRST’S CONCERNS AND SUGGESTED MODIFICATIONS

A. NERC Should Consider Not Adding Proposed Section 5.11 Or, in the Alternative, Simplifying Proposed Section 5.11.

1. Proposed Section 5.11 is Burdensome and Unncessary.

ReliabilityFirst has concerns that proposed Section 5.11 of the Compliance Monitoring and Enforcement Program (“CMEP”) will detrimentally impact the ability of Regional Entities having ISO/RTO registered entities to efficiently carry out their enforcement obligations. Proposed Section 5.11 establishes a new, burdensome procedure that prescripts the manner in

¹ ReliabilityFirst is unaware of any Region that has completed all steps involved in a hearing and, to the best of ReliabilityFirst’s knowledge; only one Region (ReliabilityFirst) has entered the Comment stage of a hearing.

which an ISO/RTO may include a third party during a Region's enforcement proceeding against an ISO/RTO. Among other things, proposed Section 5.11 mandates that multiple notices be issued within specified time periods (including the requirement that an RTO/ISO must determine and conclude that intervention is necessary within five days of commencement of the fact gathering phase of enforcement), likewise the Regional Entities must make final determinations that intervention is appropriate within this early fact gathering phase, the parties must engage in confidentiality negotiations and draft and execute confidentiality agreements for each intervention, and NERC, the Regional Entities, the ISO/RTO, and any targeted third party must create, continuously maintain and update, and consult a new Public Notification List that will now apparently play a significant administrative role in any requested intervention.

Moreover, the value in the proposed Public Notification List is not readily apparent. The list will apparently attempt to anticipatorily identify every third party that an ISO or RTO believes it may be able to allocate any monetary penalty that could conceivably be imposed against that ISO or RTO for any alleged violation. The list is not definitive and will not provide certainty or clarity – rather, it may only produce uncertainty over what it means to be either on or off the list. First, the proposed Section 5.11.1 acknowledges that the list may be inaccurate by contemplating that it is the ISO/RTO's responsibility to correct errors and omissions on the list and NERC will rightfully not be responsible to cure such errors or omissions. Second, proposed Section 5.11.2 states that if an ISO/RTO commits such an error or omission, it may still pull that third party into an enforcement proceeding by “demonstrating that there are *extraordinary circumstances* warranting [inclusion in the enforcement proceeding].”

If the list is intended to protect due process rights by allowing participation, it seems logical that potentially adversely affecting those same rights by prohibiting participation based upon an inaccurate list would most likely rise to the prerequisite “extraordinary circumstance.” As a result, the “extraordinary circumstance” exception seems to swallow the rule and, as presently drafted, generally result in mandated inclusion regardless of the third party's identification on the list.

Furthermore, ReliabilityFirst is unclear how the list furthers due process rights. On one hand, being left off a list may give a third party a false assumption that a penalty may not be allocated against it, which is not a correct assumption as discussed above. Stated differently, false notice of no liability is far worse than general notice of potential liability. On the other hand, it seems patently unfair (and contrary to due process) to prevent a third party from defending allegations of culpability by an ISO/RTO in an enforcement hearing solely because that same ISO/RTO failed to name it on a list.

More importantly, ReliabilityFirst does not feel that the new procedures within proposed Section 5.11 are necessary. The Commission has already acknowledged that a simple

notification from the ISO/RTO to the targeted third party is all that is necessary to protect due process.² Furthermore, a third party, without the existence of the current proposed procedures, recently successfully intervened in a ReliabilityFirst enforcement hearing that concerns alleged violations by an RTO. In granting intervention, FERC issued an Order that sets forth simple considerations for intervention without suggesting the need to install new administrative processes to facilitate the consideration of these simple considerations in the future.³ Simply put, it appears that the proposed Section 5.11 is prematurely attempting to fix something that does not appear to be broken.

2. *If Proposed Section 5.11 Remains, NERC Should Simplify It.*

If NERC feels compelled to proceed with proposed Section 5.11, ReliabilityFirst requests a simplified process to relieve the administrative burden on the Regional Entity. ReliabilityFirst asserts that NERC and the Regional Entities should strive for simplicity in the RoP, and believes that the additional layers of administrative procedure within proposed Section 5.11 will create unnecessary delays and inefficiencies in the enforcement process. This runs counter to the Federal Energy Regulatory Commission's ("the Commission") desire for relative ease of administration and straightforward processes.⁴

Similar to the recent FERC Order on a specific ISO/RTO intervention,⁵ any proposed rule should simply require that the ISO/RTO notify the Region and targeted third party that the targeted third party needs to be included in the proceeding because the ISO/RTO has determined that the targeted third party is responsible, in whole or part, for the alleged violation. After the issuance of this notice, the Region will then simply grant the third party intervenor status. This simple approach dispenses with the administrative burden of multiple notices, determinations,

² *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (Guidance Order on RTOs and ISOs), P 23 (However, **to ensure due process to that targeted entity**, the Commission will not entertain any such (FPA section 205) filing unless the targeted entity has been notified during the course of the investigation [or] other inquiry into, or hearing of that matter, that an RTO or ISO believes that the [specified other] entity may be responsible for a violation.).

³ *Monongahela Power Co., West Penn Power Co., The Potomac Edison Co., PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,226 (2011) (Order on Petition to Intervene in Regional Entity Enforcement Hearing).

⁴ *Policy Statement on Penalty Guidelines*, 130 FERC ¶ 61,220 (2010), P 30.

⁵ 135 FERC ¶ 61,226.

confidentiality negotiations and agreements, and the creation and maintenance of lists, as contemplated in the proposed Section 5.11.⁶

To further ensure that the process remains simple, NERC should also limit proposed Section 5.11 to ensure that the Regional Entities do not overstep their jurisdictional authority by limiting third party intervention to registered entities. Section 5.11 in its current form essentially requires *ReliabilityFirst* to budget for and conduct enforcement activities (including hearings and penalty assessments), pursuant to its Section 215 jurisdiction, to address the culpability of a non-registered entity for the purpose of a Section 205 proceeding.

If NERC feels it is necessary to proceed with the proposed Section 5.11, *ReliabilityFirst*'s proposed simplification is memorialized in **Attachment A** for NERC's consideration.

B. NERC Should Clarify Proposed Section 412 of the NERC Rules of Procedure and Section 1.5.12 of the Hearing Procedures.

In *ReliabilityFirst*'s Comments on NERC's June 30, 2011 Notice of Proposed Changes to the Rules of Procedure (the "Comments"), *ReliabilityFirst* expressed concern about NERC's new proposed administrative mechanism to certify questions raised in a hearing directly to the NERC Board of Trustees, which is codified in proposed ROP Section 412 of the NERC Rules of Procedure and Section 1.5.12 of the Hearing Procedures (Attachment 2 to the RoP).⁷

ReliabilityFirst appreciates that NERC staff has accepted many of the revisions that *ReliabilityFirst* requested in the Comments. Specifically, *ReliabilityFirst* appreciates that NERC has accepted *ReliabilityFirst*'s suggestions to narrow the scope of NERC's new certification mechanism to avoid unnecessary delay, disruption, and inflated costs. NERC narrowed the scope by tracking FERC's certification standard set forth in Rule 714 of the FERC Rules of Practice and Procedure⁸ and blending it with FERC's appellate standard in Rule 715 of the

⁶ *ReliabilityFirst* suggests that NERC broaden section 1500 of the RoP so that the confidentiality obligations automatically attach to intervenors, negating the need to execute individual confidentiality agreements whenever intervention is granted.

⁷ Such delays would be inconsistent with the NERC compliance enforcement initiative to streamline and otherwise expedite the processing of violations of the reliability standards. Additionally, while these revisions are currently being considered in the context of hearings as governed by Attachment 2, they could encourage expansion into and consequently create delays in other forums, such as audits, compliance investigations, and even spot checks.

⁸ Rule 714 provides that "during any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure." 18 C.F.R. § 385.714 (2011).

FERC Rules of Practice and Procedure.⁹ Specifically, NERC’s standard provides that a question may be certified if:

[The] hearing present[s] a significant question of law, policy or procedure the resolution of which may be determinative of the issues in the proceeding in whole or in part, or as to which there are other extraordinary circumstances that make prompt consideration of the question...appropriate.¹⁰

Tracking Rule 714 and Rule 715 ensures that FERC decisions interpreting and applying Rules 714 and 715 will provide precedential guidance and clarity for participants to understand where it is appropriate to invoke NERC’s new certification mechanism. It also ensures that NERC’s new certification mechanism is, as intended, applied in narrow situations, in accordance with Rules 714, which has been routinely limited to unusual instances.

To further clarify where it is appropriate to invoke NERC’s new certification mechanism, ReliabilityFirst suggests that NERC staff slightly revise the final clause of proposed Section 1.5.12 to better track the language and intent of Rules 714 and 715, as requested in ReliabilityFirst’s previous Comments. Specifically, ReliabilityFirst suggests that NERC replace the “*or ... extraordinary circumstances*” in proposed Section 1.5.12 with “*provided the Hearing Body finds extraordinary circumstances.*”¹¹

ReliabilityFirst believes that this slight revision better tracks the language of and captures the intent of Rules 714 and 715. Rule 714 establishes the standard to certify a question and Rule 715 establishes the standard of where it is appropriate to appeal any ruling of a presiding officer during a proceeding, including a decision to not certify a question. As a result, replacing “*or*” with “*provided the Hearing Body finds*” narrows NERC’s certification mechanism so that it only applies where the requirements of Rules 714 and 715 are both met. To leave “*or*” may create confusion that there is somehow a new, alternative, and additional certification criteria that is broader than Rule 714, when that is not the intent.

⁹ Rule 715 provides that “a participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer...finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.” 18 C.F.R. §385.715 (2011).

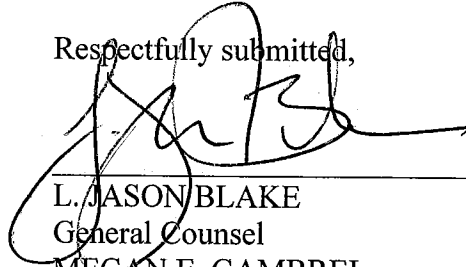
¹⁰ Proposed Section 1.5.12 of the Hearing Procedures.

¹¹ As a result, the proposed Section 1.5.12 would be modified to state: “[The] hearing present[s] a significant question of law, policy or procedure the resolution of which may be determinative of the issues in the proceeding in whole or in part, provided the Hearing Body finds extraordinary circumstances that make prompt consideration of the question...appropriate.”

IV. CONCLUSION

For the foregoing reasons, ReliabilityFirst respectfully recommends that NERC staff eliminate or revise proposed Section 5.11; RoP Section 412; and Attachment 2, Section 1.5.12, as appropriate, to ease administrative burden for the Region and avoid unnecessary delay, disruption, and inflated costs.

Respectfully submitted,



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Attachment A

5.11 Participation by Another Registered Entity in an Enforcement Action against an ISO or RTO Where the Penalty May be Allocated by the ISO or RTO to the Other Registered Entity

An ISO/RTO Registered Entity that has received a Notice of Possible Violation from a Compliance Enforcement Authority pursuant to Section 5.1 may require that the Compliance Enforcement Authority (1) include another registered entity which the ISO/RTO believes may be responsible in whole or in part for the violation of the Reliability Standard with respect to which the ISO/RTO has received the Notice of Possible Violation to participate in the ensuing enforcement proceeding and (2) make a determination in any resolution of the proceeding of the other registered entity's responsibility, in whole or in part, for actions or omissions that resulted in the violation of the Reliability Standard. Any other registered entity that is included in a proceeding as provide above shall be a full participant in such proceeding and have such rights and obligations as are permitted to any participant.

5.11.1 Procedures and Timeline for the Other Registered Entity's Participation in An Enforcement Proceeding Following Receipt of a Notice of Possible Violation by an ISO/RTO

The procedures and timeline set forth in Sections 5.11.1.1 through 5.11.1.6 apply in the situation described in Section 5.11. Failure to follow these procedures and timeline will disqualify the participation of the other registered entity in an enforcement action against an ISO/RTO, unless the Compliance Enforcement Authority finds extraordinary circumstances which make participation of the other registered entity necessary for the timely and appropriate resolution of the enforcement action.

5.11.1.1 Within seven (7) days of receiving a Notice of Possible Violation pursuant to Section 5.1, the ISO/RTO shall notify another registered entity that the ISO/RTO believes may be responsible in whole or in part for the violation of the reliability standard with respect to which the Notice of Possible Violation pertains, and provide the following information:

- (1) A statement that the ISO/RTO has received a Notice of Possible Violation from a Compliance Enforcement Authority.
- (2) The date of the receipt of the Notice of Possible Violation.
- (3) The identity of the Compliance Enforcement Authority, the identification number for the enforcement action, and contact information for the Compliance Enforcement Authority.
- (4) A statement that the ISO/RTO has determined that the other registered entity was responsible, in whole or in part, for actions or omissions that resulted in the violation of the Reliability Standard and seeks to allocate or assign to such

registered entity all or a portion of any penalty that is assessed to the ISO/RTO for any Reliability Standard violation.

- (5) A statement that the other registered entity will be entitled to participate in the Compliance Enforcement Authority enforcement.
- (6) The Web site address where the other registered entity may access the NERC Compliance Monitoring and Enforcement Program.

This notification to the other registered entity does not constitute or should not be deemed an admission by the ISO/RTO that any violation of a Reliability Standard has occurred, and the ISO/RTO may continue to maintain a position that there has been no Reliability Standard violation.

5.11.1.2. The ISO/RTO shall submit to the Compliance Enforcement Authority a copy of the notice under Section 5.11.1.1 at the same time said notice is provided to the other registered entity.

5.11.1.3. A registered entity that has received notification from the ISO/RTO pursuant to Section 5.11.1.1 shall be admitted as a participant in the enforcement proceeding and be subject to all of the rights and obligations of a participant under the NERC Compliance Program and of Section 1500 of the NERC Rules of Procedure.

5.11.1.4. At the same time, the Compliance Enforcement Authority shall provide to NERC a copy of the documents submitted pursuant to Sections 5.11.1.2 and 5.11.1.3 and the notification provided pursuant to Section 5.11.1.5.

5.11.1.5. Within twenty one (21) days of the ISO/RTO's receiving a Notice of Possible Violation pursuant to Section 5.1, the Compliance Enforcement Authority will advise the ISO/RTO and the other registered entity, if appropriate, of the preliminary schedule to be followed in the enforcement action.

5.11.2 Guidelines Regarding Participation by Another Registered entity in an Enforcement Action Against an ISO/RTO

(1) Participation by the other registered entity will not alter the scope or nature of the enforcement action, which is designed to examine the case of the Compliance Enforcement Authority's Compliance Staff against the ISO/RTO.

(2) Unless otherwise limited by the Compliance Enforcement Authority, the other registered entity may participate in the same manner as the ISO/RTO and shall be subject to the same timing requirements and deadlines specified in the NERC Compliance Program that are applicable to the ISO/RTO.

(3) The Compliance Enforcement Authority establishes the schedule and procedures to be followed.

(4) The ISO/RTO has the burden of proving that the other registered entity was responsible, in whole or in part, for actions or omissions that resulted in the violation of the Reliability Standard.

(6) The Compliance Enforcement Authority is not required to revisit or redo any aspect of the enforcement process that has already occurred when the other registered entity's request to participate is received.

(7) Issues regarding the existence, scope or effect of any tariffs, contractual provisions or governance documents that may or may not authorize the ISO/RTO to allocate or assign some or all of a penalty imposed on the ISO/RTO for violation of a Reliability Standard shall be excluded from consideration in the enforcement action.

(8) The Compliance Enforcement Authority shall make findings or a determination that the other registered entity was responsible, in whole or in part, for actions or omissions that resulted in the Reliability Standard violation.

(9) If the enforcement action is not resolved by a settlement agreement stating whether the other registered entity was responsible for actions or omissions that resulted in the Reliability Standard violation, the Compliance Enforcement Authority shall include in its Notice of Confirmed Violation:

(i) Any findings or determination on whether the other registered entity was responsible, in whole or in part, for actions or omissions that resulted in the Reliability Standard violation. The Compliance Enforcement Authority's findings or determination shall only address whether the other registered entity was responsible for actions or omissions that resulted in the Reliability Standard violation, and shall not address whether all or a part of any penalty imposed on the ISO/RTO should be allocated or assigned to the other registered entity or whether the ISO/RTO has the authority under its tariffs, contracts or governance documents to make any such allocation or assignment.

(ii) The record on which the Notice of Confirmed Violation is based.