

119 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellinghoff.

North American Electric Reliability Corporation

Docket No. RR06-1-006

ORDER ON CLARIFICATION AND REHEARING

(Issued April 19, 2007)

1. Several parties¹ seek rehearing or clarification of the Commission's January 18, 2007 Order² generally accepting a filing submitted by North American Electric Reliability Corporation (NERC) in partial compliance with the Commission's July 20, 2006 Order³ certifying NERC as the Electric Reliability Organization (ERO) for the United States under section 215 of the Federal Power Act (FPA).⁴ In this order, we grant clarification in part and deny rehearing.

¹ North American Electric Reliability Corporation (NERC), American Public Power Association (APPA), Edison Electric Institute (EEI), National Rural Electric Cooperative Association (NRECA), Xcel Energy Services Inc. (Xcel), Florida Reliability Coordinating Council (FRCC), ReliabilityFirst Corporation (ReliabilityFirst), SERC Reliability Corporation (SERC), Southwest Power Pool, Inc. (SPP), Electric Reliability Council of Texas, Inc. (ERCOT), Midwest Reliability Organization (MRO), Northeast Power Coordinating Council (NPCC), and Kansas City Power & Light Company (KCP&L).

² *North American Electric Reliability Corp.*, 118 FERC ¶ 61,030 (2007) (*January 2007 Compliance Order*).

³ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030 (2007).

⁴ 16 U.S.C. § 824o (2000).

I. Background

2. In the *Certification Order*, the Commission found that NERC generally satisfies the criteria to become the ERO responsible for developing and enforcing mandatory Reliability Standards for the United States under Order No. 672.⁵ The Commission also directed NERC, as the certified ERO, to provide additional information and make revisions to its Bylaws and Rules of Procedure. On September 18, 2006, in Docket No. RR06-1-002, NERC submitted a compliance filing limited to matters pertaining to its governance and balanced decisionmaking. On October 30, 2006, the Commission issued an order accepting most of NERC's September 18 Filing.⁶

3. On October 18, 2006, NERC submitted a further compliance filing, in which NERC provided additional information and revisions to its Rules of Procedure in response to the *Certification Order*. The Commission accepted this compliance filing in part in the *January 2007 Compliance Order*.

II. Procedural Matters

4. On March 7, 2007, the ISO/RTO Council submitted an answer to NERC's request for rehearing. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject the ISO/RTO Council's answer. On March 13, 2007, Canadian Electricity Association (CEA) filed a request for clarification out-of-time. Pursuant to section 313(a) of the FPA, 16 U.S.C. § 8251(a) (2000), an aggrieved party must file a request for rehearing within thirty days after the issuance of the Commission's order, in this case no later than February 20, 2007.⁷ Because the 30-day rehearing deadline is statutory, it cannot be extended, and CEA's request for rehearing must be rejected as untimely. Moreover, the courts have repeatedly recognized that the time period within which a

⁵ *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁶ *North American Electric Reliability Corp.*, 117 FERC ¶ 61,126 (2006).

⁷ Pursuant to Rule 2007(a)(2), 18 C.F.R. § 385.2007(a)(2) (2006), when the deadline falls on a weekend, the deadline is extended to the close of the next business day.

party may file an application for rehearing of a Commission order is statutorily established at 30 days by section 313(a) of the FPA and that the Commission has no discretion to extend that deadline.⁸

III. Discussion

5. Parties request clarification or rehearing on the following issues: (1) whether NERC may use its American National Standards Institute (ANSI)-certified Reliability Standards development process to develop a new or modified Reliability Standard in response to a Commission directive to develop such a Reliability Standard within a specified period of time; (2) whether the NERC compliance and certification committee should oversee compliance with NERC's Rules of Procedure for the development of Reliability Standards; (3) whether NERC may use the Reliability Standards development process to develop Violation Risk Factors; (4) whether NERC needs to state in its Base Penalty Amount Table maximum penalty amounts of \$1 million per day with respect to violations of Reliability Standards; and (5) whether the Commission correctly accepted provisions of NERC's Sanction Guidelines that allow enhanced penalties when a decision to commit a violation is based on economic choice.

A. Development of Commission-Ordered Reliability Standards

6. In the *January 2007 Compliance Order*, the Commission found that NERC's Rules of Procedure do not provide for the development of a new or revised Reliability Standard in response to a Commission directive. The Commission directed NERC to revise its Reliability Standards development process to "clearly indicate how it will initiate the development of a new or revised Reliability Standard in response to a Commission directive," separate from the process relating to the voluntary submission of a standards authorization request.⁹

7. The Commission noted that NERC's urgent action process does not reflect the Commission's authority to order expedited Reliability Standard development or that NERC must adhere to a Commission-imposed deadline while still allowing for due process. Therefore, the Commission directed NERC to modify both its regular and

⁸ See *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("[t]he 30-day time requirement of the [FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing"); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-98, 979 (1st Cir. 1978).

⁹ *January 2007 Compliance Order* at P 29.

expedited Reliability Standards development procedures to provide explicitly for timely adherence to a Commission-imposed deadline. The Commission further directed NERC to revise its proposed expedited urgent action process to (1) provide for the expedited development of a Reliability Standard in “extraordinary circumstances,” and (2) incorporate the ability to adjust the timeliness of that process to meet a Commission-imposed deadline while still allowing for due process.¹⁰

1. Requests for Clarification

8. NERC¹¹ seeks clarification that it may use the ANSI-certified Reliability Standards development process when the Commission orders the ERO to develop a Reliability Standard addressing a specific matter and/or sets specific deadlines, as long as NERC has modified the Reliability Standard development process to meet the Commission’s timing directives. NERC states that it 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 Reliability Standard on the particular topic within the required time frame. NERC agrees that such directives would be consistent with section 215(d)(5) of the FPA and sections 39.5(f) and (g) of the Commission’s regulations.

9. NERC states that, if the *January 2007 Compliance Order* allows NERC to continue to use the Reliability Standards development process to develop Commission-directed modifications to a Reliability Standard, as long as it has provisions in place to allow the Reliability Standards development process to be completed by a Commission-set deadline, it does not dispute the Commission’s order in this respect and will submit a timely compliance filing that satisfies these provisions. NERC states that it will modify its Rules of Procedure to provide that NERC will set schedules and deadlines as necessary, in both the regular and the expedited Reliability Standards development procedures, to meet specific deadlines imposed by the Commission in remand orders and in orders directing the development of Reliability Standards. NERC states that it 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. Finally, NERC states that it will

¹⁰ *Id.* at P 28.

¹¹ SPP, ERCOT, MRO, SERC, FRCC, NPCC and Reliability *First* adopt the requests for clarification filed by NERC.

specifically address how it will initiate the development of a new or revised Reliability Standard in response to a Commission directive separately from the standards authorization request process.

10. NERC requests clarification that it correctly interprets these elements of the *January 2007 Compliance Order*. If, however, the Commission is stating that it may prescribe the substantive contents of a Reliability Standard and order the ERO to adopt that Reliability Standard, or that NERC must have procedures in place that enable it to promulgate and adopt a Reliability Standard on a Commission-specified topic, by a specific deadline, without using a Reliability Standards development process conforming to the requirements of section 215 of the FPA, NERC requests rehearing.

11. NRECA requests clarification that the *January 2007 Compliance Order* does not require a new procedure for the development of a Reliability Standard in response to a Commission remand or directive to modify a Reliability Standard. NRECA states that section 309.2 of NERC's Rules of Procedure already includes a procedure to develop a Reliability Standard if required by the Commission. Section 309.2 states that if an "ERO governmental authority" remands a Reliability Standard to NERC or directs NERC to develop a Reliability Standard, such standards "shall be modified or developed using the Reliability Standards Procedure."¹² NRECA argues that this provision meets the Commission's stated concerns, and eliminates the need for development of a procedure outside of the ANSI-certified Reliability Standards development process.

12. NRECA and APPA request clarification whether the Commission may impose deadlines on the development of a Reliability Standard, contending that such deadlines would violate section 215(c)(2)(D) of the FPA, which calls for reasonable notice and comment, due process, openness and a balance of interests in the development of Reliability Standards.

2. Commission Conclusion

13. The Commission grants NERC's request for clarification. The Commission reiterates that NERC must file a specific process designed to meet a Commission deadline. However, any ERO process that provides "reasonable notice and opportunity for comment, due process, openness, and balance of interests" as required by section 215(c)(2)(D) of the FPA, and that also can meet a Commission-imposed deadline pursuant to section 39.5(g) of the Commission's regulations, will comply with this

¹² NERC, Rules of Procedure, § 309.2.

directive. If NERC revises its Rules of Procedure to explicitly state that it will adjust timelines and expedite schedules under the ERO's Reliability Standards development process to achieve that result, such a revision would satisfy the Commission's directive.

14. APPA's and NRECA's assertion that the Commission should not establish timelines to resolve matters is a collateral attack on Order No. 672. In that order, the Commission provided that, when ordering the ERO to submit to the Commission a proposed Reliability Standard or proposed modification to a Reliability Standard that addresses a specific matter, it may order a deadline by which the ERO must submit a proposed or modified Reliability Standard.¹³ Therefore, we deny these requests for rehearing.

15. We clarify that, consistent with section 215 of the FPA and our regulations, any modification to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through a process that provides "reasonable notice and opportunity for comment, due process, openness and balance of interests," such as NERC's normal or expedited Reliability Standard development process. A Commission directive will not usurp or supplant such a procedure.

16. The Commission grants NRECA's request for clarification to the extent that section 309.2 of NERC's Rules of Procedure provides that NERC may use its Reliability Standards development process. However, this rule does not explicitly address how the ERO would meet a Commission deadline. Therefore, NERC must still develop a process to ensure that any Commission deadline will be met.

B. Committee Oversight for Reliability Standards Development

17. In the *January 2007 Compliance Order*, the Commission rejected NERC's proposal that its standards committee be designated as the body responsible for monitoring NERC's compliance with those Rules of Procedure that deal with the Reliability Standards development process. The Commission reasoned that the compliance and certification committee would be best suited to oversee such compliance, because it is independent of the Reliability Standards development process and is already responsible for monitoring NERC's compliance with those Rules of Procedure that deal with compliance enforcement programs. The Commission directed NERC to modify

¹³ See 18 C.F.R. § 39.5(g); see also *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 118 FERC ¶ 61,218 at P 192 (2007); Order No. 672-A at P 35.

section 306 of its Rules of Procedure to make the compliance and certification committee responsible for monitoring NERC's compliance with the Reliability Standards development process.¹⁴

1. Requests for Rehearing

18. EEI and KCP&L request rehearing of the Commission's directive that the compliance and certification committee must monitor NERC's compliance with the Reliability Standards development process. They argue that NERC's standards committee has the requisite understanding of the Reliability Standards development process, making it the best group within NERC for such monitoring. They also argue that the compliance and certification committee is ill-suited to monitor the Reliability Standards development process because it is not familiar with the process, and contend that if the committee were to add experts to give it that familiarity, the additions would dilute its compliance expertise. These parties also argue that the scope of the compliance and certification committee's functions are not yet clearly defined, and, therefore, that adding to those duties would be inadvisable.

19. EEI and KCP&L alternatively propose that, in the event the Commission continues to have concerns with using the standards committee to monitor NERC's compliance with the Reliability Standards development process, it should consider allowing NERC to use its member representatives committee (or one of its subcommittees) for monitoring both standards and compliance matters. They state that the member representatives committee would be suitable for this purpose because it is composed of a balanced group of industry representatives who are generally knowledgeable about NERC issues, including standards and compliance matters, but are not so involved in those areas as to create a conflict of interest. In the event the Commission disagrees, EEI and KCP&L seek rehearing.

2. Commission Conclusion

20. NERC's compliance and certification committee's mission is to "directly engage with, support and advise the NERC Board and NERC Compliance regarding all facets of the NERC Compliance and Enforcement Program...."¹⁵ The compliance and certification committee implements programs to monitor NERC's compliance with the Reliability Standards and with NERC's Rules of Procedure, serves as the hearing body

¹⁴ *January 2007 Compliance Order* at P 63.

¹⁵ NERC October 10, 2006 Filing, Docket No. RR06-1-003, Attachment 17 at 5.

for any contest between NERC and a Regional Entity, mediates disputes between NERC and the Regional Entities, and develops the compliance administration elements for proposed Reliability Standards under development.¹⁶ To enable it to carry out these activities, the compliance and certification committee charter provides that its members will have “particular familiarity, knowledge and experience in the area of compliance and NERC and Regional standards.”¹⁷

21. In light of the compliance and certification committee’s substantial involvement and expertise in the area of compliance, the Commission rejects the contentions of EEI and KCP&L that the compliance and certification committee is ill-suited to monitor NERC’s compliance with those Rules of Procedure that deal with the development of Reliability Standards. EEI’s and KCP&L’s argument that the compliance and certification committee lacks familiarity with the mechanics of the development process misses the point. Engaging in the mechanics of the process involves a different set of skills than does monitoring the process. Since the compliance and certification committee’s expertise lies precisely in the area of compliance, it is the appropriate body to monitor compliance with the Reliability Standards development process.

22. Nor would it dilute the compliance and certification committee’s expertise if that body were to add experts familiar with the mechanics of the Reliability Standards development process, should it need to do so. Such additions would simply add to the compliance and certification committee’s existing expertise. In any event, the compliance and certification committee already possesses expertise in the area of compliance, which is the skill needed for the task of monitoring the Reliability Standards development process.

23. Furthermore, the separation of the compliance and certification committee from the Reliability Standards development process gives it the necessary independence to monitor that process. EEI and KCP&L have failed to satisfactorily explain why the standards committee, as the body overseeing development of the Reliability Standards, would be sufficiently independent to impartially and fairly monitor NERC’s compliance with the rules governing that very process.

24. In the alternative, EEI and KPCL propose that the member representatives committee should monitor the Reliability Standards development process. However, the compliance and certification committee has more hands-on experience in the area of

¹⁶ *Id.*

¹⁷ *Id.*

compliance than does the member representatives committee, and would thus be better equipped for the role. Further, the reason advanced by EEI and KCP&L to designate the member representatives committee as the Reliability Standards development process monitor, that the member representatives committee has a general knowledge about Reliability Standards and compliance matters combined with a lack of intense involvement in the process, applies at least equally as well to the compliance and certification committee.

25. For the foregoing reasons, the Commission denies rehearing on this issue and reaffirms its order that the compliance and certification committee be designated as the body responsible for monitoring NERC's compliance with the Rules of Procedure for the compliance enforcement program.

C. Development of Violation Risk Factors

26. In the *January 2007 Compliance Order*, the Commission expressed its concern that NERC had not yet submitted Violation Risk Factors to it for review. It noted that if such factors are not in place, NERC and the Regional Entities will not be able to use the Base Penalty Amount Table for the determination of a monetary penalty for a given violation. The Commission stated that it viewed NERC's February and March 2007 target dates for submission of the Violation Risk Factors as the absolute latest possible filing dates that will permit achievement of a June 2007 effective date for NERC's enforcement program.¹⁸

27. Noting that NERC's Reliability Standards development procedure neither mandates balloting Violation Risk Factors along with their applicable Reliability Standards nor describes Violation Risk Factors as being incorporated in particular Reliability Standards, the Commission concluded that development of the Violation Risk Factors could be expedited by removing them from the Reliability Standards development process and treating them as an appendix to NERC's Rules of Procedure. The Commission directed NERC to develop the Violation Risk Factors through the process described in section 1400 of the Rules of Procedure.¹⁹

¹⁸ *January 2007 Compliance Order* at P 90.

¹⁹ *Id.* at P 91.

1. Requests for Clarification

28. NERC²⁰ requests clarification that it may use the ANSI-certified Reliability Standards development process for the development of Violation Risk Factors, so long as that process produces timely results, and so long as NERC amends its Rules of Procedure to establish an alternative procedure that ensures Violation Risk Factors will be available when needed. If the Commission disagrees with this proposed clarification, NERC requests rehearing.

29. EEI, KCP&L, NRECA and APPA agree with NERC that the Reliability Standards development process should be used for the development of Violation Risk Factors, but do not concur that an alternative mechanism utilizing the Rules of Procedure may be adopted. They assert that Violation Risk Factors are an integral part of the Reliability Standards and, as such, must be developed with the same opportunity for public comment, due process, openness and a balance of interests as the Reliability Standards development process affords. NRECA notes that section 1400 of the Rules of Procedure, which the Commission directed NERC to use for the expedited development of the Violation Risk Factors, applies only to amendments to the rules themselves. It points out that the Violation Risk Factors for a given Reliability Standard are specified in NERC's Reliability Standards development procedure as performance elements of the Reliability Standard itself.²¹

30. APPA notes that Version 0 of the Violation Risk Factors has already been approved by the ballot body and the NERC board, and that Version 1 is before the ballot body on a shortened ten-day ballot deadline, which APPA contends will permit completion of the approval process by March 2007. APPA also raises the question whether the Commission's directive to use the Rules of Procedure applies only to the current set of Violation Risk Factors, or if the directive is also intended to apply to Violation Risk Factors to be developed in the future. These parties request rehearing if the Commission disagrees with their position.

²⁰ FRCC, MRO, NPCC, ERCOT, SPP, SERC and ReliabilityFirst adopt NERC's request for clarification regarding Violation Risk Factors.

²¹ NERC, Appendix 3A to Rules of Procedure, "Standards Development Process," at 6-10.

2. Commission Conclusion

31. Having NERC's Reliability Standards, including the Violation Risk Factors, in place by the target date of June 2007 is vital to the establishment of a comprehensive reliability enforcement program. In Order No. 693, we held that there would be no trial period for enforcement of the Reliability Standards, instead directing the ERO and the Regional Entities to focus their resources on the most serious violations during an initial period through December 31, 2007.²²

32. Following the Commission's issuance of its *January 2007 Compliance Order*, NERC has been successful in balloting the Violation Risk Factors that are needed to meet that target date. On February 23, 2007, in Docket No. RR07-9-000, NERC filed with the Commission its proposed Violation Risk Factors for the Version 0 Reliability Standards. On March 27, 2007, in Docket No. RR07-10-000, NERC filed its proposed Violation Risk Factors for the Version 1 Reliability Standards. These filings have alleviated the Commission's concern that the process NERC is using to develop the Violation Risk Factors may be too slow.

33. NERC and other parties seek clarification that the Commission does not preclude use of the ANSI-approved Reliability Standards development process to develop the Violation Risk Factors, so long as that procedure produces results which comport with Commission-imposed deadlines. NERC further suggests that it will amend its Rules of Procedure to provide a backup process that ensures Violation Risk Factors will be available when needed, if the Reliability Standards development process fails to do so. The Commission does not object to the use of the Reliability Standards development process to develop the Violation Risk Factors, so long as it produces timely results. Therefore, the Commission clarifies that NERC may use the Reliability Standards development process to develop the Violation Risk Factors, so long as it amends its Rules of Procedure to provide an alternative mechanism in the event the Reliability Standards development process fails in any given instance to meet Commission-imposed deadlines for development of Violation Risk Factors. The Commission notes that NERC submitted amended Rules of Procedure on March 19, 2007, which contain such an alternative mechanism.²³

²² *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 118 FERC ¶ 61,218 at P 221 (2007).

²³ NERC March 19, 2007 Compliance Filing, Docket No. RR06-1-007, Attachment 2A, Rule 320.

34. EEI, KCP&L, NRECA, and APPA oppose, even as a backup mechanism, use of the Rules of Procedure to develop Violation Risk Factors. However, they do not explain how to resolve the impasse that would result in the event the ANSI procedure fails in any given instance to produce timely results.²⁴ Therefore, their request for rehearing on this point is denied.

D. Maximum Base Penalty Amount

35. In its *Certification Order*, the Commission directed NERC to amend its Base Penalty Amount Table to incorporate a maximum Base Penalty Amount equal to the statutory maximum penalty established in the FPA, that of \$1 million per day per violation.²⁵ In the *January 2007 Compliance Order*, the Commission concluded that NERC's compliance filing did not conform with this directive. Instead, the Commission observed that the compliance filing provided that NERC may determine a Base Penalty Amount of \$1 million per monitoring period, which might be as long as a year.²⁶ The Commission reiterated its directive that NERC clarify that all amounts in the Base Penalty Amount Table be stated as per violation, per day.²⁷

1. Requests for Clarification

36. NERC²⁸ and NRECA request clarification that when a violation continues for more than one day, each day can be considered a separate violation, but that the directive does not mean: (1) that a failure to meet a requirement measured on the basis of an

²⁴ NRECA remarks in passing that, in the absence of NERC's final approval of its Violation Risk Factors, the Commission can impose penalties on its own. While the Commission possesses its own enforcement powers under section 215(e)(3) of the FPA, our primary objective here is to assist the ERO in developing a timely compliance program. Enforcement in the first instance by the Commission is not a satisfactory substitute for development of the Violation Risk Factors, which are essential components of the ERO's compliance program.

²⁵ *Certification Order* at P 447; 16 U.S.C. § 825o-1(b) (2000).

²⁶ *January 2007 Compliance Order* at P 87.

²⁷ *Id.* at P 88.

²⁸ FRCC, MRO, NPCC, ERCOT, SPP, SERC, and ReliabilityFirst adopt NERC's request for clarification on this matter.

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 (2) that multiple violations of a Reliability Standard on a single day can only be considered as one violation for purposes of imposing the penalty amount.

37. NERC cites as an example of the latter type of violation multiple failures to return the system to a safe operating state when an interconnection reliability operating limit is exceeded, in violation of Requirement 2 of Reliability Standard TOP-007-0.

2. Commission Conclusion

38. Section 316A of the FPA, as amended by the Energy Policy Act of 2005, provides that “any person who violates any provision of Part II of this title or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than \$1,000,000 for each day that such violation continues.”²⁹ We have referred to this statutory provision as imposing a maximum \$1,000,000 “per day, per violation” penalty. Our intent in directing NERC to amend its Sanction Guidelines to reflect this abbreviated designation was to ensure that the Sanction Guidelines empower NERC or a Regional Entity to impose the maximum penalty amount provided by the FPA, should the conduct at issue so warrant.

39. In light of NERC’s discussion of examples of Reliability Standards that may not conveniently fit into this abbreviated designation, we clarify our directive on this issue. The Commission agrees with NERC that there may be multiple violations of the same requirement that occur on the same day, and that each such violation would be subject to a maximum potential penalty of \$1,000,000. NERC points to Reliability Standard TOP-007-0 as an example of this sort of situation. That standard establishes requirements for returning the system to a safe operating state after an Interconnection reliability operating limit is exceeded. If an entity were to violate these requirements twice on the same day, we agree with NERC that there would be two violations on that day, each subject to the potential maximum civil penalty of \$1 million under section 316A of the FPA.

40. Conversely, certain other requirements of the Reliability Standards are measured not on the basis of discrete acts, but of cumulative acts over time. For example, Requirement R2 of Reliability Standard BAL-001-0 requires that the average area control error for each of the six ten-minute periods during the hour must be within specific limits,

²⁹ 16 U.S.C. § 825o-1(b). In Order No. 672, we interpreted FPA section 316A as setting a cap on the monetary penalties that the Commission, NERC and Regional Entities could impose under FPA section 215. Order No. 672 at P 575.

and that, for a particular month, a balancing authority achieve 90 percent compliance. NERC therefore states that there would only be one violation of Requirement R2 of Reliability Standard BAL-001-0 for that month. It appears that the only types of Reliability Standards that fall into this category are those involving measurements based on averages over a given period.³⁰

41. The Commission acknowledges that it is difficult to say when a violation arises in such a case. But we are also concerned that if NERC deems that a Reliability Standard measured by an average over time can only be violated once per applicable period, then a disproportionately mild penalty might be levied in a situation where the violation was serious and the effects on the Bulk-Power System severe. Therefore, the Commission directs the ERO in the future to specify, within each Reliability Standard that is based on an average over time, the minimum period in which a violation could occur and how to determine when a violation arises, which may be other than once per applicable period. With regard to the Reliability Standards already approved by the Commission that are based on an average over time, any ambiguity on this point should be construed conservatively, meaning that there may only be one violation per measurement period, until the Reliability Standard is clarified otherwise. This conservative approach will ensure registered entities have adequate notice of their potential liability, until NERC clarifies any ambiguity on this point in the existing Reliability Standards.

42. The Commission notes that, for those Reliability Standards for which only one violation will be deemed to have occurred during a measurement period as specified in the Reliability Standard, the Commission would look with disfavor on too lengthy a span of time being used as the basis for application of penalties. For penalties to be effective as deterrents, they must impose a meaningful cost on the violator. If for some reason an average must be measured by a span of time greater than a month, the Commission suggests that each month constitute at a minimum one violation, in order to ensure that the potential penalty amount be truly meaningful.

43. The Commission also notes that a violation based on measuring averages over a period of time presents a very different case from that of a discrete violation which may only be monitored periodically. If a requirement states that a discrete event constitutes a

³⁰ NRECA suggests there may be a Reliability Standard that requires a certain number of tests or entries to be made over a given period of time, but not daily. In the absence of a particular example, we will not speculate on this possibility. However, to the extent NRECA is referring to a requirement for periodic monitoring, we note that the fact that monitoring occurs only periodically is an entirely separate, and unrelated, consideration from the determination of whether a violation has been committed.

violation, then a violation arises when that event occurs (and continues until remedied), regardless of the monitoring period for such an activity. For example, Requirement 1 of Reliability Standard FAC-003-1 provides that a transmission owner must prepare and keep current a formal transmission vegetation management program. If that task has not been done by the required date, it is irrelevant that monitoring compliance for the activity occurs only on a yearly basis. A violation will have occurred on the first day of non-compliance, and will continue each day until compliance is effectuated. And each day of non-compliance subjects the transmission owner to a potential maximum monetary penalty of \$1 million.³¹

44. The Commission directs NERC to modify the amendments to its Base Penalty Amount Table ordered in the *January 2007 Compliance Order* to reflect the clarifications set forth in this order regarding the scope and meaning of the \$1 million “per day per violation” provision. In light of these clarifications, the Commission denies the rehearing requested by NRECA.

E. Economic Choice Penalty Provisions

45. In the *January 2007 Compliance Order*, the Commission accepted NERC’s amendments to the Sanction Guidelines regarding “economic choice,” which NERC had added in response to a Commission directive to that effect in the *Certification Order*.³² These amendments provide that a “significant increase to the penalty shall be considered” for those Reliability Standard violations that occur based on the “economic choice” of the violator.³³

46. In the *January 2007 Compliance Order*, the Commission disagreed that it is more appropriate for the Commission and the courts, rather than the ERO or Regional Entities, to conduct evaluations of economic-based punishments. We also refused to speculate on the frequency of violations regarding economic choice, and stated that NERC or a Regional Entity, by virtue of the expertise of its staff, would be able to ascertain facts

³¹ Of course, the Base Penalty Amount Table may provide for a lesser monetary amount. However, the statutory maximum, under section 316A of the FPA, is \$1 million per day for each day the violation continues.

³² *Certification Order* at P 446.

³³ *January 2007 Compliance Order* at P 96.

relevant to whether a violation represented an economic choice. The Commission further noted that in any event an alleged violator would have the opportunity to seek Commission review of any penalty assessed.³⁴

1. Requests for Rehearing

47. Xcel requests rehearing of the Commission's acceptance of NERC's economic choice provisions. While it agrees that users, owners and operators of the Bulk-Power System should be strongly discouraged from making an economic choice to violate a Reliability Standard, Xcel states that the economic choice provisions are unclear and confusing and require the ERO or Regional Entity to make complex and difficult legal and factual determinations regarding economic behavior, which Xcel contends these entities are not qualified to make.

48. Xcel argues that the Sanction Guidelines do not define what it means to engage in an "economic choice" to violate the standards, and contends that the provisions could be interpreted to apply to a situation where a company did not comply with the Reliability Standards due to budgetary constraints or a decision to allocate capital in a given way. Xcel is concerned that the ERO and Regional Entities are not qualified to opine on when a violation is the result of an economic choice. Regarding the Commission's assurances that it will have the opportunity to review any sanctions, Xcel notes that for an alleged violator to seek such review after both a full hearing before the Regional Entity and an ERO review could result in the expenditure of substantial time, effort and money.

2. Commission Conclusion

49. The Commission notes that Xcel raised the same arguments in the *January 2007 Compliance Order*, which were rejected by the Commission in that order. The Commission reiterates its disagreement with Xcel's contention that NERC and the Regional Entities are ill-equipped to conduct evaluations of whether a given action might have been taken on the basis of economic choice. These entities are charged with the task of examining all relevant evidence, including that bearing on intent. The Commission does not see any meaningful distinction between ascertaining the intent to commit a violation for economic reasons and ascertaining any other type of intent, nor has Xcel provided one. Also, while it is true that a company may well incur added expense if it seeks review before the Commission of an unfavorable decision rendered by

³⁴ *Id.* at P 102, 105.

a Regional Entity and approved by NERC, the exercise of one's rights can be accomplished in no other way. Furthermore, it would be anomalous to single out the specific issue of economic choice and fashion an entirely different enforcement process for it.

50. Xcel also argues that the Sanction Guidelines are unclear because they do not define what is meant by an "economic choice." Xcel observes that a decision to refrain from a course of action for budgetary reasons could result in the determination that a resulting violation was made because of an economic choice. The Commission agrees that such a conclusion could well be drawn, and sees no reason, absent other extenuating considerations, why it should not. If a user, owner or operator of the Bulk-Power System refrains from taking actions that are necessary to comply with a requirement of a Reliability Standard in order to save money, especially where such a violation results in an injury or an outage, the Commission endorses application of the expanded penalty provisions applicable to an economic choice decision. For example, if an entity were to cut back on its tree-trimming budget to reduce expenses and not based on actual vegetation management needs, that decision would seem very much to be a calculated economic choice. If the decision led to the entity violating a requirement of FAC-003-1, the vegetation management Reliability Standard referred to above, such a violation would fall precisely within the scope of the Commission's concern that an entity not shortchange reliability out of some misguided risk/reward calculation. As a result, the violation could well result in an increased penalty based on economic choice.

51. For the foregoing reasons, the Commission denies Xcel's request for rehearing.

The Commission orders:

- (A) The Commission denies rehearing, as discussed in the body of this order.
- (B) The Commission grants clarification, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.