118 FERC ¶61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability Corp. Docket No. RR06-1-003

ORDER ON COMPLIANCE FILING

(Issued January 18, 2007)

1. On October 18, 2006, the North American Electric Reliability Corporation (NERC) submitted a filing in partial compliance with the Commission's July 20, 2006 Order[1] certifying NERC as the Electric Reliability Organization (ERO) for the United States under section 215 of the Federal Power Act (FPA)[2] (October 18 Filing). NERC's October 18 Filing addresses the Commission's directives concerning non-governance matters. In this order, we largely accept NERC's compliance filing. To address our remaining concerns, we require NERC to submit an additional compliance filing within 60 days of the issuance of this order, and a quarterly report on the balloting results of its Reliability Standards Development Process.

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.[3] In the *Certification*

[1] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006).

[2] The Energy Policy Act of 2005, Pub. L. No. 109-58, Title XII, Subtitle A, § 1211(a), 119 Stat. 594, 941 (2005) to be codified at 16 U.S.C. § 824o (2000).

[3] *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).

Order, we generally accepted NERC's funding proposal, but required NERC to establish safeguards regarding the Regional Entity role in collecting fees and charges.[4] We also accepted NERC's proposed Reliability Standard development process but required NERC to make specific revisions and clarifications in a compliance filing. In particular, we directed NERC to propose a process for the timely development of a Reliability Standard or modification of a Reliability Standard at the direction of the Commission.[5] On enforcement matters, we accepted NERC's proposed enforcement program but required specific revisions and clarifications.[6] While we had concerns regarding the lack of uniform due process procedures in both the ERO and Regional Entity enforcement programs, we stated our expectation that these concerns would be addressed when NERC and the Regional Entities submit delegation agreements for our review.

3. The Commission also directed NERC, as the certified ERO, to provide additional information and make specific 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 and requested expedited Commission action so that the revised Bylaws could be approved by NERC's Board of Trustees at the November 1, 2006 board meeting. On October 30, 2006, the Commission issued an order accepting most of NERC's September 18 Filing.[7]

4. On October 18, 2006, NERC submitted its October 18 Filing in the instant proceeding. In its October 18 Filing, NERC provides additional information and revisions to its Rules of Procedure in response to the *Certification Order*. Many of NERC's responses indicate that the Commission's concerns set forth in the *Certification Order* will be addressed in the uniform Compliance Monitoring and Enforcement Program and *pro forma* delegation agreement.[8]

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[4] *Certification Order* at P 9.

[5] *Id.* at P 11.

[6] *Id.* at P 13.

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

[8] NERC submitted these documents on November 29, 2006. The Commission will address them separately in Docket No. RR06-1-004.

II. Procedural Matters

5. Notice of NERC's October 18 Filing was published on October 24, 2006, with comments due on or before November 17, 2006. Alcoa, Inc. (Alcoa), Allegheny Energy Companies (Allegheny), American Public Power Association (APPA), Edison Electric Institute (EEI), FirstEnergy Service Company (FirstEnergy), ISO/RTO Council, National Rural Electric Cooperative Association (NRECA), Pacific Gas and Electric Company (PG&E), Southwest Transmission Dependent Utility Group (Southwest TDUs),[9] Transmission Access Policy Study Group (TAPS), and Xcel Energy Services Inc. (Xcel) filed timely motions to intervene and comments. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

III. Discussion

6. As an initial matter, in this order we address only the issues directed in the Certification Order. Certain other matters that have been raised are beyond the scope of this proceeding.[10] With one exception discussed immediately below, all matters in

[9] Aguila Irrigation District, Ak-Chin Energy Services, Buckeye Water Conservation and Drainage District, Central Arizona Water Conservation District, Electrical District No. 3, Electrical District No. 4, Electrical District No. 5, Electrical District No. 6, Electrical District No. 7, Electrical District No. 8, Harquahala Valley Power District, Maricopa County Municipal Water District No. 1, McMullen Valley Water Conservation and Drainage District, City of Needles, Roosevelt Irrigation District, City of Safford, Tonopah Irrigation District, Wellton-Mohawk Irrigation and Drainage District.

[10] Several commenters raise matters that are beyond the scope of this proceeding and are a collateral attack on either the *Certification Order*, *Budget Order*, or Order No. 672, including, but not limited to: the purpose of the Rules of Procedure and the appendices, the purpose of Reliability Standards, how the ERO will perform its billing and collection functions, the relationship between ERO and Regional Entity programs, what is subject to NERC enforcement, timing of compliance audits, alleged violations and compliance, Commission review of sanctions and remedial actions, who must certify self-reported data, whether the Commission can challenge a settlement, how NERC would monetize penalties and the standing of third parties to challenge the ERO or a Regional Entity's decision regarding monetary penalties. Because we did not require NERC to submit a compliance filing on these matters, they are beyond the scope of this proceeding and the commenters' requests are dismissed.

NERC's compliance filing not addressed in the following discussion are hereby accepted.[11] NERC has filed a revised Reliability Standards Development Procedure (Appendix 3 to its October 18 Filing), which includes numerous revisions that were not directed pursuant to the Certification Order. NERC does not identify or explain the reason for the revisions in its transmittal letter. Moreover, while NERC has submitted a "redline" version of the document (Appendix 3A), NERC has failed to identify many of the revisions in the redline version, making it difficult to determine all of the changes that NERC has made. Accordingly, we direct NERC to refile its Reliability Standards Development Procedure and accurately identify and explain all proposed revisions.

A. Reliability Standard Development Process

7. In the *Certification Order*, we found that the relationship between section 300 of the Rules of Procedure (Reliability Standards Development) and Appendix 1 thereto is not clear and directed NERC to explain the relationship between the two documents.[12]

8. NERC indicates that it has revised the Rules of Procedure and Reliability Standard development procedure, which is now designated Appendix 3A to the Rules of Procedure, to minimize redundancies. Specific provisions of the Rules of Procedure and Reliability Standard development procedure are discussed below.

1. Adequate Level of Reliability

9. In the *Certification Order*, we directed NERC to consider and propose methods to ensure that Reliability Standards provide for an adequate level of reliability and to define "an adequate level of reliability."[13] For example, NERC was asked to address the possibility that the super-majority voting requirement could, in some cases, allow a small portion of the industry to veto a Reliability Standard that is designed to improve reliability or otherwise remedy flaws in an existing Reliability Standard. Although we

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[11] In the *Certification Order*, we directed NERC to correct certain drafting errors. *Certification Order* at P 301. While NERC corrected many of the drafting errors, others remain in section 400 and other sections throughout the Rules of Procedure. The Commission directs NERC to continue to make necessary corrections to the remaining drafting errors and to ensure that consistent terms are used throughout the Rules of Procedure. In the subsequent compliance filing, we direct NERC to submit a redline version of the Rules of Procedure showing the drafting errors and their corrections.

[12] *Certification Order* at P 230.

[13] *Id.* at P 240.

indicated our belief that a super-majority requirement is generally consistent with the nature of the ERO as a self-regulatory organization, we expressed concern that, in certain instances, it could pose an obstacle to strengthening the reliability of the grid as envisioned by Congress in enacting section 215 of the FPA. We directed NERC to address this possibility in its compliance filing.

a. NERC Response

10. NERC states that guidelines for an adequate level of reliability can be found in section 215 of the FPA, Order No. 672 and statutes and regulations in Canada. However, NERC recognizes that in the longer term, this issue requires further consideration. Historically, reliability has been defined as the degree to which the performance of system elements affects the continuity and quality of power supply to the ultimate electricity customer.

11. NERC maintains that determining "adequate reliability" cannot be separated from the question of cost, as ultimately there are necessary tradeoffs between cost and reliability. Those tradeoffs must be evaluated in the best interests of electricity consumers, who wish to have both affordable and reliable electricity. For these reasons, developing acceptable metrics for adequate reliability will require an extended and fully vetted process involving stakeholders, including end users and the states. NERC proposes to initiate a stakeholder process to refine the definition of adequate reliability, including any appropriate metrics, and will report to the Commission on its progress as part of its one year compliance filing on measures to enhance the reliability of the Bulk-Power System.

12. With regard specifically to the supermajority voting requirement, NERC insists that this requirement is a suitable means for approval of Reliability Standards that achieve an adequate level of reliability. The supermajority requirement ensures that there is a substantial agreement on a proposed Reliability Standard, that it will serve the stated reliability objective and it will not cause unintended adverse consequences. Use of the supermajority requirement in the NERC Reliability Standard development process has proven successful in bringing out a diverse range of issues and robust technical discussions of all proposed Reliability Standards. The industry has repeatedly demonstrated, according to NERC, willingness to vote to adopt Reliability Standards even though not everyone might agree with each individual standard.

b. Comments

13. EEI supports NERC's proposal that, for now, the results of the Reliability Standards development process will reflect the industry's collective sense of adequate levels of reliability. Both EEI and ISO/RTO Council support NERC's proposal to

develop meaningful performance metrics in the longer term. EEI contends that, in the future, the cost of compliance should be more explicitly considered and recommends that NERC develop procedures to more fully weigh the costs of new and modified Reliability Standards.

14. ISO/RTO Council advocates that all determinations related to defining "adequate reliability" should specifically be made through the NERC Reliability Standard development process. It believes that this is the only process that satisfies NERC's goal of employing a fully vetted process that is open to all stakeholders, end users, and regulators.

15. In contrast, Alcoa maintains that NERC's proposal to initiate a stakeholder process to refine the definition of adequate reliability and report on its progress as part of its one year compliance filing essentially defers the task of defining an adequate level of reliability and is insufficient because NERC is currently developing Reliability Standards that should ensure an adequate level of reliability without having defined what that is. Alcoa states that it advised NERC that the target level of reliability that is "adequate" must be defined as an achievable and quantifiable end point, through a series of measurable and assessable system performance targets designed to minimize the threat of cascading outages. At a minimum, Alcoa contends that "adequate level of reliability" should represent a level that prevents cascading outages of the type and severity that occurred during the August 2003 blackout, and it "must be a forward-looking examination and analysis of the weaknesses of the Bulk-Power System that will guide the evaluation of all proposed standards." This exercise, Alcoa asserts, should precede the development of Reliability Standards, rather than follow it.

c. Commission Conclusion

16. On the issue of defining an adequate level of reliability, the Commission accepts the ERO's proposal to establish a stakeholder process to achieve this important goal. While Alcoa is correct that NERC's proposal defers the definition of adequate reliability, NERC's stakeholder process provides a ready means to fairly define adequate reliability and at the same time provide stakeholders with input to the process. Moreover, the technical details and development of metrics that will be required to complete the complex task of defining an adequate level of reliability will necessarily take some time. Even so, we agree with Alcoa that the initiation of this process should not be deferred and must proceed on a set schedule. The ERO must address the issue of whether an adequate level of reliability can be defined to partly or wholly apply to all Reliability Standards, whether it can be defined for certain sets of Reliability Standards (BAL, FAC etc.), or whether, in some instances, it must be tailored to each individual Reliability Standard. The ERO must consider opportunities to develop and apply metrics that can form the

basis for broadly defining an adequate level of reliability, such as the creation of a precisely defined set of system operating states.[14] NERC should explore this and other possibilities and continue to develop metrics that will help determine compliance with Reliability Standards and better measure whether compliance with Reliability Standards assures an adequate level of reliability. We therefore direct the ERO to develop a work plan to propose a continuing improvement process to consider "adequate level of reliability" when developing new or modified Reliability Standards. If the Commission decides in the Final Rule to require NERC to submit a workplan as proposed in the Reliability Standards NOPR, it would be appropriate to include NERC's plan for considering "adequate level of reliability" with the workplan proposed by the Commission in the *Reliability Standards NOPR*.

17. The Commission directed the ERO to address the possibility that the required 67 percent affirmative vote to approve a Reliability Standard could be an "obstacle" to improved Reliability Standards. The ERO states that its supermajority voting requirement has worked well but does not provide much in the way of support for this conclusion.

18. We note that a supermajority affirmative vote requirement in the 58-60 percent range appears to work among independent system operators (ISOs) and regional transmission organizations (RTOs) and that accreditation by the American National Standards Institute (ANSI), upon which the ERO Reliability Standard development procedure is based, does not require a supermajority vote. We weigh these observations against the fact that this is a period of transition for industry from voluntary to mandatory standards and that voting patterns could change significantly under a mandatory and enforceable regime that includes the possibility of significant penalties. Thus, we will not at this time order a reduced supermajority affirmative vote requirement for the ERO Reliability Standard development procedure. Instead, we direct the ERO to closely monitor the voting results for Reliability Standards and, to report to us quarterly for the next three years its analysis of the voting results, including trends and patterns that may signal a need for improvement in the voting process, such as the balloting down of a Reliability Standard and subsequent ballot approval of a less stringent version of the Reliability Standard. These results will inform the Commission of the need to re-examine the Reliability Standard development procedure voting process.

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[14] *See, e.g. Mandatory Reliability Standards for the Bulk-Power System*, Notice of Proposed Rulemaking, FERC Stats. & Regs., Vol. IV, Proposed Regulations, ¶ 32,608 at 32,911 – 33,097 at P 275 (2006) (*Reliability Standards NOPR*).

2. Urgent Action on Standard Development

19. In the *Certification Order*, we expressed concern about the time it may take to develop a Reliability Standard under NERC's current ANSI-certified process in certain circumstances, especially under a Commission-imposed deadline.[15] NERC had indicated that, under its proposed ANSI-accredited regular process, a Reliability Standard may be developed in as little as four months or up to 12 to 15 months for a more complex Reliability Standard, whereas an urgent action Reliability Standard might be approved within 60 days. We stated that, though quicker than its regular process, NERC's urgent action process does not appear to have a built-in mechanism for meeting a Commission-set deadline. Further, the *Certification Order* indicated that NERC's current processes do not adequately address the Commission's authority under section 215 to remand a Reliability Standard or otherwise require that one be developed.[16]

20. The Commission directed NERC to address three principal shortcomings in NERC's procedures. First, it did not appear that NERC's procedures would allow the ERO to set a specific deadline for action by the Reliability Standards development committee and registered ballot body in response to a Commission order that mandates action on a remand by a date certain. We therefore required NERC to develop such a process. Second, as noted above, where expedited action is required, an urgent action Reliability Standard could be adopted on an expedited basis, but it would expire by its own terms within one year. We stated that this is not appropriate in situations where the Commission has required that a Reliability Standard be modified or developed; there should be no possibility, in that circumstance, for the resulting Reliability Standard to "lapse" or "expire." We therefore required NERC to adopt a process that provides for adopting an interim Reliability Standard on an expedited basis that is later subject to adoption on a permanent basis without any possibility that the interim Reliability Standard "expires" in the interim. Finally, we said that, "in rare instances, the urgent action process may not be sufficiently expedited, such as if necessary to address an imminent threat to national security."[17] We required NERC to address whether the urgent action process, or some other process, can accommodate such rare circumstances.

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[15] *Certification Order* at P 252.

[16] *Id.* at P 253.

[17] *Id.*

a. NERC Response

21. NERC contends that the existing urgent action procedure, with a 60-day timeline for approval of a Reliability Standard, is sufficiently timely for all cases in which a Reliability Standard is needed to quickly address an issue of Bulk-Power System reliability. Establishment of an industry Reliability Standard requires due process, which the 60-day urgent action provides. According to NERC, a Reliability Standard should be expected to establish an enduring threshold of acceptable performance and should not be used to create an emergency stopgap measure to address an immediate operational or security threat. NERC maintains that such emergency actions would be more appropriately addressed through a remedial directive or order.

22. NERC recognizes that there may be extraordinary circumstances of an immediate threat to Bulk-Power System reliability or national security, such as a widespread terrorist attack or catastrophic failure of the electric system, which could dictate the need to direct a Reliability Standard within a specific timeframe. Thus, NERC has revised the Reliability Standard development procedure to allow the NERC board to take "emergency action" after making a written finding that an extraordinary and immediate threat exists to Bulk-Power System reliability to further expedite NERC's existing urgent action procedures. Specifically, the NERC board would have the discretion to: (1) reduce or suspend the 30-day pre-ballot review of a proposed emergency Reliability Standard; and (2) reduce the time period for voting by stakeholders to five days for the initial ballot, and if necessary five days for the recirculation ballot.

23. To address the Commission's concern with the automatic expiration of an urgent or emergency action after one year, NERC proposes to modify the Reliability Standard development procedure to remove the automatic one-year expiration. In its place NERC will substitute a provision that, if a Reliability Standard is adopted through an urgent or emergency action, the Reliability Standard must subsequently be made permanent by a ballot of the stakeholders within one year, or NERC must immediately begin development of a modified or replacement Reliability Standard that must be completed within two years. The interim Reliability Standard would remain in effect until replaced or until it was made permanent or removed through the regular approval process.

b. Comments

24. EEI believes that a determination of an imminent threat to national security should be a decision reserved to the Commission. EEI asks that the Commission require NERC to remove the paragraph in the Reliability Standard development process manual that allows the NERC board to make such determinations and replace it with the following

language: "Upon notification by the Commission of an imminent threat to national security, the NERC Board shall have the discretion to take the following actions to further expedite the urgent action procedure."

c. Commission Conclusion

25. NERC's proposal raises several concerns. First, NERC's compliance filing is not responsive to the Commission directive in the *Certification Order* that NERC include within its Reliability Standard development process a means to timely respond to a Commission-imposed deadline with respect to a remand.

26. Second, while NERC's proposed urgent action process is responsive to the Commission's concern that its current urgent action process may not be sufficiently expedited in all instances, it is of limited application and may be implemented only at the discretion of the NERC Board. In contrast, EEI points out that the determination of extraordinary circumstances should be a decision reserved exclusively for the Commission. In the *Certification Order*, we explained that there may be rare instances in which the urgent action process may not be sufficiently expedited "such as if necessary to address an imminent threat to national security." NERC appears to limit the expedited emergency urgent action process to the two examples given, *i.e.*, an immediate threat to the Bulk-Power System and national security. Moreover, the process presented by NERC would have the NERC board, and not the Commission, determine when such circumstances exist.

27. 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. Further, NERC's process does not provide for expedited standard development as directed by the Commission, but only when the NERC board has made a written finding that an extraordinary and immediate threat exists to Bulk-Power System reliability or national security.

28. In light of the above, the Commission directs NERC to modify both the regular and expedited Reliability Standard development procedures to explicitly provide for timely adherence to a Commission-imposed deadline.[18] We further direct that NERC revise the proposed expedited urgent action process to (1) provide for the expedited

[18] 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.

development of a Reliability Standard in "extraordinary circumstances" without the limitation on when it can be invoked by the Commission and (2) incorporate the ability to adjust the timeliness of the process to meet a Commission-imposed deadline and still allow for due process. NERC is also directed to revise the emergency action process to make it clear that, when the Commission determines that extraordinary circumstances exist, NERC must invoke its emergency action process without NERC board discretion to overrule that determination. This does not prevent the NERC board from taking action when the Commission has not spoken.

29. NERC's Rules contemplate and provide procedures for the development of a new or revised Reliability Standard based on the voluntary submission of a "standards authorization request" (SAR). The Rules of Procedure, however, are silent regarding the procedure for initiation of the development of a new or revised Reliability Standard in response to a Commission remand or directive pursuant to section 215(d)(5) of the FPA. Because the Rules indicate that "government agencies" are included within the definition of the term "requester" which must initiate the development of a new or revised Reliability Standard by submitting a SAR, it could be understood that NERC expects this of the Commission as well. Therefore, we direct NERC to revise its Reliability Standard development procedure 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 SAR process.

30. We accept the ERO's proposal to remove the automatic one-year expiration of a Reliability Standard developed through the urgent or emergency action processes. It is sufficient, as the ERO proposes, to allow the interim Reliability Standard to remain in effect until it is made permanent or replaced by a permanent Reliability Standard, or possibly even its withdrawal as a Reliability Standard so long as it is understood that these actions are all subject to Commission approval. NERC is directed to make clear in its Reliability Standard development procedure that any of these options are subject to Commission approval.

31. Finally, the ERO has indicated that the normal and urgent action Reliability Standard development procedures can produce a Reliability Standard in four months and 60 days respectively. Both in Order No. 672 and in the *Certification Order* we expressed concern with the length of time the ERO process takes to develop a Reliability Standard. The ERO has never, to our knowledge, developed a Reliability Standard under its normal process in four months or developed an urgent action Reliability Standard in 60 days. We direct the ERO to monitor the length of time taken to develop a new or modified Reliability Standard from the submission of a SAR through approval of a Reliability Standard by the ERO board. The ERO should submit a report as part of its performance assessment at the three year anniversary of the certification of the ERO that identifies

how long each new Reliability Standard or modification under development has taken up to that point. The report should also include an analysis of the reasons for delay and any patterns of delay in developing timely Reliability Standards or modifications to Reliability Standards. The ERO should address the Commission's expressed concerns and specific orders for new or modified Reliability Standards, and compare progress with the ERO's Reliability Standards development work plan. The ERO should discuss in this report the effectiveness of the current Reliability Standards development process with regard to the timely development of Reliability Standards, and, if problems are uncovered, identify possible resolutions including possible changes to its process.

3. Regional Variance and Regional Reliability Standards

32. The *Certification Order* found that the distinction between a Reliability Standard regional variance and a regional Reliability Standard, as defined by NERC, is unclear.[19] It noted that NERC's approach to developing, reviewing and approving such regional differences appears to be the same. Both types of differences require approval by NERC and become part of the NERC-maintained catalog of Reliability Standards. Both are due a rebuttable presumption by the ERO if proposed by an Interconnection-wide Regional Entity for that Interconnection. We further noted that one difference seems to lie in the fact that NERC would permit a regional Reliability Standard for economic reasons and a regional variance to accommodate market rules and tariffs. However, as the basis for this distinction was not explained by NERC, we directed NERC to satisfactorily clarify in its compliance filing the definitions of all types of regional differences in Reliability Standards.

a. NERC Response

33. NERC states that it has clarified the differences between regional variances and regional Reliability Standards in its Rules of Procedure and in the Reliability Standard development procedure. NERC has proposed new definitions of the terms "regional Reliability Standard" and "variance" in section 202 of the Rules of Procedure. To further distinguish the two, NERC now addresses regional standards development and approval only in the Rules of Procedure, while it addresses regional variances (exceptions to a NERC Reliability Standard) only within the Reliability Standard development procedure.

34. NERC explains that a variance modifies a NERC Reliability Standard to address a unique circumstance requiring an exception to the North American-wide standard; whereas a regional Reliability Standard is a separate standard. Both would be approved by the NERC board and then by the Commission. Further, a variance provides an

[19] *Id.* at P 280.

alternative approach to meeting the same reliability objective as a NERC standard and is typically dictated by a physical difference. A regional Reliability Standard provides more stringent requirements or covers areas not covered by the North American standard.

35. NERC states that it did not intend that economic feasibility would be a factor in evaluating whether NERC or the Commission should approve a Reliability Standard. The reference to economic feasibility was intended as an example of factors stakeholders may consider when voting to approve Reliability Standards. NERC has removed the reference from section 312.2 of the Rules of Procedure to avoid confusion.

b. Comments

36. No comments were received on this portion of NERC's compliance filing.

c. Commission Conclusion

37. The Commission accepts NERC's clarification of the difference between a regional Reliability Standard and a variance. The Commission, however, is concerned with the type of "unique circumstance" that may develop or already exist that would require a variance to a Reliability Standard. The Commission's standard of review for approving a regional difference or variance will be consistent with Order No. 672, where the Commission stated that we would generally accept regional differences that are: (1) more stringent than the continent-wide Reliability Standard or that address areas not covered by the continent-wide Reliability Standard, and (2) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System.[20] Thus, while we will accept the proposed provision, we expect the ERO to only allow variations consistent with our policy set forth in Order No. 672.

4. International Coordination of Reliability Standards Development and Remand

38. In the *Certification Order*, we expressed concern about conflicting Reliability Standards across international borders but within the same interconnected Bulk-Power System.[21] We indicated that, as an international organization subject to multiple jurisdictions, it is incumbent on the ERO to manage the process of obtaining regulatory approvals in those jurisdictions. We directed NERC to revise its proposed coordination process to: (1) identify the relevant regulatory bodies and their respective Reliability

[20] Order No. 672 at P 291.

[21] *Certification Order* at P 286.

Standards approval and remand processes that will be implicated in any remand of a proposed Reliability Standard, and (2) specify actual steps to coordinate all of these processing requirements, including those that may be necessary for an expedited deadline to return a remanded proposed Reliability Standard.

a. NERC Response

39. NERC states that it has developed a procedure for coordination among ERO jurisdictions for the approval of proposed Reliability Standards (Appendix 3C to the Rules of Procedure). Pursuant to the procedure, NERC will: (1) maintain a current list of government authority contacts; (2) provide notice to and seek inputs from each government authority contact on the service list when a Reliability Standard is proposed for development, becomes available as a draft for review, and goes to a ballot of the stakeholders; and (3) facilitate an informal conference annually with governmental authorities to discuss Reliability Standards development objectives and priorities, and emerging Reliability Standards.

40. NERC's Rules of Procedure require that, if the Commission or an applicable authority in Canada directs the development of a Reliability Standard or remands a Reliability Standard, NERC will notify all governmental authority contacts on the service list within five business days. Within 60 days, NERC will propose to all listed authorities a work plan and schedule to address the directive or remand in a timely manner.

41. To coordinate the timing of approval actions by governmental authorities, except in situations requiring more timely action, NERC will propose that all Reliability Standards become effective uniformly across North America on a date that provides a minimum of a 90-day period for governmental authority review and approval of the Reliability Standards, provides reasonable time for applicable Bulk-Power System users, owners, and operators to become compliant with the standard and coincides with the start of calendar year or quarter to facilitate implementation of compliance monitoring and reporting. If any governmental authority does not make the Reliability Standard effective within the designated approval period, NERC will notify all authorities on the service list and will coordinate with the governmental authorities for an effective date for the Reliability Standard that is practical for the various jurisdictions.

b. Comments

42. No comments were received on this portion of NERC's compliance filing.

c. Commission Conclusion

43. In its Rules, the ERO has provided procedures for identifying and maintaining contact lists for governmental authorities with responsibilities for Reliability Standards. While we accept the proposed provisions of NERC's coordination procedure, NERC must submit additional language to be fully responsive to the *Certification Order*. In particular, NERC has not identified and explained the individual governmental "Reliability Standards approval and remand processes that will be implicated in any remand of a proposed Reliability Standard."[22] This information on each government entity's process would help foster coordination among the government entities. We, therefore, direct the ERO to submit a further compliance filing within 60 days responsive to this earlier Commission directive. Further, we clarify that the Commission is not bound by any ERO-developed procedure or timeline for regulatory approval of a proposed Reliability Standard.

44. To minimize the possibility of a governmental authority issuing a remand directive, it seems appropriate for such governmental authorities to have an opportunity to provide NERC with input prior to filing a proposed Reliability Standard for governmental approval. We agree with NERC's proposal to facilitate informal conferences to provide an opportunity for governmental authorities to consult with NERC and stakeholder representatives regarding Reliability Standard development work-plans, objectives and priorities, and emerging Reliability Standards. We believe this type of conference should be held at least annually. Governmental authorities may independently convene similarly structured meetings as needed. It is anticipated that the Commission and our counterpart government authorities in Canada and Mexico will convene regular meetings to coordinate on issues relating to reliability in which the ERO may be called on to provide information or expertise.

B. Compliance Monitoring, Readiness and Enforcement

1. General Matters

45. In the *Certification Order*, the Commission accepted NERC's ERO enforcement program, but required NERC to submit a compliance filing that includes certain amendments, clarifications and additional submissions. We stated that NERC's compliance filing must include the specific procedures under which it will use its authority as ERO to ensure consistency and fairness in Regional Entity programs with respect to findings relating to compliance and imposition of monetary penalties, non-monetary penalties and remedial actions. We indicated that uniformity among Regional

[22] *Id.* at P 286.

Entity programs is important to provide fairness. Accordingly, we directed NERC to provide for either a single compliance audit program or a plan and a timetable for developing such a program.[23] We stated that if NERC believes that certain differences among the regions are appropriate, such as where a particular region develops a program that is superior in certain respects to NERC's program, NERC should explain these differences.

46. In addition, among other things, the Commission directed NERC to make modifications regarding the following matters involving its compliance and enforcement program: (1) clarify procedures regarding remedial actions, (2) specify the due process procedures for audits, investigations and initial hearings that the ERO and Regional Entities are to follow, (3) specify requirements for the creation and maintenance of a written record of all communications and documents related to an investigation and initial hearing, (4) explain how NERC will review penalties levied by each Regional Entity for a violation of a Reliability Standard for consistency with similar violations and fairness in application and how this review would differ from the appeal process, (5) clarify appeal procedures, (6) provide for Commission staff participation in audits, (7) provide a schedule for ERO and Regional Entity enforcement programs, (8) clarify remedial actions, and (9) clarify notification of investigations.

a. NERC Response

47. NERC indicates that, to the extent possible, it has submitted modifications to its Rules of Procedures as required by the *Certification Order*. However, NERC states that it will propose a single uniform monitoring and enforcement program containing specific procedures to ensure consistency and fairness in Regional Entity compliance and penalty programs. These procedures will include the specific steps and triggers of audits and other enforcement processes, and each region will be required to justify differences from the uniform program on a case-by-case basis. The compliance process will also apply to NERC's enforcement program with respect to Regional Entities.[24]

b. Comments

48. Xcel asks that, because NERC did not file its compliance monitoring and enforcement program in the October 18 Filing, any ruling on that filing should be subject to the Commission's review of the compliance monitoring and enforcement program.

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[23] *Id.* at P 313.

[24] As mentioned above, NERC submitted the uniform compliance monitoring and enforcement program on November 29, 2006 in Docket No. RR06-1-004.

c. Commission Conclusion

49. Where NERC has submitted modifications to its Rules of Procedures or Sanction Guidelines, the Commission discusses those matters below. However, if the modifications to the Rules of Procedures or Sanction Guidelines are affected by NERC's uniform compliance monitoring and enforcement program, those determinations will be subject to the outcome of our proceeding in Docket No. RR06-1-004 addressing NERC's uniform compliance monitoring and enforcement program. To the extent the Commission's review in Docket No. RR06-1-004 requires additional modifications to the Rules of Procedure or Sanction Guidelines proposed herein, the Commission reserves the right to require additional compliance by NERC.

2. Reliability Readiness Reviews

50. In the *Certification Order*, the Commission noted inconsistencies between section 700 (Reliability Readiness Review and Improvement) and Appendix 7 (Readiness Audit Procedures) of the Rules of Procedure. While it appeared that Appendix 7 provided greater specificity regarding how a reliability readiness review will be conducted, we directed NERC to explain in its compliance filing the relationship between the two provisions, remove inconsistencies and/or explain and make clear which section prevails if there is an inconsistency.[25]

51. The *Certification Order* found that significant differences and levels of detail exist in the appeal process set forth for the reliability readiness program in comparison to other aspects of the enforcement program. We directed NERC to explain the need for differing appeal procedures.[26] Further, NERC was directed to explain the need for arbitration with regard to the reliability readiness reviews.

52. In the *Certification Order*, we stated that reliability readiness review team members must receive appropriate training and have expertise that qualifies them to

[25] *Certification Order* at P 334.

[26] *Id.* at P 335.

conduct reliability readiness reviews. To ensure the independence of reviews, we directed NERC to explain the composition of the proposed ERO compliance and certification committee.[27]

a. NERC Response

53. NERC indicates that section 700 and Appendix 7 have been modified to ensure consistency with each other. Appendix 7 contains greater detail on matters such as team composition and process timeline dates. NERC added a statement to section 700 indicating that section 700 will control in the event that inconsistencies still exist. NERC includes the proposed scope and procedures of the compliance and certification committee and its membership provisions as Attachment 17 in its compliance filing.

54. To aid in maintaining a separation between the readiness program and the compliance program, NERC has changed the name of the program to "Reliability Readiness Evaluation and Improvement Program" and made corresponding changes throughout its documents. NERC has amended section 700 of the Rules of Procedure to eliminate the appeals process for the reliability readiness program. NERC explains that the results of the reliability readiness evaluations are intended to provide guidance to the evaluated entity in achieving operational excellence and, as stated, the entity has the final responsibility for choosing to implement the recommendations. These recommendations are not allegations of compliance violations, and no sanctions or penalties are levied as a result. NERC believes the appeal mechanism serves no useful purpose for the reliability readiness program. Entities maintain the right to include a statement of their position with the release of the final evaluation report.

b. Comments

55. ISO/RTO Council is concerned about NERC's proposed elimination of the appeals process from the reliability readiness program. It points out that "the right to disregard the recommendations in an evaluation report is not a sufficient substitute for the ability to correct errors in the report, because entities will be reluctant to resist recommendations that have NERC's imprimatur." ISO/RTO Council states that, if the Commission accepts the proposed elimination of the appeals process, it should direct NERC to provide evaluated entities an opportunity to provide early input with regard to information to be publicly disclosed in the report. ISO/RTO Council notes that NERC's revised Rules of

[27] *Id.* at P 367. Additionally, we directed NERC to clarify the voting requirement that applies to appeal bodies throughout the appeal process for the reliability readiness program. However, as explained below, because NERC has eliminated the reliability readiness appeals, this directive is moot.

Procedure already provide some means for evaluated entities to review and seek corrections to information to be in the final evaluation report, "but additional procedures are required if there is to be no avenue for review of the report."

56. ISO/RTO Council further advises the Commission to direct NERC to "ensure that the reliability readiness program reports do not circumvent or undermine NERC's and the regional entities' compliance programs." The goal of readiness reviews is not furthered, according to ISO/RTO Council, by the publication of final readiness review reports that address compliance issues where conclusions are not subject to review or to the due process rights embodied in NERC and Regional Entity compliance programs. ISO/RTO Council recommends that the Commission direct that any compliance findings contained in a readiness review final evaluation report be reported separately pursuant to the NERC and Regional Entity compliance programs to ensure due process, including the rights of appeal. Any confirmed findings can be disclosed through the procedures specified in the respective compliance programs rather than through the readiness review final evaluation report.

c. Commission Conclusion

57. The Commission accepts NERC's proposed changes regarding reliability readiness. NERC's reliability readiness evaluation and improvement program results in voluntary recommendations for the entities being evaluated and, therefore, the right to appeal is unnecessary since such entities may choose not to implement the recommendations without penalty. The Commission thus accepts NERC's proposed elimination of the appeal process for reliability readiness evaluations so long as the evaluated entities are permitted to include a statement of their position along with the release of the final report.

58. In response to ISO/RTO Council's suggestion that additional procedures be required for evaluated entities to review and seek corrections to information included in the final evaluation report, the Commission finds the current procedures adequate. Section 700 of NERC's Rules of Procedure permits sufficient opportunity for input from an evaluated entity by informing the evaluated entity of the audit team's findings through the audit team's presentation upon completion of its on-site evaluation and by allowing the evaluated entity to review a draft report in advance, correct factual errors, provide revisions the audit team may consider including in the final report and post comments along with the final report on the NERC website.

59. The Commission previously addressed in the *Certification Order* concerns similar to those raised by ISO/RTO Council regarding potential compliance violations discovered during a reliability readiness evaluation. As indicated in that order, potential

non-compliance will be referred to NERC for resolution through an investigation so that the two programs continue to satisfy their two distinctive purposes and neither program's purpose is undermined.[28] Therefore, with respect to the concerns of ISO/RTO Council, findings from matters referred to the compliance monitoring and enforcement program will not be part of the reliability readiness final evaluation reports.

3. Monitoring NERC's Compliance with Reliability Standards and its Rules of Procedure

60. In the *Certification Order*, we noted that section 405 of the Rules of Procedure provides that a NERC stakeholder compliance committee shall establish and implement a process to monitor NERC's compliance with Reliability Standards that apply to NERC. We stated that the stakeholder compliance committee should also monitor NERC's compliance with the Rules of Procedure.[29]

a. NERC Response

61. NERC agrees that the stakeholder compliance and certification committee should monitor the compliance program Rules but believes that other stakeholder committees should monitor NERC's compliance in their areas of expertise. Thus, NERC has modified the Rules to state that the standards committee will monitor NERC's compliance with the Rules regarding Reliability Standards development. NERC has modified section 405 of the Rules of Procedure to provide that the stakeholder compliance and certification committee will monitor NERC's compliance with the Rules of Procedure for the compliance enforcement and organization registration and certification programs.

b. Comments

62. Alcoa states that NERC dismisses the Commission's conclusion with regard to the role of the stakeholder compliance committee to monitor NERC's compliance with its Rules. Alcoa further asserts that, even if the Commission had not already made a decision regarding this issue – regarding which NERC did not seek rehearing – NERC should not be allowed to decide which stakeholder groups have the expertise to monitor its activities. Alcoa states that interested stakeholders throughout the various ERO committees should not be prevented from monitoring NERC's compliance with NERC's

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[28] *Id.* at P 321.

[29] *Id.* at P 354.

own Rules based on a particular stakeholder's areas of expertise in the industry and thus that NERC must permit interested parties in all sectors of the industry to monitor, comment on, or report any purported violations by NERC.

c. Commission Conclusion

63. The Commission accepts NERC's modification to section 405 of the Rules of Procedure that identifies the compliance and certification committee as the body responsible for monitoring NERC's compliance with the Rules of Procedure for the compliance enforcement program. However, the Commission rejects NERC's proposed revisions of section 306 of the Rules of Procedure to designate the standards committee as the body responsible for monitoring NERC's compliance with the Rules of Procedure regarding the Reliability Standards development process. Unlike the standards development committee, the compliance and certification committee is best situated to oversee NERC's compliance because the compliance and certification committee is independent of the Reliability Standards development process and is responsible for monitoring NERC's compliance with the Rules of Procedure for the compliance enforcement programs. Consistent with the *Certification Order*, the Commission directs NERC to modify section 306 so that the compliance and certification committee is responsible for monitoring NERC's compliance regarding Reliability Standards development.

64. The Commission finds that Alcoa's request to have interested stakeholder involvement with monitoring, commenting on, and reporting violations of NERC's compliance with its Rules of Procedure and Reliability Standards is satisfied by the participation of stakeholders in the compliance and certification committee. Members of the compliance and certification committee are from entities subject to and affected by the NERC compliance program and the NERC Reliability Standards and are sector experts with a wide diversity of opinion and expertise. Nothing prohibits other stakeholders from reporting perceived noncompliance by NERC with regard to its Rules of Procedure and Reliability Standards to the compliance and certification committee for evaluation.

65. Finally, with regard to NERC's compliance with Reliability Standards, because NERC is not a user, owner or operator of the Bulk-Power System, NERC's compliance is not enforceable pursuant to section 215(e) of the FPA. To require NERC to comply with Reliability Standards, NERC's Rules of Procedure must indicate that NERC will comply with them and what the oversight process will be. Thus, we direct that NERC modify its Rules of Procedure to provide that the ERO will comply with each Reliability Standard that identifies the ERO as an applicable entity, identify the component of NERC that will

monitor NERC's compliance with such standards, and state that non-compliance would constitute a violation of NERC's Rules of Procedure and subject NERC to any consequences of such a violation.

4. Role of Regional Entities During System Incidents

66. In the *Certification Order*, we observed that sections 807 and 808 and Appendix 8 (NERC blackout and disturbance response procedures) to the Rules of Procedure did not describe the roles of Regional Entities in regard to off-normal events and major system disturbances. Because Regional Entities should have an important role in investigations of system disturbances and other major events that affect their regions, we directed NERC to amend sections 807 and 808 and Appendix 8 to set forth the respective roles of Regional Entities, along with regional reliability organizations, in event analysis.[30]

a. NERC Response

67. NERC indicates that it has revised sections 807 and 808 of the Rules of Procedure, including Appendix 8, to more clearly describe the roles of Regional Entities and regional reliability organizations in the analysis of off-normal events and major system disturbances.

b. Comments

68. EEI asks that NERC further clarify the roles of the Regional Entities in analyzing system disturbances. For example, EEI requests that NERC clarify: (1) when the NERC and/or regional compliance enforcement programs will become involved, (2) how data and information in Appendix 8 analyses will be collected and maintained, (3) the timing of "handoffs" from Appendix 8 actions to compliance enforcement, (4) the potential that an Appendix 8 analysis and compliance investigation would be conducted concurrently, (5) whether Appendix 8 analyses include written reports to be delivered to the compliance enforcement program, and (6) the extent to which the Commission should be informed of the outcomes of these analyses.

c. Commission Conclusion

69. NERC generally states that it will work closely with the Regional Entities and regional reliability organizations in analyzing major events and off-normal events in its revisions to sections 807 and 808 of the Rules of Procedure and in Appendix 8. We agree that NERC is free to cooperate with these organizations in monitoring system events.

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[30] *Id.* at P 370.

However, given that it is not certain whether regional reliability organizations will continue to exist, we direct NERC to clarify the specific roles it envisions for any regional reliability organizations.

70. While EEI requests that NERC further clarify various matters related to possible involvement of the ERO compliance program in the investigation of a system disturbance, we believe that the answer to EEI's concerns will likely depend on the facts of a particular occurrence and how a particular investigation unfolds. We are concerned that a definitive response to such matters as the timing of enforcement program involvement, "handoffs" to enforcement, and the preparation of a written report to be delivered to the enforcement program could reduce the ERO's flexibility in responding to a particular event. We expect NERC to inform us promptly of any disturbance analysis.

5. Referral of Regional Entity Investigation to ERO and Multiple Investigations

71. In the *Certification Order*, we noted that NERC's ERO application did not satisfy the requirement set forth in Order No. 672 that the ERO retain the ability to direct a Regional Entity to refer an investigation to the ERO where appropriate. Nor did NERC address how the ERO and Regional Entities will avoid multiple investigations involving the same matters. We directed NERC to address these requirements. We also suggested that NERC revise Appendix 8 to its Rules to state specifically that, in relation to an investigation of a blackout or other ongoing disturbance, the ERO will consider an enforcement action for any violation it finds.[31]

a. NERC Response

72. NERC responds that it revised section 807 of the Rules of Procedure and Appendix 8 to the Rules of Procedure to state specifically that, in relation to an analysis of a blackout or other ongoing disturbance, the ERO compliance enforcement program will initiate appropriate enforcement actions for any violations found during the analysis and referred to it by the event analysis team.

b. Comments

73. Xcel asserts that the Rules of Procedure and blackout and disturbance response procedures do not explain the procedures to avoid multiple investigations when the Regional Entity, ERO and the Commission all seek to investigate a disturbance, an alleged violation or compliance audit finding.

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[31] *Id.* at P 380.

74. FirstEnergy asks that NERC clarify section 404.1 of the Rules of Procedure to reflect that an entity will not be subject to separate enforcement actions by both NERC and a Regional Entity for the same occurrence.

c. Commission Conclusion

75. NERC has amended Appendix 8 to provide that all compliance issues found in an event analysis will be referred to the appropriate NERC or "RE/RRO" compliance group. This amendment adequately provides for referral of these compliance issues to the ERO or the appropriate Regional Entity compliance programs. However, in section 202 of the Rules of Procedure, NERC defines "regional reliability organization" as each of the current regional reliability organizations or any successor organizations. Because regional reliability organizations will not possess enforcement authority over Reliability Standards, we direct NERC to delete the reference in Appendix 8 to referrals of compliance issues to any regional reliability organizations.

76. The Commission agrees with Xcel that it remains unclear in the Rules of Procedure and Appendix 8 whether an analysis of blackout and disturbance responses involving the same matters may occur at both the ERO and Regional Entity levels and directs NERC to clarify in its Rules of Procedures that multiple investigations will be avoided. We expect that NERC will manage any investigation in which more than one Regional Entity participates. With regard to FirstEnergy's comment, we direct NERC to clarify in the Rules of Procedure that an entity will not be subject to separate enforcement actions by NERC and a Regional Entity for a single disturbance.

77. With regard to a possible overlapping investigation by the Commission, Order No. 672 explained that, "there may be situations in which it would be appropriate to have concurrent investigations but we expect any such occasions to be rare. In those situations we would coordinate efforts with the ERO or any relevant Regional Entity."[32] This explanation is sufficient.

6. Penalties

78. The *Certification Order* generally approved NERC's proposed Sanction Guidelines, but directed NERC to modify or further justify specific aspects of its proposal. Among other things, the Commission required that NERC: (1) include the $1 million per violation, per day maximum penalty amount in the Base Penalty Amount Table; (2) explain how the penalty amounts listed in that table are higher than an

[32] Order No. 672 at P 485.

economic choice that an entity would make to engage in a violation as a cost of doing business; and (3) explain what consideration of "violator size" in the penalty process is intended to address.[33]

79. To aid in the discussion of the issues relating to penalties, we first summarize NERC's revisions to its methodology for penalty assessments. In general, NERC submitted revisions to its Sanction Guidelines addressing the method under which it or Regional Entities would determine monetary and non-monetary penalties. With respect to monetary penalties, NERC states in section 4 of the Sanction Guidelines that this determination of a single penalty for an individual violation will include three steps. In the first step, NERC or a Regional Entity will set an initial range for the Base Penalty Amount for the violation. To do so, NERC or the Regional Entity will consider for the violation the applicable Violation Risk Factor and Violation Severity Level. NERC states in section 4.1.1 of the Sanction Guidelines that it will assign a Lower, Medium, or High Violation Risk Factor to each requirement of a Reliability Standard to associate a violation of the requirement with its expected or potential impact on the reliability of the bulk power system. For each requirement of a Reliability Standard, NERC also will define up to four Violation Severity Levels – Lower, Moderate, High and Severe – as measurements of the degree to which the requirement was violated.[34] NERC or the Regional Entity will establish the initial value range for the Base Penalty Amount by finding the intersection of the applicable Violation Risk Factor and the Violation Severity Level in the Base Penalty Amount Table in Appendix A to the Sanction Guidelines. For example, for a violation of a standard with a High Violation Risk Factor and a Severe Violation Severity Level, NERC proposes an initial range for a Base Penalty Amount

[33] *Certification Order* at P 437.

[34] NERC stated that it will assign Violation Risk Factors and Violation Severity Levels to particular requirements of Reliability Standards by the end of 2006. Sanction Guidelines at 9 n.6 and 10 n.7. On December 1, 2006, in an informational filing in Docket No. RM06-16-000 concerning its Reliability Standards Development Plan for 2007-2009, NERC states that NERC's ballot body balloted down proposed Violation Risk Factors in October 2006. NERC states that it expects to submit revised Violation Risk Factors for "Version 0" Reliability Standards to the NERC board of trustees for approval in February 2007 and to file these factors with the Commission by mid-February 2007. NERC states that it expects to complete a stakeholder ballot for Violation Risk Factors relating to "Version 1" Standards by the end of February 2007. NERC plans to submit these Violation Risk Factors for approval by the NERC trustees and to file the factors in March 2007. December 1, 2006 Informational Filing at 12.

from $20,000 to $1 million. Conversely, for a violation with a Lower Violation Risk Factor and a Lower Violation Severity Level, the initial Base Penalty Amount range would be from $1,000 to $3,000.

80. In the second step of the penalty determination, discussed in section 4.2 of the Sanction Guidelines, NERC or the Regional Entity would set the Base Penalty Amount for the violation as a value from the highest figure of the initial range to a value equal to or lower than the lowest value of the initial range. In particular, the Base Penalty Amount may be set at or below the lowest figure of the initial range upon consideration by NERC or the Regional Entity of two specific circumstances. The Base Penalty Amount may be set at an appropriate value within the initial range after NERC or the Regional Entity considers the applicability of the Violation Risk Factor to the violation in light of the "specific circumstances" of the violator. NERC states that the circumstances of the violator will include, but not be limited to, the violator's aggregate and net load and interconnections characteristics such as voltage class and transfer ratings. The Base Penalty Amount may be set at an appropriate amount within the initial range or set to zero within the discretion of NERC or the Regional Entity if the violation is an "inconsequential first violation by the violator of the reliability standard(s) in question."

81. In the third step, NERC or the Regional Entity would consider adjustment factors discussed in section 4.3 of the Sanction Guidelines to adjust the Base Penalty Amount to reflect the specific facts and circumstances applicable to each violation and violator. In particular, pursuant to Sanction Guidelines section 4.3.1, NERC or the Regional Entity must consider adjusting the penalty to reflect the time horizon of the standard requirement that was violated, on the basis that violations involving immediate or real-time activities should generally incur larger penalties than violations with longer time horizons. In addition, at the written request of the violator, NERC or the Regional Entity may review the Adjusted Penalty Amount in light of the violator's financial ability to pay the penalty. Further, if the violation was an "economic choice," NERC or the Regional Entity will confirm that the penalty will disgorge any unjust profits or economic benefits. Based on these three inquiries with respect to the Adjusted Penalty Amount, NERC or the Regional Entity will set the Final Penalty Amount for the violation.

a. Maximum Penalty Amount and Per Violation, Per Day Penalty Amount

82. In the *Certification Order*, we were concerned that the maximum Base Penalty Amount listed in the Base Penalty Amount Table NERC proposed in its application was $200,000. We stated that the Base Penalty Amount Table must include the maximum monetary penalty pursuant to FPA section 316A of $1,000,000 per violation per day and

directed NERC to modify the table accordingly.[35] We also directed NERC to clarify that all amounts in the Base Penalty Amount Table are per-day, per-violation; and if this clarification results in an adjustment of any penalty amounts listed in the table, to explain the rationale for each such change.

i. NERC Response

83. NERC states that it has added a $1 million "per occurrence" penalty to the Base Penalty Amount Table in the Sanction Guidelines. NERC states that it has established compliance monitoring periods for requirements in the Reliability Standards which, depending upon the requirement, may be hours, days, weeks, months, or once a year. NERC indicates that, in general, it will determine violations and assess penalties consistent with these monitoring periods, as long as doing so produces the desired outcome of violators correcting deficiencies and returning to compliance promptly. NERC indicates that a penalty amount of $1 million per day can be assessed where warranted.

84. According to NERC, all of the amounts indicated on the Base Penalty Amount Table are applicable on a "per violation" basis and may be applicable on a "per day" basis. NERC explains that the penalty for an initial violation of a Reliability Standard will be assessed on a "per occurrence" basis. If there is a repeat violation of the same or a closely related requirement within the requirement's "violation reset time period," the penalty for this violation will reflect this aspect of the violation.[36]

85. NERC states that the figures listed in the revised Base Penalty Amount Table are not maximums, but projected starting points for the determination of the penalty amount appropriate for the violation. In conjunction with the application of the adjustment factors and judgment by the ERO or Regional Entity adjudicator, NERC asserts that the figures listed in the table will support the determination of an appropriate and just penalty for the violation of any Reliability Standard requirement by any violator under any circumstances.

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[35] *Id.* at P 447.

[36] October 18 Filing at 49 and Sanction Guidelines § 4.3.2. Because NERC has not described "violation reset time period" in its filing, we direct NERC to amend the Sanctions Guidelines to define this term.

ii. Comments

86. ISO/RTO Council agrees with the manner in which NERC has incorporated the $1 million penalty amount into the Base Penalty Amount Table. However, ISO/RTO Council points out that the revised Base Penalty Amount Table indicates that, for a high Violation risk factor and a severe Violation Severity Level, the penalty amount can range from $20,000 to $1 million with no explanation as to how NERC would select a value within such a broad range. ISO/RTO Council recommends that the Commission direct NERC to both explain the factors that it will consider in determining the amount of any penalty and make it a priority to resolve in a timely manner the types of behavior that warrant the various penalty amounts within a range. ISO/RTO Council believes the $1 million penalty amount should be reserved for the most serious violations.

iii. Commission Conclusion

87. We do not believe that NERC's amendment to its Base Penalty Amount Table to incorporate a $1 million "per occurrence" amount complies with our directive in the *Certification Order* to insert in the table a maximum Base Penalty Amount equal to the statutory maximum penalty established in FPA section 316A.[37] While NERC has inserted a $1,000,000 amount in the Base Penalty Amount Table as the highest amount in the Base Penalty Amount range for a violation with a High Violation Risk Factor and a Severe Violation Severity level, NERC does not define how it measures the "occurrence" of a violation. To the contrary, NERC's explanation that, in general, it will determine violations consistent with the monitoring periods for violations, and that these monitoring periods "may be hours, or one or more days, weeks, months or once a year" appears to show that NERC may determine a Base Penalty Amount of $1 million for a period that may be as long as a year. This approach does not necessarily yield a maximum Base Penalty Amount of $1 million per day per violation. Although NERC states that nothing in the Sanction Guidelines prevents assessment of a monetary penalty that reaches the FPA statutory maximum, that statement does not respond to our directive concerning the Base Penalty Amount Table. We direct NERC to modify the Base Penalty Amount Table

[37] The penalty amount for a violation pursuant to FPA section 316A is "not more than $1,000,000 for each day that such violation continues."

accordingly.[38] We note that a $1 million Base Penalty Amount is a maximum for a single violation, so that the total of the Base Penalty Amounts determined for a single day for a particular entity may exceed $1 million.

88. Nor has NERC complied with our directive to state all penalties in the Base Penalty Amount Table on a per violation, per day basis. NERC appears to set all amounts in the table on a "per violation, per occurrence" basis, not just the maximum Base Penalty Amount. As discussed above, this basis for setting penalties does not necessarily result in a per violation, per day Base Penalty Amount. We reiterate our directive that NERC clarify that all amounts in the Base Penalty Amount Table are per violation, per day. If this clarification results in an adjustment of any penalty amounts listed in the table, NERC must explain the rationale for each such change.

89. We have several concerns about the Violation Risk Factors that NERC or an ERO would use in the Base Penalty Amount Table to determine a Base Penalty Amount. First, we are not sure which description of the levels of Violation Risk Factor NERC proposes to use: the descriptions in proposed Sanction Guidelines section 4.1.1 or the descriptions in the Reliability Standards Development Procedure, which appear to differ substantially.[39] We direct NERC to reconcile these differences and provide a single, consistent description.

90. Second, we are concerned that, although the Base Penalty Amount Table depends on the assignment of Violation Risk Factors to specific requirements of Reliability Standards, NERC has not yet submitted any Violation Risk Factors for our review and approval. As noted above, NERC currently does not plan to submit Violation Risk

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[38] At section 3.20.a through 3.20.c of the Sanction Guidelines, NERC states that in making penalty determinations, it or a Regional Entity will initially disregard the penalty limitations of the regulatory authority with jurisdiction and determine a penalty pursuant to the Sanction Guidelines only. Next, NERC or the Regional Entity will review the maximum penalty amount allowed by the applicable regulatory authority. Then NERC or the Regional Entity will "set the actual penalty to be levied . . . as the lesser of that determined pursuant to these guidelines and the maximum penalty or sanction allowed by the regulatory authorities." Thus, unless NERC specifically provides that its penalty determinations pursuant to the Sanction Guidelines will permit a Regional Entity or the ERO to impose the FPA maximum civil penalty, a penalty will always be less than the statutory maximum.

[39] *See* October 18 Filing, Attachment 3 at pp. 7-8 and our discussion at P 6 above.

Factors for Version 0 standards until February 2007. Nor does NERC anticipate filing Violation Risk Factors for Version 1 Standards with the Commission until March 2007. The ability of NERC and Regional Entities to enforce Reliability Standards is based in large measure on an appropriate method to determine a monetary penalty for a particular violation. Although this determination depends on the use of the Base Penalty Amount Table, NERC and the Regional Entities will not be able to use the table without Violation Risk Factors that are approved by the Commission. We view NERC's February and March target dates for submission of Violation Risk Factors as the absolute latest filing dates to provide us a reasonable period to review these factors to achieve a June 2007 effective date for NERC's enforcement program.

91. With respect to the timeliness of NERC's submission of Violation Risk Factors, we observe that in its December 1, 2006 informational filing in Docket No. RM06-16-000, NERC stated that it balloted the Violation Risk Factors in aggregate, rather than as elements of particular Reliability Standards. NERC's Reliability Standards Development Procedure neither refers to balloting Violation Risk Factors with applicable Reliability Standards nor describes Violation Risk Factors as incorporated in particular Reliability Standards. In fact, the Reliability Standards NERC has thus far submitted to the Commission do not include a placeholder for the applicable Violation Risk Factor. Because NERC proposes to employ Violation Risk Factors solely in determining penalties for violations of Reliability Standards, we believe that, like the Sanction Guidelines, Violation Risk Factors may be appropriately treated as an appendix to NERC's Rules of Procedure. As such, NERC approval of the Violation Risk Factors would be governed by section 1400 of NERC's Rules of Procedure, which addresses amendments to the Rules of Procedure. Thus, we believe that NERC should not use its Reliability Standards Development Procedure to develop the Violation Risk Factors for filing with the Commission. NERC will be able to submit Violation Risk Factors more expeditiously if it develops or modifies them according to section 1400 of its Rules of Procedure, which requires board approval after public notice and an opportunity for comment but does not require balloting. Therefore, we direct NERC to develop the Violation Risk Factors through the procedure described in section 1400 of its Rules of Procedure.

92. Our concern on timeliness relates as well to NERC's submission from Commission approval of Violation Severity Levels for all Reliability Standards. Violation Severity Levels also are integral to use of the Base Penalty Amount Table. It is not clear to us whether the Violation Severity Levels described in the Sanction Guidelines for particular Reliability Standards are equivalent to the Levels of Non-Compliance that NERC includes as part of Reliability Standards it has submitted to the Commission, so we direct NERC to describe the differences, if any. If Violation Severity

Levels differ from Levels of Non-Compliance, NERC may be able to designate Violation Severity Levels outside the Reliability Standards Development Procedure and submit them more timely for our approval.

93. In any event, if NERC does not submit Violation Risk Factors and Violation Severity Levels in sufficient time for their use when NERC's enforcement program is to become effective in June 2007, we reserve the ability to take appropriate action to ensure that the penalty-setting process described in the Sanction Guidelines is operative. Alternatively, the Commission is prepared to assess monetary penalties for violations of Reliability Standards itself, pursuant to the *Policy Statement on Enforcement*, if NERC and the Regional Entities are unable to do so.

94. Although the Commission agrees that an intentional violation or concealment or attempted concealment of a violation warrants a significant increase in a penalty amount, the Commission directs NERC to delete the suggested "doubling of the penalty otherwise determined" as used in Sanction Guidelines 4.3.7 and 4.3.8 because it may unfairly limit the discretion of NERC or a Regional Entity to weigh these factors. Penalty adjustments based upon these factors must be tailored to the particular circumstances.

b. Economic Choice

95. The *Certification Order* pointed out that, in Order No. 672, the Commission required an ERO applicant to show why its penalty determinations would not lead a violator to consider the imposition of a penalty as simply an economic choice or a cost of doing business. The Commission noted that NERC did not offer any specific justification that the Reliability Standard penalty amounts, or the upward or downward adjustments to the Reliability Standard penalty amounts relating to violator size or time horizon, listed in the Base Penalty Amount Table meet the criterion. The Commission directed that, in making a particular penalty determination, the ERO and each Regional Entity justify the penalty amount it imposes with reference to this criterion.[40]

i. NERC Response

96. With respect to violations arising out of "economic choice" decisions, the Sanction Guidelines direct that "significant increase to the penalty shall be considered," that "doubling of the penalty otherwise determined is suggested," and that the penalty determined shall "as a minimum disgorge any profits or economic benefits acquired as a consequence of the behavior, whenever and to the extent that they can be determined or

[40] *Certification Order* at P 446.

reasonably estimated."[41] As noted above, NERC also suggests a doubling of the otherwise applicable penalty in cases in which a violator concealed or attempted to conceal a violation.[42] By assessing penalties that at a minimum neutralize any gain – actual or possible – for economic choices to violate, NERC maintains that it will effectively deter potential violators from regarding penalties as a cost of doing business.[43]

97. Further, NERC states that its uniform compliance monitoring and enforcement program will include a process to provide the justification of a particular penalty amount. A situation in which a violator makes an economic choice to violate will result in a penalty that, at a minimum, would neutralize any gain, realized or otherwise, associated with that decision. NERC identifies various provisions of the Sanction Guidelines that, collectively, allow the ERO or a Regional Entity to impose a consistent and significant increase in each successive penalty assessed against an entity that is non-compliant, based on an economic choice or a cost of doing business. That entity will also not be able to count on being provided relief from these penalty amounts on the basis of financial ability to pay.[44] For example, section 3.15 (Economic Choice to Violate) of the Sanction Guidelines provides that "[p]enalties shall be sufficient to assure that entities responsible for complying with reliability standards do not find it attractive to make economic choices that cause or unduly risk violations to reliability standards . . ."

ii. Comments

98. Xcel states that the provisions in the Sanction Guidelines addressing economic choice should be eliminated or clarified. EEI asserts that NERC did not explain how its penalty table reflects economic choices. According to EEI, it appears that the economic choice to violate a Reliability Standard is a form of intentional violation, where determining the motive of an action is the core concern for an investigation. However, it maintains that not all intentional violations are attributed to economic or wrongful motives, such as when an entity must violate a Reliability Standard in order to prevent more serious problems on the Bulk-Power System.

99. EEI recommends that the Commission reconsider the economic choice issue in the proposed Sanction Guidelines. It states that it may be more appropriate for NERC to

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[41] Sanction Guidelines § 3.15; 4.3.8.

[42] *Id.* § 4.3.7.

[43] *Id.* § 3.16.

[44] *Id.* § 4.4.

provide that, in general, an intentional violation may be addressed in a far more severe manner depending on circumstances. Xcel and EEI state that it is not appropriate for NERC to make legal and factual determinations of the intent of an alleged violator, determine levels of profits, profits foregone, disgorgement of profits, and similar economic punishments. While EEI states that it believes that NERC should generally follow the *Policy Statement on Enforcement*, including consideration of ability to pay as a factor in setting monetary penalties, it asserts that it is more appropriate for the Commission and the courts to evaluate disgorgement of profits and conduct other evaluations of economic-based punishments.[45]

100. Xcel asserts that a violation resulting from an economic choice will rarely occur and, therefore, that the emphasis on this factor in the Sanction Guidelines is unwarranted and should be deleted. In the alternative, Xcel asks the Commission to acknowledge that instances where violations of the Reliability Standards were the result of economic choices have been rare under the voluntary standards and that NERC's proposal should not be relevant in most cases of alleged violations. Finally, Xcel states that the Commission, not the ERO or Regional Entity, should decide legal and factual issues regarding (1) the intent of an alleged violator to make an intentional economic choice and (2) the amount of unjust profit from the alleged violation.

iii. Commission Conclusion

101. With respect to our directives concerning a violation involving an economic choice or undertaken as a perceived cost of doing business, the Commission accepts NERC's amendments.

102. The Commission will not speculate regarding the frequency of violations regarding economic choice, as suggested by Xcel. Moreover, consideration of intent of a violator to make an economic choice is an appropriate consideration for the ERO or a Regional Entity when assessing a penalty, and Xcel has not provided a sufficient explanation why such a consideration should be limited to the Commission's enforcement process.

103. We reject EEI's proposal to eliminate the separate consideration of economic choice from the Sanction Guidelines and, rather, simply provide that an intentional violation may be addressed in a far more severe manner depending on circumstances. Where it can be determined that an entity has engaged in a violation based on economic choice or as a perceived cost of doing business, it is appropriate that a penalty assessment

[45] *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005) (*Policy Statement on Enforcement*).

remove any such economic incentive to better ensure future compliance. This principle is appropriately reflected in NERC's Sanction Guidelines, for example, in sections 3.15 and 3.16.

104. We do not share EEI's concern that certain provisions of the Sanction Guidelines indicate that the ERO or a Regional Entity may fashion a disgorgement remedy. We agree with the statement in section 4.4 that, "if the violation was an economic choice, NERC or [Regional Entity] will reconfirm that the penalty set will disgorge any unjust profits or economic benefits." We proceed from the premise that NERC or a Regional Entity should set penalty amounts to deter violations that result from an economic choice. There is little deterrent value in an enforcement action that imposes a penalty on a violator but permits it to retain any unjust profit resulting from its violation. Such a response would leave the violator in a better position than if it had not engaged in a violation because the violator would retain at least part of the benefit from the violation. We see no practicable way to avoid that result unless the penalty for a violation resulting from an economic choice is specifically crafted to exceed the amount of the profit attributable to the violation. This concept is consistent with our Enforcement Policy Statement, which states, "[C]ompanies will be expected to disgorge unjust profits whenever they can be determined or reasonably estimated."[46]

105. In this regard, we reject EEI's contention that a NERC or Regional Entity is not an adequate forum for engaging in fact-finding relating to the intent of a violator or the extent to which it profited as a result of a violation. While the Commission is an appropriate forum for such fact-finding, we conclude that it generally would not be administratively efficient or advisable for NERC or a Regional Entity to assess a penalty for a reliability violation while the Commission addresses the proper extent to which a violator should receive a disgorgement remedy.[47] We also believe that NERC or a Regional Entity, drawing on the expertise of its staff and the experienced personnel from the electric utility industry, will be able to ascertain facts relevant to whether a violation represented an economic choice and if so, what the choice was. Moreover, an alleged violator will have the opportunity to seek Commission review of any penalty assessed by the ERO or a Regional Entity, and any concern regarding the consideration of economic choice in the penalty assessment process would be subject to our review.

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[46] 113 FERC ¶ 61,068 at P 19 (2005).

[47] We note that in particular circumstances, NERC could request that the Commission impose a penalty for a violation that involved apparent economic choice, or the Commission could direct NERC to refer such a matter to it for investigation or adjudication.

7. Size of Violator Factor in Penalty Guidelines

106. The *Certification Order* noted that, while Order No. 672 recognizes that the relative size of an entity may be considered when developing penalty guidelines, NERC's proposed application of this factor was unclear and not well-supported. We directed that NERC either explain what the consideration of size is supposed to address or eliminate it as a factor in the penalty guidelines.[48] We further directed NERC to address concerns about determining the "aggregate" size of an entity that, for example, operates both as a transmission owner and a generation owner.[49] We also found that size must be attributed to a particular violator, rather than to a cooperative or joint-action agency to which the violator may belong.[50]

a. NERC Response

107. NERC modified the Sanction Guidelines to eliminate violator size as a factor to be considered as a proxy for the violation's risk to reliability or the violator's ability to pay. NERC, instead, has included the following proposed language to section 3.11 of the Sanctions Guidelines:

> [P]enalties levied for the violation of a reliability standard shall bear a reasonable relation to the seriousness of the violation. The seriousness of a given violation by a given violator shall be assessed by review of the applicability of the Violations Risk Factors associated with the violation to the characteristics of the violator's operation or power system. Size is a characteristic of violator's operation or system. The size of the violator can be considered in the assessment but shall not be the only characteristic considered. Where size is considered in such a review and the violator belongs to a generation and transmission cooperative or joint-action agency, size will be attributed to the particular violator, rather than to that generation and transmission cooperative or joint-action agency.

NERC explains that Violation Risk Factors are assigned to requirements of a Reliability Standard as an indicator of the expected risk or harm to the Bulk-Power System posed by the violation of the requirement by a typical or median entity that is required to comply.

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[48] *Certification Order* at P 443.

[49] *Id.* at P 444.

[50] *Id.*

b. Comments

108. EEI states that an entity's size will be adequately reflected in the consideration of the exposure of the Bulk-Power System to a cascading outage caused by a violation. Further, EEI maintains that NERC's proposed language does not explain how violator size will be considered and does not explain whether an explicit consideration of violator size could result in "double counting" when also considering Violation Severity Levels and ability to pay. Therefore, EEI asks the Commission to direct NERC to eliminate violator size as a factor for consideration in determining penalties.

109. In contrast, both NRECA and APPA assert that entity size is an appropriate consideration in assessing penalties. APPA notes that section 3.11 of the Sanction Guidelines states that size shall not be the only characteristic considered. APPA states that it supports this language because it allows size to be properly taken into account in assessing a sanction for a violation without it being the sole criterion. NRECA states that an entity's size is relevant to the underlying purpose of penalties, which is to encourage compliance. APPA states that it would protest any effort to eliminate size as a characteristic to be considered in assessing penalties and sanctions. Moreover, NRECA emphasizes that using size as a consideration in assessing the amount or type of penalty should not be entirely determined by an entity's "ability to pay."

110. APPA maintains that small entities are much less likely to have a material impact on the Reliable Operation of the Bulk-Power System than larger entities. Therefore, it argues, taking entity size into account in the assessment of penalties follows the directive in section 215(e)(6) of the FPA that "[a]ny penalty imposed under this section shall bear a reasonable relation to the seriousness of the violation." APPA and NRECA further note that the Commission's *Policy Statement on Enforcement* states that the Commission has "a generally applicable policy for considering reductions or waivers for small entities."[51]

111. Allegheny asserts that NERC's explanation that "where size is considered in such a review it will be attributed to the particular violator, rather than to cooperative or joint-action agency to which the violator may belong"[52] does not address the situation where a corporation is registered as multiple entities and only one of its registered entities commits a violation. In Allegheny's view, NERC has not provided justification for treating similarly situated entities differently only because one such entity has more than

[51] 113 FERC ¶ 61,068 at P 11 (2005).

[52] Compliance Filing at 45.

one function or has an affiliate relationship with another functional entity. Allegheny and FirstEnergy ask NERC to clarify that it will consider in penalty determinations only the size of the actual violator, without including other operating companies or affiliates.

c. Commission Conclusion

112. The Commission accepts NERC's proposed revisions with regard to violator size. NERC makes clear that the size of the violator can be considered in the assessment but shall not be the only characteristic considered. Further, according to NERC's proposal, size is a characteristic of violator's operation or system. This approach is reasonable as some (but certainly not all) types of violations by large entities can harm reliability more significantly than the same violation by a small entity.

113. While EEI proposes to eliminate consideration of violator size in determining a penalty amount, the Commission had previously determined that this was appropriate in Order No. 672.[53] Further, we disagree with EEI and believe that NERC has provided a sufficient explanation how the consideration of violator size will be applied. While we disagree that NERC's approach will result in "double counting" when also considering ability to pay, if this occurs in actual application, this issue can be revisited.

114. As Allegheny points out, NERC has not addressed how to determine the "aggregate" size of an entity that, for example, operates both as a transmission owner and a generation owner, as we directed in the *Certification Order*. NERC must address this matter in its compliance filing. Further, the Commission agrees with NERC's revision of Sanction Guidelines section 3.11 to state that size should be attributed to the particular violator, rather than to a cooperative or joint-action agency to which the violator may belong, in the absence of any facts that indicate otherwise. We also generally agree with Allegheny and FirstEnergy that NERC should consider the size of the "actual" violator in a corporate family, and not the size of any affiliates, in the absence of any facts that indicate otherwise. Also, in determining the size of a violator, NERC and Regional Entities should disregard any shell entity that is established solely to register as subject to one or more Reliability Standards. In sum, we believe that NERC and the Regional Entities should have discretion to examine the facts relating to a particular violation when determining the size of a violator for the purpose of imposing penalties.

[53] Order No. 672 at P 564.

8. Institutional Status of Violator

115. In the *Certification Order*, we directed NERC to include in its compliance filing as Final Adjustment Factors the organizational structure and not-for-profit status of a particular violator, as we determined in Order No. 672-A.[54]

a. NERC Response

116. NERC has revised the Sanction Guidelines to include organizational structure and not-for-profit status as considerations in making adjustments to determine a penalty. Revised sections 3.11 and 4.4 of the Sanction Guidelines provide that these two factors can be included in or form the basis of a review of a violator's ability to pay the penalty otherwise determined for the violation. NERC explains that the guidelines also direct that appropriate non-monetary sanctions or remedial actions shall be considered as alternatives or substitutes to monetary penalties that would otherwise be assessed.

b. Comments

117. EEI asserts that NERC's revisions would allow for the consideration of organizational structure and non-profit status only in the context of making an adjustment for "ability to pay." It states that NERC's proposal does not comply with the *Certification Order*, which, according to EEI, required that both organizational structure and non-profit status be included as separate elements in setting penalties. EEI states that NERC can comply with the Commission's order by adding these factors to the list of adjustment factors in section 4.3 of the Sanction Guidelines.

118. EEI also believes that NERC's proposed revisions to the Sanctions Guidelines are a "moving target" because it is unclear how the document fits together with NERC's Rules of Procedure, uniform compliance enforcement process and Violation Severity Level process (the x-axis of the Base Penalty Table). EEI recommends that the Commission defer consideration of various penalty and sanctions issues until both the industry and the Commission can see the entire proposal in a steady state. At a minimum, EEI asks the Commission to require a substantive rewrite of the Sanction Guidelines that provides clear and concise descriptions. EEI also urges the Commission to require that NERC file a complete Sanction Guidelines process document as soon as possible, including the Violations Severity Levels process document.

[54] *Certification Order* at P 456.

c. Commission Conclusion

119. The Commission accepts the proposed revisions to the Sanction Guidelines to allow consideration of a violator's organizational structure and not-for-profit status in making adjustments to determine a penalty. We believe that NERC's allowance for the consideration of these elements is sufficient and consistent with the *Certification Order* and Order No. 672-A. We disagree with EEI's characterization of these orders as requiring that organizational structure and not-for-profit status be included as separate elements in the Final Adjustment Factors.

120. Moreover, the Commission agrees with NERC that non-monetary sanctions and remedial actions or other alternatives, if applied in appropriate situations, can be adequate substitutes for monetary penalties and serve the goal of ensuring Bulk-Power System reliability. The issuance of non-monetary penalties, remedial actions and other alternative sanctions in lieu of monetary penalties all must bear a reasonable relation to the seriousness of the violation and otherwise meet the applicable statutory requirements.

121. The Commission shares EEI's concerns that the various ERO documents addressing penalties should be consistent and avoid overlap. However, we will not delay acting on NERC's compliance filing. Rather, in our future review of NERC's uniform compliance enforcement program and Violations Severity Levels, we will consider, and allow interveners the opportunity to comment on, consistency among the related ERO documents. Indeed, EEI's concern does not affect our immediate determination to accept NERC's proposal that provides for the consideration of organizational structure and not-for-profit status in assessing a penalty.

9. Violator's Ability to Pay as a Penalty Factor

122. In the *Certification Order*, the Commission required NERC either to include "financial ability" as a factor in the penalty guidelines or to explain why such a factor is unnecessary.

a. NERC Response

123. NERC amended section 3.11 and inserted section 4.4.1 of the Sanction Guidelines to provide that, upon the written request of the violator, a penalty otherwise determined may be reviewed in light of the violator's ability to pay. Specifically, NERC indicates that, following determination of the Base Penalty Amount and its adjustment through consideration of adjustment factors, NERC or a Regional Entity may review the adjusted penalty amount in light of the violator's financial ability to pay the that amount. Upon written request of the violator, NERC or a Regional Entity would review the adjusted penalty amount in light of relevant, verifiable information the violator provides regarding

its financial ability to pay the penalty. After that review, NERC or the Regional Entity may reduce the penalty to the amount deemed payable by the violator, excuse the assessment of a penalty, or sustain the Adjusted Penalty Amount. If NERC or a Regional Entity reduces a penalty amount in this review, NERC or the Regional Entity is to consider assessment of an appropriate non-monetary penalty as a substitute or alternative to the reduced or excused penalty amount.

b. Comments

124. EEI comments that an entity's ability to pay should be an explicit consideration in all penalty determinations, not just in cases where an entity makes a specific request.

c. Commission Conclusion

125. The Commission accepts NERC's procedure for considering a violator's ability to pay an Adjusted Penalty Amount. With regard to EEI's concern, the Commission concludes that it is not necessary to consider ability to pay in every penalty assessment. Rather, NERC's proposal to allow a violator the opportunity to request that its ability to pay be considered and provide support for its position is adequate.

10. Time Horizon for Measuring Occurrence of Violation

126. The *Certification Order* accepted NERC's proposed consideration of a Reliability Standard's time horizon as a possible adjustment to the penalty in calculating the base penalty amount. However, the Commission directed NERC to state the criteria it will use to determine the time horizon of a particular Reliability Standard so as to ensure consistency in determining Base Penalty Amounts.[55] We also required NERC to explain how its rationale for considering time horizon differs from the Violation Risk Factor NERC proposed for developing a penalty.

a. NERC Response

127. NERC replies that the time horizon of a Reliability Standard is considered as its temporal characteristic, which is based solely on when the impact on the system of performing or violating a particular requirement may be felt. According to NERC, some requirements call for immediate action to preserve the reliability of the Bulk-Power System. This type of requirement would be labeled a real-time operations requirement. Other requirements call for the building and evaluation of system models that are designed to identify potential weaknesses in the Bulk-Power System that is anticipated to

[55] *Id.* at P 445.

be in place 10 years in the future. NERC identifies the following categories within the time horizon: real-time operations, same-day operations, operations planning, long-term planning, and operations assessment.

128. NERC also explains that Violation Risk Factors deal solely with the potential risk or impact on the system if a requirement is violated. In NERC's view, a high risk requirement can occur over all of the temporal range, just as a lower risk requirement can.

b. Comments

129. No comments were received on this portion of NERC's compliance filing.

c. Commission Conclusion

130. The Commission reserves comment on NERC's time horizon proposal until NERC provides further explanation of the Violation Risk Factors and the Violation Severity Levels. Since each requirement's time horizon appears to be contemplated within the standard itself and reflected in the assignment of the Violation Risk Factor and Violation Severity Level, the Commission seeks further detail from NERC regarding the relevance of including this characteristic in the penalty adjustment process.

11. Formulaic Determination of Penalty

131. In the *Certification Order*, we directed NERC to explain its statement in the Sanction Guidelines that, "generally speaking, the effects of the various factors will be compounded together somewhat formulaically to determine the penalty for a violation."[56] Further, the Commission stated that, if NERC contemplates the application of a generic formula, NERC should provide the formula and explain it.

a. NERC Response

132. NERC indicates that it has not, and is not contemplating, the application of a generic formula for determining penalties. Consistent with the principles articulated in sections 3.8 and 3.9 of the Sanction Guidelines, all penalties will be determined on the basis of the facts and circumstances relevant to the specific violation and violator for which they are being assessed. NERC states that it may develop tools to assist in

[56] *Id*. at P 450.

determining penalties and these tools may use some mathematical formulae; however, penalties will be set by NERC or the Regional Entity pursuant to the Sanction Guidelines, not to the output of the tools.

b. Comments

133. EEI asserts that, although NERC states that it may develop tools or mathematical formulae to assist in determining penalties, the proposed Sanction Guidelines do not describe these tools or formulae.

134. While Xcel states that it appreciates NERC's efforts to make the determination of penalties as formulaic as possible, it states that the ERO or Regional Entity should be allowed flexibility in tailoring a penalty to the circumstances. Specifically, Xcel asks that the Commission clarify that monetary penalties should not necessarily be imposed for all violations of a Reliability Standard. For example, it states that a monetary penalty may not be warranted where the violation is a first offense, the violation was *de minimus*, the violation did not cause harm, or the violation was a result of a good faith misunderstanding.

c. Commission Conclusion

135. The Commission accepts NERC's explanation and its provisions for determining penalties with respect to its evaluation of specific facts and circumstances in light of the violation as articulated in section 3.8 and 3.9 of the Sanction Guidelines.

136. With regard to EEI's concern, we believe that NERC's filing is sufficiently clear that NERC has not developed tools or formulae at this time, but may do so in the future. If NERC chooses to develop such tools or formulae in the future, they must be submitted for Commission review. Regarding Xcel's concerns, Order No. 672 is sufficiently clear on the ERO's flexibility in fashioning an appropriate response to a violation, including the discretion to choose among monetary and non-monetary penalties.[57]

12. Assessment of Penalties for Multiple Violations and Violators

137. The *Certification Order* directed NERC to address in its compliance filing how the ERO or Regional Entities would assess penalties in situations involving multiple

[57] Order No. 672 at P 570.

violations, multiple violators or other recurring situations to assure greater consistency in such matters.[58]

a. NERC Response

138. NERC replies that section 3.10 of the Sanction Guidelines discusses the determination of penalties for one violator for multiple violations: in general, where the violations are related or the consequence of a single incident, NERC will determine a single penalty that bears a reasonable relation to the seriousness of the aggregate of the violations. Where there are multiple violations and the individual violations are unrelated or consequential to a number of incidents, NERC will determine penalties that bear reasonable relation to the seriousness of each violation, or violations related to each incident. If a violator that is registered as more than one functional entity type has violated a requirement that applies to more than one of the functional types for which the violator is registered, NERC will determine a penalty that is appropriate for the overall responsibility of the violator, in aggregate, with respect to the requirement. NERC proposes that the violator will not be assessed separate or multiple penalties for that violation for each functional type for which the violator is registered. NERC states that where multiple violators are involved in a common incident of non-compliance, the penalty to be assessed to each violator will be determined separately and independently.

b. Comments

139. Xcel maintains that the ERO or a Regional Entity should not be allowed to impose multiple penalties for the same act or common incidence of non-compliance. According to Xcel, it would be unfair for the violator if a single act of non-compliance with multiple violators is transformed into multiple penalties.

c. Commission Conclusion

140. The Commission accepts NERC's proposed revisions to the Sanction Guidelines that ensure consistency in situations involving multiple violations, multiple violators or other recurring situations of noncompliance. We reject Xcel's suggestion, and believe that it is appropriate that the ERO or a Regional Entity retain the discretion to assess a penalty for each violation, even where the multiple violations all contributed to a single incident of non-compliance.

[58] *Certification Order* at P 458.

13. Applicability of Non-monetary Penalties

141. In the *Certification Order*, we stated that the ERO and Regional Entities should consider whether non-monetary penalties are more appropriate with respect to specific violations than monetary penalties, such as in situations where particular violators could lack financial resources to pay monetary penalties.[59]

142. We further noted that, in Sanction Guideline 5, NERC listed notifications of boards of directors, regulators and others as an example of a non-monetary penalty. Because we understood these notifications to be a requirement in the process of imposing penalties, we directed NERC to explain the circumstances under which such notifications would be considered non-monetary penalties.[60]

a. NERC Response

143. NERC responds that it has added appropriate language to sections 3.11 and 4.4.1 of the Sanction Guidelines that discusses the application of non-monetary penalties where a violator's ability to pay is limited. NERC states in Sanction Guidelines section 3.18 that a non-monetary sanction may be imposed either in lieu of or in addition to a monetary penalty imposed for a violation, and vice versa. According to Sanction Guidelines section 3.19, NERC does not have a preference between monetary penalties and non-monetary sanctions for violations. In section 3.19, NERC states that it intends to "monetize" the value of a non-monetary sanction to assure that it is an appropriate alternative or addition to a monetary penalty. Further, NERC indicates that it has removed from Sanction Guideline 5 a reference to the notifications of boards of directors, regulators, and others as non-monetary penalties since all confirmed violations of Reliability Standards will become public information.

b. Comments

144. Alcoa believes that relying exclusively on financial penalties may create a situation where penalties can be passed on to consumers through administrative fees or other means, thus punishing the consumer rather than the violator. Alcoa asserts that NERC, therefore, must continue to consider methods such as administrative sanctions or publicized ratings for organizations that are likely to pass through financial penalties to

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[59] *Id*. at P 461.

[60] *Id.* at n.182.

consumers. Alcoa also seeks additional clarification from NERC on how it will monetize non-monetary penalties to ensure consistency between monetary and non-monetary penalties.

c. Commission Conclusion

145. The Commission accepts the proposed revisions to sections 3.11 and 4.4.1 of the Sanction Guidelines that address situations where particular violators could lack financial resources to pay monetary penalties. NERC may determine, where appropriate, that a non-monetary penalty should be assessed in lieu of or in conjunction with a monetary penalty as the most effective means of promoting reliability and compliance with the Reliability Standards, as stated in Sanction Guideline 5. The Commission accepts NERC's proposed deletion from Sanction Guideline 5 of a reference to notifications to boards of directors, regulators and others as a non-monetary penalty.

146. The Commission disagrees with Alcoa and finds that NERC has made clear that it will not rely exclusively on monetary penalties, whether or not a violator's ability to pay is at issue. In response to Alcoa's concerns regarding "monetizing" non-monetary penalties, NERC made clear in its modifications to sections 3.11 and 4.4.1 that NERC's oversight will ensure similarity in degree and type of non-monetary penalties. Therefore, the Commission declines to require additional clarification as to how NERC will address non-monetary penalties. Where NERC or a Regional Entity monetizes a non-monetary penalty, it must disclose the method used for the monetization and ensure that any different methods yield consistent results.

14. Hold Harmless Provision

147. In the *Certification Order*, we directed NERC to explain why it should not delete the "hold harmless" provision of section 411 of the Rules of Procedure and, instead, indemnify employees or consultants who participate in appeals processes.[61] We noted that the indemnification procedures appeared more direct and less broad than the "hold harmless" provision.

[61] *Certification Order* at P 495. Section 411 is limited to the ERO "appeals" process and provides that "a condition of invoking the challenge or appeals process and section 409 or 410 is that the entity requesting the challenge or appeal agrees that neither NERC …, any person assisting in the challenge or appeals processes, nor any company employing a person assisting in the challenge or appeals processes, shall be liable, and they shall be held harmless…."

a. NERC Response

148. NERC states that this "hold harmless" provision is essential to attract high-quality candidates to stand for election as independent trustees, and to attract volunteers from industry, government and academia with appropriate technical expertise to serve on its committees, task forces, audit teams and in other capacities critical to accomplishment of the ERO's purpose. NERC notes that the Commission has already accepted a similar provision in its Bylaws with respect to membership in NERC.[62] NERC asserts that virtually all potential volunteers will be employees of organizations that are unlikely to consent to their employees serving as volunteer members of ERO committees, task forces or audit teams if these activities carry any potential risk of exposing the employer to litigation and liability.

149. Further, NERC believes that the hold harmless language is consistent with its goal of developing and enforcing compliance with Reliability Standards, and to carry out other activities with the objective of assuring reliable operation of the Bulk-Power System, as a cooperative industry effort. NERC argues that the provision does not place an undue burden on an entity's ability to appeal an enforcement decision with which it disagrees. Any entity wishing to challenge actions taken by a Regional Entity or NERC is not deprived of a forum by the "hold harmless" provision, because there will be a right of appeal to the ERO, followed by an appeal to the Commission.

150. According to NERC, indemnification, as an alternative to the section 411 hold harmless provision, is impractical and would simply raise NERC's cost to insure against such claims. According to NERC, as a non-profit corporation, its indemnification payments would have to come from NERC's cash reserves or from short-term borrowing.

151. Finally, NERC notes that if a government organization were to perform the auditing and enforcement functions that NERC and the Regional Entities will perform under delegated authority from the federal government, the government officials and staff would generally be immune from suit and liability in their personal capacities for any actions or inactions in the scope of their official activities and employment.

b. Comments

152. Alcoa and PG&E protest NERC's proposed retention of the hold harmless provision. PG&E asserts that NERC's hold harmless provision unfairly burdens an entity's ability to use NERC's proposed procedures and appeal process. PG&E also believes that NERC's current proposed provision is "significantly overbroad" and

[62] NERC Compliance Filing at 60, citing *Certification Order* at P 56.

"shelters NERC from its own negligence." PG&E recommends as an alternative that NERC agree to indemnify employees or consultants for actions they conduct for or on behalf of NERC.

153. According to Alcoa, the hold harmless provision would ensure that NERC would be unable to hold its staff, trustees, and volunteers accountable for most actions taken in its official capacity. Such provisions would guarantee that these individuals would not face any meaningful discipline or accountability for any actions or inaction within the scope of their duties for NERC. Alcoa asserts that NERC cannot liken itself to a government organization as justification for the hold harmless clause, because government employees are still subject to internal governmental sanctions. Alcoa characterizes the "new" NERC as a paid professional organization intended to drive the electrical grid to a higher level of reliability through standards development and enforcement, and, as such, contends that NERC's staff and volunteers should be held accountable for its successes and failures.

154. Additionally, PG&E states that NERC's "hold harmless" proposal may be "misinterpreted" to require an "appealing entity to defend against and indemnify NERC for claims or suits by third parties who may object to the decision on appeal."

c. Commission Conclusion

155. The Commission notes that, despite the broader generalizations of some NERC and intervenor statements, the issue is limited to whether NERC should hold harmless those who assist in the ERO appeals process. The Commission disagrees with Alcoa and finds persuasive NERC's explanation for retaining its "hold harmless" provision in section 411 of the Rules of Procedure. Consistent with our finding as to NERC membership in the *Certification Order*, we agree with NERC that a "hold harmless" provision is necessary to attract qualified persons who may otherwise decline to serve in the ERO appeals process due to the prospect for having to defend lawsuits. However, the Commission directs NERC to make consistent the "hold harmless" provision in section 411 and the "hold harmless" provision in NERC's Bylaws for NERC membership.

156. The Commission observes that NERC's Bylaws condition NERC membership upon the signing of an agreement which, among other things, holds harmless all trustees, officers, employees and agents of NERC, as well as volunteers performing in good faith, for any act or injury caused by an act or omission occurring in the course of performance of duties on behalf of NERC with the exception of acts of fraud.[63] The Commission notes that section 411 is inconsistent with the Bylaws provision in that section 411

[63] NERC's Bylaws, section 3.b. (November 2, 2006).

conditions access to the challenge process under section 409 or the appeals process under section 410 of the Rules of Procedure to the agreement of the entity invoking one of these processes to both: (1) not hold liable NERC's members, Board of Trustees, committees, subcommittees, staff and industry volunteers, any person assisting in the challenge or appeals process, nor any company employing a person assisting in the challenge or appeals process; and (2) hold them harmless against the consequences of or any action or inaction or of any agreement or failure to reach agreement as a result of the challenge or appeals proceeding, except with respect to matters constituting gross negligence, intentional misconduct, or a breach of confidentiality. NERC has not shown why any differences between the two hold harmless provisions are justified. In this regard, we do not understand why both hold harmless provisions should not provide the reasonable exceptions for matters involving gross negligence, intentional misconduct or a breach of confidentiality that are now set forth only in proposed section 411.

157. In response to PG&E's comments, Commission review of a penalty is available to any alleged violator and NERC's hold harmless proposal does not jeopardize this opportunity. Therefore, the Commission finds that NERC's "hold harmless" provision will not "unfairly burden" an entity's ability to use NERC's proposed procedures and its "appeal" process because the entity may seek Commission review.

15. Compliance and Certification Committee

158. In the *Certification Order*, we expressed concern about the need for additional information about the compliance and certification committee that will act as the ERO's adjudicative body. We directed NERC to provide additional details regarding the compliance and certification committee, including a description of the committee's functions, who is eligible to serve on the committee and how members are chosen, how many members will comprise a hearing panel, whether the hearing panel will decide matters by majority vote, the disqualification or recusal process for committee members, whether those involved in the investigation of the matter will be barred from serving as an adjudicator on the same matter, and other procedures of the committee that will apply when determining a challenge to a compliance action or audit finding.[64]

a. NERC Response

159. NERC has included with its compliance filing the charter of the NERC compliance and certification committee, which sets forth the scope and procedures of the committee, including membership selection, quorum, officers and voting provisions.[65]

[64] *Certification Order* at P 506.

[65] *See* NERC Filing, Attachment 17.

The full compliance and certification committee would initially serve to hear all matters brought before it for hearing. According to NERC, the hearing process, including recusal procedures, is included with the single uniform compliance monitoring and enforcement program document.

b. Comments

160. EEI states that the Commission should direct NERC to further consider the appropriate scope and mission of the compliance and certification committee, including whether the NERC proposal provides appropriate checks and balances to support a fully independent compliance enforcement program. EEI proposes several specific improvements to the compliance and certification committee. First, the compliance and certification committee should report directly to the NERC compliance committee, which is composed of board members. Second, NERC should describe how its compliance with Reliability Standards will be monitored or audited, how potential violations will be investigated, and how staff resources will be acquired to support these activities. Third, NERC should clarify how the Rules of Procedure, other than the Reliability Standards setting process, will be monitored for NERC compliance, including any audit process and reporting to the Commission. Fourth, EEI states that any hearing body under the compliance and certification committee should consist of fewer members than the full committee, and suggests that a hearing body of five members should suffice. Fifth, if the committee plans to make use of the hearing process in the uniform compliance enforcement program that the Commission ultimately approves, the committee charter should make an explicit reference to the procedures. Sixth, EEI proposes that the compliance and certification committee should use the same nominations and elections procedures as the standards committee.

161. Finally, EEI requests clarification of the committee's intention to assist NERC in its registration and certification programs, and to act as a mediator between the regional entities and NERC, as stated in the proposed charter.

c. Commission Conclusion

162. The Commission seeks further explanation from NERC regarding the compliance and certification committee. Specifically, in its compliance filing, NERC should respond to EEI's concerns and proposals. We also note that, because the compliance and certification committee's hearing and recusal procedures are included in NERC's uniform compliance monitoring and enforcement program, our determination on this issue will be subject to the outcome of our proceeding in Docket No. RR06-1-004 addressing that program.

C. Confidentiality and Access to Information

163. The *Certification Order* noted the need to ensure confidentiality where appropriate and the need to specify in the Rules of Procedure who will make such determinations. The Commission found that the proposed disclosure provisions needed additional explanation before it could decide whether the provisions appropriately protect the confidentiality of information received by NERC or a Regional Entity. We directed NERC to submit revised confidentiality provisions for NERC and the Regional Entities to address concerns raised by the Commission and commenters.[66] Conforming changes to the *pro forma* delegation agreement were also directed to be reflected in the individually negotiated delegation agreements.

164. NERC indicates that it has added a new section 1500 – Confidential Information – to its Rules of Procedure to address the various concerns raised by commenters and the Commission. New section 1500 generally defines "confidential information" and related terms, governs how NERC and Regional Entities will treat confidential information, including information that would jeopardize Bulk-Power System reliability (including information relating to a Cybersecurity Incident), and describes how and under what circumstances others may gain access to such information, including an appeal process to challenge a denial of access to information. NERC states that it has also revised other portions of the Rules of Procedure to harmonize them with the new section 1500, and is revising the *pro forma* delegation agreement to apply the same confidentiality obligations to both NERC and the Regional Entities. We discuss specific provisions of section 1500 below.

1. Definition of Confidential Information

165. In the *Certification Order*, the Commission directed NERC to explain how the ERO and Regional Entities would define specific types of information that must be treated confidentially or as otherwise exempt from public disclosure. We stated our belief that the ERO and the Regional Entities must apply the same criteria in all provisions of the Rules of Procedure concerning confidentiality. We deferred until receiving an explanation from NERC our consideration of comments that we should require the ERO and Regional Entities to protect from public disclosure categories of information that NERC did not specifically list in proposed section 408.3 of the Rules of Procedure that it filed in its application, such as "business sensitive energy information,"

[66] *Id.* at P 650-51.

"commercially sensitive information," and information that an entity would be prohibited from sharing with an affiliate pursuant to Codes of Conduct approved by the Commission."[67]

166. The Commission noted that NERC did not specifically reference processes for identifying and protecting from public disclosure information concerning violations or alleged violations relating to a Cybersecurity Incident or any disclosure that would jeopardize Bulk-Power System reliability in accord with section 39.7(b)(4) of our regulations. Also, while NERC described in its application several types of information that must be treated as confidential, it was not clear to us whether information related to a Cybersecurity Incident would, in all instances, be protected as critical energy infrastructure information, as set out in proposed section 408.3.2 of the Rules of Procedure. We directed NERC to revise section 408.3.2 to explicitly require that information that would jeopardize Bulk-Power System reliability, including information relating to a Cybersecurity Incident, be identified and protected from public disclosure.[68]

a. NERC Response

167. NERC explains that it has added a new section 1500 to its Rules of Procedure in response to concerns raised about how NERC and Regional Entities will keep information confidential. In section 1502.2, NERC proposes that unless otherwise specified in section 1500, it and Regional Entities "shall keep in confidence and not copy, disclose or distribute any confidential information" without the permission of the entity that submitted the information, except as otherwise legally required. NERC defines the categories of "confidential information" in section 1501.1 as confidential business and market information, critical energy infrastructure information (CEII), personnel information, work papers, investigative files and cybersecurity incident information.

168. NERC emphasizes that, in the Energy Policy Act of 2005, Congress stated that the ERO and the Regional Entities "are not departments, agencies, or instrumentalities of the United States Government."[69] By doing so, NERC maintains that Congress has made clear that neither the ERO nor the Regional Entities are subject to the Freedom of Information Act (FOIA)[70] or any comparable provision of law. Thus, NERC asserts that

[67] *Id.* at P 400.

[68] *Id.* at P 398.

[69] Compliance Filing at 37, citing section 1211(b) of the Energy Policy Act of 2005, 119 Stat. 594, 946 (2005).

[70] 5 U.S.C. § 552 (2000).

there is no presumption of public access to NERC records such as the information that various entities submit to it. Further, according to NERC, nothing in section 215 of the FPA or Order No. 672 requires that the ERO or a Regional Entity make any information in its control available to the general public. NERC has not excluded from its definition of "confidential information" information that is "publicly available" or "independently developed" because NERC asserts that the fact that the information is publicly or independently available does not place an obligation on a submitting entity or NERC to provide it to the general public. To the contrary, in NERC's view, if information is available from a public source or is independently developed, a party seeking that information need not obtain it from NERC.

169. NERC provides in amended section 408.3 that it will treat as confidential all alleged violations and matters relating to a compliance investigation, including the status of the investigation, in accordance with new section 1500. NERC adds that it will identify as critical energy infrastructure information (CEII) and protect from public disclosure information that would jeopardize Bulk-Power System reliability, including information relating to a Cybersecurity Incident, in accordance with section 1500. NERC proposes that it and Regional Entities will give bulk power system owners, operators and users a reasonable opportunity to demonstrate that information concerning a violation is confidential, as defined in section 1500, before disclosing to the public a report on the violation. In section 408.6, NERC states that when an affected Bulk-Power System user, owner or operator agrees with a violation or a report of violation, or the time for submitting an appeal is passed, or all appeals processes are complete, NERC shall publicly post each confirmed violation, penalty or sanction and the final audit or compliance investigation report on NERC's website. In accordance with section 1500, information deemed to be CEII or other confidential information shall be redacted from the posting and not be released publicly.

170. NERC states that it shares the Commission's strong commitment to the protection of information that would jeopardize Bulk-Power System reliability, including information relating to a Cybersecurity Incident, as well as other critical infrastructure information and has included appropriate provisions in section 1500 to protect that information.

b. Comments

171. The Southwest TDUs argue that NERC's position that it can keep documents confidential because it is a non-governmental entity is seriously flawed. The Southwest TDUs view both federal and state civil procedure discovery rules as providing otherwise and believe that NERC's position may be inconsistent with federal CEII rules and state

laws that may apply to NERC. Further, the Southwest TDUs maintain that NERC does not address the problem that some entities providing information to it will be public bodies governed by state or federal law concerning confidential information.

172. EEI strongly supports NERC proposed section 1500 because it will protect sensitive information while maintaining NERC's ability to monitor and enforce compliance with Reliability Standards.

173. APPA and TAPS state that NERC failed to comply with the Commission's directives regarding confidentiality and should further justify its proposed confidentiality procedures. TAPS notes that the *Certification Order* expressed concern about the breadth of the information NERC proposed to define as confidential.[71] According to TAPS, the section 1500 definitions do not address the Commission's concern that they are too broad. For example, TAPS states that NERC fails to explain why it has included in the category "confidential business and market information" information that is "otherwise valuable" to a business. TAPS maintains that NERC's definition could be interpreted to include all information received from any business. Further, TAPS asserts that NERC omitted its previous exclusion from confidential treatment of information in the public domain, disclosed by a third party, or developed by a third party.

174. TAPS also argues that NERC's claim that it has no obligation to disclose any information to the public is contrary to its statutory obligation to establish rules that "provide for …openness… in developing Reliability Standards and otherwise exercising its duties."[72] While acknowledging that NERC and the Regional Entities are not government agencies subject to FOIA, TAPS argues that they cannot plausibly claim to be mere private corporate entities, "given, in particular, the public interest in disclosure of facts relevant to violations of Reliability Standards."[73] TAPS maintains that Reliability Standard development, monitoring, and enforcement, as well as adequacy assessments, should not be exempt from the "openness" requirement simply because Congress decided to authorize the ERO, instead of giving the Commission direct authority over reliability.

175. Xcel asserts that NERC's proposed provision in section 403.13 that "all compliance investigations are to be non-public unless NERC or the regional entity determines a need to conduct a public investigation" contradicts Order No. 672, which Xcel interprets as providing that each violation or alleged violation will be treated as non-

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[71] TAPS at 3-4, citing *Certification Order* at n.242.

[72] 16 U.S.C. § 824o(c)(2)(D). *See also* 18 C.F.R. § 39.3(b)(2)(iv).

[73] TAPS at 8, citing *Certification Order* at P 399.

public until the matter is filed with us.[74] According to Xcel, neither NERC nor a Regional Entity should have the authority to determine that its investigation should be made public, and the Commission should order NERC to revise its Rules of Procedure to remove the authority of the ERO or Regional Entities to make an investigation public. Xcel claims that, similar to the procedures the Commission uses for investigations and audits, and due to the potential prejudicial impact on entities whose activities are being investigated, the ERO and Regional Entities should keep their investigations non-public until they are completed.

c. Commission Conclusion

i. Scope of Commission's Authority

176. We initially make clear that our determinations below on confidentiality of information only relate to the activities of NERC and Regional Entities pursuant to FPA section 215. We lack jurisdiction to prescribe or review the treatment of claims of confidentiality that relate exclusively to any other activities of NERC or a Regional Entity.

177. We recognize the statement in EPAct 2005 section 1211(b) that the ERO and Regional Entities are not departments, agencies or instrumentalities of the United States Government. Further, we agree with NERC that there is no requirement in either section 215 of the FPA or the Commission's regulations that the ERO or a Regional Entity make information available to the general public. As noted by TAPS, section 215(c)(2)(D) provides that the ERO must have rules that provide for openness in developing Reliability Standards and otherwise exercising its duties.[75] We believe that NERC's Rules of Procedure relating to the development of Reliability Standards satisfy the openness requirement. Further, we note that NERC makes available through its website a significant amount of information regarding NERC's programs and the activities of the board of trustees and NERC committees. We believe that this satisfies the requirement for openness with regard to the ERO's exercise of its duties. We do not believe that the statutory provision cited by TAPS is intended to make the ERO a clearinghouse for information that would distract it from its primary mission of overseeing Bulk-Power System reliability.

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[74] 18 C.F.R. § 39.7(b)(4).

[75] Pursuant to section 215(e)(4)(B) of the FPA, the openness provision also applies to the ERO's delegation of authority to a Regional Entity.

ii. Disclosure of Potentially Commercially Sensitive Information

178. NERC and the Regional Entities are responsible for maintaining the confidentiality of information they receive pursuant to FPA section 215 that should not be disclosed publicly. We accept the definitions of categories of confidential information NERC proposes in section 1501, with the exception of the definition of "confidential business and market information" in section 1501.2. To meet this definition, according to NERC, information must: (1) pertain to the interests of any business; (2) be developed or acquired by that business; and (3) be proprietary, competitively sensitive or otherwise valuable. This definition is deficient in two respects.

179. First, a "business" is not the only entity that may possess confidential business and market information. In this regard, we agree with Southwest TDUs that public entities will provide information to NERC and Regional Entities pursuant to FPA section 215. It is not clear whether such entities fall within the term "business" as used in section 1501.2. The definition in section 1501.2 should be broad enough to encompass confidential business and market information that any owner, operator or user of the Bulk-Power System provides to NERC or a Regional Entity pursuant to FPA section 215. We direct NERC to amend its definition in section 1501.2 accordingly.

180. Second, we believe that the term "proprietary, competitively sensitive or otherwise valuable" in section 1501.2 is overbroad. We share the concern of TAPS that this phrase, and particularly its term "or otherwise valuable," could describe all information developed or received by an entity that submits information to NERC or a Regional Entity. Therefore, we direct NERC either to amend the phrase to read "proprietary or commercially sensitive" or explain why the inclusion in it of "otherwise valuable" is appropriate.

181. In addition, we conclude that section 1501.2 should not permit an entity to designate as confidential public information it developed or acquired. Public information should not be shielded from disclosure simply because an entity provides it to NERC or a Regional Entity pursuant to FPA section 215.

iii. Disclosure of Information on Investigations

182. We disagree with Xcel that we should direct NERC to amend the statement in section 408.13 that all compliance investigations are to be non-public unless NERC or a Regional Entity determines a need to conduct a public investigation. We made clear in Order No. 672 that neither NERC nor a Regional Entity can make public an investigation on its own initiative: NERC or the Regional Entity must receive advance authorization

from the Commission with respect to matters under our FPA section 215 jurisdiction.[76] In the sentence of section 403.13 immediately following the sentence with which Xcel disagrees, NERC recognizes this requirement. However, for clarity's sake, we direct NERC to amend this sentence to state as follows: "Advance authorization from the applicable governmental authority is required to make public any investigation, enforcement audit, or any information relating to an investigation or enforcement audit, or to permit interventions when determining whether to impose a penalty."[77]

183. Although NERC does not describe whether it will treat as confidential reports it submits to the Commission, NERC states generally that it will treat all information on alleged violations and matters relating to investigations as confidential. To avoid any ambiguity, we direct NERC to amend its Rules of Procedure to state that it will maintain information it reports to the Commission as confidential, pursuant to the provisions of section 1500 of the Rules of Procedure and the Commission's regulations, until such time as the Commission authorizes public disclosure of the information. Moreover, NERC does not specifically state that a Regional Entity is bound to treat as confidential information on alleged violations and investigations it supplies to NERC, until such time as the Commission authorizes public disclosure. We direct NERC to amend its Rules of Procedure to state that requirement specifically.

184. On a related point, we observe that NERC provides in section 408.3.6 that it will post publicly on its Website each confirmed violation, penalty or sanction and the related final audit or compliance investigation report. NERC indicates that it will give entities the opportunity to assert that information they provide in an investigation is confidential, and that, in accordance with section 1500, information deemed to be CEII or other confidential information shall be redacted from the posting and not be released publicly. When we find that an entity has engaged in a violation, or we accept a settlement related to an alleged violation, we have long followed the practice of disclosing publicly the name of any relevant entities, the nature, time period and circumstances of the violation or alleged violation, and sufficient facts to enable those within our jurisdiction to evaluate

[76] Order No. 672 at P 511, 533.

[77] The Commission has given advance authorization for the public disclosure of a NERC or Regional Entity investigation and investigative information relating to it in certain circumstances set forth in our regulations, such as in the filing of a notice of penalty with the Commission, pursuant to section 39.7(d)(4) of our regulations. Other than the situations in our regulations in which we have granted authority to disclose publicly investigative information, NERC or a Regional Entity must seek and obtain advance Commission authorization.

whether they have engaged in or are engaging in similar activities and, if so, whether they should terminate those activities and desist from future, similar activities. The purpose of these disclosures is to deter the entity in question and others subject to our jurisdiction from continuing or initiating misconduct like that described in our orders. We expect that NERC or a Regional Entity will make available to the public the same kinds of information in the Website postings described in section 408.3.6.

2. Designation of Confidential Information

185. In the *Certification Order*, we noted that section 408.3 of the proposed Rules of Procedure placed the burden on users, owners and operators of the Bulk-Power System who assert that specific information is confidential and should be prevented from public disclosure to show that such information qualifies for such treatment. We directed that this be extended to apply to all entities that seek confidential treatment of information they provide to NERC or a Regional Entity.[78] We indicated that the proper time for the entity to make this showing of the need for confidential treatment, in written form, is when the entity provides that information to NERC or a Regional Entity. Also, we stated that the entity must update the information relating to its claim of confidentiality if, for example, it concludes that the information no longer qualifies for that treatment, and so notify NERC or the relevant Regional Entity. We directed NERC to modify its Rules of Procedure accordingly.

186. In the *Certification Order*, we directed NERC to state explicitly in its Rules of Procedure that the procedures to designate confidential information that NERC had set forth in section 408.3 apply to investigations, audits and enforcement actions.[79]

a. NERC Response

187. NERC proposes in section 1502.1 that an entity that submits a document to NERC or a Regional Entity may mark that document as confidential if the entity reasonably believes that the document contains confidential information as defined by the Rules of Procedure. Under proposed section 1502.3, a submitting entity should notify NERC or the relevant Regional Entity if the entity concludes that information for which it had sought confidential treatment no longer qualifies for that treatment. Because NERC has harmonized other Rules of Procedure to conform to proposed section 1500, NERC deleted from section 408.3 provisions that required submitting entities to demonstrate that information they assert to be confidential qualifies for such treatment. NERC did not

[78] *Certification Order* at P 658.

[79] *Id.* at P 402.

insert these provisions into proposed section 1500. In proposed section 1503.1, NERC states that it or a Regional Entity shall make information available "only to one with a demonstrable legal right to obtain the information from [NERC or a Regional Entity]."

188. NERC has amended section 408.3 to provide that NERC will treat as confidential under section 1500 all alleged violations and matters related to a compliance investigation, including the status of the investigation. Section 408.3 also states that an entity seeking to protect as confidential information resulting from compliance investigations, audits and enforcement actions shall follow the section 1500 procedures.

b. Comments

189. APPA asserts that NERC's proposed procedures would appear to rubber stamp any assertion of confidentiality by an entity submitting data, and then shift the burden of disproving the need for such treatment to any third parties seeking the data. TAPS contends that section 1500 would deny access to *any* information, whether or not confidential, except to those with a "legal right" to such information because section 1503, which deals with "Requests for Information," applies to all information. Characterizing the procedures in section 1500 as vague and general, APPA asserts that they could contribute to overbroad confidentiality designations in circumstances that do not warrant such treatment, and do not comport with the Commission's injection of greater transparency into its policies and procedures in implementing EPAct 2005.

190. TAPS also asserts that NERC failed to comply with the Commission's directives to extend the burden of showing that information qualifies for confidential treatment to all entities requesting such treatment. TAPS maintains that section 1500 completely eliminates the requirement, previously contained in section 408.3 of the Rules of Procedure, that users, owners and operators of the Bulk-Power System seeking to protect information as confidential must demonstrate that the information qualifies for such treatment. TAPS argues that section 1500 imposes no obligation on those submitting information to demonstrate that it qualifies for confidential treatment and instead places a heavy burden on entities requesting information, whether it is confidential or not.

191. ISO/RTO Council asserts that the Commission should direct NERC to revise its Rules of Procedure to provide express protection for information accorded confidential treatment by the Commission (and other applicable ERO governmental authorities), including information deemed confidential under an ISO or RTO information policy. ISO/RTO Council suggests that the Commission require NERC to amend section 1502.1 to permit an entity to mark as confidential a document it submits to NERC or a Regional Entity that the entity reasonably believes contains confidential information as defined by

any rules, procedures, or tariffs approved by an ERO governmental authority. The Southwest TDUs assert that section 1500 does not protect public bodies, which need to know that NERC will not disclose information they must keep confidential by law.

192. ISO/RTO Council also states that, pursuant to Commission-approved rules, ISOs and RTOs in many instances require third party entities to file non-disclosure agreements before release of information about market participants and that in some cases ISO and RTO tariffs prohibit the disclosure of confidential information to third parties. ISO/RTO Council believes that the provisions for confidentiality in section 1500 should be consistent with and honor approved confidentiality rules of ISOs and RTOs.

c. Commission Conclusion

193. We intend that NERC and the Regional Entities look with disfavor on frivolous, overly broad or unreasonable requests for information. However, we do not agree that, with respect to activities pursuant to FPA section 215, a person who seeks information from NERC or a Regional Entity must show that it has a "demonstrable legal right" to obtain that information, as required by NERC's proposed section 1503.1. Certainly, no one should have to demonstrate a right to obtain information that is public, or that the submitting entity agrees may be disclosed to the requestor. Thus, we direct NERC to delete section 1503.1, which would require a requestor to show that it has a legal right to information it seeks, and to amend section 1500 to exclude any reference to this requirement.

194. Because we conclude that NERC and the Regional Entities may not shelter from disclosure public information they receive, the requirement in section 1503.2.3 that a requestor maintain the confidentiality of any information it receives would not apply to requests for public information. This condition is only appropriate if the requestor seeks information for which NERC or a Regional Entity has received a claim of confidentiality, but does not seek public disclosure of the information. This situation would arise when a submitter of information claims it to be confidential but authorizes NERC to make a non-public disclosure of the information to a particular requestor. As a result, we direct NERC to amend section 1503.2.3 to state, "The request must stipulate that, if the requesting party does not seek public disclosure, it will maintain as confidential any information for which a submitting party has made a claim of confidentiality, in accordance with NERC's rules."

195. With respect to the issues APPA and TAPS raise concerning whether a submitting entity must make a showing of confidentiality for information received by NERC or a Regional Entity, we conclude that an entity that seeks confidential treatment of any information it submits to NERC or a Regional Entity relating to activities authorized

pursuant to FPA section 215 must indicate with the submission each category of confidential information as defined in section 1501 that the submitting entity reasonably believes relates to the information. We do not intend that this designation be burdensome for the submitting entity. An entity that fails to designate information it submits to NERC or a Regional Entity as confidential in conformance with this determination has no right to object to its public disclosure by NERC or the Regional Entity that received the information. Nor do we intend that NERC or a Regional Entity must evaluate a claim of confidentiality when it receives information. However, NERC and the Regional Entities should look with disfavor on frivolous, overly broad or unreasonable claims of confidentiality when evaluating a request for disclosure of information.

196. NERC and the Regional Entities must treat as confidential information that a submitting entity has so designated until making a determination that specific information does not fall within the categories of confidential information NERC lists or the submitting entity informs that it no longer considers confidential information it previously designated. In this regard, we direct NERC to amend section 1502.3 to state that a submitting entity must promptly notify NERC or the applicable Regional Entity when the submitter believes that particular information no longer qualifies for confidential treatment. We also direct NERC and the Regional Entities to consult with each other with respect to their evaluations of claims of confidentiality so that determinations on assertions of confidentiality are consistent to the maximum extent possible.

197. The comments by Southwest TDUs and ISO/RTO Council that information NERC or a Regional Entity receives may be subject to prohibitions against public disclosure contained in the Commission-approved rules of an RTO or ISO, or applicable provisions of state or federal law, raise an important point. We believe the most appropriate means to prevent unwarranted disclosure by NERC or a Regional Entity of such information is for the submitting entity to describe any such prohibition that is applicable when submitting the information to NERC or a Regional Entity. We further direct that, when seeking such information from NERC or a Regional Entity, a person or entity must describe how it qualifies to receive information subject to such prohibitions.

3. Challenges to Confidential Treatment

198. In the *Certification Order*, we noted that, in its application for certification, NERC neither identified persons who will decide disputes over assertions of confidentiality as to specific information nor indicated whether there will be appeals or reviews of such decisions. We directed NERC to include in its compliance filing processes under which

an entity's classification of information as confidential can be challenged and processes under which NERC and the Regional Entities would decide issues of confidentiality in specific situations.[80]

a. NERC Response

199. NERC states that section 1500 of its Rules of Procedure addresses these concerns. In addition to sections 1503.1 and 1503.2, which we discuss above, section 1503.3 requires NERC or a Regional Entity to provide to the entity that submitted the information written notice of the possible disclosure of the information, or receipt of a request for its disclosure, and an opportunity either to waive objection to disclosure or provide comments on why the information in question should not be disclosed. Section 1503.3 specifically provides that a failure by a submitting entity to provide such comments or otherwise respond to the written notice is not deemed a waiver of the submitting entity's claim of confidentiality.

200. Section 1503.4 provides that the chief executive officer of the ERO or Regional Entity (or his or her designee) shall determine whether to grant a request to disclose information for which an entity has requested confidential treatment. In addition, pursuant to section 1503.5, any person whose request for confidential treatment is denied may appeal that decision to the president of NERC within 30 days of the decision. In that event, NERC proposes to give the submitting entity an opportunity to waive objection to disclosure or to provide comments opposing disclosure of the information within 10 days of the notice, provided, however, that the submitting entity's failure to provide comments or otherwise respond to NERC's notice of the appeal is not deemed to be a waiver of the claim of confidentiality. NERC states that corresponding changes have been made in other parts of the Rules of Procedure and the delegation agreements to refer to section 1500.

b. Comments

201. Allegheny asserts that the standard that NERC will use to determine when it is appropriate for it to disclose information previously identified as confidential is unclear. According to Allegheny, section 1503.4 does not clearly identify what information NERC will review to determine what "confidential" information may be disclosed and is not clear as to what NERC may actually disclose once a finding is made. For sake of clarity, Allegheny recommends that section 1503.4 be rewritten as follows:

[80] *Certification Order* at P 660.

> The chief executive officer or his/her designee of the receiving entity (ERO or Regional Entity) shall determine whether to disclose such information based upon the requestor's information provided under Rule 1503.2, comments provided by the submitting entity and any other relevant information available.

202. Allegheny maintains that the process for appealing a decision by NERC to disclose information previously treated as confidential does not provide adequate time to address any issues raised in such an appeal. Allegheny points to the disparity between the 30-day period NERC proposes for the filing of an appeal of a denial of disclosure and the 10-day period for the submitting entity to respond to the notice of appeal. If a response is not made within 10 days, Allegheny asserts that the submitting entity will be deemed to have waived any claims of confidentiality with respect to the specific information at issue. Allegheny maintains that this process unfairly prejudices the submitting entity because, in many instances, 10 days will not be a sufficient amount of time to properly respond to an appeal of this sort. Allegheny requests that the Commission extend the response time to such an appeal to at least the 30 days the requestor has to file its appeal.

c. Commission Conclusion

203. We do not find any substantive difference between Allegheny's suggested wording of section 1503.4 and NERC's proposal and reject Allegheny's suggestion on this point. We disagree with Allegheny that the 10 days NERC would allot for a submitting entity to file comments on an appeal of a denial of a request for disclosure of information is a waiver of a claim of confidentiality. We observe that, contrary to Allegheny's argument, NERC will not deem the submitting entity's failure to respond within the 10-day period as a waiver of the submitting entity's claim of confidentiality. Thus, NERC could not justify granting a requestor's appeal solely because the submitting entity failed to file timely comments opposing the appeal. However, NERC has not substantiated why it allots far less time for a submitting entity to respond to a requestor's appeal than for the requestor to file its appeal. We, therefore, direct NERC to align the time periods for filing an appeal and for filing either comments on it or a waiver of a confidentiality claim.

4. Commission Access to Reliability and Adequacy Information

204. In the *Certification Order*, we expressed concern that NERC provided little detail on how it would facilitate access to the information the Commission will need to fulfill its reliability oversight and adequacy assessment roles under section 215 of the FPA. We indicated that our access to accurate and timely information is important if both the

Commission and NERC seek to assess the reliability and adequacy of the Bulk-Power System in North America. Although section 803 of NERC's Rules of Procedure provides that NERC will determine the number and type of assessments it conducts, Order No. 672 and our regulations provide the Commission discretion to determine the types and frequency of reliability and adequacy assessments the ERO shall conduct.[81] We therefore directed NERC to modify its Rules of Procedure to acknowledge the Commission's authority to have timely access to information and records within the time frame provided by the Commission in accordance with our regulations implementing sections 215 and 301(b) of the FPA.[82]

a. NERC Response

205. NERC states that it has revised its Rules of Procedure to add a new section 1505 that provides that a Commission request for reliability information is presumptively authorized by section 215 of the FPA. Section 1505 provides that, when responding to a request for information from the Commission, NERC or a Regional Entity shall preserve any mark of confidentiality a submitter made for the information and shall notify the Commission of the submitter's assertion of confidentiality. Section 1505 further provides that, upon receiving a request for information from the Commission or any other appropriate governmental authority, NERC or a Regional Entity shall provide contemporaneous notice of the request to an entity that submitted information subject to the request. Proposed section 1506 states that nothing in section 1500 shall prohibit the disclosure of a violation at the point when the matter is filed with an appropriate governmental authority as a notice of penalty, the "violator" admits to the violation, or the alleged violator and NERC or the Regional Entity reach a settlement regarding the violation.

b. Comments

206. According to TAPS, while section 1505 provides the Commission with presumptive access to information, section 1506 may be read to narrow the information to be filed with this Commission, contrary to Order No. 672.

c. Commission Conclusion

207. We do not accept NERC's proposal in section 1505 that a request for information from the Commission is only presumptively authorized by FPA section 215. Section

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[81] Order No. 672 at P 804; 18 C.F.R. § 39.11(a) and (b).

[82] *Certification Order* at P 641.

39.2(d) of our regulations requires the ERO and each Regional Entity to provide us with "such information as is necessary" to implement FPA section 215. Establishing only a presumption that a Commission request for information is authorized by FPA section 215 implies that NERC or a Regional Entity can determine what is necessary for the Commission to fulfill its statutory duties relating to reliability. NERC and the Regional Entities are not in a position to make that decision. Nor does NERC state any justification for its apparent concern that our informational requests may be overbroad or inconsistent with our responsibilities under FPA section 215. Accordingly, we direct NERC to delete "presumptively" from the first sentence of section 1505. When we receive information from NERC or a Regional Entity in response to a request, we will treat that information in accordance with our regulatory provisions relating to claims that information received by the Commission is confidential or otherwise exempt from public disclosure.[83]

208. We also direct NERC to amend its proposal in the third sentence of section 1505 that, with respect to each request for information from the Commission, NERC or the applicable Regional Entity will notify entities that provided the information of that request. This notification is not appropriate with respect to a Commission or staff request for information pertaining to a non-public activity such as a non-public investigation pursuant to 18 C.F.R. Part 1b. Only the Commission may disclose publicly a Part 1b investigation, pursuant to section 1b.9 of our regulations. If NERC or a Regional Entity informs a person who has submitted information to it that the Commission has requested the information with respect to a non-public inquiry, the submitter would learn of the inquiry and its possible subject matter and could pass this knowledge to others. This practice could give entities the ability to destroy or conceal information relevant to the investigation or otherwise impede it.[84] Therefore, we direct NERC to insert the phrase

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[83] Our general regulation on this matter is found at section 388.112 of our regulations, 18 C.F.R. § 388.112 (2006). Similar provisions concerning information the Commission or its staff receives with respect to an investigation under Part 1b of our regulations are located at 18 C.F.R. §§ 1b.9 and 1b.20.

[84] *Cf. PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,263 at P 26-27, 31-32 (2006) (denying rehearing request that we require PJM to provide public notice of referrals by its Market Monitoring Unit (MMU) to the Commission of apparent violations because, under section 1b.9 of our regulations, "all aspects of an MMU referral, from its initiation to its conclusion, are deemed confidential unless the Commission authorizes disclosure," and noting that the non-public nature of an investigation requires safeguarding from public disclosure all "included information" the Commission or its staff receives from the MMU concerning a referral).

"Unless otherwise directed by FERC or its staff," at the beginning of the third sentence of section 1505.

209. We disagree with TAPS that section 1506 narrows the scope of information that NERC or a Regional Entity would file with the Commission. Section 1506 harmonizes NERC's policy of protecting from disclosure information that a submitter reasonably asserts to be confidential with NERC's disclosure of such information in circumstances in which we approved disclosure in Order No. 672.[85]

5. Recourse When Confidentiality Is Violated

210. In the *Certification Order*, we directed NERC to clarify what recourse is available to entities who are threatened with breach of confidentiality or whose confidentiality is breached.[86]

a. NERC Response

211. NERC states that, in order to address this matter within its authority as the ERO, it has proposed section 1503.6 of the Rules of Procedure, which states that if the ERO or a Regional Entity determines to disclose information designated as confidential, it shall provide the entity that submitted the designation no fewer than 21 days' written notice prior to releasing the information to enable such submitting entity to (a) seek an appropriate protective order or other remedy, (b) consult with the receiving entity with respect to taking steps to resist or narrow the scope of such request or legal process, or (c) waive compliance, in whole or in part, with section 1500. Section 1503.6 also provides that, should an entity be required to disclose confidential information, or should the submitting entity waive objection to disclosure, the receiving entity shall furnish only that portion of the confidential information which the receiving entity's counsel advises is legally required. NERC states that the delegation agreements have been revised

[85] *See* Order No. 672 at P 534 (the ERO and Regional Entities must submit rules that require non-public investigations and confidentiality of material obtained during an investigation unless otherwise authorized by the Commission); P 535 (notices of penalty that the ERO files with the Commission will be public except with respect to Cybersecurity issues and other matters that would jeopardize Bulk-Power System security if publicly disclosed); P 598 (a violation determined by self-reporting, an admission, or a finding by a Regional Entity or the ERO, or a settlement or other negotiated disposition of an alleged violation generally will be made public after the matter is filed with the Commission as a notice of penalty).

[86] *Certification Order* at P 668.

correspondingly. In addition, NERC maintains that parties have all legal remedies available to them from state, federal, and provincial courts. Furthermore, NERC and the Regional Entities have no special authority or jurisdiction to deal with such matters.

b. Comments

212. FirstEnergy contends that section 402.8.4, which provides that a member of NERC's staff, of a NERC committee or of a NERC audit team who violates confidentiality rules, "may be subject to appropriate action," should be strengthened to impose a severe sanction for such a violation to reflect severe harm that could result from unauthorized disclosure of confidential information.

c. Commission Conclusion

213. We conclude that the procedure NERC sets forth in section 1503.6 to notify the submitter of NERC's determination to disclose information for which the submitter sought confidentiality, at least 21 days prior to the date of disclosure, adequately protects the submitter's interests with respect to NERC's activities pursuant to FPA section 215. However, NERC has not described in its compliance filing how it would mitigate the inappropriate release of information that a submitter asserts is confidential or the adverse actions it would apply to a person who caused such a release. We agree with FirstEnergy that NERC has not provided sufficient specificity on this matter, including whether such adverse actions would reflect the harm that could result from unauthorized disclosure of confidential information. We further observe that section 402.8.4 relates specifically to the integrity of the NERC compliance monitoring and enforcement program, rather than to all Regional Entity and ERO activities pursuant to FPA section 215. We direct NERC to submit in its compliance filing in response to this order adverse actions that could apply to any individual engaged in Regional Entity or ERO activity pursuant to FPA section 215 for the inappropriate release of information that is determined to be confidential. These adverse actions must reflect appropriately the harm that could result from the unauthorized disclosure of confidential information. Further, these adverse actions would not preclude an entity whose information was improperly disclosed from seeking a remedy in an appropriate court.

D. Delegation Agreements

214. In the *Certification Order*, we directed that NERC make several changes to the *pro forma* delegation. We indicated that such changes should also be reflected in the individual delegation agreements. We directed that, once NERC has established the

default provisions for the delegation agreements, including the changes required in the *Certification Order* and negotiated in the delegation agreements, NERC should resubmit the *pro forma* delegation agreement.[87]

215. Among other things, the Commission directed NERC to take the following actions regarding the delegation agreements: (1) explain how it would address conflicts that could arise regarding the boundaries of adjacent Regional Entities,[88] (2) provide that no two industry sectors may control any decision and no single segment may veto any matter at the ERO or Regional Entity level, unless the ERO adequately explains why it cannot apply these principles,[89] (3) modify section 16 of the *pro forma* delegation agreement to allow a Regional Entity, if it believes that a Rules change conflicts with the rights set forth in its agreement, to have ample opportunity to participate in the modification process for Rules, Reliability Standards and procedures and limit a Regional Entity's right to terminate its delegation agreement to instances where a Rules change would "conflict" with its rights,[90] (4) allow each Regional Entity to appeal NERC's decision not to approve a proposed regional Reliability Standard or variance and forward it on to the Commission,[91] (5) provide consistent enforcement programs among the Regional Entities, unless a deviation is identified and justified,[92] (6) designate data collection as a statutory activity,[93] (7) include uniform language in each delegation agreement preserving a Regional Entity's right to terminate, limited to instances where a Rule change would extend the notice of termination provision in the *pro forma* delegation

[87] *Id.* at P 518.

[88] *Id.* at P 534.

[89] *Id.* at P 545.

[90] *Id.* at P 554, 605.

[91] *Id.* at P 562.

[92] *Id.* at P 570.

[93] *Id.* at P 582.

agreement to one year,[94] (8) provide certain funding protections, and (9) remove the presumption of reasonableness by the ERO of a Regional Entity's budget if the Regional Entity's governing body has approved its budget.[95]

1. NERC Response

216. NERC says that it has made the required changes to the *pro forma* delegation agreement, and that they will be reflected in the individual delegation agreements. NERC will include appropriate language in the uniform compliance monitoring and enforcement program and Rules of Procedure and review the makeup of any committees addressing compliance matters.

217. NERC states that it intends to refile the *pro forma* delegation agreement when it files for approval of the individual delegation agreements.

2. Comments

218. No comments were received on this portion of NERC's compliance filing.

3. Commission Conclusion

219. The Commission will not rule on NERC's proposals regarding the delegation agreements at this time. NERC filed its modified *pro forma* delegation agreement and its executed delegation agreements in separate dockets.[96] We will rule on these matters in those proceedings.

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[94] *Id.* at P 595.

[95] *Id.* at P 203.

[96] As stated above, the *pro forma* delegation agreement was filed in Docket No. RR06-1-004. The individual delegation agreements were filed in the following dockets: ERCOT, Docket No. RR07-1-000; FRCC, Docket No. RR07-8-000 (in unexecuted form); MRO, Docket No. RR07-2-000; NPCC, Docket No. RR07-3-000; Reliability*First*, Docket No. RR07-4-000; SERC, Docket No. RR07-5-000; SPP, Docket No. RR07-6-000; and WECC, Docket No. RR07-7-000.

E. Use of Order No. 672 Definitions

220. In the *Certification Order*, we directed NERC to adopt definitions of the terms defined in Order No. 672 throughout its documents.[97]

1. NERC Response

221. NERC states that it has modified the definitions of "Bulk-Power System," "electric reliability organization," and "Regional Entity" in Article I, section 1 of the Bylaws to track the definitions in Order No. 672. NERC will also track the Order No. 672 definitions in its Rules of Procedure. The definitions of "electric reliability organization" and "Regional Entity" also recognize the international character of NERC and certain Regional Entities.

2. Comments

222. ISO/RTO Council believes that the Commission should find that NERC has complied with the Commission's directive to adopt the Definition of Terms in Order No. 672 throughout the documents in NERC's compliance filing. Moreover, ISO/RTO Council supports NERC's revised definition of "bulk electric system" and believes the revision to be consistent with the definition of "Bulk-Power System" as defined in Order No. 672.

3. Commission Conclusion

223. NERC has appropriately revised definitions in its Bylaws and its Rules of Procedure to reflect these same definitions in Order No. 672.

The Commission orders:

(A) NERC's October 18, 2006 compliance filing is hereby accepted in part and rejected in part, as discussed in the body of this order.

(B) NERC is hereby directed to file a compliance filing within 60 days of the date of this order.

[97] *Certification Order* at P 727.

(C) NERC is hereby directed to file with the Commission quarterly reports for the next three years, within 30 days of the end of each quarterly period, beginning with the first quarter of 2007, on voting results in the Reliability Standard development process, as discussed herein.

(D) NERC is hereby directed to include in its first performance assessment three years from the date of certification a report analyzing the length of time taken to develop a new or modified Reliability Standard from the submission of a SAR through approval of a Reliability Standard by the ERO board, as discussed herein.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.