

127 FERC ¶ 61,209
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

North American Electric Reliability Council, North American Electric Reliability Corporation	Docket No. RR06-1-021
Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT	Docket No. RR07-1-005
Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization	Docket No. RR07-2-005
Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc.	Docket No. RR07-3-006
Delegation Agreement Between the North American Electric Reliability Corporation and Reliability <i>First</i> Corporation	Docket No. RR07-4-005
Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation	Docket No. RR07-5-006
Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc.	Docket No. RR07-6-007
Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council	Docket No. RR07-7-007
Delegation Agreement Between the North American Electric Reliability Corporation and Florida Reliability Coordinating Council.	Docket No. RR07-8-006

ORDER ON COMPLIANCE FILING

(Issued June 1, 2009)

1. On February 17, 2009, the North America Electric Reliability Corporation (NERC) submitted a compliance filing in response to a Commission order issued December 19, 2008.¹ In the December 19 Order, the Commission addressed NERC's third compliance filing in this proceeding regarding NERC's agreements delegating certain of its functions to eight Regional Entities.² In the instant compliance filing, NERC proposes additional revisions to its *pro forma* delegation agreement exhibits, namely, to the uniform Compliance Monitoring and Enforcement Program (CMEP) and CMEP Attachment 2 Hearing Procedures. NERC also proposes to revise related documents, including the NERC Rules of Procedure and certain of its individual delegation agreements.
2. For the reasons discussed below, we accept NERC's compliance filing, subject to revisions, to become effective 15 days after the date of this order. We also require NERC to submit an additional compliance filing within 60 days of the date of this order.

Background

3. The Commission issued its initial order in this proceeding on July 20, 2006, certifying NERC to serve as the Electric Reliability Organization (ERO) for the continental United States.³ The Commission also accepted, subject to conditions, NERC's proposal to delegate certain of its ERO functions to its designated Regional

¹ *North American Electric Reliability Corp.*, 125 FERC ¶ 61,330 (2008) (December 19 Order), *order granting, in part, and denying, in part, rehearing*, 126 FERC ¶ 61,270 (2009).

² NERC's eight Regional Entities are: Texas Regional Entity, a Division of the Electric Reliability Council of Texas; Midwest Reliability Organization (MRO); Northeast Power Coordinating Council, Inc. (NPCC); ReliabilityFirst Corporation (RFC); SERC Reliability Corporation; Southwest Power Pool, Inc. (SPP); Western Electricity Coordinating Council (WECC); and Florida Reliability Coordinating Council (FRCC).

³ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006).

Entities. In addition, the Commission accepted, subject to conditions, NERC's proposed *pro forma* delegation agreement and the exhibits to this agreement, including the NERC *pro forma* CMEP and CMEP Attachment 2 Hearing Procedures. Orders addressing NERC's first and second compliance filings were issued by the Commission on April 19, 2007 and March 21, 2008, respectively.⁴ In the December 19 Order, the Commission addressed NERC's third compliance filing.

On February 17, 2009, NERC made its compliance filing in response to the December 19 Order. NERC's compliance filing includes proposed revisions to: (i) the NERC Rules of Procedures; (ii) NERC's delegation agreements with FRCC, NPCC, RFC, and WECC; (iii) the *pro forma* CMEP; and (iv) the *pro forma* CMEP Attachment 2 Hearing Procedures.

Notice of Filing and Responsive Pleadings

4. Notice of NERC's filing was published in the *Federal Register*, with interventions, protests and comments due on or before March 9, 2009. Comments were timely filed by the Transmission Agency of Northern California (TANC). On March 18, 2009, NERC filed an answer to TANC's comments.

Discussion

A. Procedural Matters

5. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NERC's answer because it has provided information that assisted us in our decision-making process.

B. Cross-Border Disclosure of Non-Public Compliance Information

1. December 19 Order

6. The December 19 Order directed NERC that when it issues a notice regarding its disclosure of non-public compliance-related information to an Applicable Governmental

⁴ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007) (First Delegation Agreements Compliance Order); *North American Electric Reliability Corp.*, 122 FERC ¶ 61,245 (2008).

Authority, NERC must specify each particular Applicable Governmental Authority to which it proposes to disclose this information and the specific procedures it proposes to follow for protecting this information from public disclosure.

7. The Commission also required NERC to explain, in its compliance filing, how it would protect from public disclosure non-public U.S.-related compliance information that is subject to the protections of section 39.7(b)(4) of the Commission's rules.⁵

2. NERC's Response

8. NERC states that each Applicable Governmental Authority to which it might submit non-public U.S. compliance information has provisions covering the submission of confidential information. NERC adds that these provisions are generally comparable to section 388.112 of the Commission's rules.⁶ NERC further adds that it will make use of these provisions when submitting such information to Applicable Governmental Authorities, and that any request that NERC submits to the Commission when requesting permission to disclose such information will identify specific procedures that will be used for protecting from public disclosure the information that will be transferred to any other Applicable Governmental Authority.

9. NERC states that it supports the development of procedures by the Commission and other Applicable Governmental Authorities addressing the receipt of non-public compliance information by an Applicable Governmental Authority about an entity subject to the jurisdiction of another Applicable Governmental Authority. NERC notes that under a December 4, 2008 agreement reached by the Manitoba Department of Science, Technology, Energy and Mines and Commission Staff (December Exchange Agreement), information exchange issues were appropriately addressed regarding a September 2007 disturbance occurring within the MRO footprint. NERC states that it would support the broader application of the approach taken in this agreement, or an analogous approach.

⁵ December 19 Order, 125 FERC ¶ 61,330 at P 30. Pursuant to section 39.7(b)(4), violations and alleged violations of Reliability Standards are generally required to be treated as non-public until the matter is filed with the Commission as a notice of penalty or otherwise resolved by an admission of violation, a settlement agreement or other negotiated disposition. *See* 18 C.F.R. § 39.7(b)(4) (2008).

⁶ *See* 18 C.F.R. § 388.112 (2008) (addressing requests for special treatment of documents submitted to the Commission).

3. Commission Determination

10. We accept NERC's compliance filing, regarding the cross-border disclosure of non-public compliance information, and remain committed to working with NERC and Canadian and Mexican reliability authorities to develop workable, mutually satisfactory procedures addressing these issues. We also agree that the December Exchange Agreement offers a useful initial approach for other case-specific agreements. Such agreements will be useful in promoting greater cooperation among U.S., Canadian and Mexican reliability authorities.

C. Mitigation Plans

1. December 19 Order

11. The December 19 Order directed NERC to amend CMEP section 6.5 to provide that if a mitigation plan is approved by the Regional Entity, it will be submitted to NERC for NERC's review by a specified date and notice will be given to both NERC and the affected Registered Entity.⁷ The Commission also required that section 6.5 be revised to require that contemporaneous notice be given by NERC to the Regional Entity and the Registered Entity as to whether NERC has accepted or rejected a mitigation plan.⁸ In addition, the Commission required that section 6.5 be revised regarding the time period in which a waiver of findings of violations and imposition of penalties or sanctions for violations would apply regarding NERC's review of a mitigation plan accepted by a Regional Entity.⁹ Finally, the Commission directed NERC to amend the NERC Rules of Procedure to parallel section 6.5 and required NERC to conform section 6.5 to CMEP figure 6.1 (a provision describing the mitigation plan process).¹⁰

2. NERC's Response

12. NERC proposes to revise section 6.5 to state that Regional Entities will notify NERC and the Registered Entity within five business days of the acceptance of a mitigation plan and will provide the accepted mitigation plan to NERC. NERC also

⁷ December 19 Order, 125 FERC ¶ 61,330 at P 51.

⁸ *Id.* P 52.

⁹ *Id.* P 54.

¹⁰ *Id.* P 56 and n.27.

proposes to revise section 6.5 to state that NERC, within thirty days following its receipt of an accepted mitigation plan from the Regional Entity, will notify the Regional Entity and the Registered Entity as to whether the mitigation plan is approved or disapproved by NERC. NERC also proposes to add to section 6.5 a provision addressing the time period in which a waiver of findings of violations and imposition of penalties or sanctions for violations will apply regarding NERC's review of a mitigation plan accepted by a Regional Entity. In addition, NERC states that it has revised figure 6.1 to be consistent with revised section 6.5.

13. To parallel section 6.5, NERC proposes to amend section 403.18 of the NERC Rules of Procedure. Section 403.18, as revised, states that “[i]f the regional entity accepts the mitigation plan, it shall notify the owner, operator, or user and shall promptly submit the complete approved mitigation plan to NERC in accordance with NERC’s form.” NERC also proposes to amend section 403.18 to state that NERC will notify the Regional Entity and the bulk-power system owner, operator or user of NERC’s approval or disapproval of a mitigation plan.

3. Responsive Pleadings

14. TANC argues that figure 6.1 fails to reflect NERC’s revisions to section 6.5, regarding the notice that must be given by a Regional Entity when it accepts a mitigation plan. TANC asserts that this notice, as proposed section 6.5 appropriately provides and figure 6.1 should provide, must be given to both NERC *and* the affected Registered Entity. TANC also requests that figure 6.1 be revised to conform to section 6.5 and section 403.18 of the NERC Rules of Procedure, pursuant to which NERC is required to provide contemporaneous notice to the Regional Entity and the Registered Entity regarding its acceptance or rejection of a mitigation plan.

15. NERC, in its answer, agrees that figure 6.1 should be revised as TANC proposes.

4. Commission Determination

16. We accept NERC’s proposed revisions to section 6.5 and figure 6.1, subject to conditions. In the December 19 Order, the Commission directed NERC to amend section 6.5 to provide that, after approving a proposed mitigation plan, a Regional Entity will submit the mitigation plan to NERC by a specified date. While NERC’s proposed revision specifies the date (five business days) by which the Regional Entity will notify NERC and the registered entity of the acceptance of a mitigation plan, NERC’s proposed revision fails to specify, with sufficient clarity, the date by which the Regional Entity will provide the accepted mitigation plan to NERC. Accordingly, we construe NERC’s proposed revision to require that the mitigation plan be provided to NERC within five business days following its acceptance by the Regional Entity.

17. NERC's proposed revisions to section 6.5 also fail to provide that within 30 days after receiving an accepted mitigation plan NERC will notify the Regional Entity and the Registered Entity, on a *contemporaneous* basis, as to whether NERC approves or disapproves the mitigation plan. We require NERC, in its compliance filing, to make this revision.

18. NERC also proposes to revise section 6.5 to state that a registered entity "shall not be subject to findings of violations of Reliability Standards or to imposition of penalties or sanctions for such violations" during the time period in which NERC is considering a mitigation plan accepted by a Regional Entity. We construe this language to refer only to findings of violations and imposition of penalties or sanctions for violations of the specific requirements of particular Reliability Standards that are listed in a specific mitigation plan.

19. In addition, we direct NERC to make the conforming changes to figure 6.1 of the CMEP, to which TANC and NERC agree.

D. SPP Independence

1. December 19 Order

20. The December 19 Order directed NERC and SPP to provide a further explanation regarding the asserted independence of the SPP Regional Entity with respect to the development and approval of proposed regional Reliability Standards.¹¹

2. NERC's and SPP's Response

21. NERC and SPP state that no further revisions are required to the SPP RTO bylaws or to the SPP Regional Entity Standards Development Process regarding the independence concerns outlined by the Commission in the December 19 Order. NERC and SPP state that, with respect to these matters, the SPP Regional Entity will operate with sufficient independence.

22. First, NERC and SPP point out that any interested party may participate in activities related to SPP's Regional Entity functions, including the regional Reliability Standards development process. NERC and SPP state that membership is not required in the SPP RTO in order to participate in the regional Reliability Standards development process.

¹¹ *Id.* P 108-10.

23. NERC and SPP state that while the Markets and Operations Policy Committee (MOPC) makes the initial assignment of an SPP RTO subcommittee or work group to be the Standards Drafting Team for a regional Reliability Standard drafting project, this is an administrative function which is well-placed in the MOPC because the MOPC is in the best position to know which SPP organizational group has the appropriate technical expertise to serve as the Standards Drafting Team for a particular proposed regional Reliability Standard. NERC and SPP state that while the MOPC is an SPP RTO committee, its meetings are publicly announced and open to any interested party.

24. NERC and SPP state that while existing SPP RTO subcommittees and work groups serve as regional Reliability Standards Drafting Teams, any such team is subject to the SPP Regional Entity's commission-approved SPP Standards Drafting Team Manual (a document that requires, among other things, that all activities be open to any interested party). NERC and SPP add that all information concerning a proposed regional Reliability Standard is publicly available (via subscription e-mail or on the SPP Regional Entity website). NERC and SPP further assert that, in SPP's Reliability Standards development process, the roles played by the MOPC and the SPP RTO board and members committee are advisory only.

25. NERC and SPP state that throughout the entire regional Reliability Standards development process, information is provided to the SPP Regional Entity trustees, who have the sole authority to approve a regional Reliability Standard developed by the Standards Drafting Team. NERC and SPP add that while the SPP RTO board or members committee has the authority to seek a remand of a regional Reliability Standard to the MOPC, a requested remand does not require the SPP Regional Entity trustees or the Standards Drafting Team to revise the remanded regional Reliability Standard.

3. Commission Determination

26. At this time, we will not rule on the adequacy of NERC's and SPP's response to the December 19 Order. Instead, we preserve the right to address this matter in the proceeding addressing NERC's first performance assessment.¹²

¹² We note that NERC was previously directed to assess the effectiveness of the SPP bylaws in ensuring an adequate separation of functions as between the SPP RTO and the SPP Regional Entity trustees in their three-year assessment. First Delegation Agreements Compliance Order, 119 FERC ¶ 61,060 at Ordering Paragraph D.

The Commission orders:

(A) NERC's compliance filing is hereby accepted, subject to conditions, as discussed in the body of this order.

(B) NERC is hereby directed to make a compliance filing within 60 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.