

144 FERC ¶ 61,180
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

North American Electric Reliability Corporation

Docket No. RR13-3-000

ORDER APPROVING REVISIONS TO ELECTRIC RELIABILITY
ORGANIZATION'S RULES OF PROCEDURE AND DIRECTING COMPLIANCE
FILING

(Issued September 3, 2013)

1. On April 8, 2013, North American Electric Reliability Corporation (NERC) submitted revisions to two sections of its Rules of Procedure (Rules): (1) Appendix 4D (Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Standards) (TFE Procedure); and (2) Appendix 2 (Definitions Used in the Rules of Procedure). NERC states that the revisions streamline the Technical Feasibility Exceptions (TFE) approval process, reflecting NERC, Regional Entity and industry experience processing TFE requests over the last three years. As discussed below, pursuant to section 215(f) of the Federal Power Act (FPA) and section 39.10 of the Commission's regulations, we approve NERC's proposed revisions.¹ In addition, we direct NERC to submit a compliance filing within 90 days of the date of this order.

I. Background

2. In January 2008, the Commission issued Order No. 706, which approved eight Critical Infrastructure Protection Reliability Standards (CIP Standards) and, among other things, directed NERC to develop a set of conditions or criteria that a responsible entity must follow to obtain a TFE from specific requirements of the CIP Standards.² The

¹ 16 U.S.C. § 824o(f) (2006); 18 C.F.R. § 39.10 (2013).

² *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order No. 706, 122 FERC ¶ 61,040 at P 178, *order on reh'g*, Order No. 706-A, 123 FERC ¶ 61,174 (2008), *order on clarification*, Order No. 706-B, 126 FERC ¶ 61,229 (2009), *order denying clarification*, Order No. 706-C, 127 FERC ¶ 61,273 (2009).

Commission specified that the TFE process must include: mitigation steps, a remediation plan, a timeline for eliminating the use of the TFE unless appropriate justification otherwise is provided, regular review of the continued need for the TFE, internal approval by senior managers, and regional approval through the Electric Reliability Organization (ERO).³ On October 29, 2009, NERC filed amendments to its Rules to implement the Commission's directive in Order No. 706 that it develop and adopt a set of conditions or criteria that a responsible entity must follow to obtain a TFE. Specifically, NERC proposed section 412 (Requests for Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Reliability Standards) and Appendix 4D (Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Reliability Standards). In a January 21, 2010 order, the Commission approved NERC's amended Rules.⁴ In addition, the Commission requested further information and clarification regarding certain aspects of the TFE process.

3. On April 21, 2010, NERC submitted its compliance filing in response to the January 21 Order. On October 1, 2010, the Commission issued an order accepting NERC's April 2010 filing as partially compliant and directing further changes to the TFE Procedure.⁵ On December 23, 2010, NERC submitted a compliance filing in response to the Commission's October 1 Order, which the Commission subsequently accepted.⁶

II. NERC's Petition

4. NERC proposes revisions to the TFE Procedure (Appendix 4D) and definitions (Appendix 2) within the NERC Rules. NERC states that the proposed revisions will promote more efficient use of resources by streamlining the process for submitting, reviewing, and approving or disapproving TFE requests, and for modifying approved TFEs. According to NERC, "the majority of TFE Requests that have been submitted relate to minimal-risk issues, have common rationales and justifications, are supported by common evidence, and often involve similar devices across Responsible Entities

³ *Id.* P 222.

⁴ *North American Electric Reliability Corp.*, 130 FERC ¶ 61,050 (2010) (January 21 Order), *order on compliance*, 133 FERC ¶ 61,008 (2010) (October 1 Order), *order on reh'g*, 133 FERC ¶ 61,209 (2010), *order on compliance*, 135 FERC ¶ 61,026 (2011) (April 12 Order).

⁵ October 1 Order, 133 FERC ¶ 61,008.

⁶ April 12 Order, 135 FERC ¶ 61,026.

nationwide (i.e., it is infrequent that a TFE Request is unique or unfamiliar).”⁷ Thus, NERC explains, the proposed revisions “balance the need for adequate information to evaluate and approve or disapprove a TFE Request with the need to streamline the process for reviewing TFE Requests and eliminate the administrative burdens that the current process imposes on both Responsible Entities and Regional Entities.”⁸ Further, NERC states that, while the proposed revisions simplify the process for analyzing whether a TFE is appropriate, there are no changes to the substantive criteria for analyzing TFE requests.

5. Specifically, NERC proposes to modify section 3.0 of the TFE Procedure (Basis for Approval of a TFE) by removing language stating that TFEs are typically approved for a limited duration, except that “under limited, justified circumstances” a TFE may be approved without an expiration date, subject to periodic review to verify the continuing justification for the TFE. NERC proposes new language that “a TFE may be approved without a specified Expiration Date, however, in the event of a Material Change to the facts underlying an approved TFE, the Responsible Entity shall submit a Material Change Report providing continuing justification for the TFE or verifying Strict Compliance with the Applicable Requirement has been achieved.”⁹

6. NERC also proposes to add new language to section 4.0 of the TFE Procedure (Form, Contents and Submission of a TFE Request or Material Change Report) that would enable a responsible entity to seek a TFE for “class-based categories of devices.” The revision also provides that NERC will maintain on its website a list of permissible class-based categories of devices. The proposed revisions would allow a responsible entity to use one submission to request a TFE from the same requirement for “multiple, similar covered assets.”¹⁰ Proposed section 4.2 sets forth the required information to be included in a TFE request or Material Change Report, both requiring a statement by a “Senior Manager or Delegate” that a TFE is warranted. Further, the proposed provision states that “additional information may be requested by the Regional Entity as

⁷ North American Electric Reliability Corp., *Petition for Approval of Revisions to Appendix 2 and Appendix 4D of the NERC Rules of Procedure*, Docket No. RR13-3-000, at 4 (filed April 8, 2013) (NERC Petition).

⁸ *Id.*

⁹ NERC Petition, Att. 1B at 6.

¹⁰ *Id.*

appropriate. At the discretion of the Regional Entity, information may be verified at a subsequent Compliance Audit or Spot Check or other form of monitoring.”¹¹

7. Current section 5.0 of the TFE Procedure provides a two part TFE process, consisting of: (1) a preliminary screen to determine whether the application contains all required information, followed by; (2) a substantive determination whether to approve or disapprove the TFE request. NERC proposes to modify section 5.0 by consolidating the two part submission process into one. NERC also proposes revisions pertaining to the substantive review of a TFE, by: (1) permitting a Regional Entity to approve a TFE request in whole or in part, where the existing process only allows for the entire request to be considered; and (2) reducing the time frame for the Regional Entities to review a TFE request from one year to 60 days.

8. NERC proposes modifications to section 6.0 of the TFE Procedure (Implementation and Reporting By the Responsible Entity Pursuant to an Approved TFE) to replace quarterly status reports with a Material Change Report, which a responsible entity must submit if there is a material change to the facts underlying an approved TFE.¹² Current section 6.8 (which is not being revised), provides that “[i]f a Responsible Entity fails to implement or maintain a compensating measure or mitigating measure or ... fails to submit one or more reports by the required submission date, the Responsible Entity (i) is required to file a Self-Report ... and (ii) will be subject to issuance of a Notice of Alleged Violation for any non-compliance with the Applicable Requirement that is the subject of the approved TFE.”

9. Current section 8.0 of the TFE Procedure (Compliance Audit Requirements Relating to Approved TFE) provides that “[f]ollowing approval of a Responsible Entity’s TFE Request, subsequent Compliance Audits of the Responsible Entity conducted prior to the Expiration Date shall include audit of: (i) the Responsible Entity’s implementation and maintenance of compensating measures ...; and (ii) the Responsible Entity’s implementation of steps ... towards achieving Strict Compliance with the Applicable

¹¹ *Id.* at 9.

¹² NERC defines “Material Change” as “[a] change in facts that modifies Required Information in connection with an approved TFE. Examples of Material Change could include, but are not limited to an increase in device count (but not a decrease), change in compensating measures, change in statement of basis for approval for the TFE, a change in the Expiration Date of the TFE, or a Responsible Entity achieving Strict Compliance with the Applicable Requirement.” NERC Petition at 7, Att. 1B at 4.

Requirement...” NERC proposes to replace “shall...audit” with “may...audit” in section 8.0.¹³

III. Notice and Responsive Pleadings

10. Notice of the filing was published in the *Federal Register*, with interventions and protests due on or before April 29, 2013.¹⁴ Edison Electric Institute filed a timely motion to intervene. No protests or comments were filed.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the timely, unopposed motion to intervene serves to make Edison Electric Institute a party to this proceeding.

B. Substantive Issues

12. Pursuant to FPA section 215(f) and section 39.10 of the Commission’s regulations, we approve the proposed revisions to NERC’s Rules. NERC and the Regional Entities have processed over 3,800 TFE requests over the last three years, including over 1,300 TFE requests during 2011.¹⁵ Based on this experience, NERC developed revisions to streamline the TFE process and ease the administrative burden of the program while maintaining the substantive criteria for determining whether to approve or disapprove a TFE request. Except for the limited provisions discussed below, we find that NERC’s proposed revisions are just, reasonable, not unduly discriminatory or preferential, and in the public interest. Accordingly, we approve NERC’s petition. In addition, we direct that NERC submit a compliance filing, within 90 days of the date of this order, addressing the matters discussed below.

¹³ NERC Petition, Att. 1B at 21.

¹⁴ 78 Fed. Reg. 22,538 (2013).

¹⁵ See North American Electric Reliability Corp., *Annual Report of the North American Electric Reliability Corporation on Wide-Area Analysis of Technical Feasibility Exceptions*, Docket No. RR10-1-001, at 5-8 (Sept. 28, 2012).

1. Time Frame for Submitting Material Change Report

13. Proposed section 6.5 of the TFE Procedure provides that “If there is a Material Change in the facts underlying approval of the TFE, the Responsible Entity shall submit a Material Change Report to the Regional Entity supporting the continuing need and justification for the approved TFE or verifying that the Responsible Entity has achieved Strict Compliance with the Applicable Requirement pursuant to Section 4.0.” The proposed modification does not specify a deadline for a responsible entity to submit a Material Change Report to the Regional Entity after a material change is identified.

Commission Determination

14. We believe that specification of a deadline is important to assure that responsible entities will timely submit a Material Change Report to the Regional Entity. Further, specification of a deadline will promote consistency across regions. Thus, we direct NERC to submit a compliance filing within 90 days of the date of this order revising section 6.5 of the TFE Procedure to specify a time frame for reporting a material change upon identification or discovery.

2. NERC’s Annual Report to the Commission

15. Currently-effective section 13 of the TFE Procedure requires NERC to “submit an Annual Report to FERC that provides a Wide-Area analysis or analyses, which NERC shall prepare in consultation with the Regional Entities, regarding the use of TFEs and the impact on the reliability of the Bulk Electric System...” and identifies various topics to be included in the annual report.¹⁶

Commission Determination

16. While we support NERC’s streamlined TFE process, we also seek feedback regarding the effectiveness of the revised TFE Procedure. The annual reporting requirements set forth in section 13 of the TFE Procedure should provide sufficient evidence that the TFE process is working, current TFEs are justified, and reliability is maintained.¹⁷ To accomplish this in light of the significant revisions to the TFE Procedure, we believe that several enhancements to the annual report are warranted.

¹⁶ NERC Petition, Att. 1B at 26.

¹⁷ See also Order No. 706, 122 FERC ¶ 61,040 at PP 220-221 (requiring annual reporting to the Commission on the TFE program).

17. First, we direct NERC to revise the TFE Procedure to require the annual report to the Commission to include data and information regarding Material Change Reports, including the number of Material Change Reports filed annually and information regarding the types of circumstances or events that led to material changes, as well as any additional information NERC believes would be useful.

18. Second, we seek additional information about TFEs with and without expiration dates. NERC states in its petition that its experience during the first three years of implementing the TFE Procedure has shown that “most TFEs are approved without Expiration Dates, because there is no solution that will allow Strict Compliance to be achieved. This is because most TFE Requests are for network devices and other equipment for which the vendors are not pursuing development of versions that would allow Strict Compliance.... Therefore it is not possible to specify an Expiration Date for these TFEs....”¹⁸ In light of that information, we direct NERC to include in its annual TFE report additional information regarding TFEs and their expiration dates, including the number of TFEs by expiration year and CIP Standard requirement, the percentage of currently approved TFEs without expiration dates, and the number of new TFEs approved without expiration dates annually.

The Commission orders:

(A) NERC’s filing is hereby approved, as discussed in the body of this order.

(B) NERC is hereby directed to submit a compliance filing within 90 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.

¹⁸ NERC Petition at 14.