

133 FERC ¶ 61,008
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability
Corporation

Docket No. RR10-1-001

ORDER ON COMPLIANCE FILING

(Issued October 1, 2010)

1. On April 21, 2010, the North American Electric Reliability Corporation (NERC), the Commission-certified electric reliability organization (ERO), submitted a compliance filing in response to the Commission's January 21, 2010 order approving NERC's procedure by which a responsible entity may request and receive a technical feasibility exception (TFE) from strict compliance with certain Critical Infrastructure Protection Reliability Standards (CIP Standards).¹ NERC's compliance filing includes revisions to Appendix 4D, Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Standards (TFE Procedure). For the reasons discussed below, we accept NERC's filing as in partial compliance with the January 21 Order, effective as of the date of this order. We also direct NERC to submit an additional 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 CIP Standards.² In addition, pursuant to section 215(d)(5) of the Federal Power Act

¹ *North American Reliability Corporation*, 130 FERC ¶ 61,050 (2010) (January 21 Order).

² *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order No. 706, 122 FERC ¶ 61,040, *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).

(FPA), the Commission directed NERC to develop modifications to the CIP Standards to address a number of concerns, including developing procedures for an entity that must comply with the CIP Standards to obtain a TFE. Two of the approved CIP Standards provide for exceptions from compliance with certain requirements based on “technical feasibility.”³ NERC explained that “technical feasibility” refers only to engineering possibility and is expected to be a “can/cannot” determination and that such determination is to be made in light of the responsible entity’s existing equipment and facilities.⁴ In Order No. 706, the Commission proposed to allow, in the near term, exceptions from compliance with the CIP Standards based on the concept of “technical feasibility.”⁵ The Commission posited that the term “technical feasibility” should be interpreted narrowly, without reference to considerations of business judgment, but concluded that exceptions should allow for operational and safety considerations.⁶ The Commission specified that, due to the nature of technical feasibility issues, exceptions should be granted on a case-by-case basis.⁷

3. Thus, the Commission directed NERC to develop a set of conditions or criteria that a responsible entity must follow to obtain a technical feasibility exception to specific requirements of the CIP Standards.⁸ The Commission clarified that the TFE is “an exception that forms an alternative obligation.”⁹ Thus, a central issue in individual cases where legacy equipment presents a technical feasibility issue is “whether an alternative course of action protects the reliability of the Bulk-Power System to an equal or greater degree” than strict compliance¹⁰ with the specific CIP Standard requirement.¹¹ The

³ Order No. 706, 122 FERC ¶ 61,040 at P 157 (One requirement uses the term “technical limitations” to similar effect).

⁴ *See id.* (quoting from NERC’s FAQ document its guidance on the meaning of the phrase “where technically feasible”).

⁵ *Id.* P 158.

⁶ *Id.* P 178.

⁷ *Id.* P 179.

⁸ *Id.* P 192.

⁹ *Id.* P 184.

¹⁰ NERC defines “Strict Compliance” to mean “Compliance with the terms of an Applicable Requirement without reliance on a Technical Feasibility Exception.” *See* North American Electric Reliability Corporation, October 29, 2009, Petition for Approval

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 ERO.¹²

4. On October 29, 2009, NERC filed amendments to its Rules of Procedure 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 to add to its Rules of Procedure new section 412, "Requests for Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Reliability Standards," and new Appendix 4D, "Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Reliability Standards."

5. In the January 21 Order, the Commission approved NERC's amended Rules of Procedure. The Commission also directed NERC to submit a compliance filing providing further information and addressing Commission concerns.¹³ Specifically, the Commission directed NERC to modify the following sections of the TFE Procedure contained in Appendix 4D:

- Revise section 1.3, Scope, to designate CIP-006-1, Requirement R1.1 and CIP-007-1, Requirement R3 as "Applicable Requirements" subject to the TFE procedure.
- Revise sub-sections 3.1(iv) and (vi), Basis for Approval of TFE, to designate: (i) which entity will determine under section 3.1(iv) what safety risks or issues outweigh the benefits of Strict Compliance with the Applicable Requirement; and (ii) which entity will determine under section 3.1(vi) what costs far exceed the benefits to the reliability of the bulk electric system.
- Revise section 3.2, Basis for Approval of a TFE, to explicitly require any alternative means of compliance to achieve a comparable level of security as strict compliance with the requirement.

of Amendments to the Rules of Procedures at Appendix D, § 2.26 (hereinafter "NERC Petition").

¹¹ Order No. 706, 122 FERC ¶ 61,040 at P 183.

¹² *Id.* P 222.

¹³ January 21 Order, 130 FERC ¶ 61,050 at P 14.

- Revise section 4.2, Form and Format of TFE Request, and section 4.3.1, Required Information to Be Included in the TFE Request, to establish a uniform set of required information for the “Part A” portion of a TFE request.¹⁴
- Revise section 5.2, Substantive Review of TFE Request for Approval or Disapproval, to ensure that the burden of establishing a valid TFE remains with the requesting responsible entity.
- Revise section 5.3, No Findings of Violations or Imposition of Penalties for Violations of an Applicable Requirement for the Period a TFE Request is Being Reviewed, to establish stricter limits and guidelines regarding the effective date of a TFE and to include an explicit statement that fraudulent or bad faith TFE requests will be subject to enforcement action.
- Revise section 12.1, Contents of Annual Report, to include certain additional information in the annual report.

In addition, the Commission requested further information and clarification regarding: (i) the “Class-Type” TFE list;¹⁵ (ii) the manner in which NERC will quantify reliability benefits in order to make the determination under sub-sections 3.1(iv) and 3.1(vi) of what safety risks outweigh the benefits of strict compliance and what costs “far exceed the benefits” to the reliability of the bulk electric system; and (iii) the steps NERC will take to ensure consistency and security in administering the TFE process with respect to sub-sections 3.1(iv) and (vi).¹⁶

II. NERC Compliance Filing

6. On April 21, 2010, NERC submitted its compliance filing in response to the January 21 Order. NERC’s compliance filing responds to each of the directives from the Commission’s January 21 Order.

¹⁴ A TFE request is composed of two parts, Part A and Part B. Part A is a template form that elicits non-confidential information about the TFE request, which information is used by the Regional Entity for its initial screening of the TFE request. Part B of the TFE request contains the detailed material to support the TFE request, including the documents, drawings, and other information necessary to provide the Regional Entity the details and justification for the requested TFE.

¹⁵ January 21 Order, 130 FERC ¶ 61,050 at P 27.

¹⁶ *Id.* P 32.

7. NERC further proposes several minor revisions to the TFE Procedure that are not in response to specific Commission directives. NERC explains that these additional amendments reflect subsequent events as well as some non-substantive corrections. For example, NERC proposes the following revisions to the TFE Procedure: (i) in section 1.3, revise the list of Applicable Requirements to refer to Version 2 of the CIP Standards which became effective on April 1, 2010; (ii) delete from section 4.5, the outdated reference “if it is effective by January 31, 2010;” and (iii) add to section 9.3 the reference “with a copy to NERC if the notice is issued by the Regional Entity” to ensure NERC is aware of any early terminations of an approved TFE. NERC states that the revisions included in its compliance filing were approved by the NERC Board of Trustees on April 16, 2010. NERC did not request a specific effective date for the proposed revisions.

III. Notice and Responsive Pleadings

8. Notice of the filing was published in the *Federal Register*, with interventions and protests due on or before May 12, 2010.¹⁷ ISO New England, Inc. filed a timely motion to intervene. Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (collectively, KCP&L) filed timely comments.

IV. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motion to intervene serves to make ISO New England, Inc. a party to this proceeding.

B. Commission Determination

10. Except as noted below, the Commission accepts NERC’s filing and other amendments to the TFE Procedure. The Commission also directs NERC to submit an additional compliance filing within 90 days from the date of this order, addressing the concerns detailed below.

1. Section 1.3 Scope

11. Section 1.3 of the TFE Procedure lists the specific CIP Standard requirements for which a responsible entity may request a TFE. Section 1.3 states:

¹⁷ 75 Fed. Reg. 23,756 (2010).

This procedure for requesting and obtaining approval of TFEs is applicable only to those requirements of CIP Standards CIP-002 through CIP-009 that: (i) expressly provide either (A) that compliance with the terms of the requirement is required where or as technically feasible, or (B) that technical limitations may preclude compliance with the terms of the requirement; or (ii) FERC has directed should be subject to this procedure.

Section 1.3 then lists the specific requirements that fall within the above-described requirements. The designated requirements that are subject to the TFE Procedure are referred to as the “Applicable Requirements.”¹⁸

12. In the January 21 Order, the Commission directed NERC to revise section 1.3 of the TFE Procedure to designate CIP-007-1, Requirement R3 as an Applicable Requirement.¹⁹ In its Compliance Filing, NERC revises section 1.3 to include sub-Requirement R3.2 of CIP-007 in the list of Applicable Requirements rather than CIP-007, R3.²⁰ NERC states that although the Commission directed NERC to include CIP-007, R3

¹⁸ “Applicable Requirement” is defined in the TFE Procedure to mean “[a] requirement of a CIP Standard that: (i) expressly provides either (A) that compliance with the terms of the requirements is required where or as technically feasible, or (B) that technical limitations may preclude compliance with the terms of the requirement; or (ii) is subject to this Appendix by FERC direction.” *See* NERC’s Rules of Procedure, Appendix 4D, Procedure for Requesting and Receiving Technical Feasibility Exceptions at § 2.2.

¹⁹ January 21 Order, 130 FERC ¶ 61,050 at P 22.

²⁰ CIP-007-2, R3 through R3.2 provides:

R.3 Security Patch Management – The Responsible Entity, either separately or as a component of the documented configuration management process specified in CIP-003 Requirement R6, shall establish and document a security patch management program for tracking, evaluating, testing, and installing applicable cyber security software patches for all Cyber Assets within the Electronic Security Perimeter(s).

R3.1 The Responsible Entity shall document the assessment of security patches and security upgrades for applicability within thirty calendar days of availability of the patches or upgrades.

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to the list of Applicable Requirements, it instead designated R3.2 because it is R3.2 that could potentially require a TFE. NERC argues that, because Requirement R3.2 references “implementing compensating measures to mitigate risk,” R3.2 is the specific provision of CIP-007, R3 that allows for the possibility of not implementing the required security patches.²¹

13. KCP&L, in its comments, raises a separate issue regarding the inclusion of CIP-007, R3. KCP&L states that CIP-007, Requirement R3 should not be included as an eligible TFE requirement because the sub-requirements are clear regarding the management of software patches. According to KCP&L, currently under Reliability Standard, CIP-007 Requirement R3, if a software patch becomes available that is applicable to a particular cyber asset, the responsible entity either implements the software patch or documents: (i) the justification for not implementing the software patch; and (ii) the compensating measures taken in lieu of implementation of the patch.²²

Commission Conclusion

14. The Commission recognizes that NERC has attempted to comply with our prior directive; however, the Commission directs NERC to revise section 1.3 of the TFE Procedure to include CIP-007 R3, rather than R3.2, on the list of Applicable Requirements. While CIP-007 R3 establishes the requirements for implementation of a program for, among other things, installing applicable cyber security software patches, CIP-007 R3.2 is only the *documentation* requirement. NERC’s proposal to designate CIP-007, R3.2 as the “Applicable Requirement” could result in confusion among responsible entities because under NERC’s proposal the TFE provision would be tied to a documentation requirement rather than being explicitly identified as an “in lieu of” option to the requirement for physical installation of the software patches. We agree that documentation for a TFE is required, but documentation follows from the inability to install software patches, an implementation requirement set forth in R3.²³ The

R3.2 The Responsible Entity shall document the implementation of security patches. In any case where the patch is not installed, the Responsible Entity shall document compensating measure(s) applied to mitigate risk exposure.

²¹ NERC Compliance Filing at 5.

²² KCP&L Comments at 3.

²³ The Commission also agrees with NERC that R3.2 is the specific provision of CIP-007, R3 that refers to “compensating measures.” However, “compensating measures” is not the language that triggers the availability of a TFE. Pursuant to section

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Commission therefore directed NERC to designate CIP-007, R3 as an “Applicable Requirement” under section 1.3 of the TFE Procedure²⁴ because it is Requirement R3, not sub-Requirement R3.2, that carries the requirement for a responsible entity to install applicable cyber security software patches from which a responsible entity may need a TFE. Accordingly, to avoid potential future ambiguities regarding the availability of a TFE for the infeasibility of installing certain software patches, the Commission directs NERC to revise section 1.3 of the TFE Procedure to remove CIP-007, R3.2 from the list of Applicable Requirements and add CIP-007, R3 instead.

15. Regarding KCP&L’s proposal to exclude CIP-007, Requirement R3 from the TFE Procedure, this issue is outside the scope of NERC’s compliance filing. Any concerns with the inclusion of CIP-007, Requirement R3 as an eligible TFE requirement should have been raised earlier in this proceeding, at the time the Commission first addressed CIP-007, Requirement R3. Moreover, because the Commission ruled on this issue in the January 21 Order, KCP&L’s argument is an impermissible collateral attack on a prior Commission order.²⁵

2. Section 3.1(iv) and (vi) Basis for Approval of TFE

16. Section 3.1 of the TFE Procedure sets forth the six bases on which a TFE may be requested or approved. In other words, the asset for which the TFE is being sought must satisfy at least one of the six criteria in section 3.1. The two section 3.1 criteria that NERC revised in its compliance filing, sub-sections 3.1(iv) and 3.1(vi), describe requirements for which strict compliance:

1.3 of the TFE Procedure, a CIP requirement does not qualify for a TFE unless the requirement explicitly includes the language “technically feasible” or “technical limitations.” The sole exception is if the Commission directs NERC to make a specific requirement subject to the TFE Procedure. That is the case with CIP-007, R3. Neither CIP-007, Requirement R3 nor any of its sub-sections include the triggering language “technically feasible” or “technical limitations.”

²⁴ January 21 Order, 130 FERC ¶ 61,050 at P 22.

²⁵ The Commission concluded in the January 21 Order that “NERC was given the discretion to allow technical feasibility exceptions to CIP-007-1 R3. Having chosen to allow exceptions to CIP-007-1 R3 for technical infeasibility, however, such exceptions must be implemented using the TFE procedure.” January 21 Order, 130 FERC ¶ 61,050 at P 22.

(iv) would pose safety risks or issues *that, in the determination of the Regional Entity, outweigh the reliability benefits of Strict Compliance* with the Applicable Requirement; or . . .

(vi) would require the incurrence of costs *that, in the determination of the Regional Entity, far exceed the benefits to the reliability* of the Bulk Electric System of Strict Compliance with the Applicable Requirement, such as for example by requiring the retirement of existing equipment that is not capable of Strict Compliance with the Applicable Requirement but is far from the end of its useful life and replacement with newer-generation equipment that is capable of Strict Compliance, where the incremental risk to the reliable operation of the Covered Asset, the related Facility and the Bulk Electric System of continuing to operate with the existing equipment is minimal in the determination of the Regional Entity. (emphasis added)

17. In the January 21 Order, the Commission directed NERC: (1) to designate which entity or entities will determine what safety risks or issues outweigh the benefits of strict compliance with the applicable requirement; (2) to designate the entity or entities responsible for determining what costs “far exceed the benefits” to the reliability of the bulk electric system; and (3) to specify the manner in which reliability benefits are intended to be quantified to make this determination.²⁶ In addition, if multiple entities are responsible for making these determinations, NERC was directed to include the steps that it will take to ensure consistency and security in administering the TFE process.

NERC Filing

18. In its compliance filing, NERC modifies sub-sections 3.1(iv) and (vi) of the TFE Procedure to state that the Regional Entity will be responsible for determining what safety risks outweigh the benefits of strict compliance and what costs “far exceed the benefits” to the reliability of the bulk electric system. NERC indicates that this approach is consistent with the overall approach of the TFE Procedure, which gives the Regional Entities responsibility for the substantive review, and the approval or disapproval, of TFE Requests. NERC further emphasizes this approach by highlighting in new section 3.3 that “it is the responsibility of the Regional Entity, subject to oversight by NERC as

²⁶ January 21 Order, 130 FERC ¶ 61,050 at P 32.

provided in [Appendix 4D], to make all determinations as to whether a TFE Request has met the criteria for approval.”²⁷

19. With respect to section 3.1, KCP&L takes issue with NERC’s proposal in the compliance filing to revise sub-sections 3.1(iv) and (vi) of the TFE Procedure to include the phrase, “in the determination of the Regional Entity.” KCP&L asserts that “it is awkward to include the subjectivity of the Regional Entity” in section 3.1.²⁸ KCP&L indicates that, prior to NERC’s proposed revision, sub-sections 3.1(iv) and (vi) clearly identified the reasons for which a TFE may be submitted. Further, KCP&L states that it is clear in other sections of the TFE Procedure that a Regional Entity has the responsibility to evaluate the basis for a TFE and the authority to accept/reject or approve/deny a TFE request. KCP&L states that inclusion of the Regional Entity in the language of these subparts seems to presuppose the acceptance by the Regional Entity or implies a basis has already been agreed to between the responsible entity and the Regional Entity prior to TFE submission.

20. With respect to the Commission’s directive that NERC specify the manner in which the reliability benefits are intended to be quantified, NERC states that “at this early stage of the submission and review of TFE Requests, NERC has not been able to develop a straightforward, formulaic approach to this quantification that would be appropriate for the wide range of covered assets for which TFE Requests are being and will be submitted.”²⁹ Instead, NERC proposed to add new sections 3.3 and 11 to the TFE Procedure, which sections list “activities” to be carried out by NERC and the Regional Entities to ensure consistency across TFE requests and across Regional Entities.

21. Section 3.3 provides in part:

It is the responsibility of the Regional Entity, subject to oversight by NERC as provided in this Appendix, to make all determinations as to whether a TFE Request has met the criteria for approval. NERC and the Regional Entities shall carry out the activities described in Section 11.0 of this Appendix to provide consistency in the review and approval or disapproval of TFE Requests across Regional Entities and across TFE Requests.

²⁷ NERC Compliance Filing at 10.

²⁸ KCP&L Comments at 3.

²⁹ NERC Compliance Filing at 10.

22. New Section 11 consists of two parts, section 11.1 and section 11.2. Section 11.1 states that “NERC and the Regional Entities will engage in the activities specified in this section 11.0 for the purpose of assuring consistency in the review, approval and disapproval of TFE Requests” Section 11.2 sets forth the three “consistency activities” that NERC and the Regional Entities will undertake. The three activities are: (1) NERC’s review of TFE determinations and issuance of guidance as appropriate to achieve greater consistency; (2) the development of a catalogue of the types of covered assets for which TFE requests have been approved or disapproved; and (3) NERC’s and the Regional Entities’ formation of a “consistency committee” to review approved/disapproved TFE Requests for consistency and provide guidance to the Regional Entities as deemed appropriate to achieve greater consistency.

Commission Conclusion

23. The Commission approves NERC’s designation of the Regional Entity as the person that will make the determinations under sub-sections 3.1(iv) and (vi). We disagree with KCP&L that the language, “in the determination of the Regional Entity,” presupposes a previous agreement between a responsible entity and Regional Entity. NERC added the phrase “in the determination of the Regional Entity,” in direct response to the Commission’s directive that NERC specify what entity or entities will be responsible for determining whether a safety risk or issue outweighs the reliability benefits of strict compliance and what entity or entities will be responsible for determining whether costs “far exceed the benefits” to reliability of the Bulk Electric System. NERC’s added language, “in the determination of the Regional Entity,” simply serves to identify that the Regional Entities are responsible for making the determinations called for in sub-sections 3.1(iv) and (vi) and does not lead to the implications KCP&L suggests.

24. In its compliance filing, NERC indicates that it has not had sufficient experience with the TFE process to develop a straightforward, formulaic approach to quantify reliability benefits. As we stated in the January Order, “given our preference for consistency in granting exceptions, we believe a uniform framework for establishing TFEs under the criteria in Section 3.1 is necessary and appropriate to ensure the effective administration of the TFE process.”³⁰ We continue to believe that it is important for NERC and the Regional Entities to specify a uniform framework that the Regional Entities will use to appraise the reliability benefits of strict compliance.³¹ We believe a

³⁰ January 21 Order, 130 FERC ¶ 61,050 at P 32.

³¹ Although the January 21 Order directed NERC to specify the manner that would be used to “quantify” reliability benefits, we did not intend for NERC to develop a formulaic approach. A uniform framework need only establish the factors under which

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uniform framework would provide guidance for and ensure consistency among Regional Entities' on-going evaluation of pending TFE requests. However, we recognize that NERC and the Regional Entities may need experience with processing TFEs in order to develop this uniform framework. In light of NERC's concerns, we will accept NERC's proposal to list activities to be carried out by NERC and the Regional Entities to ensure consistency across TFE requests and Regional Entities until such time as NERC can submit a uniform framework.

25. NERC's proposed new section 11, Consistency in Approval and Disapproval of TFE Requests, is a step in the right direction to achieving consistency. The Commission recognizes that the steps proposed by NERC will likely result in the development of criteria to help ensure consistency and security in administering the TFE process. This is useful and appropriate. However, in the absence of a fully developed uniform framework to assess TFE requests, the Commission believes that NERC's proposal does not go far enough to ensure consistency. Therefore, the Commission directs NERC to make the following revisions to section 3.3 and section 11 of the TFE Procedure.

26. First, NERC should revise section 3.3 to allow for reconsideration of a TFE determination by a Regional Entity solely on the grounds that the approval, disapproval or rejection of the TFE request would result in an inconsistent application of the criteria specified in section 3.1 within a Regional Entity or between Regional Entities. This right to seek reconsideration would be limited to NERC and to responsible entities who received differing TFE determinations on the same type of covered assets.

27. Second, section 11.2 of the TFE Procedure should be revised to add, as an additional, fourth consistency activity, the requirement that NERC prepare and submit to the Commission an informational report that describes the manner in which Regional Entities have made the section 3.1(iv) and (vi) determinations. The report should: (i) identify whether there were any consistency issues with respect to the section 3.1 determinations within and among the Regional Entities; (ii) describe these inconsistencies; (iii) describe the manner in which they were resolved; and (iv) state the number of TFE requests for which reconsideration was sought based on inconsistency grounds. NERC also should report whether it has or is in a position to develop a uniform framework for Regional Entities to use to appraise the reliability benefits of strict compliance when making the section 3.1(vi) and (iv) determinations. NERC should submit a "consistency" report to the Commission annually, on the same date that the annual TFE reports are due, i.e., September 28,³² until such time as NERC has submitted

the Regional Entities would evaluate the reliability benefits of strict compliance.

³² The first report would be due to the Commission in 2011.

and the Commission has approved a uniform framework for appraising the reliability benefits of strict compliance when making the section 3.1(iv) and (vi) determinations.

28. In addition, with regards to the “consistency committee” formed under new section 11.2(3) of the TFE Procedure, the Commission approves the formation of the “consistency committee” with the understanding that the committee members will possess the skills and subject matter expertise necessary to effectively perform such an important undertaking. Due to the emphasis placed on evaluating the adequacy of mitigating measures, subject matter experts should comprise a total or substantial part of the committee membership.

3. Section 1.3 Scope – Updated Reference to Effective Version of CIP Standard

29. Section 1.3, Scope, lists the specific requirements of the CIP Standards that are subject to the TFE Procedure. NERC proposes to revise section 1.3 of the TFE Procedure to update the list of Applicable Requirements to refer to the Version 2 of the CIP Standards, which became effective on April 1, 2010 (i.e., CIP-005-2, CIP-006-2 and CIP-007-2).³³

Discussion

30. The Commission agrees with NERC that the revised TFE Procedure should refer to the currently-effective version of the applicable CIP requirements. Version 3 of the CIP Standards will become effective October 1, 2010,³⁴ and future versions of the CIP Standards are being developed by NERC standards drafting teams. To avoid having to revise the TFE Procedure each time another CIP Standard version becomes effective, NERC should consider developing generic language to be included in section 1.3 that references the currently-effective CIP Version at the time the TFE request is submitted.

4. Section 4.3.2

31. Section 4.3.2 of the TFE Procedure lists the information that is required to be included in Part B of a TFE request. Part B of the TFE request is to contain detailed material that supports the TFE Request, including the documents, drawings, and other information necessary to provide the Regional Entity the details and justification for the

³³ NERC Compliance Filing at 23-24.

³⁴ *North American Electric Reliability Corporation*, 130 FERC ¶ 61,271 (2010) (approving version 3 of the CIP Standards to take effect on October 1, 2010).

requested TFE. NERC revised the list of Part B Required Information enumerated in section 4.3.2 to eliminate items 3 and 4 as unnecessary due to revisions it made to section 4.3.1 and the elimination of the “Class-Type TFEs” from the TFE Procedure. Original item 3 required a statement identifying the specific requirement that is the subject of the TFE Request. Original item 4 required identification of which “Class-Type” the TFE fell within, if applicable. NERC renumbered the remaining twelve items.

Discussion

32. NERC’s removal of original items 3 and 4 from the enumerated list of Part B Required Information resulted in the renumbering of the remainder of the listed items. However, NERC did not update the numerical reference to the listed items from the opening paragraph of section 4.3.2 which states, “the information for items 5 through 10 below should be comprehensive... .” NERC appears to have inadvertently failed to revise this language in the section 4.3.2 introductory paragraph to reflect the elimination of items 3 and 4. Accordingly, the Commission directs NERC to update the opening paragraph of section 4.3.2 to reference “3 through 8” instead of “5 through 10” to correct this oversight.

5. Elimination of Class-Type TFE

33. Initially, in its October 29, 2009 Petition for Approval of the TFE Procedure, NERC sought to allow “Class-Type” TFEs to automatically qualify for a TFE request. NERC defined “Class-Type TFE” as “[a] type or category of equipment, device, process or procedure for which NERC has determined that a TFE from an Applicable Requirement is appropriate. . . .” In its October 29, 2009 Petition, NERC proposed to develop and post on its website a list of Class-Type TFEs. In the January 21 Order, the Commission raised several concerns regarding the Class-Type TFE stating that “[t]he Class-Type mechanism proposed by NERC is not sufficiently specified”³⁵ The Commission concluded that, if NERC wished to retain the Class-Type TFE, it must identify the purpose of a Class-Type TFE list and better define both the process for identifying the Class-Type TFEs and the procedure for publishing and maintaining the Class-Type TFE list.³⁶ In its Compliance Filing, NERC opted to delete Class-Type TFEs from the TFE Procedure, citing cost and stakeholder comments regarding the diminishing usefulness of a Class-Type TFE list going forward.

³⁵ January 21 Order, 130 FERC ¶ 61,050 at P 27.

³⁶ *Id.*

34. In its comments on NERC's Compliance Filing, KCP&L suggests that NERC should maintain a Class-Type TFE mechanism for common TFE exceptions that would be sought on an industry-wide basis. KCP&L states that known exceptions that are common throughout the industry should be identified, categorized, and provided as a "known issue class."

Discussion

35. In the January 21 Order, the Commission questioned the utility of developing "Class-Types" within the TFE process. The Commission further indicated that, if the purpose behind the "Class-Type TFEs" was to expedite the TFE review process, then NERC must clearly define its procedure and state the criteria for identifying equipment as a Class-Type TFE. In light of the Commission's concerns, as well as cost and stakeholder comments, NERC decided to eliminate Class-Type TFEs from the TFE Procedure. NERC's decision to eliminate Class-Type TFEs is within its discretion and NERC provides a reasonable justification for its decision. KCP&L's comments do not address or remedy the issues with Class-Type TFEs that informed NERC's decision. Nor does KCP&L indicate how it would be harmed by the deletion, given it can still obtain TFE exceptions. Therefore, the Commission affirms NERC's decision to eliminate the "Class-Type" TFEs from the TFE Procedure. This decision does not foreclose NERC from developing a Class-Type mechanism in the future, provided any future proposals adequately address and remedy the Commission's concerns articulated in the January 21 Order.

6. Timing of TFE Submissions

36. KCP&L suggests that NERC should include additional language in the TFE Procedure that would address timing as it relates to the submission of Part A and Part B of a TFE request. KCP&L further suggests that NERC should include language granting registered entities that acquire "new cyber" assets a grace period "to allow for TFE submissions and the TFE process without subjecting a registered entity to a potential compliance issue."³⁷

Discussion

37. With regards to the timing of the Part A and Part B information, KCP&L's comment is adequately addressed by section 4.2(ii) of NERC's approved TFE Procedure. Section 4.2(ii) sets forth the timing requirements for Part B. Section 4.2(ii) provides: "The Part B Required Information must be available at the responsible entity's location

³⁷ KCP&L Comments at 2.

for review by the Regional Entity and/or NERC beginning on the date the TFE Request is submitted.”³⁸

38. The Commission rejects KCP&L’s proposal regarding a “grace period” for new cyber assets. With respect to newly installed assets, the Commission addressed this issue in Order No. 706, in which the Commission made clear that TFEs do not apply to future assets.³⁹ The Commission found that “the justification for technical feasibility exceptions is rooted in the problem of long-life legacy equipment and the economic considerations involved in the replacement of such equipment before the end of its useful life.”⁴⁰ Thus, in Order No. 706, the Commission stated “that all responsible entities eventually will be able to achieve full compliance with the CIP Reliability Standards when the legacy equipment that creates the need for the exception is supplemented, upgraded or replaced.”⁴¹ With respect to newly acquired assets, *e.g.*, assets that a responsible entity acquires through merger or acquisition, the compliance deadline for such assets is set forth in the Commission-approved Implementation Plan for Newly Identified Critical Cyber Assets and Newly Registered Entities.⁴² This Implementation Plan essentially gives responsible entities a “grace period” for newly acquired assets before such assets must be in compliance with the CIP Reliability Standards.

7. Right to Appeal

39. KCP&L comments that a recourse avenue does not exist for a responsible entity to appeal a Regional Entity’s rejection or denial of a TFE submission. KCP&L suggests that the TFE Procedure should include an appeal process.

40. Section 10 of the TFE Procedure, which addresses “Hearings and Appeals Process for Responsible Entity,”⁴³ is not at issue in the Compliance Filing, thus KCP&L’s

³⁸ Section 4.5, Submission of TFE Request in Advance of Compliant Date, specifies the timing requirements for submitting a TFE Request.

³⁹ Order No. 706, 122 FERC ¶ 61,040 at P 181.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *North American Electric Reliability Corp.*, 130 FERC ¶ 61,271, at P 15 (2010) (approving the Implementation Plan for Newly Identified Cyber Assets).

⁴³ Under section 10 of the TFE Procedure, Hearings and Appeals Process for Responsible Entity, [0]a responsible entity whose TFE request has been rejected or disapproved, or whose approved TFE has been terminated, and thereafter receives a

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concerns are beyond the scope of this proceeding. Any concerns with this section, including the scope of the appeals process, should have been raised in the prior proceeding, Docket No. RR10-1-000.

8. Section 5.1.6 – “Incomplete” TFE Submissions

41. KCP&L states that section 5.1.6 of the TFE Procedure should identify whether a submission is deemed “incomplete” due to a lack of content, clarity, or quality of information. KCP&L states that the term “incomplete” should not be a subjective judgment by the Regional Entity regarding the content quality of information for a TFE submission, and if it is, suggests that NERC should not limit the TFE Procedure to one resubmission. KCP&L also states that a responsible entity should be afforded an appropriate process to work with the Regional Entity to respond to questions or to clarify information in an appropriate time frame regardless of resubmissions.

Discussion

42. Section 5.1.6 of the TFE Procedure is not at issue in the Compliance Filing, and KCP&L’s concerns are beyond the scope of this proceeding. Any concerns with this section should have been raised in the prior proceeding, Docket No. RR10-1-000. Further, we believe that a determination of whether a TFE submission is “complete” is reasonably within the discretion of the Regional Entity. We also note that section 5.1.6 of the TFE Procedure states, “[i]f the Regional Entity rejects the TFE Request because not all Part A Required Information was provided, the Regional Entity’s notice shall identify the Part A Required Information that was not provided in the TFE Request.” Thus, the Regional Entity will inform the submitting entity of any deficiencies that lead to a rejection of a TFE submittal. An entity may informally discuss any concerns with the Regional Entity, but we see no reason to direct NERC to formalize the process in the TFE Procedures.

9. NERC Annual Report Compliance Information

43. Section 13 of the TFE Procedure provides that NERC will submit an annual report to the Commission regarding the use of TFEs and the impact on the reliability of the bulk

notice of alleged violation for the applicable requirement that was the subject of the TFE request or approved TFE, is entitled to a hearing before the Regional Entity Hearing Body if the responsible entity contests the notice of Alleged Violation, proposed penalty or sanction, or any mitigation plan components. At such a hearing, the responsible entity may raise issues relating to the rejection or disapproval of its TFE request.

electric system. Section 13.4 provides that NERC intends the annual report to be a public document, but may also submit confidential or classified information.

44. KCP&L suggests that the TFE Procedure should provide more details regarding capturing and distributing compliance information in NERC's annual report. In particular, KCP&L expresses concern that a responsible entity may lose control of data that could reveal potential security vulnerabilities. KCP&L recommends that the TFE Procedure include notification to the affected responsible entity in advance of the release of the responsible entity's TFE data and other information protection controls.

Discussion

45. The Commission denies KCP&L's request on this issue. Section 12 of the TFE Procedure, titled "Confidentiality of TFE Requests and Related Information," includes detailed provisions regarding the capture and distribution of TFE information. Pursuant to this provision, NERC maintains as confidential the submission, review, and disposition of TFE requests. To protect against unintentional disclosure of confidential information, all Part B information is maintained by the responsible entity at its site for review by the Regional Entity and/or NERC unless otherwise required.⁴⁴ In addition, section 13.4 of the TFE Procedure, includes the following notification mechanism:

Prior to submitting to FERC or another Applicable Governmental Authority a non-public, confidential appendix that provides specific Confidential Information, Classified National Security Information, NRC Safeguards Information, or Protected FOIA Information of a particular Responsible Entity and identifies the Responsible Entity or one of its Facilities by name, NERC shall provide at least twenty-one (21) days advance notice to the Responsible Entity. The non-public, confidential appendix shall be submitted to FERC and other Applicable Governmental Authorities in accordance with their procedures for receiving confidential, proprietary, and other protected information.⁴⁵

⁴⁴ See NERC's Rules of Procedure, Appendix 4D, Procedure for Requesting and Receiving Technical Feasibility Exceptions at § 4.2(iii).

⁴⁵ NERC Compliance Filing at Attachment 1, Revised Appendix 4D, § 13.4. The term "Applicable Governmental Authority" is used throughout NERC's Rules of Procedure and is defined as: "[t]he Federal Energy Regulatory Commission ("FERC") within the United States and the appropriate governmental authority with subject matter

(continued...)

Accordingly, the Commission finds that KCP&L's concerns are fully addressed by current provisions of the TFE Procedure.

The Commission orders:

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

(B) NERC is hereby required to submit a compliance filing within 90 days from the date of this order, as discussed in the body of this order.

(C) NERC is hereby directed to submit an annual informational report, with the first report due on September 28, 2011, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

jurisdiction over reliability in Canada and Mexico." *See* NERC's Rules of Procedure, Appendix 4C, Compliance Monitoring and Enforcement Program at § 1.1.3 (effective Oct. 2, 2009).

Document Content(s)

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