

135 FERC ¶ 61,026
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. RR10-1-004

ORDER ON COMPLIANCE FILING

(Issued April 12, 2011)

1. On December 23, 2010, the North American Electric Reliability Corporation (NERC) submitted a filing in response to the Commission's October 1, 2010 order,¹ as modified by its December 10, 2010 order,² pertaining to Appendix 4D of the NERC Rules of Procedure, "Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Standards," (TFE Procedure). As discussed below, pursuant to section 215(f) of the Federal Power Act (FPA) and section 39.10(a) of the Commission's regulations,³ we accept NERC's filing as in satisfactory compliance with our prior orders in this proceeding.

I. Background

2. In January 2008, the Commission issued Order No. 706, which approved eight Critical Infrastructure Protection (CIP) Reliability Standards.⁴ In addition, the Commission directed NERC to develop procedures for a responsible entity subject to the CIP Reliability Standards to obtain an exception from compliance with certain of the CIP

¹ *North American Electric Reliability Corp.*, 133 FERC ¶ 61,008 (2010) (October Order).

² *North American Electric Reliability Corp.*, 133 FERC ¶ 61,209 (2010) (December Order).

³ 16 U.S.C. § 824o(f) (2006); 18 C.F.R. § 39.10(a) (2010).

⁴ *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).

Reliability Standards based on “technical feasibility.” 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 (TFE) from specific requirements of the CIP Reliability Standards.⁵

3. On October 29, 2009, NERC filed amendments to its Rules of Procedure to implement the Commission’s directive 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,” as well as the TFE Procedure contained in new Appendix 4D, “Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Reliability Standards.”

4. By order dated January 21, 2010, the Commission approved both section 412 to NERC’s Rules of Procedures and the TFE Procedure.⁶ The Commission also directed NERC to submit a compliance filing modifying several sections of the TFE Procedure.

5. On April 21, 2010, NERC submitted a filing in response to the January Order. On October 1, 2010, the Commission issued an order accepting NERC’s April 2010 filing as partially compliant and ordered further changes to the TFE Procedure.⁷ Specifically, the Commission directed NERC to: (i) revise section 1.3 of the TFE Procedure to remove CIP-007, Requirement R3.2 from the list of “applicable requirements” and add CIP-007, Requirement R3 instead; (ii) revise section 3.3 of the TFE Procedure 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 created an inconsistent result; (iii) revise section 11.2 to require NERC to submit to the Commission an informational report that describes the manner in which Regional Entities have made the section 3.1 determinations; and (iv) correct the opening paragraph of section 4.3.2 to reference “3 through 8” instead of “5 through 10.”⁸ In addition, in the October Order, the Commission noted that, with respect to its approval of the consistency committee to be formed under section 11.2(3) of the TFE Procedure, the Commission understood that the

⁵ Order No. 706, 122 FERC ¶ 61,040 at P 192.

⁶ *North American Electric Reliability Corp.*, 130 FERC ¶ 61,050, at P 32 (2010) (January Order).

⁷ October Order, 133 FERC ¶ 61,008.

⁸ *Id.* P 14, 26-27, 32.

committee members would possess the necessary skills and subject matter expertise.⁹ Last, with respect to section 1.3 of the TFE Procedure, Scope, the Commission suggested that NERC develop generic language to be included in section 1.3 that would automatically make the TFE Procedure applicable to the currently-effective version of the CIP Reliability Standards.

6. On October 29, 2010, NERC filed a request for reconsideration or rehearing of the October Order. NERC sought reconsideration/rehearing of the directive to revise section 3.3 to allow NERC and responsible entities who received differing TFE determinations on the same type of covered assets to seek reconsideration of that TFE determination.¹⁰ Specifically, NERC asked the Commission to revise its directive so that only NERC, not a responsible entity, would be allowed to request a Regional Entity to reconsider its determination to approve, disapprove, or reject a TFE request based on an apparent inconsistency among determinations.

7. On December 10, 2010, the Commission issued an order granting rehearing, finding that NERC's proposed modification to the October Order's directive mandating a process for requests for reconsideration fulfills the intent of the directive. Specifically, the Commission found that NERC's proposed process for seeking reconsideration as outlined in its October 29, 2010 request for rehearing establishes an avenue for reconsideration while still allowing responsible entities to seek reconsideration.¹¹

NERC's Compliance Filing

8. On December 23, 2010, NERC submitted a filing (December Filing) responsive to the Commission's October Order, as modified by the December Order. The December Filing addresses each of the directives in the October Order as detailed below.

9. Regarding the section 1.3 directive,¹² NERC revised section 1.3 of the TFE Procedure to list CIP-007-3, Requirement R3 as an "applicable requirement,"¹³ and struck CIP-007, Requirement R3.2 from the list.¹⁴

⁹ *Id.* P 28.

¹⁰ *Id.* P 26.

¹¹ December Order, 133 FERC ¶ 61,209 at P 13.

¹² Section 1.3 of the TFE Procedure lists the specific CIP Reliability Standard Requirements for which a responsible entity may request a TFE.

¹³ "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
(continued)

10. Regarding the directive to allow for reconsideration of a potentially inconsistent TFE determination, NERC added new sections 5.2.8 and 5.2.9 to the TFE Procedure. Section 5.2.8 specifies the process by which a responsible entity may submit to NERC information that it believes demonstrates that the approval, disapproval, or rejection by a Regional Entity of a TFE Request constitutes an inconsistent application of the section 3.1 criteria.¹⁵ A responsible entity's submission under section 5.2.8 must provide a clear and compelling demonstration that inconsistent applications of the section 3.1 criteria occurred in two or more TFE Requests for the same type of covered asset. Under section 5.2.8, NERC reviews the responsible entity's submission and decides whether to request that the Regional Entity reconsider its determination. Section 5.2.9 specifies the process for NERC to request a Regional Entity to reconsider a TFE Request. In addition, NERC made several conforming changes to other sections of the TFE Procedure to reflect the addition of sections 5.2.8 and 5.2.9. Specifically, NERC revised sections 11 and 12 of the TFE Procedure to cross-reference new sections 5.2.8 and 5.2.9.

11. In response to the directive to revise section 11.2, NERC added sub-section 11.2(4) requiring submission of an annual informational report. The report includes, among other things, the number of TFE requests for which reconsideration was requested pursuant to new section 5.2.9. Revised section 11.2(4) also provides for procedures to protect any confidential information, classified national security information, "NRC Safeguards" information, or information protected from disclosure under the Freedom of Information Act that may be included in the informational report. Specifically, any such confidential information shall be contained in a separate non-public confidential appendix to the informational report.

12. In response to the directive regarding section 4.3.2 of the TFE Procedure, NERC revised that section to read, "for items 3 through 8 below" as directed.

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.

¹⁴ NERC also revised section 1.3 of the TFE Procedure to update the version number of CIP-007 from "2" to "3" to reflect that version 3 of the CIP Reliability Standards became effective on October 1, 2010.

¹⁵ Section 3.1 of the TFE Procedure sets forth six criteria. Any asset that is the subject of a TFE request must satisfy at least one of these six criteria to be approved.

13. With respect to the consistency committee formed under section 11.2(3) of the TFE Procedure, NERC added the following sentence to the end of section 11.2(3): “The committee shall include persons with appropriate subject matter expertise for the responsibilities and activities of the committee.”¹⁶

14. Last, acting on the Commission’s suggestion that NERC develop generic language for section 1.3 that would automatically make the TFE Procedure applicable to the currently-effective version of the CIP Reliability Standards, NERC added to section 1.3 of the TFE Procedure the following sentence: “Subsequent versions of these requirements that are approved by FERC will continue to be Applicable Requirements, without the need to amend this Appendix to reflect the new version number of the CIP standards, (i) if the subsequent versions continue to expressly provide either (A) that compliance with their terms is required where technically feasible or (B) that technical limitations may preclude compliance with the terms of the requirement or (ii) so long as FERC does not direct that the subsequent versions are no longer Applicable Requirements.”¹⁷

II. Notice and Responsive Pleadings

15. Notice of the December Filing was published in the *Federal Register*, with interventions and protests due on or before January 14, 2011.¹⁸ The Transmission Agency of Northern California (TANC) filed a timely motion to intervene and comments.

III. Discussion

A. Procedural Matters

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

B. Commission Determination

17. The Commission finds that the December Filing satisfies each of the directives from the October Order, as modified by the December Order on rehearing. Accordingly, the Commission accepts NERC’s December Filing and approves the revisions to the TFE Procedure.

¹⁶ December Filing at 10-11.

¹⁷ *Id.* at 11-12.

¹⁸ 75 Fed. Reg. 23,756 (2010).

18. TANC, the sole commenter, raised two concerns regarding the process for reconsideration as set forth in proposed sections 5.2.8 and 5.2.9 of the TFE Procedure. First, TANC argues that responsible entities have insufficient ability to access the information necessary to challenge a TFE determination as inconsistent under new section 5.2.8 of the TFE Procedure, because information related to TFE requests and determinations is confidential pursuant to section 12 of the TFE Procedure. Section 12, “Confidentiality of TFE Requests and Related Information,” of the TFE Procedure states that “the submission, review, acceptance/rejection and approval/disapproval of TFE Requests and the implementation of approved TFEs shall be maintained as confidential.” TANC asserts that the reconsideration process outlined in section 5.2.8 places the onus on responsible entities to have all of the necessary information to convince NERC that its TFE request suffered from inconsistent treatment. However, such TFE information is confidential under section 12, and as such a responsible entity does not have reasonable access to the necessary information on which to request reconsideration. Noting that section 5.2.8 specifically requires responsible entities to rely on “specific reference(s) to any other determination of TFE requests for the same type of Covered Assets that the Responsible Entity believes constitutes inconsistent application,” TANC’s concern is that a responsible entity cannot be cognizant of potentially inconsistent treatment because information related to TFE determinations is not publically disclosed.

19. TANC notes that it may obtain confidential TFE information pursuant to section 1503 of NERC’s Rules of Procedure, which governs requests for confidential information. However, TANC is concerned that it would not be able to obtain needed TFE information in a timely manner because section 1503 of NERC’s Rules of Procedure does not set a deadline or timeframe within which NERC or the Regional Entity must act on a request for confidential information. Accordingly, TANC requests that the Commission clarify a timeframe within which NERC or a Regional Entity must act on a request for information submitted pursuant to section 1503 to access information related to other responsible entities’ TFE requests.

20. Second, TANC argues that the reconsideration process outlined in section 5.2.9 is incomplete as it makes the Regional Entity, rather than NERC, the final arbiter on a consistency challenge. Specifically, TANC asserts that section 5.2.9 does not specify what recourse a responsible entity or NERC would have to remedy the potential inconsistent application of the TFE criteria in the event that a Regional Entity incorrectly stands by its initial inconsistent TFE determination. According to TANC, NERC’s proposed TFE procedures do not completely incorporate the Commission’s conclusion that NERC has the authority to review and reverse a Regional Entity’s TFE determination on reconsideration. Thus TANC requests that the TFE Procedure explicitly state that NERC has the authority to review and reverse a Regional Entity’s TFE determination on reconsideration if NERC finds that the Regional Entity’s decision does not promote consistency and reliability throughout the Bulk-Power System.

21. The Commission disagrees with TANC and finds that entities have adequate access or procedures to obtain access to TFE information for purposes of seeking reconsideration of potentially inconsistent TFEs. A responsible entity always has unfettered access to its own TFE information, which allows it to readily identify and challenge potentially inconsistent TFE determinations among its own covered assets. Furthermore, TFEs pertain to CIP Reliability Standards, which provide the security framework for protecting the Bulk-Power System. Any issue related to a CIP Reliability Standard, including a TFE request, requires the discussion of sensitive information about critical cyber assets. Such information, if improperly disclosed, could compromise the security of the Bulk-Power System. The confidentiality provisions in the TFE Procedure are thus crucial in light of the security issues surrounding CIP Reliability Standards. So, although the procedures for accessing confidential information may delay access, the Commission will not dilute those provisions. In any event, the Commission finds that the existing process for entities to obtain access to confidential information, section 1503 of the NERC Rules of Procedure, is sufficient for the purpose of seeking reconsideration of a potentially inconsistent TFE determination. Moreover, there is nothing in the TFE Procedure that prevents a responsible entity from sharing with other responsible entities information related to their own TFE requests.

22. The Commission denies as unnecessary TANC's request that the TFE Procedure be revised to more clearly state that NERC has the authority to review and reverse a Regional Entity's TFE determination on reconsideration. NERC's authority to review and reverse a Regional Entity's TFE determination is unchallenged and clear. As the Commission emphasized in the December Order, NERC has the necessary authority to review and reverse a Regional Entity's TFE determination on reconsideration if NERC finds that the Regional Entity's decision does not promote consistency and reliability.¹⁹ Thus, if NERC elects to review a determination, and directs that a specific action be taken on a TFE request, its directive is mandatory.

23. The Commission also rejects TANC's request that sections 5.2.8 and 5.2.9 be modified to permit responsible entities to appeal the Regional Entity's determination on a request for reconsideration submitted under section 5.2.9. The reconsideration process is a very narrowly focused, limited appeal process.²⁰ TANC is effectively requesting an opportunity to further appeal an appeal determination. We believe that the protracted appeal process that TANC seeks would unnecessarily drain NERC's and a Regional Entity's limited resources. Moreover, the Commission finds it unnecessary to allow responsible entities to challenge an unfavorable outcome of an inconsistency challenge,

¹⁹ See December Order, 133 FERC ¶ 61,209 at P 14 (citing January Order, 130 FERC ¶ 61,050 at n.58).

²⁰ See October Order, 133 FERC ¶ 61,008 at P 26.

as it is the ERO that is responsible for ensuring consistency among TFE determinations. And, as stated above, NERC has the authority to review a Regional Entity's decision on a reconsideration request.

The Commission orders:

NERC's December Filing is hereby accepted and revised Appendix 4D to the NERC Rules of Procedure is hereby approved, effective as of the date of this order.

By the Commission.

Kimberly D. Bose,
Secretary.