

NERC Compliance Process Bulletin #2009-004

Providing Access to and Copies of Evidence to Regional Entity, NERC, and FERC Staff

Version 2.0

July 15, 2009 | Public Process Announcement

This bulletin outlines the requirements for and provides guidance with regard to the provision of access to and copies of evidence related to Compliance Audit and Compliance Violation Investigation (CVI) activities under Sections 403.11 and 403.13 of the NERC Rules of Procedure (RoP). In recent Compliance audits, questions have been raised concerning access by Regional Entity staff, NERC staff and FERC staff to confidential information to be used as evidence in an audit or CVI.¹ This bulletin addresses those concerns by making clear that these Compliance authority personnel have the authority to obtain confidential information needed as evidence in carrying out the Compliance Monitoring and Enforcement Program (CMEP) without the need to sign separate confidentiality agreements or undertake precautions beyond those outlined in Section 1500 of the RoP.

Authority

Federal law and the federally-approved CMEP include provisions regarding the authority for access to evidence by Regional Entities, NERC and FERC.

The Code of Federal Regulations (CFR), 18 CFR § 39.2, specifically provides for access by Regional Entity staff, NERC staff, and FERC staff to information necessary to carry out the CMEP:

(d) Each user, owner or operator of the bulk power system within the United States (other than Alaska and Hawaii) shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement Section 215 of the Federal Power Act as determined by the Commission and set out in the Rules of the Electric Reliability Organization and each applicable Regional Entity. The Electric Reliability Organization and each Regional Entity shall provide the Commission such information as is necessary to implement section 215 of the Federal Power Act.

¹ The guidance provided in this bulletin concerning FERC's access to evidence applies to evidence obtained in audits and CVIs conducted in the United States. Consistent with RoP Section 1505, access to evidence by Other Governmental Authorities in other jurisdictions will be determined by the laws and regulations in those other jurisdictions, although it is generally expected that such Other Governmental Authorities will have similar access rights and responsibilities with respect to evidence in audits and CVIs conducted in those other jurisdictions.

Additionally, FERC Order 672 establishing NERC as the ERO in paragraph 114 states:

The Commission agrees with commenters that, to fulfill its obligations under this Final Rule, the ERO or a Regional Entity will need access to certain data from users, owners and operators of the Bulk-Power System. Further, the Commission will need access to such information as is necessary to fulfill its oversight and enforcement roles under the statute.

Section 3.0 of the approved CMEP contains provisions for the collection of certain data and information and identifies the processes used in the event such data is not provided in a timely manner.

The Compliance Program requires timely data from Registered Entities to effectively monitor compliance with NERC Reliability Standards. If data, information or other reports to determine compliance requested from a Registered Entity are not received by the required date, the Compliance Enforcement Authority may execute the steps described in **Attachment 1, Process for Non-submittal of Requested Data**.

Notwithstanding the authority of the Regional Entities, NERC, and FERC to obtain information to be used as evidence in connection with an audit, CVI or any other process under the CMEP, there is a need to respect legitimate confidentiality considerations of Registered Entities and also to ensure that information critical to the security of energy infrastructure is appropriately handled. Section 1500 of the RoP provides detailed procedures for the request of handling and storage of confidential information. Nevertheless, Section 1505.1 of the RoP makes clear that “[a] request from FERC for reliability information with respect to owners, operators, and users of the bulk power system within the United States is authorized by Section 215 of the Federal Power Act.”

Guidance

Personnel Requiring Access to Evidence

The following specific individuals require access to company documents for use in carrying out their respective CMEP obligations:

- Regional Entity Auditors or Investigators;
- NERC Regional Compliance Auditors;
- NERC Compliance Violation Investigators;
- NERC CMEP staff performing NERC-led audits; and
- FERC staff

This is true even in the case where NERC or FERC staff is reviewing the CMEP activities of others. In those situations, NERC and FERC staffs are seeking documents to assess whether the audit is being conducted properly. Accordingly, the individuals mentioned above require access to evidence in the underlying compliance activity to assure adequacy of the audit testing and sufficiency of the technical rigor employed, as well as to provide feedback, as necessary, regarding audit processes, procedures, and techniques.

Access to Evidence

Registered Entities should be on notice that Regional Entity, NERC and FERC staff may require access to relevant data in the context of a Compliance audit or CVI.

The Regional Entity, NERC, and FERC have authority to request and obtain access to the following:

- Full access to the evidence being displayed on the screen (i.e., access as requested by Regional Entity, NERC or FERC staff to view any page or section of a document, or related document, being displayed electronically);
- Physical access to the evidence being displayed on a screen (i.e., access to a paper version of a plan, in addition to, or in lieu of, the visual display of the plan on a screen);
- Electronic copies of the evidence for use onsite or removal off-site; and
- Any additional evidence that may be required in order to corroborate any evidence in the record.²

In the context of a Compliance audit, the audit notice constitutes a written request for information under RoP 1503.2, and that it is incumbent upon the Registered Entity to mark any document as confidential where appropriate prior to disclosing such information to the Regional Entity, NERC or FERC. NERC and FERC staff may ultimately receive access to any information disclosed to the Regional Entity either by their participation in the audit team or in subsequent review of the audit record. In addition to marking documents prior to producing them in response to a pre-audit questionnaire or request for information, the Registered Entity should be prepared to mark documents as necessary that are requested during onsite audits.

Registered Entities should also be advised that the staff of the Regional Entity, NERC and FERC will not sign separate audit-specific or CVI-specific confidentiality agreements or accede to any other procedural hurdles prior to accessing information required as evidence.³ Regional Entities and NERC will assure confidentiality of appropriately marked documents to the extent and as required by the CMEP and RoP. Moreover, under Section 301(b) of the Federal Power Act, a FERC staff member cannot divulge any fact or information that comes to his or her knowledge during participation in CMEP audit activities unless FERC or a court first directs such disclosure.⁴

² These statements do not apply to a document or information that is subject to the attorney-client privilege, or other applicable privilege, unless the applicable privileges are waived.

³ Nondisclosure agreements may be appropriate for members of the audit team who are contractors or stakeholder volunteers and not directly employed by a Regional Entity or NERC.

⁴ 16 U.S.C. § 825(b) (2006).

Marking of Evidence

It is the Registered Entity's right and responsibility to mark any information it produces in response to a request by a Regional Entity, NERC, or FERC staff. A Registered Entity should not rely on the staff of these Compliance authorities to assert such rights on behalf of the Registered Entity, and it is the Registered Entity's specific responsibility to:

- Mark appropriately its information in accordance with Section 1500 if the audited entity is seeking to protect confidential information (which is defined therein to include critical energy infrastructure information [CEII]); and
- Document such status (confidential, CEII) on every page so it is visible to prevent inadvertent disclosure.

NERC will treat this information in line with Section 9.3 of the CMEP and Section 1500 of the NERC RoP

FERC staff will maintain as non-public information that is asserted to be CEII or otherwise confidential in accordance with FERC's own rules regarding the handling of such information. In the event FERC receives a Freedom of Information Act (FOIA) request for the material, FERC staff will process the request pursuant to the FOIA and FERC's regulations.⁵

If you have additional questions or comments regarding Provision of Access to and Copies of Evidence, please contact Joel deJesus at Joel.deJesus@nerc.net.

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Process disclaimer: NERC reserves the right to issue new process bulletins or modify existing process bulletins when necessary and at its discretion.

⁵ If a FERC staff member receives and retains a document that is marked as confidential or as CEII, FERC will maintain that document as non-public pending any request for its public disclosure, pursuant to the provisions of Section 388.112 of FERC's regulations, 18 C.F.R. § 388.112 (2008). If FERC receives a FOIA request that seeks any such document, FERC staff will notify the person who submitted the document and provide him or her an opportunity to comment, 18 C.F.R. § 388.112(d). In addition, prior to disclosure of any allegedly confidential information, FERC staff will notify the submitter of the reason for the proposed release and the date of release, 18 C.F.R. § 388.112(e). At that time, the submitter may seek a judicial order blocking release of the information.

REVISION HISTORY

Version	Date	Reviewers	Revision Description
1	June 29, 2009	NERC and Regional Entity Staff	Version 1.0
2	July 15, 2009	NERC and Regional Entity Staff	Added footnote 1; clarified scope of this bulletin outside the U.S.

Retired