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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 39

(Docket No. RM05-30-001; Order No. 672-A)

Rules Concerning Certification of the Electric Reliability Organization;
and Procedures for the Establishment, Approval, and Enforcement
of Electric Reliability Standards

(Issued March 30, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing.

SUMMARY: The Commission grants rehearing on one matter, clarifies certain provisions and otherwise reaffirms its determinations in Order No. 672. 71 FR 8,662 (February 17, 2006). Order No. 672 implements Subtitle A (Reliability Standards) of the Electricity Modernization Act of 2005, which is Title XII of the Energy Policy Act of 2005, by establishing criteria that an entity must satisfy to qualify to be the Electric Reliability Organization (ERO). The Commission will certify one ERO as the organization that will develop and enforce Reliability Standards for the Bulk-Power System in the United States. The Final Rule also establishes procedures under which the ERO may propose new or modified Reliability Standards for Commission review and procedures governing an enforcement action for the violation of a Reliability Standard.

EFFECTIVE DATE: This Order on Rehearing will become effective [insert date that is 30 days after publication in the **FEDERAL REGISTER**]

FOR FURTHER INFORMATION CONTACT:

Kumar Agarwal (Technical Information)
Office of Energy Markets and Reliability
Division of Policy Analysis and Rulemaking
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8570

Michelle Veloso (Technical Information)
Office of Energy Markets and Reliability
Division of Policy Analysis and Rulemaking
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-6473

Jonathan First (Legal Information)
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8529

Paul Silverman (Legal Information)
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8683

SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Rules Concerning Certification of the Electric
Reliability Organization; and Procedures for
the Establishment, Approval, and Enforcement
of Electric Reliability Standards

Docket No. RM05-30-001

ORDER NO. 672-A

ORDER ON REHEARING

(Issued March 30, 2006)

I. Introduction And Summary

1. On February 3, 2006, the Commission issued a Final Rule (Order No. 672),¹ implementing Subtitle A (Reliability Standards) of the Electricity Modernization Act of 2005, which is Title XII of the Energy Policy Act of 2005.² Order No. 672 establishes criteria that an entity must satisfy to qualify to be the Electric Reliability Organization (ERO). The Commission will certify one organization that will develop and enforce

¹ Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672, 71 FR 8,662 (Feb. 17, 2006), FERC Stats. & Regs. Regulations Preambles ¶ 31,204 (2006).

² Pub. L. No. 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 to be codified at 16 U.S.C. 824o (2000).

Reliability Standards for the Bulk-Power System in the United States.³ The Final Rule also establishes procedures under which the ERO may propose new or modified Reliability Standards for Commission review and procedures governing an enforcement action for the violation of a Reliability Standard.

A. Summary of Order No. 672⁴

2. Order No. 672 provides that the Commission will, after notice and opportunity for comment, certify one applicant as the ERO. The Final Rule sets forth the criteria that an ERO applicant must satisfy to qualify as the ERO, including the ability to develop and enforce Reliability Standards. To ensure that the ERO complies with the certification criteria on an ongoing basis, the Final Rule requires the ERO to undergo a performance assessment three years after certification and every five years thereafter.

3. Order No. 672 provides that the ERO is responsible for developing proposed Reliability Standards and must submit each proposed Reliability Standard to the Commission for approval. Only a Reliability Standard approved by the Commission is enforceable under section 215 of the Federal Power Act (FPA). The Commission may approve a proposed Reliability Standard (or modification to a Reliability Standard) if it determines that it is just, reasonable, not unduly discriminatory or preferential, and in the public interest and satisfies other requirements set out in Order No. 672. In its review of

³ Terms defined in Order No. 672 are capitalized in this order.

⁴ A comprehensive summary of the Final Rule is provided in Order No. 672 at P 20-58.

a proposed Reliability Standard, the Commission will give due weight to the technical expertise of the ERO or a Regional Entity organized on an Interconnection-wide basis with respect to a proposed Reliability Standard to be applicable within that Interconnection. However, the Commission will not defer to the ERO or a Regional Entity with respect to a Reliability Standard's effect on competition.

4. The ERO may delegate its enforcement responsibilities to a Regional Entity. Delegation is effective only after the Commission approves the delegation agreement. A Regional Entity may also propose a Reliability Standard to the ERO for submission to the Commission for approval. This Reliability Standard may be either for application to the entire interconnected Bulk-Power System or for application only within its own region.
5. The ERO or a Regional Entity must monitor compliance with the Reliability Standards. They will conduct investigations of alleged violations of Reliability Standards. The ERO or Regional Entity may impose a non-monetary or monetary penalty on a user, owner or operator for violating a Reliability Standard, subject to review by the Commission.

B. Procedural Discussion

6. The following parties have filed timely requests for rehearing or for clarification of Order No. 672: Edison Electric Institute (EEI), ISO/RTO Council, National Rural Electric Cooperative Association (NRECA), New York Independent System Operator, Inc. (New York ISO), New York State Reliability Council (NYSRC), Southern California Edison Company (SoCal Ed), and Western Governors' Association (Western Governors) filing jointly with the Committee on Regional Electric Power Cooperation (CREPC). In

addition, the California Public Utilities Commission (CPUC) submitted a letter stating its full support for, and request to be associated with, the filing of Western Governors and CREPC.

II. Discussion

A. Definitions, Jurisdiction, and Applicability

7. Order No. 672 adopted verbatim the definitions set forth in new section 215(a) of the FPA, including the definitions of “Bulk-Power System,” “Reliable Operation” and “Reliability Standard.”⁵ The Commission, however, declined proposals to define the term “User of the Bulk-Power System,” concluding that:

the precise scope of the term “User of the Bulk-Power System,” and thus the extent of persons subject to the Reliability Standards, would be best considered in the context of our review of those Standards, taking into account the views of the ERO and others. Therefore, until we have proposed Reliability Standards before us, we will reserve further judgment on whether a definition of “User of the Bulk-Power System” is appropriate or whether the decision of who is a “User of the Bulk-Power System” should be made on a case-by-case basis.^[6]

8. Order No. 672 also does not formally define the term “end user.”⁷ The Commission explained that there was no need to adopt a formal definition because the term end user is commonly used in the electric power industry and is generally understood to mean a retail consumer of electricity. However, Order No. 672 does not preclude an ERO applicant from proposing a definition, subject to Commission approval,

⁵ Order No. 672 at P 70 and 18 CFR 39.1.

⁶ Id. at P 99.

⁷ Id. at P 101.

if the applicant believes additional definition is needed as part of its application for explaining its funding mechanism or for another reason.

9. Section 39.2 of the regulations codifies the jurisdictional provisions found in section 215(b)(1) of the FPA. Those provisions state, among other things, that “[a]ll users, owners and operators of the Bulk-Power System shall comply with Reliability Standards that take effect under this section.” Further, consistent with the statute, Order No. 672 explicitly makes the Reliability Standards applicable to all users, owners, and operators of the Bulk-Power System.⁸

Request for Rehearing

10. SoCal Ed maintains that the Commission erred in failing to define or further define the terms “Bulk-Power System,” “End User,” “Reliable Operation,” “Reliability Standard,” and “User of the Bulk Power System.” SoCal Ed argues that failure to establish or refine these definitions would be inconsistent with due process because the Commission would have failed to establish with reasonable clarity and certainty what is meant by the rules it has promulgated and what is required of regulated entities.⁹ SoCal Ed further argues that the Commission has improperly delegated the task of defining some of these terms to others.

11. EEI states that, in response to rulemaking comments that small entities such as distribution-only utilities should not be “targeted,” Order No. 672 explains that “[s]ection

⁸ Id. at P 112.

⁹ SoCal Ed at 4-10.

215 of the FPA provides the Commission with jurisdiction over all users, owners and operators of the Bulk-Power System for purposes of ensuring compliance with the Reliability Standards. Until the Commission has approved a specific Reliability Standard that impacts a particular type/class of users, it is premature to consider” commenters’ concerns.¹⁰ Based on this language, EEI asks the Commission to clarify that small entities are not exempt from the statutory obligation to comply with applicable Reliability Standards.

Commission Conclusion

12. Order No. 672 adopted the statutory definitions of the terms “Bulk Power System,” “Reliable Operation” and “Reliability Standard.”¹¹ These definitions need no further clarification at this time. As we explained in Order No. 672, the Commission believes it is appropriate to consider the issue of scope about which SoCal Ed expresses concern, in the context of specific proposed Reliability Standards.¹² Since proposed Reliability Standards are not enforceable until approved by the Commission, no harm will result from deferring judgment here and allowing SoCal Ed to renew any specific concerns regarding applicability in response to the filing of proposed Reliability Standards. Accordingly, SoCal Ed’s request for rehearing is denied on this issue.

¹⁰ Order No. 672 at P 866.

¹¹ Id. at P 70.

¹² Id. at P 71-73.

13. Order No. 672 does not formally define “End User or “User of the Bulk-Power System.” SoCal Ed acknowledges that the Commission has deferred the question of the proper definition of the terms “End User” and “User of the Bulk Power System” until a later date. Therefore, SoCal Ed’s claims are premature. The Commission recognizes in Order No. 672 the common industry use of the term “end user” as referring generally to a retail consumer of electricity and invites an ERO applicant to provide additional definition if needed for explaining its funding mechanism.¹³ Likewise, in Order No. 672, the Commission states that it will consider the precise scope of the term “User of the Bulk Power System” on a case-by-case basis in the context of its review of a Reliability Standard, as this would permit it to take “into account the views of the ERO and others.”¹⁴ Any formal definition proposed in an ERO application would be subject to Commission approval. Thus, we reject SoCal Ed’s argument that we are improperly delegating the definition of certain terms to others.¹⁵

14. Order No. 672 addresses EEI’s request for clarification regarding categorical exemptions from applicable Reliability Standards. As noted by EEI, the Final Rule requires that all entities subject to the Commission’s reliability jurisdiction, i.e., all users, owners and operators of the Bulk Power System, shall comply with applicable Reliability

¹³ Id. at P 101.

¹⁴ Id. at P 99.

¹⁵ In fact, the precedent cited by SoCal Ed supports our approach. See U.S. Telecom Ass’n v. F.C.C., 359 F.3d 554, 568 (D.C. Cir. 2004) (stating that “a federal agency may turn to an outside entity for advice and policy recommendations, provided the agency makes the final decisions itself”).

Standards.¹⁶ While the Commission has deferred the question of who is a “User of the Bulk Power System,” it did note in Order No. 672 that if the owner or operator of a local distribution facility falls within that definition, it must comply with all relevant Reliability Standards as a user.¹⁷ EEI acknowledges that some Reliability Standards, by their terms, may not be applicable to small entities or to distribution-only entities. It is in reviewing such terms in the course of its review of a proposed Reliability Standard that the Commission will consider the scope of a particular Reliability Standard.¹⁸

B. Electric Reliability Organization Certification

15. Order No. 672 provides that the Commission will, after notice and opportunity for comment, certify one applicant as the ERO and sets forth the criteria that an ERO applicant must satisfy to qualify as the ERO. The Final Rule gives guidance to ERO applicants regarding the content of an application and certain functions it must undertake.

16. With regard to ERO governance, an ERO applicant must demonstrate that it has Rules that adequately assure its independence from the users, owners and operators of the Bulk-Power System, while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subcommittee. The Commission, however, recognized that “there are many ways that an ERO could provide

¹⁶ Id. at P 112.

¹⁷ Id. at P 100.

¹⁸ See also, id. at P 99 and 866.

balanced governance and decisionmaking.”¹⁹ The Commission, therefore, did not mandate a specific approach to ERO governance but, rather, allowed an ERO candidate to develop a proposal to be provided in its application for certification consistent with the requirements of independence and stakeholder representation.

Request for Rehearing

17. ISO/RTO Council asserts that ISOs and RTOs will not be fairly represented in ERO and Regional Entity voting procedures based on one-person, one-vote. This is because a handful of ISOs and RTOs are responsible for a large fraction of the nation’s load but constitute only a small percentage of the nation’s utilities. Consequently, their importance and unique reliability concerns will not be fairly represented. ISO/RTO Council states that it previously expressed concerns that failure of the Commission to mandate a specific approach to ERO voting structure could lead to the inadequate representation of ISOs and RTOs. ISO/RTO Council asserts that the failure to mandate a specific approach to ERO voting structure has already adversely affected ISO and RTO interests, in that the North American Electric Reliability Council’s (NERC) draft ERO application attempts to address this issue by placing ISOs and RTOs into the same voting category as Regional Entities.

¹⁹ Id. at P 152.

Commission Conclusion

18. Order No. 672 requires that an ERO applicant assure fair stakeholder representation in ERO processes.²⁰ We agree that ISOs and RTOs, as system operators, are stakeholders and should be represented fairly in ERO processes. However, we will neither require nor forbid in our regulations any specific representation formula. To do so would limit the flexibility of the ERO and the Commission to change ERO Rules over time as needed to reflect changes in industry organization and other changes. We urge the ISO/RTO Council to raise its concerns regarding ISO and RTO representation with ERO applicants and, if necessary, with the Commission in our notice and comment proceeding to review ERO certification applications.

C. Reliability Standards

19. Consistent with section 215(d) of the FPA, Order No. 672 directs the ERO to file a proposed Reliability Standard or modification to a Reliability Standard with the Commission for review.²¹ The Commission may approve a proposed Reliability Standard or modification to a Reliability Standard if it determines that the Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. In its review, the Commission will give due weight to the technical expertise of the ERO or a Regional Entity organized on an Interconnection-wide basis with respect to a Reliability Standard to be applicable within that Interconnection, except that the

²⁰ Id.

²¹ Id. at P 38, 258.

Commission may not defer to the ERO or a Regional Entity with respect to the effect of a Reliability Standard on competition.

20. Order No. 672 provides that the Commission shall remand a Reliability Standard that it disapproves in whole or in part and, when remanding, may set a deadline by which the ERO must submit a proposed revision to the Reliability Standard.²² The Final Rule states that the Commission may direct the ERO to submit a proposed Reliability Standard that addresses a specific matter.

1. Reliability Standards Development

21. In its comments on the notice of proposed rulemaking, ISO/RTO Council stated that a Reliability Standard developed by the ERO should reflect the “what” and not the “how” of reliability, i.e., that the ERO should develop a Reliability Standard specifying “what” is necessary to preserve reliability and implementation should be left to others. In response, the Final Rule explains:

. . . in certain limited situations there may be a good reason to leave implementation practices out of a Reliability Standard. In other situations, however, the “how” may be inextricably linked to the Reliability Standard and may need to be specified by the ERO to ensure the enforcement of the Reliability Standard. For some Reliability Standards, leaving out implementation features could: (1) sacrifice necessary uniformity in implementation of the Reliability Standard; (2) create uncertainty for the entity that has to follow the Reliability Standard; (3) make enforcement difficult; and (4) increase the complexity of the Commission's oversight and review process. Accordingly, we leave it to the ERO to develop proposed

²² Id. at P 390, 408.

Reliability Standards that appropriately balance reliability principles and implementation features.^[23]

Requests for Rehearing

22. ISO/RTO Council asks the Commission to clarify the ERO's role in Reliability Standard setting and enforcement as opposed to implementation of Reliability Standards. It believes the Commission erred in allowing the ERO to develop proposed Reliability Standards that balance questions of reliability and implementation on a case-by-case basis because this gives the ERO too much authority and blurs the lines between standard setting - an ERO function - and standard implementation - a system operator function. ISO/RTO Council argues that the ERO should focus on the "what" of reliability, but not the "how" to ensure that the same Reliability Standards can be adopted for regions with and without organized electricity markets. ISO/RTO Council asserts that more conflicts are likely to arise between existing Reliability Standards and ISO or RTO tariffs if the ERO adopts detailed requirements for implementing the Reliability Standards. It also argues that NERC's draft certification application would have the ERO perform some functions best performed by system operators, a role for which the ERO is unlikely to have the knowledge or resources to carry out operational functions effectively.

Commission Conclusion

23. The Commission addressed this adequately in Order No. 672, explaining that, in some situations, some aspects of the implementation of a Reliability Standard may need

²³ Id. at P 260.

to be part of the Reliability Standard itself.²⁴ As is public knowledge, NERC has over 100 candidate Reliability Standards it intends to file for approval. We continue to believe it is more appropriate to decide the issues raised by the ISO/RTO Council on a case-by-case basis for each proposed Reliability Standard than to make a generic ruling based on general theory. When we say we are leaving it to the ERO to develop a proposal we mean it do so subject to its Rules for obtaining broad stakeholder input. If an ISO, RTO or other entity has specific concerns, they should be raised in the ERO's Reliability Standard development process as we expect Reliability Standards to be developed that work effectively and can be implemented in all regions.²⁵ Accordingly, the Commission denies the RTO/ISO Council's request for rehearing to provide additional guidance to the ERO regarding this issue.

²⁴ Id.

²⁵ See Id. at P 331 (“[a] proposed Reliability Standard should be designed to apply throughout the interconnected North American Bulk-Power System, to the maximum extent this is achievable with a single Reliability Standard. The proposed Reliability Standard . . . should take into account . . . regional variations in market design if these affect the proposed Reliability Standard”).

2. Notice and Comment

24. Order No. 672 states that, when the ERO files a proposed Reliability Standard, the Commission will provide notice and opportunity for comment except in “extraordinary circumstances.”²⁶

Request for Rehearing

25. EEI asks the Commission to clarify that the notice and comment procedures that will apply to its review of a proposed Reliability Standard will comply with the notice and comment requirements of section 553 of the Administrative Procedure Act (APA).²⁷ It explains that, although section 215 of the FPA does not state that the Commission must provide notice and comment when reviewing a proposed Reliability Standard, notice and comment is required by section 553 of the APA. Further, EEI notes that, while the APA does not allow an exception to the notice and comment requirement for “extraordinary circumstances,” the APA does provide an exception when an agency for good cause finds that notice and comment procedures are “impracticable, unnecessary, or contrary to the public interest.”²⁸ EEI requests that the Commission clarify that “extraordinary circumstances” will be construed to have the same meaning as the exception provided in section 553(b)(B) of the APA.

²⁶ Id. at P 308.

²⁷ 5 U.S.C. 553 (2000).

²⁸ 5 U.S.C. 553(b)(B) (2000).

Commission Conclusion

26. Like all federal agencies, the Commission is obligated to comply with the APA. Accordingly, the Commission clarifies that any decision by the Commission not to provide notice and comment when reviewing a proposed Reliability Standard will be made in accordance with the criteria established in section 553 of the APA.

3. No Deference on Competition

27. Consistent with section 215(d)(2) of the FPA, Order No. 672 states that the Commission will not defer to the ERO or a Regional Entity with respect to the effect of a proposed Reliability Standard on competition.²⁹ The Final Rule, however, does not adopt a generic test to balance reliability and competition concerns in the absence of specific facts and, instead, states that the Commission will evaluate the effects of a proposed Reliability Standard on competition on a case-by-case basis.³⁰ Further, the Final Rule explains that, when reviewing a proposed Reliability Standard, the Commission will ensure that the proposal does not have the implicit effect of either favoring or thwarting bilateral or organized markets.

Request for Rehearing

28. ISO/RTO Council seeks rehearing or clarification regarding the Commission's decision not to adopt a generic test to balance reliability and competition concerns in the absence of specific facts. It maintains that failure to adopt such a test "would be a legal

²⁹ Order No. 672 at P 40, 18 CFR 39.5(c)(3).

³⁰ Id. at P 376.

error because it would effectively leave the Commission discretion to defer to the ERO on competition questions, which is prohibited under the FPA”³¹ ISO/RTO Council asks the Commission to provide clearer substantive guidance on how it will review the impact of a Reliability Standard on competition. It requests the Commission to revise its regulations to incorporate Order No. 672 Preamble language stating that a Reliability Standard will not be allowed to have the implicit effect of either favoring or thwarting bilateral or organized markets or unduly favor individual market participants. It further asks the Commission to specify that any Reliability Standard that has any effect on ISO or RTO market rules will be subject to de novo Commission review. In addition, the ERO should have the burden of demonstrating that a proposed Reliability Standard does not affect competition.

Commission Conclusion

29. ISO/RTO Council correctly notes that the Commission has a statutory obligation not to defer to the ERO with respect to the effect of a proposed Reliability Standard or a proposed modification to a Reliability Standard on competition. We will not do so. However, ISO/RTO Council has failed to explain why dealing with this issue on a case-by-case basis is inappropriate or declining to revise Commission regulations as requested is a legal error. Case-by-case consideration is particularly appropriate where an issue can arise in many different forms and factual situations. The Commission concluded that a

³¹ ISO/RTO Council at 7.

case-by-case approach is appropriate here and noted that “[n]o single definition [of competition] appears sufficient to cover all the relevant bases for evaluating a proposed Reliability Standard's effect on competition.”³² ISO/RTO Council insists that the Commission must add to its regulations, but does not explain how the failure to adopt its suggestions is unlawful or amounts to Commission deference to the ERO on competition issues. Section 215(d)(2) prohibits such deference. Accordingly, the ISO/RTO Council has failed to establish the error of law it asserts, and its request for rehearing or clarification is denied on this issue.

4. Commission Remand of a Proposed Reliability Standard

30. Consistent with section 215(d)(4) of the FPA, Order No. 672 provides that the Commission may remand to the ERO for further consideration a proposed Reliability Standard or proposed modification to a Reliability Standard that the Commission disapproves in whole or in part. In the Final Rule, the Commission explains that “[w]e will either accept or remand a proposed Reliability Standard. If we remand a proposed Reliability Standard or a proposed modification to a Reliability Standard, we intend to specify our concerns so that the ERO can address them.”³³

31. Further, the Final Rule provides that the Commission, when remanding a proposed Reliability Standard, may set a deadline by which the ERO must resubmit the proposed

³² Order No. 672 at P 377.

³³ Id. at P 390.

Reliability Standard with revisions that address the reason for the remand.³⁴ The Final Rule explains that any necessary deadline will be established in a reasonable manner taking into consideration the complexity of the issue and will consider the time needed for a proposed revision to go through the ERO's process as well as any need to have an enforceable Reliability Standard in a timely manner.³⁵

Requests for Rehearing

32. NRECA notes that the Commission stated that it “would take appropriate action, for example, if the ERO or Regional Entity fails to comply with a Commission order requiring that a Reliability Standard be developed or modified as necessary to maintain reliability” and also “that failure to meet a Commission deadline [on remand of a Reliability Standard] would be considered a violation of the FPA.”³⁶ NRECA expresses concern that “such statements could unintentionally imply that the Commission could seek to treat a failure by the ERO or potentially a Regional Entity to adopt the exact text or substance of a Reliability Standard specified by the Commission as a violation of the FPA.”³⁷ NRECA requests the Commission to clarify that it did not intend in the Final Rule to prescribe the text or substance of a Reliability Standard.

³⁴ Id. at P 408-410.

³⁵ Id.

³⁶ NRECA Comments at 2 (citing Order No. 672 at P 441 and 765).

³⁷ Id. at 2-3.

33. EEI requests that the Commission clarify that any deadlines it imposes on the ERO's consideration of proposed Reliability Standards on remand will respect the requirements that the ERO have an open process and that the Commission give due weight to the technical expertise of the ERO.

Commission Conclusion

34. We clarify that it is not our intent to prescribe the text or substance of a Reliability Standard. Our authority in this context is to "remand to the [ERO] for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part."³⁸ In the Final Rule, we stated that "the Commission cannot change the Reliability Standard and must send the Reliability Standard to the ERO for modification."³⁹ Moreover, the Commission specifically stated that as part of the remand process, "we intend to specify our concerns so that the ERO can address them."⁴⁰

35. With regard to EEI's request for clarification, Order No. 672 already provides the assurance that EEI seeks.⁴¹ Any necessary deadline will be established in a reasonable manner taking into account the complexity of the issue and will consider the time needed for a proposed revision to go through the ERO's process as well as any need to have an

³⁸ Section 215(d)(4) of the FPA.

³⁹ Order No. 672 at P 424.

⁴⁰ Id. at P 390.

⁴¹ Id. at P 410.

enforceable Reliability Standard in a timely manner. The Commission will respect the ERO's approved Reliability Standard development process, but in Order No. 672 the Commission also set out its expectation that the ERO will have sufficient flexibility in its process to consider matters expeditiously when necessary. As we explained in Order No. 672, an ERO applicant should propose an accelerated process for addressing a Reliability Standard that has been remanded with a specific deadline.⁴²

D. Conflict of a Reliability Standard with a Commission Order

36. Section 215(d)(6) of the FPA requires that the Commission develop "fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a transmission organization." Consistent with this requirement, the Final Rule provides a process for a user, owner or operator of the transmission facilities of a Transmission Organization to notify the Commission of a possible conflict for timely resolution by the Commission.⁴³ The Transmission Organization is responsible for expeditiously notifying the Commission of the possible conflict.

37. Section 39.6(b) of the Commission's regulations provides that the Commission will determine within 60 days of a filing whether a conflict exists and, if so, resolve the conflict by directing the Transmission Organization to file a modification of the

⁴² Id.

⁴³ Id. at P 444, 18 CFR 39.6(a).

conflicting tariff “pursuant to section 205 or section 206 of the Federal Power Act, as appropriate” or direct the ERO to propose a modification to the conflicting Reliability Standard. Section 39.6(c) requires that the Transmission Organization continue to comply with the tariff until the Commission finds that a conflict exists, the Commission orders a change to such provision pursuant to section 205 or 206 of the FPA, and the order becomes effective.

Request for Rehearing

38. NYSRC seeks clarification or, in the alternative, rehearing on whether both sections 205 and 206 of the FPA should apply when the Commission undertakes to determine whether a Commission-approved function, rule, order, tariff, rate schedule, or agreement should change because it conflicts with an ERO Reliability Standard, or whether only section 206 should apply. NYSRC notes that section 215(d)(6) of the FPA refers only to section 206 and argues that the reference to section 205 in sections 39.6(b) and (c) of the Commission’s regulations creates a discrepancy that, unless clarified, will result in confusion as to the legal standard applicable to such a determination by the Commission.

39. ISO/RTO Council requests that the Commission clarify that a user, owner or operator should consult with the ISO or RTO regarding a potential conflict between a Reliability Standard and a Commission-approved ISO or RTO tariff. It proposes that, in the event of a disagreement over a potential conflict, the ISO/RTO should submit the concern raised by the transmission user or owner along with its own comments on the issue. ISO/RTO Council also maintains that the ERO should be expected to identify any

potential conflict with an existing ISO or RTO tariff when it submits a proposed Reliability Standard to the Commission, and that the Commission should revise its regulations to provide that any party proposing a revision to a tariff to eliminate a conflict with a Reliability Standard will bear the burden of persuasion.

Commission Conclusion

40. We grant rehearing in part and amend our regulations to provide that, if the Commission determines that a Commission-approved function, rule, order, tariff, rate schedule, or agreement should be revised because it conflicts with a Reliability Standard, the Commission may offer the Transmission Organization an opportunity to submit a revised term or condition of the tariff or other relevant document or may itself modify the tariff pursuant to section 206 of the FPA. The Commission will not, however, direct a Transmission Organization to make a filing pursuant to section 205 of the FPA, and we delete this provision from sections 39.6(b)(1) and (c) of our regulations. A public utility may voluntarily submit a revised tariff provision pursuant to section 205 to resolve the conflict. Thus, although section 215(d)(6) of the statute refers specifically to the Commission finding a conflict and ordering a change to a provision pursuant to section 206 of the FPA, a voluntary section 205 filing is always an option available to the Transmission Organization.

41. With regard to ISO/RTO Council's request for clarification or rehearing, we encourage any user, owner or operator that identifies a potential conflict between a Transmission Organization tariff and a Reliability Standard to consult with the Transmission Organization regarding the potential conflict. If the matter is not resolved

informally, the Transmission Organization must expeditiously notify the Commission of the potential conflict. Further, we encourage the Transmission Organization to submit its own comments on the issue when it notifies the Commission, provided that the preparation of Transmission Organization comments causes no delay in notifying the Commission. The Transmission Organization may provide additional comments on the potential conflict during the notice and comment period on the matter. However, there is no need to revise our regulations to incorporate this level of detail.

42. Order No. 672 provides that the ERO should attempt to resolve such potential conflicts in the Reliability Standard development process.⁴⁴ We encourage the ERO, when submitting a proposed Reliability Standard to the Commission for review, to identify any potential conflict with a Transmission Organization tariff that could not be resolved and provide any information on the topic that may inform the Commission. However, it is not necessary to include this level of detail in the regulation text.

E. Enforcement of Reliability Standards

43. Section 215(e) of the FPA provides that the ERO or a Regional Entity that is delegated enforcement authority may impose a penalty on a user, owner or operator of the Bulk-Power System for a violation of a Reliability Standard. The Final Rule sets forth procedures pursuant to which the ERO or a Regional Entity may impose a non-

⁴⁴ Id. at P 444.

monetary or monetary penalty, and procedures for Commission review of a penalty.⁴⁵

Also, the Commission itself may initiate an investigation, require compliance with or impose a penalty for non-compliance with a Reliability Standard.

1. ERO and Regional Entity Appeals Process

44. Order No. 672 finds that allowing an appeals process at the ERO or Regional Entity level is appropriate to ensure internal consistency in the imposition of penalties by the ERO or the Regional Entity.⁴⁶ Expressing concern that such a process should not result in a drawn-out series of sequential appeals, the Final Rule concludes that there should be a single appeal at either the ERO or the Regional Entity. An ERO applicant must propose in its certification application whether the appeal of a penalty imposed by a Regional Entity should be at the ERO or Regional Entity.

Request for Rehearing

45. EEI requests that the Commission specify that all appeals of penalties, whether imposed by a Regional Entity or the ERO, should be at the ERO level. It states that having a single formal appeal at the ERO will ensure timely enforcement as well as consistency in interpretation of Reliability Standards and in the sanctions applied across Regional Entities. EEI also requests that the Commission clarify that each Regional Entity must have a process to resolve issues that arise in the course of implementation of its compliance enforcement program before final decision in a particular matter is

⁴⁵ 18 CFR 39.7.

⁴⁶ Order No. 672 at P 610-611.

reached by the Regional Entity. EEI maintains that this clarification is necessary to ensure that the enforcement process includes due process protections and procedures.

Commission Conclusion

46. Order No. 672 concludes that a single appeal at either the ERO or Regional Entity is appropriate to avoid duplication and delay, but allows an ERO applicant to propose in its application for certification whether the appeal of a penalty imposed by a Regional Entity should be at the ERO or Regional Entity.⁴⁷ EEI may raise its concerns in the ERO certification proceeding regarding the appropriate forum for such an appeal. Further, we note that Order No. 672 directs the ERO and Regional Entities to develop uniform due process procedures.⁴⁸ EEI's request for a process to resolve issues that arise in the course of a Regional Entity's compliance program is satisfied by this requirement. Accordingly, EEI's request for an additional requirement is not necessary and is denied.

2. Monetary Penalties

47. Both the statute and our regulations require that a penalty must bear a reasonable relationship to the seriousness of the violation. Order No. 672 requires the ERO to develop penalty guidelines that would provide a predictable, uniform and rational approach to the imposition of penalties.

48. Further, Order No. 672 concludes that it is appropriate for the entity investigating an alleged violation and imposing a penalty to receive any penalty monies that result

⁴⁷ Id. at P 611.

⁴⁸ Id. at P 494-495.

from that investigation.⁴⁹ However, rather than allowing penalty monies to offset a specific program, such as a compliance or enforcement program, the Final Rule determines that, for an ERO or Regional Entity investigation, the entity conducting the investigation should receive the penalty monies as an offset against its next year's budget. Order No. 672 states that, "[w]ith this approach, the monies represent a savings to those consumers responsible ultimately for paying the costs of the ERO or Regional Entity."⁵⁰

49. In response to comments regarding the application of a penalty to an RTO or ISO, Order No. 672 concludes that:

[w]hile we recognize that RTOs and ISOs have some unique characteristics, we do not believe a generic exemption from any type of penalty is appropriate for any entity, including an RTO or ISO. The ERO or Regional Entity determining whether to impose a penalty on an RTO or ISO may consider the entity's unique characteristics, as well as the nature of the violation, in determining an appropriate and effective sanction.

Further, we do not decide generically whether an RTO or ISO may pass a monetary penalty through to its members or customers. We will consider such an issue on a case-by-case basis.⁵¹

Requests for Rehearing

50. ISO/RTO Council maintains that the Commission has not adequately addressed the concern that penalty monies could create an improper incentive for the ERO to over-collect penalties. It asserts that the Commission has not explained why it is willing to allow penalty monies to offset the enforcing entity's entire budget for implementing

⁴⁹ Id. at P 626.

⁵⁰ Id. at P 627.

⁵¹ Id. at P 634-635 (footnote omitted).

section 215 of the FPA rather than just the costs of a specific program, such as enforcement. ISO/RTO Council views the incentives as being the same in each case. It urges the Commission to adopt a clear rule requiring the ERO and Regional Entities to direct penalty monies received from U.S. entities to the U.S. Treasury.

51. New York ISO asserts that the Commission erred when it failed to establish that ISOs and RTOs should be subject to financial penalties imposed by the ERO or a Regional Entity only in “extraordinary circumstances.” It argues that, because ISOs, RTOs and reliability organizations are similarly situated in all material respects, it is arbitrary and capricious for the Commission to determine that reliability organizations will be subject to financial penalties only in extraordinary circumstances and not to do likewise in the case of ISOs and RTOs. New York ISO states that the Commission has failed to justify treating reliability organizations more favorably than ISOs and RTOs by refusing in Order No. 672 to provide that the latter as well as the former would be subject to financial penalties only in extraordinary circumstances.

52. New York ISO also contends that imposing a financial penalty that could render a not-for-profit ISO or RTO insolvent is inconsistent with the section 215(e) of the FPA and the Commission’s own directive that a penalty must be proportionate to the offense. An ISO or RTO will, absent a pass-through, face insolvency if it is subject to a financial penalty.

53. Further, New York ISO asserts that the Commission’s failure to establish that ISOs and RTOs should not be subject to financial penalties in connection with reliability violations committed by third parties within the ISO/RTO’s control area is arbitrary and

capricious, as well as inconsistent with due process, section 215(e) of the FPA, and the Commission's policy that penalties should be proportionate to the offender's misconduct. New York ISO notes that, while Order No. 672 agrees generally that an entity should not be punished for a violation outside of its control, the Order does not make a generic ruling on the issue and, rather, directs New York ISO to raise such concerns in the ERO stakeholder process. It asserts that failure to establish a "bright line" that insulates a party from penalty for a violation outside its control is arbitrary and capricious and violates due process.

54. SoCal Ed states that the Commission erred when it would not decide generically whether an RTO or ISO may pass a monetary penalty through to its members or customers. Like New York ISO, SoCal Ed points to the limited resources of ISOs and RTOs. It seeks rehearing on this issue and also argues that, in passing on costs, the ISO or RTO should determine whether particular members or customers are responsible for the penalty and obtain repayment from them.

Commission Conclusion

55. ISO/RTO Council does not explain why permitting penalty monies to offset the enforcing entity's entire section 215 budget creates an improper incentive for the ERO or a Regional Entity to overcollect penalties. Penalty monies would be received as an offset against the budget of the ERO and Regional Entities for discharging their statutory duties in the coming year. Unless the aggregate amount of penalties exceeds the entire ERO budget, the only beneficiaries of this policy are the entities that have reduced payments for next year's support of the ERO. Order No. 672 concludes that penalty monies

represent a savings to end users of electricity. ISO/RTO Council has not persuaded us that this approach creates an improper incentive for the ERO to impose excessive penalties. Further, we remind ISO/RTO Council that every penalty must be filed with the Commission, and the Commission is therefore in the position to detect and correct any possible incentive for overcollection. ISO/RTO Council's request for rehearing on this issue is, therefore, denied.

56. In response to New York ISO, while ISOs, RTOs and reliability organizations may be similarly situated in some respects, they differ in important respects regarding penalty liability. The most significant difference, highly relevant to this proceeding, is that the statute makes the ERO and Regional Entities responsible for establishing and enforcing Reliability Standards, while making users, owners and operators of the Bulk-Power System, including ISOs and RTOs, subject to penalties for failure to comply with those Reliability Standards. It is not arbitrary and capricious to treat all operators alike, including RTOs and ISOs, in terms of their liability for violation of a Reliability Standard. Nor is it arbitrary and capricious to treat the ERO or a Regional Entity that violates a Commission order differently, for penalty purposes, from an operator that violates a Reliability Standard. The statute specifically authorizes the imposition of a penalty on a user, owner or operator for the violation of a Reliability Standard. The Commission acknowledges in Order No. 672 the unique characteristics of ISOs and

RTOs and agrees that, in determining a penalty, circumstances such as organizational structure or not-for-profit status will be considered.⁵²

57. New York ISO and SoCal Ed argue that the Commission erred in denying a generic penalty exemption for RTOs and ISOs because in their view - absent the ability to pass the penalty through to members or customers - a monetary penalty would lead to the insolvency of such entities. The Commission is mindful of the special characteristics of RTOs and ISOs, including the resources they have at their disposal. However, we do not believe that Congress enacted a law that provided for Reliability Standards to be enforceable through penalties and neglected to mention that it intended to exempt system operators that operate the Bulk-Power System serving half or more of the electric load in the United States. We understand that penalties may be monetary or non-monetary and the difficulty that a large monetary penalty would pose for a not-for-profit organization. However, we will not by rule exempt these large and important system operators from monetary penalties for violation of Reliability Standards. The Commission directed New York ISO to raise its concern about the punishment of entities for violations outside their control in the ERO or Regional Entity stakeholder process because it is first necessary to determine whether a proposed Reliability Standard would have this effect.⁵³ Both New York ISO and SoCal Ed have failed to demonstrate the need for a generic exemption or a

⁵² Consideration of such factors in determining an appropriate penalty is consistent with our Enforcement Policy. See Enforcement of Statutes, Orders, Rules, and Regulations, 113 FERC ¶ 61,068. See also, Order No. 672 at P 561, n. 158.

⁵³ Order No. 672 at P 636.

blanket pass-through provision, and their requests for rehearing on these points are therefore denied.

58. For the reasons discussed above, the Commission affirms its earlier decision and will not allow a generic pass through of monetary penalties for RTOs and ISOs.

However, an individual RTO or ISO may propose a mechanism through a section 205 tariff filing to recover penalty monies imposed by the ERO or a Regional Entity.

59. Further, any concerns regarding a particular ERO applicant's proposed penalty imposition policies should be addressed in its ERO certification proceeding.

F. Funding of the Electric Reliability Organization

60. Order No. 672 directs an ERO candidate to propose a formula or method of funding addressing cost allocation and cost responsibility, along with a proposed mechanism for revenue collection for Commission consideration. Further, pursuant to the Final Rule, the ERO will fund the Regional Entities as well as approve their budgets, under the Commission's oversight. The ERO must file with the Commission its entire proposed annual budget for statutory and non-statutory activities, including the entire budgets of each Regional Entity. All entities within the Commission's jurisdiction pursuant to section 215(b) of the FPA are required to pay any ERO assessments, as set out in the ERO Rules approved by the Commission, in a timely manner reasonably designated by the ERO.

1. Activities to be Funded by End-Users

61. Order No. 672 concludes that section 215 of the FPA "provides for federal authorization of funding limited to the development of Reliability Standards and their

enforcement, and monitoring the reliability of the Bulk-Power System. However, the ERO or a Regional Entity is not precluded from pursuing other activities, funded from other sources.”⁵⁴ Likewise, any funding that is approved and provided by the ERO to a Regional Entity would be limited to a Regional Entity’s costs related to the delegated functions.⁵⁵ The Final Rule explains that, while neither the ERO nor a Regional Entity is precluded from pursuing other activities, activities not explicitly authorized under FPA section 215 may not be funded through the ERO.

62. Order No. 672 also determines that it is not necessary to provide in the Commission’s regulations funding of a Regional Advisory Body. The Final Rule states that “[s]uch bodies are voluntary organizations with members to be appointed by the Governor of each participating state or province. Each Regional Advisory Body is responsible for developing its own funding means.”⁵⁶

Requests for Rehearing

63. SoCal Ed states that restricting ERO and Regional Entity activities funded by end users to the development of Reliability Standards and their enforcement, and monitoring the reliability of the Bulk-Power System is too restrictive and that the ERO and the Regional Entities will have many more reliability-related functions. SoCal Ed states that it is not clear that, for example, the ERO and Regional Entities may be funded for costs

⁵⁴ Id. at P 202. Order No. 672 also discusses possible limitations on such other activities. Id.

⁵⁵ Id. at P 229.

⁵⁶ Id. at P 248.

associated with “reliability centers” and reliability assessments of the Bulk-Power System. SoCal Ed asks that the Commission allow end-user funding of all ERO and Regional Entity reliability activities.

64. Western Governors /CREPC, supported by the CPUC, asks the Commission to clarify whether Order No. 672, in the discussion of Regional Advisory Body funding, simply declines to guarantee that the budget of a Regional Advisory Body will be funded through section 215 mandatory reliability fees collected from end users or whether the Final Rule precludes the inclusion of a Regional Advisory Body budget in such mandatory fees. Further, Western Governors /CREPC seeks rehearing to the extent that the Commission intended to preclude funding of a Regional Advisory Body through mandatory fees collected from end users. Western Governors /CREPC argues that precluding such funding would be inconsistent with section 215(c)(2)(B), which requires the ERO to have rules that allocate equitably reasonable dues, fees, and other charges among end users for all activities under that section. Western Governors /CREPC maintains that Regional Advisory Body activities under section 215(j) are covered by this requirement and that end users will benefit from those activities. Western Governors /CREPC also argues that making Regional Advisory Bodies responsible for their own funding would discourage the formation of such entities and reduce their effectiveness.

Commission Conclusion

65. With regard to SoCal Ed’s request, we clarify that the ERO can collect a Commission-approved assessment of dues, fees or charges for all activities performed pursuant to section 215 of the FPA, which would include all activities pursuant to our

regulations. The isolated preamble language cited by SoCal Ed was not intended to limit the scope of ERO activities that may be funded. Elsewhere in the preamble to Order No. 672 , as well as the regulation text, the Commission distinguishes between statutory and non-statutory activities of the ERO, and indicates that statutory activities of the ERO should be funded through a Commission-approved assessment of dues, fees or charges, while non-statutory activities must be funded through other means.⁵⁷ We will consider what a permissible statutory activity is when we see a specific proposal.

66. In response to Western Governors /CREPC, we agree that neither the statute nor Order No. 672 provides explicitly for Commission-approved ERO funding of a Regional Advisory Body, nor does either explicitly preclude such funding. As Western Governors commented in response to our proposed rule, under the statute the Commission must establish a Regional Advisory Body if it meets the explicit statutory criteria. In response to this comment by Western Governors and others, Order No. 672 reflects this requirement. However, Western Governors /CREPC does not indicate what would be the nature or scope of the funding for the Regional Advisory Body that it would like to see codified in our regulations. Order No. 672 appropriately does not automatically provide for ratepayer funding for any Regional Advisory Body through section 215 of the FPA without an opportunity to consider the nature, size, and cost of Regional Advisory Body activities. We recognize that, in some regions, the governors may prefer to provide state

⁵⁷ Id. at P 197, 198, 228 and 18 CFR 39.4(b).

funding for such a Body to ensure its independence from the entities it must advise, namely, the ERO, the Regional Entity, and the Commission.

67. Our approach in Order No. 672 is to codify the requirement to establish such a Body, upon petition, if it meets the statutory criteria, and to consider subsequently any funding request. In response to any such request, the Commission would consider what activities are covered by the requested funds. Any such request would have to specify, for example, whether the funding is just for the travel expenses of Regional Advisory Body members, or goes beyond that to include funding for other things (such as funding for state employees who support the members of the Regional Advisory Body, non-governmental employee staffing for the Regional Advisory Body itself, outside consultants or reliability experts, costs of any studies, or any other intended activities). Since this request would be part of the ERO's overall budget, we would be able to consider also the recommendation of the ERO and any relevant Regional Entity. These considerations are beyond the scope of this rulemaking and best considered with a specific application before us. For these reasons, we deny the request for rehearing of Order No. 672 but clarify that this denial is without prejudice to any possible future ERO request for Regional Advisory Body funding in its budget (including that portion of its budget that provides funding for the activities of the Regional Entities).

68. For example, one mechanism that the ERO may choose to consider is the funding of a Regional Advisory Body through the sharing of costs. The ERO could seek Commission approval of a "matching" program in which Commission-approved funding would be permitted in an amount up to that contributed by the relevant states to the

Regional Advisory Body's budget for section 215 activities. The Commission will consider this or other proposed approaches to Regional Advisory Body funding on a case-by-case basis.

2. Allocation of ERO Costs

69. SoCal Ed contends that the Final Rule does not address its comment that RTOs and ISOs, if allocated section 215 reliability costs, should be required to amend their Commission-approved tariffs to provide a method for the allocation of such costs to end users in their footprint. It argues that failure to do this could deny RTO and ISO members due process and subject them to regulatory uncertainty.

Commission Conclusion

70. We agree with SoCal Ed that an RTO or ISO may need to amend its Commission-approved tariff to provide a method for the recovery of costs if it is allocated ERO costs. SoCal Ed is assuming that an RTO or ISO rather than a load-serving entity will be allocated such costs. Order No. 672 states that "cost allocation and cost responsibility questions should be addressed first by the ERO and submitted together with a proposal for revenue collection for Commission approval."⁵⁸ Because we do not have a cost allocation proposal before us yet, it is premature for the Commission to consider whether to amend its regulations to require ISOs and RTOs to amend their tariff.

⁵⁸ Id. at P 242.

III. Information Collection Statement

71. Order No. 672 contains information collection requirements for which the Commission obtained approval from the Office of Management and Budget (OMB). Given that this Order on Rehearing makes only one minor revision to the regulation text of Order No. 672 and other minor clarifications to Order No. 672, OMB approval for this order is not necessary. However, the Commission will send a copy of this order to OMB for informational purposes.

IV. Document Availability

72. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C., 20426.

73. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

74. User assistance is available for eLibrary and the FERC's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public

Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

V. Effective Date

75. Changes to Order No. 672 made in this order on rehearing will become effective on [insert date that is 30 days after publication in the Federal Register].

List of Subjects 18 CFR Part 39

Administrative practice and procedure; electric power; penalties; reporting and recordkeeping requirements.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission amends Chapter I, Title 18, Code of Federal Regulations to read as follows:

PART 39 – RULES CONCERNING CERTIFICATION OF THE ELECTRIC RELIABILITY ORGANIZATION AND PROCEDURES FOR THE ESTABLISHMENT, APPROVAL, AND ENFORCEMENT OF ELECTRIC RELIABILITY STANDARDS

1. The authority citation for Part 39 continues to read as follows:

Authority: 16 U.S.C. 8240.

2. In § 39.6, paragraphs (b)(1) and (c) are revised to read as follows:

§ 39.6 Conflict of a Reliability Standard with a Commission Order.

* * * * *

(b) * * *

(1) The Transmission Organization to file a modification of the conflicting function, rule, order, tariff, rate schedule, or agreement pursuant to section 206 of the Federal Power Act, as appropriate, or

* * * * *

(c) The Transmission Organization shall continue to comply with the function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission until the Commission finds that a conflict exists, the Commission orders a change to such provision pursuant to section 206 of the Federal Power Act, and the ordered change becomes effective.