

133 FERC ¶ 61,209
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. RR10-1-003

ORDER GRANTING REHEARING

(Issued December 10, 2010)

1. In its October 1, 2010 order in this proceeding,¹ the Commission directed the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), to make several revisions to Appendix 4D of its Rules of Procedure, “Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Standards” (TFE Procedure).² One of the directives from the October Order requires NERC to revise the TFE Procedure to allow both NERC and responsible entities to seek reconsideration of a determination on a request for a technical feasibility exception (TFE) where the responsible entity received differing TFE determinations on the same type of covered assets either within a Regional Entity or between Regional Entities.³ NERC requests reconsideration, or in the alternative, rehearing of this directive. NERC requests that the Commission modify this directive so that only NERC, not a responsible entity, would be allowed to request a Regional Entity to reconsider a TFE determination. This order grants NERC’s request.

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

² The TFE Procedure is incorporated into NERC’s Rules of Procedure as Appendix 4D.

³ October Order, 133 FERC ¶ 61,008 at P 26.

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 Standards to obtain a TFE. Thus, the Commission directed NERC to develop a set of conditions or criteria that a responsible entity must follow to obtain a TFE from specific requirements of the CIP Standards.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," and new Appendix 4D, "Procedure for Requesting and Receiving Technical Feasibility Exceptions to NERC Critical Infrastructure Protection Reliability Standards" (TFE Procedure).

4. By order dated January 21, 2010, the Commission approved NERC's TFE Procedure.⁶ The TFE Procedure gives the Regional Entities responsibility for the substantive review, and the approval or disapproval, of TFE requests based on the criteria set forth in section 3.1 of the TFE Procedure.⁷ In the January 21 Order, the Commission also directed NERC to modify certain sections of the TFE Procedure and stated that, if multiple Regional Entities are responsible for making TFE determinations, NERC must include the steps that it will take to ensure consistency in administering the TFE process.⁸

5. NERC responded to this directive in its April 21, 2010 Compliance Filing by revising the TFE Procedure to add new sections 3.3 and 11. Section 3.3 provides:

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).

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 21 Order).

⁷ Section 3.1 of the TFE Procedure sets forth six criteria or bases on which a TFE may be requested or approved; i.e., the asset for which the TFE is being sought must satisfy at least one of the six criteria.

⁸ January 21 Order, 130 FERC ¶ 61,050 at P 32.

The burden to justify approval of a TFE Request in accordance with the provisions of this Appendix is on the Responsible Entity. 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.⁹

Section 11, “Consistency in Approval and Disapproval of TFE Requests,” lists activities to be carried out by NERC and the Regional Entities to ensure consistency across TFE requests and across Regional Entities. The three section 11 “consistency 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 to provide guidance to the Regional Entities as deemed appropriate to achieve greater consistency.

6. The Commission’s October Order on the April 21 Compliance Filing noted that, while new section 11 is a step in the right direction to achieving consistency, absent a fully developed uniform framework to assess TFE requests, NERC’s compliance filing did not go far enough to ensure consistency. Therefore, as relevant here, the Commission directed NERC to make the following revisions to sections 3.3 and 11 of the TFE Procedure:

[] 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.¹⁰

⁹ Appendix 4D to NERC’s Rules of Procedure at § 3.3.

¹⁰ October Order, 133 FERC ¶ 61,008 at P 26 (emphasis added).

II. NERC's Request for Reconsideration

7. On October 29, 2010, NERC filed a request for reconsideration or, in the alternative, rehearing, of the above-quoted directive. NERC requests that the Commission modify this 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. Specifically, NERC requests that the Commission reconsider and revise its directive so that the Commission instead:

[D]irect[s] that the TFE Procedure be revised to establish a process whereby a Responsible Entity can submit to NERC information indicating that one or more Regional Entity(ies) has made determinations on TFE Requests for the Responsible Entity that indicate inconsistent application of the Section 3.1 criteria to the same type of Covered Assets, for NERC's consideration in determining whether to request the applicable Regional Entity(ies) to reconsider the determinations made on the applicable TFE Request(s).¹¹

8. NERC states that, under its proposed change, the TFE Procedure would be revised to establish a process for a responsible entity to inform NERC of purported inconsistent determinations of TFE Requests by one or more Regional Entities so that NERC may consider asking the applicable Regional Entity(ies) to reconsider the applicable TFE determination(s). NERC would review the responsible entity's submission along with the applicable Regional Entity report(s) on the initial TFE determinations at issue. Based on its review, NERC would determine whether the responsible entity's submission demonstrates sufficient indications of inconsistent application of the section 3.1 criteria used to make the TFE determinations to warrant asking the applicable Regional Entity to reconsider the applicable TFE Request(s). As appropriate, NERC would then ask the relevant Regional Entity(ies) to reconsider the applicable TFE Request(s).

9. NERC seeks this modification to the October Order's directive to address its concern that, if responsible entities have a right to directly ask Regional Entities to reconsider a TFE determination, even on the limited "inconsistency" grounds, there would be a flood of requests for reconsideration that would swamp the TFE process and overwhelm the Regional Entities' resources. NERC states that its proposed modification would foster four goals: (1) keep the focus of efforts to maintain consistency with NERC; (2) avoid bogging down the TFE request process and overburdening the Regional Entities; (3) still provide an avenue for responsible entities to seek review based on

¹¹ NERC Request for Reconsideration or Rehearing at 10.

inconsistencies in the application of the section 3.1 criteria; and (4) allow NERC to serve its role as the entity principally responsible for monitoring the Regional Entities' activities for consistency.¹²

III. Discussion

10. As discussed below, we find that NERC has justified our revising the directive in the October Order regarding the right to seek reconsideration of TFE determinations. Accordingly, we will grant NERC's request for rehearing.

11. In the October Order, the Commission instructed NERC to allow for reconsideration of a Regional Entity's TFE determination on the grounds that the TFE determination reflects an inconsistent application of the section 3.1 criteria either within a Regional Entity or between Regional Entities. The Commission further noted that the right to seek reconsideration should be accorded to both NERC and responsible entities.¹³ NERC seeks a modification to this directive to allow NERC to establish a process for requests for reconsideration under which NERC would serve as a gatekeeper for all such requests by responsible entities.

12. The Commission issued its directive as an additional means of ensuring consistent application of the section 3.1 criteria. Since Order No. 672, the Commission has been concerned with consistency among regions.¹⁴

13. With respect to the TFE Procedure, because NERC has tasked the Regional Entities with the substantive review of TFE requests, the Commission in both the January 21 Order and the October Order sought to ensure consistency in Regional Entities' TFE determinations. The Commission noted that a uniform framework for establishing TFEs under the criteria in Section 3.1 is appropriate.¹⁵ In the October Order, the Commission concluded that, in the absence of a uniform framework to assess TFE

¹² *Id.* at 9-10.

¹³ October Order, 133 FERC ¶ 61,008 at P 26.

¹⁴ *See, e.g., 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 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204 at P 290, 292, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

¹⁵ January 21 Order, 130 FERC ¶ 61,050 at P 32; October Order, 133 FERC ¶ 61,008 at P 25.

requests, NERC must revise the TFE Procedure to allow for reconsideration of TFE determinations on inconsistency grounds. The Commission finds that NERC's proposed modification to the October Order's directive mandating a process for requests for reconsideration fulfills the intent of the directive, as NERC's proposed process for seeking reconsideration establishes an avenue for reconsideration while still allowing responsible entities to seek reconsideration. While a responsible entity's request for reconsideration will be first screened by NERC to determine the validity of the request, we find this to be consistent with NERC's role and authority with respect to TFEs.

14. NERC is responsible for ensuring correct and consistent application of TFEs and thus should retain oversight of the TFE Procedure.¹⁶ In its Request for Reconsideration or Rehearing, NERC notes that:

[T]he directive inappropriately and erroneously focuses on the Regional Entities as responsible for improving and ensuring the consistency of TFE Request determinations. *Under the TFE Procedure, that responsibility is appropriately focused at NERC, which is uniquely positioned to perform the functions of monitoring the Regional Entities' implementation of the TFE Request process, identifying inconsistencies in implementation of the criteria for approving and disapproving TFE Requests, both within a Regional Entity and among Regional Entities, and giving guidance and direction to the Regional Entities for the purpose of improving and ensuring consistency in their TFE Request determinations.*¹⁷

The Commission agrees that NERC is responsible for ensuring consistency in approving or disapproving TFE requests and thus NERC would be the entity appropriately charged with determining whether reconsideration of Regional Entity decisions on TFE requests is appropriate. As underscored in the January 21 Order, NERC, as the ERO, would also, when necessary, be able to review and reverse a Regional Entity's TFE determination on reconsideration if NERC finds that the Regional Entity's decision does not promote

¹⁶ See, e.g., January 21 Order, 130 FERC ¶ 61,050 at P 47, 48, 53, n.58.

¹⁷ NERC Request for Reconsideration or Rehearing at 11 (emphasis added).

consistency and reliability throughout the Bulk-Power System.¹⁸ Accordingly, we will grant rehearing.

The Commission orders:

We hereby grant rehearing of the directive in paragraph 26 of the October Order, as discussed above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁸ See January 21 Order, 130 FERC ¶ 61,050 at n.58 (noting that the ERO is not precluded from exercising its authority to review a claimed TFE, whether resulting from an incident, a complaint, on its own initiative, or otherwise).