139 FERC ¶ 61,179
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability Corporation Docket No. FA11-21-000

ORDER ON PROCEDURES

(Issued June 4, 2012)

1. On May 15, 2012, the North American Electric Reliability Corporation (NERC) filed a proposed schedule for a paper hearing process to address the 42 audit recommendations made in the "Performance Audit of the North American Electric Reliability Corporation for Budget Formulation, Administration, and Execution" (Audit Report), which was issued by the Commission's Office of Enforcement by delegated letter order on May 4, 2012.[1] In addition, NERC requested that the Office of Enforcement be designated as non-decisional and thereby precluded from acting in an advisory capacity to the Commission during the paper hearing process if the Office of Enforcement participates in the paper hearing. As discussed below, the Commission adopts NERC's proposed schedule for a paper hearing with modifications. Although not required, the Commission will exercise its discretion in the specific factual circumstances here and designate, with certain exceptions, staff of the Office of Enforcement as non-decisional employees, thereby separating them from serving in an advisory capacity to the Commission with regard to this matter.

I. Background

2. On August 22, 2011, the Office of Enforcement gave written notice that it was commencing a financial performance audit of NERC to "evaluate NERC's budget formulation, administration, and execution . . . [and] the costs and resources used to

[1] On May 15, 2012, NERC also filed a request for rehearing of the May 4, 2012 delegated letter order issued by the Office of Enforcement. In the present filing, NERC indicated that the rehearing request would be rendered moot if the Commission adopts the proposed paper hearing process. NERC Filing at 1.

achieve program objectives."[2] The notice indicated that the financial performance audit would cover the period from August 23, 2006 to the present.

3. On May 4, 2012, the Office of Enforcement issued its Audit Report by delegated letter order. The delegated letter order stated that the Audit Report covered a period from August 23, 2006 to March 14, 2012 and that it contained 11 audit findings and 42 audit recommendations. The delegated letter order stated that NERC had 30 days to notify the Commission as to whether it would seek a hearing, such as a paper or trial type hearing, on issues in the Audit Report contested by NERC. The delegated letter order further indicated that it constituted a final agency action with respect to any uncontested issues in the Audit Report and that NERC could seek rehearing before the Commission of those issues within 30 days.

4. On May 23, 2012, staff from the Office of Enforcement filed a Response Regarding Communications Between Staff and NERC. On the same date, NERC responded.

5. On May 24, 2012, Florida Reliability Coordinating Council, Inc. (FRCC) filed a motion to intervene or otherwise participate in this proceeding. On the same day, FRCC, Reliability*First* Corporation (RFC), Texas Reliability Entity (TRE), Western Electricity Coordinating Council (WECC), Midwest Reliability Organization, Northeast Power Coordinating Council, Southwest Power Pool Regional Entity, and SERC Reliability Corporation jointly filed a motion to intervene or otherwise participate in this proceeding. On May 25, 2012, RFC and TRE filed motions to intervene or otherwise participate in this proceeding. Also on May 25, 2012, while not moving to intervene, The American Public Power Association, The Edison Electric Institute, The Electric Power Supply Association, The Electricity Consumers Resource Council, The Large Public Power Council, The National Rural Electric Cooperative Association and The Transmission Access Policy Study Group jointly filed comments in support of the proposal contained in NERC's filing. On May 29, 2012, WECC filed a motion to intervene or otherwise participate in this proceeding.

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[2] The Office of Enforcement's August 22, 2011 notice is available through the Commission's eLibrary document retrieval system in Docket No. FA11-21-000.

II. Discussion

A. Proposed Schedule for Paper Hearing

1. Filing

6. NERC requests a paper hearing process to address the 42 audit recommendations made in the Audit Report. NERC states that it vigorously disagrees with the factual findings contained in the Audit Report. However, NERC requests that the paper hearing not address the factual findings in the Audit Report and only address the 42 audit recommendations made in the Audit Report.[3] NERC asserts that it would be a waste of resources to address the factual findings in the paper hearing because the Office of Enforcement has indicated in its reply to NERC's response to the draft audit report that the findings were made only to illustrate concerns regarding the transparency and clarity of NERC's process, not to make findings of non-compliance or imprudence.[4]

7. NERC proposed the following schedule for the paper hearing to address the 42 recommendations made in the Audit Report:

- Within thirty (30) days of a Commission order adopting the hearing procedures, NERC would submit a brief that addresses all 42 recommendations in the Final Audit Report on a comprehensive basis and provides support for any proposed modifications to those recommendations;

- Within thirty (30) days of the filing of NERC's brief, all interested parties (including the Office of Enforcement if it so chooses) would have the opportunity to file briefs responding to NERC's Filing;

- Within twenty (20) days of the submission of such responsive briefs, NERC would have the opportunity to submit a reply brief;

- The Commission would then, based on the record compiled, issue an order resolving all issues on a coordinated and comprehensive basis; and

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[3] NERC Filing at 5. The factual findings are summarized at pages 5-7 of the Audit Report.

[4] NERC Filing at 5.

- Within sixty (60) days thereafter, NERC would submit a compliance filing to the Commission that would be subject to notice and comment by interested parties.[5]

8. NERC maintains that the proposed procedures are appropriate because: (1) interested persons will be able to participate in the proceeding; (2) they allow the Commission to decide all issues; (3) they will facilitate a comprehensive and coordinated resolution of all issues; (4) they are consistent with paper hearings conducted by the Commission in matters not requiring a trial-type hearing; and (5) they allow the Office of Enforcement to participate as a litigant in the paper hearing if it so chooses.

2. Commission Determination

9. The Commission finds that a paper hearing in this proceeding is appropriate and adopts the paper hearing process described below. The Commission finds that the paper hearing should address the 42 audit recommendations made in the Audit Report as NERC proposed. However, the Commission disagrees with NERC on whether to address the disputed findings of fact in the paper hearing. The factual findings are more than illustrations of concerns; they are the evidentiary bases in the Audit Report for the recommendations. Therefore, addressing the recommendations in isolation of the findings would leave an incomplete record for the Commission's decision-making. As a result, the Commission finds that the paper hearing also should address the factual findings in the Audit Report that are in dispute. In its motion, NERC indicated that it disagrees with the Audit Staff's factual findings, but did not specify those findings that it disagreed with and those that it does not dispute. We will give NERC an opportunity to do so. NERC may be bound by any factual findings it does not challenge.

10. Therefore, as set forth below, the Commission adopts NERC's proposed schedule for a paper hearing, but modifies NERC's proposal to include additional steps where NERC can identify and brief the Commission on factual findings that it disputes.

a. Within fifteen (15) days of the date of this order, NERC shall submit a filing to the Commission that identifies the factual findings that NERC disputes;

b. Within thirty (30) days of that submission, NERC shall file a brief that addresses all 42 recommendations in the Final Audit Report, as well as the disputed factual findings, on a comprehensive basis and provides support for any challenges to the disputed factual findings and for any proposed modifications to the recommendations;

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[5] NERC Filing at 3.

c. Within thirty (30) days of the filing of NERC's brief, all interested entities (including the non-decisional staff of the Office of Enforcement) may file briefs responding to NERC's brief;

d. Within twenty (20) days of the submission of such responsive briefs, NERC may file a reply brief;

e. The Commission would then, based on the record compiled, issue an order resolving all issues on a coordinated and comprehensive basis; and

f. Within sixty (60) days thereafter, NERC would submit a compliance filing to the Commission.[6]

11. Regarding the motions to intervene or otherwise participate, we will not grant the entities intervenor status in this proceeding. However, as set forth in the schedule adopted above, all interested entities may file briefs responding to NERC's initial brief.

B. Separation of Functions

1. Filing

12. NERC maintains that, if the Office of Enforcement chooses to participate in the paper hearing process, "a separation of functions should be created to ensure that the Office of Enforcement does not function as both litigant and judge in the case."[7] In support of this argument, NERC states that the Commission walled-off employees in one other enforcement proceeding involving the imposition of civil penalties.[8]

2. Commission Determination

13. The Commission has held that Rule 2202 of the Commission's regulations requires a separation of functions in limited circumstances. Rule 2202 states:

> In any proceeding in which a Commission adjudication is made after hearing, or in any proceeding arising from an

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[6] The Commission agrees with NERC's proposal that this compliance filing would replace the "compliance and implementation of recommendations" provision set forth in the Audit Report at page 12. NERC Filing at 3, n.2.

[7] *Id.* at 6.

[8] *Id.*

> investigation under part 1b of this chapter beginning from the time the Commission initiates a proceeding governed by part 385 of this chapter, no officer, employee, or agent assigned to work upon the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.[9]

14. The Commission has held that Rule 2202 requires a separation where the Commission convenes a trial-type evidentiary hearing. For example, in the Statement of Administrative Policy on Separations of Functions (Policy Statement), the Commission stated that the applicability of Rule 2202 "assumes a trial-type evidentiary hearing."[10] In the Policy Statement, the Commission explained that "Rule 2202 in particular governs discussions between a litigator and other members of the Commission's staff. As provided there, the litigator must separate his function from other functions once a matter is set for trial-type evidentiary hearing. In effect, until that time, the 'litigator,' i.e., typically a staff member in [the Office of Administrative Litigation], would not be serving a litigation function."[11] In this case, the Commission is not convening a trial-type evidentiary hearing before an ALJ, but instead is convening a paper hearing. As a result, separation of functions is not required under Rule 2202.

15. Our application of Rule 2202 to cases involving trial-type evidentiary hearings, is consistent with our obligations under section 554(d)(2) of the Administrative Procedure Act (APA). The Commission has explained that, "[a]s a practical matter, the Commission has implemented APA § 554's mandate in Rule 2202 by separating staff into advisory and trial staff once a filing, complaint or investigation has been set for a trial-type evidentiary hearing before an ALJ."[12] Thus, the Commission is not required in this instance to create a separation of functions to wall off Office of Enforcement staff.

16. Under the specific factual circumstances of this matter, we will exercise our discretion in this case to extend greater protections beyond what is required under the APA and our regulations. With respect to this case, effective as of the date of this order, the Commission will make certain employees non-decisional. The non-decisional

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[9] 18 C.F.R. § 385.2202 (2011).

[10] *Statement of Administrative Policy on Separations of Functions*, 101 FERC ¶ 61,340, at P 26 (2002).

[11] *Id.* P 19.

[12] *Id.* P 12.

employees will participate in the paper hearing and will not serve in an advisory role to the Commission and its staff with regard to this matter. A notice will be issued in this docket designating, with certain exceptions, the staff of the Office of Enforcement as non-decisional in deliberations by the Commission in this docket. Pursuant to 18 C.F.R. § 385.2202 (2011), non-decisional staff will not serve as advisors to the Commission or take part in the Commission's review of any offer of settlement should one occur. Likewise, as non-decisional staff, pursuant to 18 C.F.R. § 385.2201 (2011), they are prohibited from communicating with advisory staff concerning any deliberations in this docket.

The Commission orders:

(A) The Commission hereby adopts NERC's proposed schedule for a paper hearing with modifications, as discussed in this order.

(B) The Commission hereby creates a separation of functions among staff for this proceeding, as discussed in this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.