

153 FERC ¶ 61,135
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

North American Electric Reliability Corporation

Docket No. RR15-12-000

ORDER CONDITIONALLY APPROVING REVISED *PRO FORMA* DELEGATION
AGREEMENT AND REVISED DELEGATION AGREEMENTS WITH REGIONAL
ENTITIES

(Issued November 2, 2015)

1. On June 26, 2015, North American Electric Reliability Corporation (NERC) petitioned the Commission to approve: (i) a revised *Pro Forma* Delegation Agreement; and (ii) revised Delegation Agreements between NERC and each of the eight Regional Entities.¹ The currently effective Delegation Agreements between NERC and each Regional Entity will expire on December 31, 2015; NERC proposes that the revised Delegation Agreements become effective January 1, 2016.
2. In this order, we conditionally approve the agreements in NERC's petition, to become effective January 1, 2016. As discussed below, the Commission directs NERC to modify the revised *Pro Forma* Delegation Agreement and revised Delegation Agreements and submit a compliance filing to address those modifications within 120 days of the date of this order.

¹ The eight Regional Entities are: Florida Reliability Coordinating Council (FRCC); Midwest Reliability Organization (MRO); Northeast Power Coordinating Council, Inc. (NPCC); ReliabilityFirst Corporation (RFC); SERC Reliability Corporation (SERC); Southwest Power Pool, Inc. (SPP RE); Texas Reliability Entity (Texas RE); and Western Electricity Coordinating Council (WECC).

I. Background

3. On February 3, 2006, the Commission issued Order No. 672² to implement the requirements of section 215 of the Federal Power Act (FPA) governing electric reliability.³ In July 2006, the Commission, pursuant to section 215 of the FPA, certified NERC as the Electric Reliability Organization (ERO).⁴ The Commission conditionally accepted NERC's proposal to delegate certain ERO functions to its designated Regional Entities. In addition, the Commission conditionally accepted NERC's proposed *Pro Forma* Delegation Agreement, including the NERC *Pro Forma* Compliance Monitoring and Enforcement Program (CMEP) and CMEP Hearing Procedures.

4. In April 2007, NERC entered into separate Delegation Agreements with eight Regional Entities, through which NERC delegated certain ERO functions. Consistent with Order No. 672, NERC delegated authority to the Regional Entities to audit, investigate, and otherwise ensure that users, owners, and operators of the Bulk-Power System comply with NERC's mandatory Reliability Standards, subject to ERO oversight.⁵ Further, the Delegation Agreements addressed: (i) regional Reliability Standards development; (ii) registration of entities that must comply with Reliability Standards; and (iii) other services supporting NERC's functions, including reliability assessments, event analysis, and training and education. The Commission accepted the Delegation Agreements.⁶

² *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

³ 16 U.S.C. § 824o (2012).

⁴ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

⁵ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 654.

⁶ *See North American Electric Reliability Corp.*, 119 FERC ¶ 61,232 (2007) (accepting executed delegation agreements); *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007).

5. On June 9, 2010, as supplemented on June 17, 2010, NERC filed a petition for the Commission to approve revisions to NERC's Rules of Procedure, the *Pro Forma* Delegation Agreement, Delegation Agreements between NERC and the eight Regional Entities, and bylaws of FRCC and MRO. On October 21, 2010, the Commission conditionally approved NERC's petition and directed NERC to submit a compliance filing containing revisions to the NERC Rules of Procedure, NERC's *Pro Forma* Delegation Agreement, Delegation Agreements between NERC and the eight Regional Entities, and bylaws of FRCC and MRO.⁷ NERC submitted a compliance filing, and the Commission accepted the compliance filing on October 7, 2011.⁸

II. NERC Filing

6. In its June 26, 2015 petition, NERC proposes revisions to the *Pro Forma* Delegation Agreement and its attachments and the Delegation Agreements with the eight Regional Entities. NERC requests that the Commission approve its proposals effective January 1, 2016.

7. NERC proposes revisions to the following sections of the *Pro Forma* Delegation Agreement: (i) Definitions (Section 1); (ii) Representations (Section 2); (iii) General Covenants (Section 3); (iv) Development and Proposal of Reliability Standards (Section 5); (v) Enforcement of Compliance with Reliability Standards (Section 6); (vi) Delegation-Related Activities (Section 7); (vii) Oversight of Performance of Delegated Functions and Related Activities (Section 8); (viii) Funding (Section 9); (ix) Term and Termination (Section 12); (x) Confidentiality (Section 15); (xi) Exhibit B – Governance; and (xii) Exhibit C – Regional Standard Development Procedure; and (xiii) Exhibit D – Compliance Monitoring and Enforcement Program.

8. NERC's proposed revisions to the Delegation Agreements with the eight Regional Entities are generally limited to conforming the Delegation Agreements to the language contained in the revised *Pro Forma* Delegation Agreement. Each proposed Delegation Agreement, however, contains deviations from the revised *Pro Forma* Delegation Agreement.

⁷ *North American Electric Reliability Corp.*, 133 FERC ¶ 61,061 (2010), *reh'g denied*, 134 FERC ¶ 61,179 (2011) (2010 Delegation Agreement Order).

⁸ *North American Electric Reliability Corp.*, 137 FERC ¶ 61,028 (2011). The Commission has accepted further modifications to some Delegation Agreements since October 7, 2011.

III. Notice and Responsive Pleadings

9. Notice of NERC's filing was published in the *Federal Register*, 80 Fed. Reg. 38,187, 38,188 (2015), with interventions and protests due on or before July 27, 2015. Motions to intervene were timely filed by Idaho Power Company, Avista Corporation, Portland General Electric Company, California Department of Water Resources, Tri-State Generation and Transmission Association, Inc., and Puget Sound Energy, Inc. Joint comments were filed by Avista Corporation, Idaho Power Company, Portland General Electric Company, Puget Sound Energy, Inc., and Tri-State Generation and Transmission Association, Inc. (Joint Commenters). Motions to intervene and comments were timely filed by the American Public Power Association and the Transmission Access Policy Study Group (jointly, APPA and TAPS), and Public Utility District No. 1 of Snohomish County, Washington (Snohomish). A motion to intervene and protest was timely filed by the Large Public Power Council (LPPC).

10. NERC submitted a motion for leave to answer and an answer on August 10, 2015. On August 14, 2015, the Western Interconnection Regional Advisory Body (WIRAB) submitted advice to the Commission pursuant to section 215(j) of the FPA.⁹ Joint Commenters and Snohomish moved for leave to answer NERC's answer and filed answers on August 21, 2015.

IV. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or an answer, unless otherwise ordered by the decisional authority. We will accept the answers filed because they provide information that assisted us in our decision-making process.

V. Discussion

13. Except as otherwise indicated below, we approve NERC's proposed *Pro Forma* Delegation Agreement and the revised Delegation Agreements between NERC and each of the eight Regional Entities. As indicated by NERC, the revised *Pro Forma* Delegation Agreement and revised Delegation Agreements between NERC and each of the eight Regional Entities are the product of negotiations between NERC and the Regional

⁹ 16 U.S.C. § 824o(j) (2012).

Entities, reflecting lessons learned from their experience operating under section 215 of the FPA and the prior Delegation Agreements.¹⁰

A. Delegation-Related Activities (Section 7)

1. NERC Filing

14. NERC proposes to revise section 7, “Delegation-Related Activities,” of the *Pro Forma* Delegation Agreement as follows:

NERC will engage [Regional Entity] on its behalf to carry out certain of its activities that in furtherance of Bulk-Power System reliability and NERC’s responsibilities as the ERO under the Act or in support of the Delegated Authority, as specified in the NERC Rules of Procedure and listed ~~on~~in Exhibit E. NERC may from time to time develop policies or procedures, which shall be used by [Regional Entity] in the performance of the delegation-related activities. These delegation-related activities shall include, but are not limited to, those described in subsection (a) through (fg), each of which shall be considered a statutory activity.¹¹

Section 7 of the *Pro Forma* Delegation Agreement identifies the following delegation-related activities: (a) Certification of Bulk-Power System Entities; (b) Registration of owners, operators, and users of the Bulk-Power System; (c) Reliability Assessment and Performance Analysis; (d) Event Analysis and Reliability Improvement; (e) Training and Education; (f) Situation Awareness; and (g) Critical Infrastructure Security. Section 7 contains only minor revisions from the currently-effective *Pro Forma* Delegation Agreement; namely, separating Situation Awareness and Critical Infrastructure Security into two separate categories, and inserting new language underlined above indicating that NERC may from time to time develop policies and procedures related to certain topics.

15. NERC states that during its stakeholder comment period, stakeholders requested that NERC distinguish in the *Pro Forma* Delegation Agreement “between statutory delegated authority to NERC under Section 215 of the FPA and delegation-related

¹⁰ NERC Petition, Attachment 2 Redline – Revised *Pro Forma* Regional Delegation Agreement, Preamble.

¹¹ NERC Petition, Attachment 2 Redline – Revised *Pro Forma* Regional Delegation Agreement, Section 7.

activities performed by the Regional Entities.”¹² NERC states that stakeholders also contended that the scope of responsibilities assumed by NERC, and further delegated to the Regional Entities in the Delegation Agreements, extends beyond that contemplated in section 215 of the FPA. NERC states that the scope of NERC’s statutory authority under section 215 of the FPA has been previously litigated before the Commission and resolved in the proceedings resulting in the Statutory Criteria Order.¹³

16. NERC states that the definition of “Delegated Authority” in the revised *Pro Forma* Delegation Agreement is not substantively changed from the current Commission-approved *Pro Forma* Delegation Agreement, encompasses authority to propose and enforce Reliability Standards as expressly provided to the ERO in section 215 of the FPA, and provides the Regional Entity authority to “undertake related activities set forth in this Agreement in furtherance of these delegated functions in accordance with the [FPA], the ERO Regulations and this Agreement.”¹⁴ NERC states that the Commission concluded in the Statutory Criteria Order that section 215 of the FPA allows “necessary or appropriate” activities in furtherance of the functions specified in section 215.¹⁵ NERC asserts that it believes that all of the “related activities . . . in furtherance of these delegated functions” set forth in the revised *Pro Forma* Delegation Agreement fall within the Commission-approved section 215 written criteria.¹⁶ Further, NERC contends, the revised *Pro Forma* Delegation Agreement does not expand the delegated functions beyond the scope of the delegated functions provided for in the currently effective *Pro Forma* Delegation Agreement, which the Commission approved in the 2010 Delegation Agreement Order.

2. Comments

17. Several commenters raise concern regarding NERC’s authority to delegate certain activities to a Regional Entity. Joint Commenters note that section 215 of the FPA and the Commission’s regulations state that NERC may delegate authority to a Regional Entity for two discrete functions, i.e., proposing Reliability Standards to the ERO and

¹² NERC Petition at 10.

¹³ *Id.* at 10 (citing *North American Electric Reliability Corp.*, 143 FERC ¶ 61,052 (2013) (Statutory Criteria Order)).

¹⁴ *Id.* (citing section 1(c) of the *Pro Forma* Delegation Agreement).

¹⁵ *Id.* at 11 (citing Statutory Criteria Order, 143 FERC ¶ 61,052 at P 31).

¹⁶ *Id.*

enforcing Reliability Standards. Joint Commenters add that section 215 of the FPA requires NERC to conduct periodic assessments of the reliability and adequacy of the Bulk-Power System; section 215 does not authorize NERC to delegate this function to Regional Entities. Further, Joint Commenters state that section 215 of the FPA provides for NERC to allocate charges among end users for all activities under section 215.

18. Joint Commenters state that WECC's performance of activities falling outside of section 215 of the FPA cannot be funded through statutory funding. Pointing only to information not in the record of the instant proceeding, Joint Commenters allege that WECC engages in planning services, transmission expansion planning, the Western Renewable Energy Generation Information System (WREGIS), and other programs that are neither statutory functions nor appropriate to further WECC's performance of any statutory function.¹⁷ Joint Commenters note that the only program WECC claims is non-statutory is WREGIS. Joint Commenters contend that WECC relies on an overly broad grant of authority in its current Delegation Agreement with NERC to justify funding its activities.¹⁸

19. Joint Commenters state that the proposed Delegation Agreement with WECC purports to delegate to WECC activities that are neither delegable under section 215 nor statutory functions at all. Specifically, Joint Commenters note that section 7 of the Delegation Agreement with WECC provides that WECC may "carry out certain of its activities that are in furtherance of Bulk-Power System reliability and NERC's responsibilities as the ERO . . . in support of the Delegated Authority, as specified in the NERC Rules of Procedure and listed on Exhibit E" and that each of those activities "shall be considered a statutory activity[.]"¹⁹ Joint Commenters argue that section 7 lists activities that go, or are subject to interpretations that go, beyond the functions that may be delegated to Regional Entities. Joint Commenters argue that to the extent section 7 may include activities that are delegable to WECC under section 215 of the FPA, it is duplicative of the authorizations provided for in sections 4, 5, and 6 of the proposed Delegation Agreement with WECC. Thus, Joint Commenters argue that section 7 of the proposed Delegation Agreement with WECC should be rejected in its entirety.

¹⁷ Joint Commenters Comments at 5-6.

¹⁸ *Id.* at 7 (citing WECC Response to Stakeholder Comments – 2016 Draft Business Plan and Budget [June 5, 2015] at 3).

¹⁹ *Id.* at 8 (citing WECC Delegation Agreement at 9).

20. However, Joint Commenters also state that “even assuming without conceding that the Section 7 Activities are within the scope of functions that may be delegated to Regional Entities, including WECC, Section 7 of the Delegation Agreement with WECC does not provide sufficient definition of those Section 7 Activities.”²⁰ Joint Commenters argue that the section 7 language – providing that delegation-related activities “shall include, but are not limited to, those described in subsections (a) through (g), each of which shall be considered a statutory activity” – creates an opportunity to expand the scope of the proposed Delegation Agreement with WECC without oversight or Commission review and approval.²¹ Joint Commenters conclude that, at a minimum, NERC and WECC should be required to clearly articulate the activities to be performed, and funded, as statutory activities pursuant to section 215 of the FPA.

21. LPPC raises a concern with the open-ended nature of the list of activities in section 7 (i.e., “these delegation-related activities shall include, but are not limited to”). LPPC states that “although it does not quarrel with the list of activities NERC provides [in section 7 of the revised *Pro Forma* Delegation Agreement], it must either be an exclusionary list or affirmatively restricted to NERC’s statutory responsibilities and those that may be delegated under the statute.”²²

22. LPPC notes that its members expressed concern that certain Regional Entities may propose being involved in regional planning activities and in the administration of energy markets. LPPC states that it understands Regional Entities may undertake responsibilities independent of the delegated functions, but contends it must be clear these functions are independent of the ERO and not eligible for funding pursuant to section 215 of the FPA.²³

23. LPPC concludes that its concern is that the proposed *Pro Forma* Delegation Agreement fails to express NERC’s intention to restrict the Regional Entities to statutorily authorized activities. LPPC suggests that the Commission issue an order

²⁰ *Id.* at 16.

²¹ *Id.* at 16. The language cited by Joint Commenters is identical to that in the *Pro Forma* Delegation Agreement quoted above at P 14.

²² LPPC Comments at 3.

²³ *Id.* at 4.

ensuring that delegation may not exceed the scope of activity contemplated under the statute.²⁴

24. Snohomish contends that the proposed *Pro Forma* Delegation Agreement should make clear that delegation-related activities described in sections 5, 6, and 7 do not include administration of transmission planning activities (e.g., a regional transmission planning process under Order No. 1000),²⁵ or commercial activities (e.g., an energy market), as Snohomish argues that these activities are beyond the scope of section 215 of the FPA.²⁶ Snohomish contends that these exclusions will clarify the funding mechanisms that should be used at a time when Regional Entities are increasingly being asked to perform more activities. Snohomish states, for example, that entities in the WECC footprint have suggested that WECC take a larger role in the development of energy markets in the Western Interconnection, while others have suggested that WECC undertake transmission planning obligations under Order No. 1000. Snohomish notes that it is not aware of any Commission-regulated energy market that is statutorily funded, and that allowing a Regional Entity to use statutory funding to administer an energy market would be inconsistent with how other energy markets are funded.

25. Snohomish states that, under the proposed *Pro Forma* Delegation Agreement, such activities are not explicitly excluded unless an individual Regional Entity lists them as non-statutory activities in Exhibit E of its Delegation Agreement.²⁷ As an example, Snohomish notes that Exhibit E of the proposed Delegation Agreement with NPCC states that NPCC does not conduct resource or transmission planning. Snohomish requests that, rather than allowing a Regional Entity and NERC to decide whether administering transmission planning or commercial activities is non-statutory, the Commission direct NERC to explicitly state so in the revised *Pro Forma* Delegation Agreement.

²⁴ *Id.* at 5.

²⁵ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (Order No. 1000).

²⁶ Snohomish Comments at 1, 3.

²⁷ *Id.* at 3.

3. Answers and Replies

26. NERC responds that it is unnecessary and unduly restrictive to require an exhaustive, all-inclusive list of activities that may or may not be eligible for statutory funding in the revised *Pro Forma* Delegation Agreement. NERC states that the annual business plan and budget process provides an opportunity for the Commission to review each Regional Entity's proposed activities and related costs and determine whether they are eligible and appropriate for funding under section 215 of the FPA. WIRAB concurs with these statements and requests the Commission approve the proposed *Pro Forma* Delegation Agreement and Delegation Agreement with WECC as filed, as WIRAB states this approval would be consistent with section 215 of the FPA and prior Commission orders.²⁸

27. NERC contends that the delegation-related activities listed in section 7 of the proposed *Pro Forma* Delegation Agreement are all activities that fall within NERC's Commission-approved criteria for statutory funding.²⁹ NERC notes that the language in section 7, providing that the delegation-related activities "are not limited to" the list in that section, appears in all eight Delegation Agreements and was approved by the Commission in earlier versions of the Delegation Agreements. NERC adds that it, or the Regional Entities, cannot use section 7 to unilaterally expand the list of activities that a Regional Entity can perform and be funded under section 215 of the FPA because such activities must be submitted and approved through the annual business plan and budget process.³⁰ Thus, NERC argues it is unnecessary to include an exclusive list of delegation-related activities in the *Pro Forma* Delegation Agreement.

28. NERC notes that some commenters' concerns appear to arise from discussions regarding WECC's potential involvement in Order No. 1000-related activities, and argues that these issues should be treated as outside the scope of this proceeding. NERC notes that neither LPPC's nor Snohomish's comments reference any proposal from WECC.

29. NERC states that confirmed non-statutory activities are described in Exhibit E of individual Delegation Agreements, to ensure that such activities do not compromise the Regional Entity's oversight role or independence.

²⁸ WIRAB Advice at 1.

²⁹ NERC Answer at 5.

³⁰ *Id.*

30. Joint Commenters assert in their reply that the Commission should ensure that WECC's statutorily-funded activities are not impermissible expansions of the functions that are properly delegated to WECC. Specifically, Joint Commenters state, the Commission's review should ensure that the Delegation Agreement with WECC is properly tailored to provide clear guidance to allow the Commission, NERC, and the industry to readily identify what should be funded under section 215 of the FPA and what should not. Joint Commenters add that, while the annual business plan and budget process should independently ensure that only those functions that are properly delegated to a Regional Entity are included in WECC's statutory budget, that review does not eliminate the need for the Commission to ensure that the Delegation Agreement with WECC complies with section 215 of the FPA. Joint Commenters note that WECC provides on its website written criteria for determining whether an activity is eligible to be funded under section 215 of the FPA, which include any activity necessary or appropriate for compliance with the Delegation Agreement with WECC. Thus, Joint Commenters request the Commission reject the Delegation Agreement with WECC or at least the non-conforming parts thereof.

31. Snohomish argues that the annual business plan and budget process is not the appropriate place to deal with funding issues under section 215 of the FPA, as a Regional Entity's ability to statutorily fund an activity stems from its authority under its Delegation Agreement. Snohomish contends that if a Delegation Agreement can be read to allow the Regional Entity to engage in an activity, then it would follow that the activity would qualify for statutory funding. Thus, Snohomish states that challenges to fundamental statutory funding issues must be addressed in the instant proceeding.³¹

32. Snohomish notes that NERC does not object to LPPC's request that the *Pro Forma* Delegation Agreement be modified to specify that delegation is limited to NERC's statutory functions.

4. Commission Determination

33. We find that the categories of delegation-related activities set forth in section 7 of the proposed Delegation Agreements are just and reasonable and that delegation of these activities to a Regional Entity by NERC is consistent with Commission precedent. The Commission previously addressed in various contexts both the scope of statutory activities under section 215 of the FPA for funding purposes, as well as activities that are subject to delegation to a Regional Entity. In an October 2006 order approving the NERC and Regional Entity 2007 annual business plans and budgets, the Commission stated that "Regional Entities are entitled to receive funding under section 215 of the FPA

³¹ Snohomish Answer at 2.

for functions covered by section 215 . . . , such as the development of Reliability Standards and their enforcement, and monitoring the reliability of the [B]ulk-[P]ower [S]ystem.”³² In the 2007 Budget Order, the Commission also approved the Regional Entity budget categories, which are consistent with the NERC categories and the activities delegated to the Regional Entities in the current and proposed *Pro Forma* Delegation Agreement.³³ The Commission also concluded in the 2007 Budget Order that activities that are found to be statutory under section 215 of the FPA for NERC are statutory activities for the Regional Entities.³⁴

34. Additionally, in the 2010 Delegation Agreement Order, the Commission approved NERC’s revised *Pro Forma* Delegation Agreement, which expanded the description of section 7, “Delegation-Related Activities,” to its current form, including the list of delegated activities, as well as the “but are not limited to” phrase to which LPPC and Joint Commenters now object.³⁵ While the Commission conditionally approved the so-revised (and now-current) *Pro Forma* Delegation Agreement, no stakeholders provided

³² *North American Electric Reliability Corp.*, 117 FERC ¶ 61,091, at P 31 (2006), *order on reh*, 118 FERC ¶ 61,111, *order on reh’g*, 119 FERC ¶ 61,059 (2007) (2007 Budget Order); *see also* ERO Certification Order, 116 FERC ¶ 61,062 at P 185 (stating that the NERC budget proceeding is the appropriate forum to address issues of whether

certain activities identified in the Delegation Agreements are within the scope of section 215 of the FPA).

³³ 2007 Budget Order, 117 FERC ¶ 61,091 at P 32.

³⁴ 2007 Budget Order, 117 FERC ¶ 61,091 at P 38. The Commission stated:

NERC has proposed that funded statutory activities be consistent as between the ERO and each Regional Entity. We support NERC’s proposal in this regard NERC’s proposed activities are the same that we find to be within the ambit of FPA section 215 and thus entitled to receive funding pursuant to section 215 of the FPA for the ERO and should be statutory in the context of the Regional Entities. We see no reason why they would differ on a regional basis.

Id.

³⁵ *See* 2010 Delegation Agreement Order, 133 FERC ¶ 61,061.

comments regarding the section 7 delegation-related activities and no modifications to section 7 were required.

35. In the Statutory Criteria Order, the Commission explained:

The proposed criteria identify categories of activities that are eligible for funding pursuant to FPA section 215. While we approve NERC's proposed criteria with modifications, our determination does not mean that the Commission must accept future NERC business plans and budgets that are based on the application of NERC's proposed criteria. Instead, as in past budget cycles, *the Commission's determination regarding the appropriateness of NERC's activities and funding request will be made in the annual NERC business plan and budget proceedings.*³⁶

36. We find that the categories of delegation-related activities set forth in section 7 of the proposed *Pro Forma* Delegation Agreement and in the eight proposed Delegation Agreements are just and reasonable, and delegation of these activities by NERC to a specific Regional Entity, such as WECC, is consistent with Commission precedent. Furthermore, we find that concerns regarding statutory funding of specific activities within these categories are more appropriately addressed in NERC's annual business plan and budget proceedings. This approach is consistent with prior Commission orders.³⁷

37. Additionally, we do not find it reasonable to require NERC to list specific activities that are not delegable in the *Pro Forma* Delegation Agreement. Instead, we find it appropriate that the Delegation Agreements provide the types of activities that are delegable to Regional Entities and that the annual business plan and budget filings provide an opportunity to review specific programs and activities that each Regional Entity proposes under those categories of delegated activities. Further, we note that commenters express concern regarding Regional Entities' potential involvement in regional planning activities under Order No. 1000 and in the administration of energy markets. However, commenters in this proceeding do not provide any specific example or evidence of a Regional Entity currently undertaking activities that might fall outside

³⁶ Statutory Criteria Order, 143 FERC ¶ 61,052 at P 28 (footnotes omitted) (emphasis added).

³⁷ We note that Joint Commenters and Snohomish filed similar pleadings in the 2016 annual business plan and budget proceeding in Docket No. RR15-16-000.

the scope of section 215 of the FPA. Rather, commenters discuss activities that Regional Entities, in particular WECC, have been asked to perform or may perform in the future.

38. With regard to the specific activities commenters raised, such as transmission planning and commercial activities, we do not find it appropriate to require such broad items to be explicitly excluded from the list of delegation-related activities in the *Pro Forma* Delegation Agreement. While we agree that these activities, in general, may not fall under section 215 of the FPA, tasks related to these activities that a Regional Entity could perform for purposes of Bulk-Power System reliability may be justifiable for funding under section 215. Because such specific tasks, let alone any proposal to fund them, are not before us here, we defer any such ruling to consideration in an annual business plan and budget filing in which a Regional Entity proposes to undertake tasks related to such activities.³⁸

B. Oversight of Performance of Delegated Functions and Related Activities (Section 8)

1. NERC Filing

39. NERC proposes to consolidate the provisions in section 8 of the *Pro Forma* Delegation Agreement regarding NERC's oversight of the Regional Entities. In connection with this consolidation, NERC proposes to remove current section 6(i), which requires NERC to audit Regional Entity CMEP activities at least every five years. NERC states that “[i]nstead, this audit requirement, pursuant to section 402.1.3 of the NERC Rules of Procedure, will be encompassed in revised section 8(f), which provides for NERC reviews of the Regional Entity's performance of all delegation-related activities, not just CMEP activities.”³⁹

³⁸ See *North American Electric Reliability Corp.*, 152 FERC ¶ 61,134, at PP 57, 58 (2015) (accepting the 2016 NERC business plan and budget).

³⁹ NERC Petition at 15. Section 402.1.3 of the NERC Rules of Procedure provides that “[a]t least once every *five years*, NERC shall conduct an audit to evaluate how each Regional Entity Compliance Monitoring and Enforcement Program implements the NERC Compliance Monitoring and Enforcement Program. . . .” (emphasis added). Section 1207 of the NERC Rules of Procedure (entitled “Regional Entity Audits”) states that “approximately every five years and more frequently if necessary for cause, NERC shall audit each Regional Entity to verify that the Regional Entity continues to comply with NERC Rules of Procedure and the obligations of NERC [D]elegation [A]greement”

40. Current section 6(i) of the *Pro Forma* Delegation Agreement states:

(i) As often as NERC deems necessary, but no less than every five years, NERC shall review [REGIONAL ENTITY]'s compliance monitoring and enforcement program to determine that: (i) the program meets all applicable legal requirements; (ii) actual practices reflect the requirements; and (iii) the program administered pursuant to the Delegated Authority promotes consistent interpretations across North America of Reliability Standards and comparable levels of sanctions and penalties for violations of Reliability Standards constituting comparable levels of threat to reliability of the Bulk-Power System.⁴⁰

41. NERC proposes revisions to sections 8(f)-(g) of the *Pro Forma* Delegation Agreement as follows:

(f) ~~Any audits~~ NERC may perform reviews of [REGIONAL ENTITY] performed by NERC shall be limited on a reasonable periodicity to an examination of determine [REGIONAL ENTITY]'s compliance with this Agreement, any policies or procedures established by NERC, NERC's Rules of Procedure, the Compliance Monitoring and Enforcement Program, Commission requirements, and directives that are in effect pursuant to Section 8(c): and to monitor the implementation of guidance and directions issued by the NERC Board of Trustees pursuant to Section 8(d). All such periodic reviews shall comply with the NERC Rules of Procedure and Commission directives.

(g) The Commission and the Commission staff shall have full access to action plans and remedial actions, directives, and directions and guidance issued pursuant to subsections (a)(iii), (c)(iv) and (d), respectively, that are maintained as non-public.⁴¹

⁴⁰ NERC Petition, Attachment 2 Redline – Revised *Pro Forma* Regional Delegation Agreement, Section 6(i).

⁴¹ NERC Petition, Attachment 2 Redline – Revised *Pro Forma* Regional Delegation Agreement, Section 8(f)-(g).

2. Comments

42. APPA and TAPS express concern regarding NERC's proposal to replace the current section 8(f) audit provisions with new language that provides for "reviews . . . on reasonable periodicity."⁴² Further, APPA and TAPS express concern with the removal of section 6(i), which currently requires NERC to review each Regional Entity's CMEP activities at least once every five years.⁴³

43. APPA and TAPS contend that the revisions in the *Pro Forma* Delegation Agreement tip the power balance away from NERC and its ability to ensure the consistent implementation of ERO authority that Congress envisioned in allowing for delegation to Regional Entities, and are contrary to the Order No. 672 language favoring a "strong" ERO.⁴⁴ Specifically, APPA and TAPS note that the Commission stated in Order No. 672 that "[t]he Commission concludes that a strong ERO . . . is the preferred model for ensuring Bulk-Power System reliability[;]" Order No. 672 "establishes that, in general, the Commission oversees the ERO and the ERO oversees any approved Regional Entity[;]" and "[t]he ERO must periodically audit each Regional Entity's compliance with relevant statutory and regulatory criteria for becoming a Regional Entity and performance in enforcing Reliability Standards and report the results to the Commission."⁴⁵ APPA and TAPS state that only with a strong ERO can the Commission achieve the consistency in implementing ERO authority it demanded in Order No. 672 and through years of implementing section 215 of the FPA.

3. Answers

44. NERC asserts that its proposed revisions to the *Pro Forma* Delegation Agreement enhance the ERO's ability to exercise oversight over the Regional Entities and streamline the ability of the ERO to issue a directive to a Regional Entity. NERC notes that the requirement for it to audit the Regional Entities has not been eliminated, and remains in NERC's Rules of Procedure at section 402.1.3. NERC observes that section 8(f) of the proposed *Pro Forma* Delegation Agreement provides that all such periodic reviews, not

⁴² APPA and TAPS Comments at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 5-6 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204 at PP 57, 654, 772).

just CMEP audits, must continue to comply with the NERC Rules of Procedure and Commission directives.

45. NERC states that the proposed *Pro Forma* Delegation Agreement reflects the ERO's current oversight and monitoring of Regional Entities, which occurs on a continuous basis and as frequently as reasonably required. Additionally, NERC notes, the proposed *Pro Forma* Delegation Agreement is updated to include additional oversight tools and areas of compliance in the form of guidance, policies, and procedures. NERC adds that the proposed *Pro Forma* Delegation Agreement strengthens NERC's authority by streamlining the directive process and eliminating the ability to appeal a proposed directive to the NERC president.⁴⁶

4. Commission Determination

46. We agree with NERC that the proposed revisions to the *Pro Forma* Delegation Agreement should enhance the ERO's ability to exercise oversight over the Regional Entities and streamline the ability of the ERO to issue a directive. However, we are also concerned that the proposed revisions to section 8(f) and elimination of section 6(i) of the *Pro Forma* Delegation Agreement remove any reference in the *Pro Forma* Delegation Agreement to NERC's obligation to "audit" the Regional Entities, specifically the audit of Regional Entities' CMEP activities at least every five years.

47. As NERC states, current section 6(i) provides for a "review" of a Regional Entity's compliance monitoring and enforcement program activities at least every five years pursuant to the audit requirement of section 402.1.3 of the NERC Rules of Procedure. Current section 8(f) is the section of the *Pro Forma* Delegation Agreement that now refers to NERC "audits" of the Regional Entities. However, unlike current section 6(i), current section 8(f) does not refer to a specific time frame by which NERC must conduct these "audits." The current reference to audits performed by NERC in section 8(f) of the *Pro Forma* Delegation Agreement and the five year requirement in current section 6(i), provide important oversight functions. The Commission is concerned that removal of the word "audits" from section 8(f) of the *Pro Forma* Delegation Agreement in favor of a statement that NERC "may" perform "reviews" with a "reasonable periodicity" could result in confusion or disagreements regarding NERC's responsibility to audit each Regional Entity at least every five years. For this reason, retaining a reference to "audits" in section 8(f) is appropriate.

⁴⁶ NERC Answer at 7.

48. However, we are also cognizant that “audits” are a type of “review” in the context of the ERO enterprise, albeit subject to applicable auditing standards and specific procedures, and NERC may wish to perform other types of reviews on a more flexible basis than a typical audit schedule.⁴⁷ Therefore, it is appropriate for NERC to perform reviews on a reasonable periodicity in addition to conducting the audits required in the NERC Rules of Procedure. Accordingly, we direct NERC to revise section 8(f) of the *Pro Forma* Delegation Agreement to insert “and audits” after “reviews” where the latter term appears in proposed section 8(f). We also direct NERC to replace the term “may” with “shall” in the first sentence of section 8(f) of the *Pro Forma* Delegation Agreement. These revisions will ensure that the *Pro Forma* Delegation Agreement accounts for the required NERC audits of Regional Entities in accordance with the NERC Rules of Procedure and provides NERC the flexibility to perform reviews it deems necessary on a reasonable periodicity.

49. We are also concerned that neither proposed section 8(f) nor section 8(g) mention Commission access to NERC “reviews” of Regional Entities to be conducted under proposed section 8(f). We believe that the Commission should have access to any NERC reviews and audits of Regional Entity compliance with the policies and procedures listed in section 8(f). In the 2010 Delegation Agreement Order, which conditionally approved the current Delegation Agreements, the Commission directed NERC to insert section 8(g) into the *Pro Forma* Delegation Agreement in order to clarify that the Commission has full access to the non-public information relating to a procedure conducted pursuant to subsections (a)(iii), (c)(iv), or (d) of section 8 of the *Pro Forma* Delegation Agreement.⁴⁸ We believe that, without modification, section 8(g) of the proposed *Pro Forma* Delegation Agreement may not grant the Commission sufficient access to NERC reviews (and audits) of the Regional Entities. Without access to that information, Commission oversight of the ERO enterprise would be limited, and the ERO would be less accountable to the public. For this reason, we direct NERC to revise section 8(g), similar to the 2010 Delegation Agreement Order, to explicitly reference the audits and reviews conducted pursuant to section 8(f) in order to grant the Commission full access to the non-public material resulting from these activities.⁴⁹

⁴⁷ See sections 402.1.3, 1207 and Appendices 4A, 4C of the NERC Rules of Procedure.

⁴⁸ 2010 Delegation Agreement Order, 133 FERC ¶ 61,061 at P 19.

⁴⁹ If NERC or a Regional Entity asserts that any responsive materials are confidential or constitute Critical Energy Infrastructure Information, the Commission and its staff will treat such materials as non-public, as set forth in sections 388.112 and 388.113 of its regulations. 18 C.F.R. §§ 388.112-.113 (2015).

C. Term and Termination (Section 12)

1. NERC Filing

50. NERC proposes to revise section 12(b) of the *Pro Forma* Delegation Agreement to provide for an initial five-year term for the Delegation Agreements ending on December 31, 2020 that automatically renews for one additional five-year term ending on December 31, 2025, unless either party provides written notice of termination no later than one year prior to the end of the initial five year term.

51. NERC states that it and the Regional Entities intend for the *Pro Forma* Delegation Agreement to serve as a streamlined, flexible, and forward-looking document that does not require substantial revisions at the expiration of each term, and that changes in the ERO enterprise's strategic plan and programmatic focus should be reflected in the NERC Rules of Procedure and in NERC policies and procedures.⁵⁰ NERC states that given this new direction and the limited changes expected for Delegation Agreements year to year, NERC and the Regional Entities propose an initial five-year term with an automatic five-year renewal for the Delegation Agreements. NERC states that this is a typical renewal provision in contracts and allows parties to seek to renegotiate provisions at the end of the five-year term by exercising the notice of termination provision one year in advance of the expiration of the term.

52. The currently effective section 12(b) of the Delegation Agreements requires that NERC shall conduct an audit pursuant to subsection 6(i) of the Delegation Agreement to ensure that the Regional Entity continues to meet all applicable statutory and regulatory requirements necessary to maintain eligibility for delegation before renewing the Delegation Agreement for another five-year term. NERC proposes to eliminate this provision. NERC states this provision is unnecessary given NERC's continuous oversight of the Regional Entities and the current sequence of completing the five-year ERO performance assessments in relation to the expiration of the end of the five-year term of the Delegation Agreement.⁵¹ NERC states that a review of the Delegation Agreement provisions and the Regional Entities' compliance with the Delegation Agreements will be a component of future ERO performance assessments.

⁵⁰ NERC Petition at 20.

⁵¹ *Id.* at 20-21.

2. Comments

53. APPA and TAPS stress the importance of close Commission scrutiny of the proposed *Pro Forma* Delegation Agreement, noting that the proposed automatic extension provision could make this the last time that the Delegation Agreements, which form the foundation for the NERC-Regional Entity relationship, are presented to the Commission for review and approval until 2025.⁵² APPA and TAPS state that ten years is a long time for a young and still evolving organization with a crucial reliability mission, and the proposed automatic renewal provision highlights the need to ensure the proposed *Pro Forma* Delegation Agreement achieves the strong ERO the Commission intends.

54. APPA and TAPS urge that the Commission make clear its expectation that NERC will exercise its authority under the proposed Delegation Agreements to ensure NERC and the Regional Entities operate in accordance with the strong ERO scheme established in Order No. 672. APPA and TAPS state that, at a minimum, the Commission should preserve its ability to review the Delegation Agreements at the end of the initial five-year term (e.g., by requiring modifications to section 12(b)).

3. Answers

55. NERC responds that the proposed automatic renewal provision does not prevent the Commission from examining the operations of the ERO and Regional Entities for a ten-year period; rather, NERC notes it has committed to its Board of Trustees to review the Delegation Agreements as part of the five-year ERO performance assessment due to be filed in July 2019.⁵³ NERC states that the review of this report will provide the Commission with the opportunity to review the Delegation Agreements.

56. NERC contends that, if the Commission identifies any opportunities for improvement of the Delegation Agreements in its order on the 2019 performance assessment, NERC and the Regional Entities will have sufficient time to issue notices to terminate the Delegation Agreements and prevent the triggering of the automatic renewal, to instead develop revised Delegation Agreements that address the Commission's directives or concerns.

⁵² APPA and TAPS Comments at 6-7.

⁵³ NERC Answer at 7.

4. Commission Determination

57. We note that NERC replaced much of the programmatic detail in previous versions of the Delegation Agreement with references to the NERC Rules of Procedure, Regional Entity Rules, and other ERO enterprise policies and procedures. Many of the streamlining revisions represent an improvement as they promote efficiency and flexibility. However, we agree with APPA and TAPS that NERC's proposed revision to section 12(b) would make it possible for ten years to elapse without a requirement that NERC and the Regional Entities present the Delegation Agreements in their entirety to the Commission for review. This is a period longer than the time between the Commission's certification of NERC as the ERO in 2006 and the present, during which substantial changes have occurred in the programs and operations of NERC and the Regional Entities.

58. The proposed revisions to the *Pro Forma* Delegation Agreement may be less extensive than previous revisions, as NERC maintains; however, we believe that the revisions are significant and reflect how the relationship between NERC and the Regional Entities has developed over the last five years. We have no reason to expect that the changes over the next five years will be any less significant. For example, NERC has recently launched initiatives, such as the implementation of the risk-based CMEP and the risk-based registration program, which may result in significant and potentially unforeseeable organizational or operational changes over the next five to ten years. NERC, the Regional Entities, or the Commission may find that further revisions to the Delegation Agreements are needed to account for or address these changes.

59. Given the current revisions and the history of revisions that NERC has proposed to the Delegation Agreements, we direct NERC to modify the *Pro Forma* Delegation Agreement and specific Delegation Agreements with each Regional Entity by removing the automatic renewal provisions, such that the Delegation Agreements are subject to our re-evaluation and re-approval following the initial term, scheduled to end on December 31, 2020. This re-evaluation and re-approval will provide the Commission, NERC, and the Regional Entities with an opportunity to consider whether and, if so, what revisions to these agreements may be appropriate in light of developments during the five-year term, including the results of the Commission's evaluation of the ERO's five-year performance assessment to be filed in 2019.

60. NERC is required to evaluate the effectiveness of each Regional Entity's performance of its delegated functions and provide recommendations for improvement as part of its five-year assessments.⁵⁴ We agree with NERC that part of this evaluation

⁵⁴ 18 C.F.R. § 39.3(c)(1)(iii) (2015).

should include a review of the Delegation Agreements and the Regional Entities' compliance with the Delegation Agreements. However, we do not believe that the Commission's review of the five-year assessment should replace the formal review of the *Pro Forma* Delegation Agreements and the Delegation Agreements with the Regional Entities. The Commission's orders on the performance assessments provide an opportunity to direct NERC to address operational challenges and identify whether those changes should include changes to the Delegation Agreements with the Regional Entities. However, in light of recent significant NERC initiatives, the continual evolution of the ERO enterprise, and the importance of the Delegation Agreements in ensuring appropriate oversight of the Regional Entities, we conclude that the Commission should continue to review the Delegation Agreements separately from the five-year assessment.

61. NERC also proposes to eliminate the audit provisions of section 12(b) of the Delegation Agreements. As discussed above in the determination regarding the section 8 audit language, we believe the audit provisions in the *Pro Forma* Delegation Agreement provide an important oversight function. Section 402.1.3 of the NERC Rules of Procedure requires NERC to audit a Regional Entity's CMEP at least every five years.⁵⁵ Pursuant to section 1207 of the NERC Rules of Procedure, "approximately every five years and more frequently if necessary for cause, NERC shall audit each Regional Entity to verify that the Regional Entity continues to comply with NERC Rules of Procedure and the obligations of NERC delegation agreement."⁵⁶ We believe the Delegation Agreements should require similar audit provisions as the NERC Rules of Procedure to ensure NERC performs the necessary audits required by the NERC Rules of Procedure. Therefore, we disagree with NERC that the audit provisions in section 12(b) are unnecessary, and we find that NERC has not sufficiently supported the deletion of the audit provisions in section 12(b).

62. Accordingly, we direct NERC to submit a compliance filing within 120 days of the date of this order, revising section 12 of the *Pro Forma* Delegation Agreement by removing the proposed automatic renewal provisions and by re-inserting the audit provisions in section 12(b) that NERC proposes to eliminate. In this filing, NERC must also replace the references in section 12(b) to audits "pursuant to subsection 6(i)" with a reference to audits "pursuant to the audit requirements of the NERC Rules of Procedure" because the Commission is approving the deletion of section 6(i) in the Delegation Agreements.

⁵⁵ See *supra* n.39.

⁵⁶ See *id.*

63. We also note that one rationale for NERC's proposed automatic renewal provision is that NERC believes the streamlined, forward-looking *Pro Forma* Delegation Agreement will require minimal or no revisions at the end of the initial five-year term. Nothing in our determination prohibits NERC from submitting to the Commission a petition to renew the Delegation Agreements and justifying why minimal or no changes are necessary.

D. Regional Entity Bylaws (Exhibit B) and Regional Standard Development Procedure (Exhibit C)

1. NERC Filing

64. NERC proposes to revise the Delegation Agreements to eliminate inclusion of the exhibits that contain the relevant Regional Entity's bylaws and regional standard development procedures. NERC states that there is an administrative efficiency benefit to eliminating copies of the bylaws and regional standard development procedures from the Delegation Agreements, because if a Regional Entity amends its bylaws or its regional standard development procedure, the amendment need only be submitted to the NERC Board and then to the Commission for approval as an amendment to a Regional Entity Rule, rather than an amendment to the Regional Entity's entire Delegation Agreement.⁵⁷

65. NERC states that revised Exhibit B of the Delegation Agreements would continue to provide criteria for bylaw provisions pertaining to corporate governance consistent with section 215(e) of the FPA, noting that section 2(a)(i) of the revised Delegation Agreements states that no other corporate governance documents will be inconsistent with these criteria. Further, NERC notes that language in section 5(a)(ii) of the revised Delegation Agreements provides that the Regional Entity's regional standard development procedure will be consistent with the NERC Rules of Procedure (e.g., Appendix 3A of the NERC Rules of Procedure, the "Standards Process Manual," which provides a comprehensive set of rules for development of standards) and Commission directives.

66. NERC explains that Regional Entity bylaws and regional standard development procedures will continue to be recognized as Regional Entity Rules under section 215(f) of the FPA and any amendments to them will require approval of the NERC Board of Trustees and the Commission. NERC also proposes to add new section 3(b) of the *Pro Forma* Delegation Agreement that specifies that a Regional Entity shall provide NERC with a copy of its Regional Entity Rules upon NERC's request.

⁵⁷ NERC Petition at 11-12 & n.30.

2. Commission Determination

67. We find it appropriate to eliminate the requirement that each Regional Entity's bylaws and regional standard development procedure be part of its Delegation Agreement. In the past, this requirement resulted in NERC filing entire Delegation Agreements with the Commission on a regular basis, often due to only a few minor changes in a Regional Entity's bylaws. We believe that separating these documents will increase efficiency and streamline the Delegation Agreements.

68. We are concerned, however, with how NERC and the Regional Entities intend to maintain the Regional Entity bylaws and regional standard development procedures if they are removed from the Delegation Agreements. NERC argues that:

The decision not to include the Regional Entity's bylaws and [Regional Reliability Standards development procedure] as exhibits to the [Delegation Agreements] does not change each Regional Entity's obligation to develop or *to maintain* these documents, as permitted by FPA 215. The Regional Entity's bylaws and [Regional Reliability Standards development procedure] remain "Regional Entity Rules" as defined in the Commission's ERO regulations; accordingly, a Regional Entity must still obtain NERC and Commission approval of changes to these documents before they take effect.⁵⁸

69. NERC also proposes to add new section 3(b) to the *Pro Forma* Delegation Agreement that states "[Regional Entity] shall provide NERC with a copy of its Regional Entity Rules upon request by NERC." Proposed section 3(b) suggests that NERC does not intend to maintain the Regional Entity bylaws and regional standard development procedures on its website as it currently does with the Delegation Agreements. Instead, section 3(b) suggests that NERC intends to let the Regional Entities maintain the documents separately and provide NERC with the documents upon request. However, we believe that providing access to each Regional Entity's bylaws and regional standard development procedures through a central, easily accessible location on NERC's website will provide important transparency benefits for the public.

70. Thus, we direct NERC to include in its compliance filing a revision to proposed section 3(b) of the Delegation Agreements to include a provision requiring NERC to maintain on its public website the currently effective versions of all of the Regional Entities' bylaws and regional standard development procedures. We also reiterate that all

⁵⁸ *Id.* at 12 (emphasis added).

Regional Entity Rules, such as the Regional Entity bylaws and regional standard development procedures, must be filed with and approved by the Commission before they become effective.

E. Enforcement of Compliance with Reliability Standards (Section 6)

1. NERC Filing

71. Section 6 of the *Pro Forma* Delegation Agreement pertains to compliance monitoring and enforcement. NERC proposes to delete sections 6(b)–(f) from the currently-effective Delegation Agreements. According to NERC, these provisions are either out-of-date or duplicative of compliance monitoring and enforcement provisions in the NERC Rules of Procedure, including Appendix 4C, the Uniform Compliance Monitoring and Enforcement Program. NERC avers that the proposed changes do not alter NERC’s authority to review and approve a Regional Entity’s disposition of noncompliance with Reliability Standards or NERC’s oversight authority. NERC states that the intent of the revisions to section 6 is to accommodate future changes in the CMEP practices and procedures without also amending the Delegation Agreements with the Regional Entities.⁵⁹

72. NERC also proposes the following new sections 6(c) and (d) in the revised *Pro Forma* Delegation Agreement:

(c) [REGIONAL ENTITY] shall report promptly to NERC information regarding noncompliance with a Reliability Standard, and its eventual disposition by [REGIONAL ENTITY], as set forth in, and subject to the confidentiality and disclosure provisions of, the NERC Rules of Procedure, the NERC Compliance Monitoring and Enforcement Program, this Agreement, compliance and enforcement program procedures and guidance that NERC may from time to time develop and the ERO Regulations. NERC shall promptly forward such report to the Commission, as required by the ERO Regulations, or as the Commission shall from time to time direct. NERC and [REGIONAL ENTITY] shall cooperate in filing such periodic summary reports and analyses as the Commission shall from time to time direct.

⁵⁹ *Id.* at 15. As discussed above, NERC also proposes to eliminate section 6(i), which requires NERC to review Regional Entity CMEP activities at least every five years.

(d) All dispositions by [REGIONAL ENTITY] of noncompliance with Reliability Standards shall be reported to NERC for review. NERC shall develop and implement policies and procedures for the review and, where appropriate, approval of dispositions of noncompliance.⁶⁰

2. Commission Determination

73. In proposed section 6(c), NERC includes the phrase, “compliance and enforcement program procedures and guidance that NERC may from time to time develop” in the list of resources for Regional Entities in reporting noncompliance with Reliability Standards and their eventual disposition. It is unclear whether NERC envisions developing procedures and guidance in addition to that contained in its Rules of Procedure, CMEP, and Delegation Agreements, all of which require filing with the Commission for approval. Nevertheless, we note that policies and procedures governing what information is reported to the Commission regarding noncompliance and when the information should be reported require Commission approval before they become effective. Thus, we direct NERC to clarify in its compliance filing, to be filed within 120 days of the date of this order, the meaning of other “guidance that NERC may from time to time develop,” and that its guidance on reporting to the Commission instances of noncompliance of Reliability Standards and their disposition must be filed with the Commission for approval before it becomes effective.

F. Confidentiality (Section 15)

1. NERC Filing

74. NERC proposes to include new section 15(c) and to revise current section 15(d) in section 15 (Confidentiality) of the *Pro Forma* Delegation Agreements as follows:

(c) The Parties may transfer or exchange such Confidential Information with and between the other Regional Entities as third-party beneficiaries of the terms of this Agreement, provided the Parties and the other Regional Entities as third-party beneficiaries continue to maintain the confidentiality of such information.

⁶⁰ NERC Petition, Attachment 2 Redline – Revised *Pro Forma* Regional Delegation Agreement, Section 6(c)–(d).

(d) Except as set forth herein and within the NERC Rules of Procedure, the Parties agree to keep in confidence and not to copy, disclose, or distribute any Confidential Information or any part thereof, without the prior written permission of the issuing Party or specified third-party beneficiary of this Agreement, unless disclosure is required by subpoena, law, or other directive of a court, administrative agency, or arbitration panel, in which event the recipient hereby agrees to provide the Party or specified third-party beneficiary of this Agreement that provided the Confidential Information with prompt notice of such request or requirement in order to enable such issuing Party or specified third-party beneficiary of this Agreement to (a) seek an appropriate protective order or other remedy, (b) consult with the recipient with respect to taking steps to resist or narrow the scope of such request or legal process, or (c) waive compliance, in whole or in part, with the terms of this Section. In the event a protective order or other remedy is not obtained or the issuing Party or specified third-party beneficiary of this Agreement waives compliance with the provisions, the recipient agrees to furnish only that portion of the Confidential Information which the recipient's counsel advises is legally required and to exercise best efforts to obtain assurance that confidential treatment will be accorded to such Confidential Information.⁶¹

75. NERC states that the revisions are intended to clarify the variety of confidential information shared among the business units of the ERO enterprise in exercising their delegated authority, as well as the handling of such information within the ERO enterprise.⁶² NERC also states the revisions eliminate the need for ERO business units to draft *ad hoc* non-disclosure agreements as part of the ERO enterprise's daily activities. NERC states that the scope of confidential information under the Delegation Agreements

⁶¹ NERC Petition, Attachment 2 Redline – Revised *Pro Forma* Regional Delegation Agreement, Section 15(c)–(d).

⁶² NERC Petition at 21.

extends beyond the categories identified in section 1501 of the NERC Rules of Procedure.⁶³

2. Commission Determination

76. We are concerned that the revisions to section 15 of the Delegation Agreements may impose an unreasonable condition on the Commission's ability to access confidential information necessary for effective regulation of the ERO and Regional Entities. As proposed, section 15 of the Delegation Agreements sets forth the provisions for sharing confidential information between NERC and the counterparty Regional Entity, as well as "specified third-party beneficiaries." Section 15(d) also requires the directed party to obtain written permission for disclosure from, or provide "prompt notice" to, the entity that issued the confidential information or a specified third-party beneficiary. Although NERC states that section 15 relates to the handling of confidential information within the ERO enterprise, section 15(d) may apply to disclosure of information sought by the Commission, as an "administrative agency," or its staff. The Delegation Agreements do not appear to contemplate the possibility that the Commission or a court may direct NERC or a Regional Entity not to notify any other entity of the required disclosure. This omission appears to conflict with section 1505.1 of the NERC Rules of Procedure, which provides:

Unless otherwise directed by FERC or its staff or the other Applicable Governmental Authority requesting the information, upon receiving such a request, a Receiving Entity shall provide contemporaneous notice to the applicable Submitting Entity. In its response to such a request, a Receiving Entity shall preserve any mark of confidentiality and shall notify FERC or other Applicable Governmental

⁶³ *Id.* at 21-22 & n.51 (NERC states that NERC Rules of Procedure section 1501 deals with Confidential Business and Market Information, Critical Energy Infrastructure Information, personal information, work papers, investigative files, including any records produced for or created in the course of an investigation, or Cyber Security Incident Information).

Authorities that the Submitting Entity has marked the information as confidential.⁶⁴

77. We are concerned that the apparent inconsistency between the proposed section 15(d) of the revised Delegation Agreements and section 1500 of the NERC Rules of Procedure may create unnecessary confusion. We believe that section 1500 of the NERC Rules of Procedure is clear and that proposed section 15(d) of the revised Delegation Agreement should not alter any obligations imposed by section 1500 of the NERC Rules of Procedure.

78. Proposed section 15(f) of the Delegation Agreements also refers to the NERC Rules of Procedure, but does not support the Commission's use of NERC Rules of Procedure section 1505.1 directives. Proposed section 15(f) states: "This confidentiality provision does not prohibit reporting and disclosure as directed by NERC, as set forth in Section 6 of this Agreement, nor does it prohibit permitted disclosures as set forth in the NERC Rules of Procedure." The "permitted disclosures" set forth in NERC Rules of Procedure section 1505 include disclosures to the Commission by NERC of information it receives from a Regional Entity and by NERC or a Regional Entity of information received from a Regional Entity or a user, owner or operator of the Bulk-Power System. While stating that the confidentiality provisions of the Delegation Agreement does not "prohibit" these disclosures, sections 15(d) and 15(f) together could permit NERC or an Regional Entity to *condition* such disclosures by disabling the authority of the Commission to issue a NERC Rules of Procedure section 1505.1 directive.

79. Thus, we direct NERC to submit a compliance filing within 120 days of the date of this order to include language in section 15 of the Delegation Agreements stating that the provisions of section 1500 of the NERC Rules of Procedure control when a conflict between it and the Delegation Agreements may arise.

The Commission orders:

(A) NERC's revised *Pro Forma* Delegation Agreement and revised Delegation Agreements with the eight Regional Entities are hereby conditionally approved, as discussed in the body of this order.

⁶⁴ Section 1505.1 of the NERC Rules of Procedure (emphasis added). We also note that because NERC states that the phrase "Confidential Information" used in section 15 of the Delegation Agreements is broader than the definition of the same term in section 1501.1 of the Rules of Procedure, NERC or a Regional Entity could seek to condition its provision of broader categories of information to the Commission under section 15 than contemplated under the Rules of Procedure.

(B) NERC is hereby directed to submit a compliance filing within 120 days of the date of this order to revise the *Pro Forma* Delegation Agreement, as discussed in the body of this order.

(C) NERC shall include in its compliance filing, to be submitted within 120 days of the date of this order, revised individual Delegation Agreements with each Regional Entity reflecting the changes to the *Pro Forma* Delegation Agreement directed herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.