

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Jon Wellinghoff.

North American Electric Reliability Corp.

Docket Nos. RR06-1-001
RR06-1-002

ORDER ON PETITIONS FOR REHEARING AND CLARIFICATION;
ORDER ON COMPLIANCE FILING

(Issued October 30, 2006)

1. Electricity Consumers Resource Council (ELCON), Alcoa, Inc. (Alcoa), the Transmission Access Policy Study Group (TAPS), and the ISO/RTO Council request rehearing and/or clarification of the Commission's July 20, 2006 Order¹ certifying the North American Electric Reliability Corporation (NERC) as the Electric Reliability Organization (ERO) for the United States under section 215 of the Federal Power Act (FPA).² In that order, we concluded that NERC generally satisfies the criteria to become the ERO responsible for developing and enforcing mandatory Reliability Standards for the United States pursuant to Order No. 672³ and directed NERC to provide additional information and make specific revisions to its Rules, including its Bylaws.⁴

¹ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006) (*Certification Order*).

² The Energy Policy Act of 2005, Pub. L. No. 109-58, Title XII, Subtitle A, § 1211(a), 119 Stat. 594, 941 (2005) to be codified at 16 U.S.C. 824o (2000).

³ *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006), order on *reh'*g, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁴ *Certification Order* at P 3. October 18, 2006 is the 90 day deadline for the compliance filing; however, the Commission permitted NERC to request a reasonable extension of time to file specific elements of its compliance filing. *Id.* at n.2.

2. On September 18, 2006, NERC submitted a filing in partial compliance with our *Certification Order* (September 18 Filing). NERC's September 18 Filing addresses the Commission's directives concerning governance and balanced decisionmaking. NERC requests expedited action on its September 18 Filing so that the revised Bylaws may be approved by NERC's Board of Trustees at the November 1, 2006 board meeting.

3. The Commission is addressing in this order both the petitions for rehearing and clarification of the *Certification Order*, as well as NERC's September 18 Filing. In this order, we largely deny rehearing and accept NERC's compliance filing.

I. Background

4. On August 8, 2005, the Energy Policy Act of 2005 (EPAAct) was enacted into law. EPAAct added section 215 to the FPA.⁵ On February 3, 2006, the Commission issued Order No. 672 to implement the requirements of section 215 of the FPA. Order No. 672 sets forth the process for certifying a single independent ERO, which will be responsible for proposing and enforcing mandatory Reliability Standards subject to the Commission's review and oversight.⁶

5. On April 4, 2006, NERC filed its application to become the ERO, including a comprehensive set of documents defining the structure, governance, and operational procedures of the ERO, which was accepted, subject to compliance, in the *Certification Order*.

II. Procedural Matters

6. ELCON, Alcoa, TAPS and the ISO/RTO Council filed timely requests for rehearing or clarification of the *Certification Order*. On September 5, 2006, the ISO/RTO Council submitted an answer to ELCON's request. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), prohibits answers to requests for rehearing. Accordingly, we will reject the ISO/RTO Council's answer.

7. Notice of NERC's September 18 Filing was published on September 20, 2006, with comments due on or before October 2, 2006. Alcoa, Electric Reliability Council of Texas, Inc, (ERCOT), Georgia System Operations Corp. (Georgia Operators), Midwest Reliability Organization (MRO), Pacific Gas and Electric Co. (PG&E) and TAPS filed

⁵ Pub. L. No. 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (to be codified at 16 U.S.C. 824o).

⁶ Order No. 672 at P 31.

comments. The California Independent System Operator Corp. (CAISO) filed a timely motion to intervene. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

8. The ISO/RTO Council submitted an answer to comments filed by Georgia Operators.⁷ Georgia Operators filed an answer to the ISO/RTO Council's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the ISO/RTO Council's answer or Georgia Operators' answer and will, therefore, reject them.

III. Discussion

9. The discussion in this order is organized into the following main topics: (1) relationship between Regional Entities and regional reliability organizations; (2) lack of consistency among member representatives committee sectors and registered ballot body segments; (3) Regional Entity and regional reliability organization voting rights within the member representatives committee; (4) multiple corporate affiliates abilities to populate a single member representatives committee segment; (5) voting rights within the registered ballot body; (6) minimum transmission ownership in the registered ballot body; (7) balancing authorities, transmission operators and reliability coordinators within the registered ballot body; (8) voting in subordinate organization structures; (9) funding; (10) cost-benefit analysis in reliability standards development; (11) ERO review of regional criteria; (12) ERO review of Regional Entity settlements with violators; (13) compliance registry; (14) definitions; and, finally, (15) miscellaneous matters.

10. The Commission is largely denying rehearing of the *Certification Order* and accepting NERC's compliance filing including its revised Bylaws. On compliance, the Commission accepts NERC's explanation of the relationship between the Regional Entities and regional reliability organizations. We also accept NERC's explanation as to why it is appropriate that the member representatives committee and the registered ballot body have different voting structures. We will also deny the requests for rehearing and accept NERC's compliance filing regarding voting rights within the member representatives committee and registered ballot body.

⁷ Although Georgia Operators labeled its filing as a "comment," it is essentially a protest, and will be treated as such. Therefore, the ISO/RTO Council's response is an answer to a protest.

11. The Commission also denies rehearing regarding various concerns with funding, Reliability Standard development, settlements of alleged violations and NERC's compliance registry. Finally, we will grant rehearing and require NERC to provide that regional criteria are developed only by Regional Entities and require NERC to make a further compliance filing regarding voting in committees and other subordinate organizational structures within 60 days of the issuance of this order.

A. Relationship between Regional Entities and Regional Reliability Organizations

12. In the *Certification Order*, we stated that the relationship between the regional reliability organizations and the Regional Entities contemplated under section 215 of the FPA is important and directed NERC to explain in greater detail these relationships.⁸ As part of its explanation, we asked NERC to include clarification about the following issues: (1) the extent to which management of the organizations may overlap; (2) the functions expected to be performed by each organization and whether they overlap, (for example, is the Regional Entity performing statutory functions exclusively, and the regional reliability organization performing non-statutory functions exclusively?); (3) any expected shared resources, facilities or personnel between organizations; (4) the extent to which the Regional Entity may be affected by actions taken by the regional reliability organization; (5) their respective roles in the Reliability Standard development and implementation process; and (6) any other clarifications that would be helpful for the Commission to understand the distinction between the two organizations and their respective duties.

1. Compliance Filing

13. NERC explains that its Bylaws define the term "regional reliability organization" by listing the eight existing regional reliability councils/organizations.⁹ The regional reliability organizations are member-based organizations intended to perform a number of functions to improve the reliability of the Bulk-Power System and are subject to specific obligations under several of NERC's proposed Reliability Standards. According

⁸ *Certification Order* at P 76.

⁹ Electric Reliability Council of Texas (ERCOT), Florida Reliability Coordinating Council (FRCC), Midwest Reliability Organization (MRO), Northeast Power Coordinating Council (NPCC), ReliabilityFirst Corporation (ReliabilityFirst), SERC Reliability Corporation (SERC), Southwest Power Pool, Inc. (SPP), and the Western Electricity Coordinating Council (WECC). The term also includes their successors. (Bylaws, art. I, § 1.)

to NERC, regional reliability organizations also undertake a number of system modeling and coordination activities. In addition, regional reliability organizations perform a number of other services for their members such as reliability coordination, operations planning, and transmission planning. Finally, regional reliability organizations may establish resource adequacy criteria for the Bulk-Power System which NERC claims is outside the scope of the duties of a Regional Entity under section 215 of the FPA.

14. According to NERC, Regional Entities will be delegated authority by the ERO to develop regional Reliability Standards, audit compliance, and perform organization registration and certification. They will also assist in 1) reliability readiness audits and improvement, 2) reliability assessment and performance analysis, 3) training and education, and 4) situational awareness and infrastructure security. However, Regional Entities will not exist until the delegation agreements, which are still being negotiated, are signed and approved by the Commission.

15. NERC explains that, in the near term, both Regional Entities and regional reliability organizations are necessary. Whereas a Regional Entity will have legal authority to develop regional Reliability Standards, conduct audits, and enforce compliance, NERC states that a regional reliability organization will comply with certain NERC Reliability Standards and has the right to establish resource adequacy criteria, neither of which are functions of a Regional Entity. Over time, Reliability Standards that currently refer to or impose responsibilities on regional reliability organizations may be revised so they no longer refer to regional reliability organizations, but instead substitute Regional Entities or some other responsible entities.

16. NERC states that it anticipates that there will be three models for the relationship between a regional reliability organization and a Regional Entity: (1) they may be the same organization; (2) a regional reliability organization may create an affiliated organization to perform the functions of the Regional Entity; or (3) a regional reliability organization may continue to exist while the Regional Entity functions are performed by an entirely separate organization, or even by NERC.¹⁰ NERC indicates that it will provide additional information when it files for approval of the Regional Entity delegation agreements. Therefore, the final relationship between a Regional Entity and a regional reliability organization will not be fully determined until the Commission issues a final order approving the delegation agreements.

17. Finally, NERC notes that section 215(a)(6) of the FPA and the Commission's regulations define the term "Regional Entity" to mean "an entity having enforcement

¹⁰ September 18 Filing at 11-12.

authority pursuant to section 39.8.”¹¹ NERC indicates that it has revised its Bylaws to use the same definition. In addition, in order to recognize NERC’s international presence and the role of applicable governmental authorities in Canada and, in due time, in Mexico, NERC has also added: “The term also means an entity to which an appropriate governmental authority has approved the assignment of enforcement authority for reliability standards.”¹²

2. Comments on Compliance Filing

18. MRO states that it supports NERC’s proposed revisions to its bylaws and believes that they represent an improvement. Nevertheless, it asserts that NERC should further clarify that Regional Entities are not limited to performing only statutory functions and may perform functions outside of section 215 of the FPA, such as setting adequacy standards. MRO maintains that when a Regional Entity performs functions outside of section 215, they are required to document and budget those functions separately to assure that collections are not commingled. In addition, the performance of functions outside of the statute by a Regional Entity should not create any conflict with its statutory functions.

19. Alcoa asserts that it appears that the regional reliability organizations and Regional Entities will overlap significantly. Because all regional reliability organizations have suggested that they intend to become Regional Entities, Alcoa asserts that the relevant issue appears to be what the budget and functions of those entities will be, which the Commission is considering in a separate docket. However, Alcoa states that it is important to note that the issue of which entities will exercise which functions is far from settled.

3. Commission Conclusion

20. We find NERC’s explanation of the relationship between Regional Entities and regional reliability organizations to be helpful and informative. As directed in our *Certification Order*, NERC has revised its Bylaws to use the statutory definition of Regional Entity. In addition, NERC has added language to recognize NERC’s international presence and the role of applicable governmental authorities in Canada and, in due time, in Mexico. We also find this to be appropriate.

21. With respect to MRO’s suggestion that NERC clarify its Bylaws to provide that Regional Entities are not limited to performing only statutory functions, we note that

¹¹ 16 U.S.C. § 824o(a)(6)(2000); 18 C.F.R. § 39.1 (2006).

¹² Bylaws, art. I, § 1.

Order No. 672 provides for this possibility¹³ and we do not find it necessary for NERC to revise its Bylaws in this regard but NERC may do so if it determines that it would be appropriate. Finally, with respect to NERC's suggestion that a Regional Entity and a regional reliability organization may be the same organization, we note that although Order No. 672 does not preclude a Regional Entity from pursuing activities other than statutory activities,¹⁴ this does not necessarily envision a Regional Entity being a regional reliability organization. We recently addressed the Regional Entities' budgets and business plans in Docket No. RR06-3-000 and concluded that, with respect to WECC's reliability coordinator function, unless there is a strong separation between oversight and real-time operations, the same entity should not oversee its own compliance with Reliability Standards.¹⁵ We also expressed doubt about a regional reliability organization playing a role separate from a Regional Entity whose function and responsibility is explicitly recognized by section 215 of the FPA, and proposed that Regional Entities be given responsibility under the Reliability Standards for functions currently performed by the regional reliability organizations once the transition to mandatory and enforceable Reliability Standards is complete.¹⁶

B. Member Representatives Committee and Registered Ballot Body

1. Lack of Consistency among Member Representatives Committee Sectors and Registered Ballot Body Segments

22. In its ERO certification application, NERC proposed two major voting bodies in addition to the board of trustees – the member representatives committee and the registered ballot body. The member representatives committee will elect the independent trustees, vote on amendments to the Bylaws (jointly with the board), and advise the board with respect to development of the budget, business plans and funding mechanisms, and other matters.¹⁷ The registered ballot body will vote on Reliability Standards prior to submittal to the board.

¹³ Order No. 672 at P 228.

¹⁴ *North American Electric Reliability Corp.* 117 FERC ¶ 61,091, at P 41 (2006).

¹⁵ *North American Electric Reliability Corp.*, 117 FERC ¶ 61,091, at P 51-53, (2006).

¹⁶ FERC Stats & Regs., at ¶ _____, 117 FERC 61,084, at P 56-58 (2006).

¹⁷ Transmittal Letter at 38; Bylaws art. VIII, § 1.

23. Under NERC's proposal, the member representatives committee would consist of: (i) two representatives from each of the twelve membership sectors¹⁸ except the government representative sector and the regional reliability organization sector; (ii) one representative from each regional reliability organization; (iii) the chairman and vice chairman of the member representatives committee; (iv) any additional Canadian representatives that are selected pursuant to the provisions regarding adequate representation of Canadian interests on the member representatives committee;¹⁹ and (v) the following government representatives: two non-voting representatives of the United States federal government, one non-voting representative of the Canadian federal government, two voting representatives of state governments, and one non-voting representative of a provincial government. Any person or entity is eligible to participate in the registered ballot body, and may belong to more than one registered ballot body segment as long as it meets the applicable eligibility criteria. Each organization, including its affiliates or integrated operations, is limited to one participant in each applicable segment. Voting is by segment, and in order for a proposed Reliability Standard to be approved, at least two-thirds of the weighted segment votes must be affirmative. The registered ballot body segments were proposed as follows: (1) transmission owners; (2) Regional Transmission Organizations (RTOs), independent system operators (ISOs), and regional reliability organizations; (3) load-serving entities; (4) transmission dependent utilities; (5) electric generators; (6) electricity brokers, aggregators, and marketers; (7) large electricity end users; (8) small electricity users; and (9) federal, state, and provincial regulators or other government entities.²⁰

¹⁸ The membership sectors are: (1) investor-owned utility; (2) state/municipal utility; (3) cooperative utility; (4) federal or provincial utility/Federal Power Marketing Administration; (5) transmission-dependent utility; (6) merchant electricity generator; (7) electricity marketer; (8) large end-use electricity customer; (9) small end-use electricity customer; (10) independent system operator/regional transmission organization; (11) regional reliability organization; and (12) government representatives.

¹⁹ The Bylaws provide for representation of Canada on the member representatives committee in proportion to Canada's percentage of net energy for load. If insufficient representatives are elected through the usual process, the Canadian candidates with the greatest number of votes will be added to the member representatives committee; however, no more than one Canadian representative will be added from a sector. Bylaws art. VIII, § 4.

²⁰ Rules of Procedure § 305.5; Rules of Procedure app. 1 at 19; Bylaws art. VII, § 9.

24. In the *Certification Order*, we stated that we were concerned that NERC has proposed two voting bodies with distinct differences in stakeholder composition without adequate justification for the difference. We deferred a decision on the proposed difference in voting structures and directed NERC to explain why this difference is necessary or appropriate. We indicated that, without greater justification by NERC, it is our preference that the two voting bodies share a consistent structure.²¹

a. Compliance Filing

25. NERC asserts that the two distinct voting bodies and their respective structures are critical to NERC's ability to effectively carry out its responsibilities. Since the member representatives committee and the registered ballot body serve fundamentally different purposes, the voting structures for the two bodies were intentionally developed with those different purposes in mind. NERC claims that it is joined in this view by a substantial majority of NERC stakeholders.²² NERC explains that the 12 segment composition of the member representatives committee mirrors the composition of the industry as it actually exists, while the nine stakeholder segment registered ballot body is designed along functional or business lines within the industry.

26. NERC states that it is essential to continue to have the 12 segment composition of the member representatives committee to provide for an effective presence of each of the industry sectors in NERC's governing and policy forums. The industry sector-oriented member representatives committee will be focused on the fundamental policy issues of who runs NERC and how it is organized and governed. According to NERC, it is highly unlikely that any two representatives of transmission owners could effectively and successfully represent all transmission owner views because investor-owned utilities, public power entities, cooperatives, and federal or provincial utilities have fundamentally different business models. Therefore, NERC maintains that its proposed structure for the member representatives committee will provide diverse, open, and balanced policy input to the NERC board and staff in a regular public forum.²³

²¹ *Certification Order* at P 63.

²² On July 27, 2006, NERC sought comments from its stakeholders on several of the issues raised in the Commission's July 20 *Certification Order*. According to NERC, a number of commenters urged NERC to continue with separate voting structures for the registered ballot body and the member representatives committee because of the different purposes the two bodies serve.

²³ NERC also notes that most of its standing committees are structured along the same lines as the member representatives committee, for the same reasons.

27. NERC further explains that, in contrast to the industry sector-oriented member representatives committee, the nine stakeholder segment registered ballot body designed along functional or business lines is intended to bring together technical experts to vote on whether to approve technical Reliability Standards. On these issues, interests and perspectives are much more likely to align according to the functional activities each organization performs as a user, owner, or operator of the Bulk-Power System or as a regulator or consumer of electric services provided by such users, owners and operators. When it comes to the rules for planning and operating the Bulk-Power System, the issues for transmission owners are likely to be mostly the same, whether they are investor-owned utilities, public power entities, or cooperatives.

28. Finally, NERC notes that those commenters who supported a single voting structure supported the registered ballot body. NERC states that it is concerned that important governance and policy input would be lost if that approach were adopted. The composition of the registered ballot body works well for approving technical Reliability Standards, but it would not serve the purpose of assuring effective and balanced policy input from all relevant industry interests on matters of governance. NERC asserts that any incremental expense and complexity created by maintaining two distinct voting structures is trivial in light of the relevant inputs, the due-process safeguards, and the checks and balances the two structures provide in the respective areas of governance and standards development.

b. Comments on Compliance Filing

29. Alcoa asserts that NERC's rationale for distinguishing between the registered ballot body and member representatives committee is not logical. It is unrealistic to think that either the registered ballot body or the member representatives committee votes will be cast on the basis of anything other than the overall controlling shareholder interest of the corporation, whether the voting is done by one or more separate corporate affiliates or by a single entity representing the controlling holding company.²⁴ There is no evidence that interests and votes at the registered ballot body would align according to functional activities more or less than they would in the member representatives committee. Thus, according to Alcoa, the rationale offered by NERC for differently structured voting bodies does not make sense.

²⁴ This issue is addressed in the discussion on voting rights within the registered ballot body.

c. Commission Conclusion

30. We are persuaded by NERC's assertion that the two distinct voting bodies and their respective structures are essential to NERC's ability to effectively carry out its responsibilities and the general support for this approach. In general, we find that the industry sector composition of the member representatives committee serves well for the purpose of considering matters such as how NERC should be organized and operated. We also find that the functional voting structure of the registered ballot body makes sense to bring together technical experts to vote on whether to approve technical Reliability Standards. Therefore, we will not require that the two voting bodies share a consistent structure.

2. Regional Entity and regional reliability organization voting rights within the member representatives committee

31. In the *Certification Order*, we indicated that we were concerned with participation by the regional reliability organizations in the member representatives committee. We indicated that, if any regional group is to be represented on the member representatives committee, we required that committee to also include the Regional Entities, which have a direct role in the functions provided by the ERO under section 215 of the FPA, in addition to the regional reliability organizations.²⁵ We were concerned that the regions, both the Regional Entities and the regional reliability organizations, were to have a disproportionate vote on the member representatives committee – representing approximately 25 percent of the votes. We stated that we believed that providing for one participant from each Interconnection from either the Regional Entities or the regional reliability organizations is sufficient to ensure that each Interconnection is adequately represented. The member from the Eastern Interconnection should be voted on by the members of that Interconnection. As part of its compliance filing, we directed NERC to address the potential conflict in having Regional Entities participate in advising the board on issues such as budgets, which will have a direct impact on the Regional Entities.

a. Request for Rehearing

32. According to ELCON, section 215(c)(2)(A) of the FPA requires NERC rules to assure fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure. In its petition for rehearing, ELCON states that the *Certification Order* does not meet this statutory requirement for balanced decisionmaking because it provides excessive voting rights to the Regional Entities and regional reliability organizations in violation of the

²⁵ *Certification Order* at P 75.

statutory directive requiring voting rights to be balanced. ELCON asserts that, while the *Certification Order* reduces the voting rights of Regional Entities and regional reliability organizations in the member representatives committee, it does not eliminate them. Further, ELCON states that the Commission required that Regional Entities should be represented on the member representatives committee, but did not specify a limit on their voting percentage. ELCON asserts that any voting participation, even if diluted, inherently raises conflict of interest issues and turns upside down the structure calling for the Regional Entities to be subordinate to NERC. Therefore, ELCON states that the Regional Entities and regional reliability organizations should have no voting rights.

b. Compliance Filing

33. NERC proposes to revise its Bylaws to combine Regional Entities and regional reliability organizations in a single sector of the member representatives committee.²⁶ Members of the Regional Entities/regional reliability organizations sector would elect two voting representatives to the member representatives committee. The remaining Regional Entities and regional reliability organizations will be non-voting members of the member representatives committee.

34. NERC also believes that Regional Entities and regional reliability organizations should have the same voting presence on the member representatives committee as other sectors of the industry. NERC states that, because Regional Entities and regional reliability organizations play important roles in enhancing the reliability of the Bulk-Power System, a Regional Entity/regional reliability organization sector with two votes on the member representatives committee is consistent with the imperative of section 215 of the FPA by ensuring fair stakeholder representation in the selection of the directors of the ERO and balanced decisionmaking in any ERO committee or subordinate organizational structure and that all interests have the opportunity to participate in NERC's decisional processes in accordance with its Bylaws and Rules of Procedure.

35. NERC contends that it should not require one of the two voting member representatives committee representatives from the Regional Entity/regional reliability organization sector to come from the Eastern Interconnection and the other to come from the Western Interconnection. NERC states that such an approach would preclude representatives of ERCOT or the Quebec Interconnection from the member representatives committee. NERC believes the members in the Regional Entity/regional

²⁶ NERC notes that, as will be the case with all other corporate organizations, a corporation comprising a Regional Entity or a regional reliability organization and any affiliates would be treated as a single member for purposes of membership sector selection and would be eligible only for one sector.

reliability organization sector should determine their representatives on the member representatives committee. NERC asserts that the proposed Bylaw revision (article VIII, section 2) to provide for the other members of this sector to be non-voting members of the member representatives committee will ensure viewpoints of all interconnections and regions can be expressed in the member representatives committee's discussions.

c. Comments on Compliance Filing

36. ERCOT states that it is concerned that NERC's proposal moves away from a structure which would guarantee at least some representation by each Interconnection. Allowing only two voting representatives for the entire sector also does not comply with the Commission's directive to have one representative from each Interconnection. While NERC proposes to allow other regional reliability organizations and Regional Entities to have non-voting representatives, ERCOT asserts that the ability to vote is critical to influencing decisions of the member representatives committee. ERCOT, therefore, suggests adopting a committee structure that guarantees that there is at least one voting representative of each Interconnection in the regional reliability organization/Regional Entity sector.

37. PG&E also notes that, rather than allowing for one representative from each Interconnection to become a voting member of the member representatives committee for the regional reliability organization/Regional Entity sector, instead NERC's proposed procedures permit all members of the combined regional reliability organization/Regional Entity sector to elect only two voting representatives to the member representatives committee. PG&E states that, to ensure that differences in geographic or physical characteristics of the different interconnections are adequately reflected in the ERO decision-making process, it is critical that each Interconnection be fairly represented in order to provide appropriate input. As each Interconnection will implement the reliability measures determined by the ERO, as well as provide the funding for the ERO and regional entity reliability activities (according to net energy for load), it is important that no single interconnection dominates and that each interconnection has an appropriate, proportionate voice in the ERO decision-making processes.

38. PG&E contends that NERC seeks to achieve equitable representation on ERO committees by grouping entities according to their functions. NERC proposes that each group of related entities will elect representatives for that group, without consideration of geographic differences or boundaries. PG&E asserts that, due to the unique make-up of the Western Interconnection, NERC's procedures will likely result in the inability of entities from the Western Interconnection that will constitute voting members or stakeholders to achieve fair and adequate representation on NERC committees because there are fewer entities in the Western Interconnection than in other interconnections.

39. PG&E maintains that, as a result, under the proposed process for electing representatives to NERC committees, entities from the Western Interconnection will not have an adequate opportunity to elect representatives or, therefore, to participate in the ERO decision-making process. PG&E argues that, due to the extreme imbalance in membership numbers, it is possible that no member from an entity in the Western Interconnection would receive sufficient votes to be elected to a committee which would result in recommendations or decisions by NERC committees that fail to reflect appropriately the realities of the Bulk-Power System across the United States. PG&E states that a reasonable solution, which is based on NERC's proposal to ensure adequate representation of Canadian interests, is to guarantee that entities from the Western Interconnection will have a minimum number of representatives on ERO committees.²⁷

40. Alcoa submits that NERC fails to substantively address the potential for a conflict of interest in the event Regional Entities or regional reliability organizations are voting members of the member representatives committee. Alcoa asserts that, as Regional Entities are delegated responsibility by the ERO, they should not be able to select ERO trustees or otherwise influence the ERO policy decisions through the member representatives committee. Alcoa asserts that allowing Regional Entities to vote on the governance of the ERO undercuts the ability of the ERO to supervise and/or administer the terms and conditions of the delegation of enforcement authority to the Regional Entities, and thereby diminishes the accountability of the Regional Entities for the exercise of such delegated authority. Alcoa further asserts that NERC's compliance filing does not sufficiently clarify the role of the regional reliability organizations. It maintains that the regional reliability organizations, with no role in implementing the reliability scheme contemplated under section 215 of the FPA, should have no role in the governance of the ERO.

41. Finally, Alcoa contends that NERC's proposal to allow the non-elected representatives of regional reliability organizations and Regional Entities to participate in the member representatives committee as non-voting members would give the regional reliability organization/Regional Entity sector greater influence in NERC affairs than other sectors without justification. Alcoa asserts that this lack of balance is inappropriate and reinforces Alcoa's concern, previously raised, that the regions will continue to have inordinate influence over the ERO in direct contradiction to what the statute requires.

²⁷ In the proposed NERC procedures, if the regular election of committee members does not result in at least the minimum number of Canadian members being elected, the Canadian nominees receiving the next highest percentage of votes within their respective sectors or segments will be designated as members, as needed to achieve the minimum number of Canadian members.

d. Commission Conclusion

42. The Commission denies ELCON's request for rehearing. As noted above, we said in the *Certification Order* that, if any regional group is to be represented on the member representatives committee, it should include the Regional Entities. Although we indicated that we believe that having one participant from each Interconnection (from either the regional reliability organization or the Regional Entity) would be sufficient to ensure adequate representation, we did so in the context of discussing NERC's proposal to permit each of the eight regional reliability organizations to appoint its own member to the membership representatives committee, thus constituting approximately 25 percent of the votes of the committee.²⁸ We did not mandate that each Interconnection be provided with its own vote; we merely indicated a need to limit the overall Regional Entity/regional reliability organization voting percentage in the membership representatives committee.

43. Further, we disagree that Regional Entity and regional reliability organization participation on the member representatives committee inherently raises a conflict of interest. ELCON and Alcoa have not provided a reason to eliminate the voting rights of Regional Entities and regional reliability organizations in the member representatives committee. Although subordinate to NERC, the Regional Entities are an important stakeholder group in the NERC process because they have the legal authority to develop regional Reliability Standards, conduct audits, and enforce compliance, and should therefore be allowed to vote on governance matters. The Commission required that NERC greatly reduce the voting percentage of Regional Entities and regional reliability organizations so that they can no longer control the vote in the member representatives committee. This balanced voting will assure that no one interest will prevail. Therefore, the Regional Entities/regional reliability organizations will not be able to control the outcome of any vote in the member representatives committee.

44. The Commission approves NERC's proposal for Regional Entity/regional reliability organization representation on the member representatives committee. The Commission's concern that the regions would have a disproportionate vote on the member representatives committee has been satisfied. Given that the Eastern Interconnection will have six out of the eight votes within the Regional Entity/regional reliability organization sector, we understand commenters' concerns that NERC's proposal could lead to the Eastern Interconnection controlling the vote and being over-represented on the member representatives committee. The Commission will monitor this matter including the non-elected representatives of regional reliability organizations

²⁸ *Certification Order* at P 75.

and Regional Entities participation as non-voting members,²⁹ and, if issues arise regarding the inability of a particular Interconnection to have its views taken into account, the Commission may reevaluate its decision.

3. Multiple Corporate Affiliates Abilities to Populate A Single Member Representatives Committee Stakeholder Sector

45. In the *Certification Order*, we noted that the Bylaws seem to allow two affiliates of the same company to populate a single sector of the member representatives committee. We stated that if NERC intends to prevent this, it should clarify the Bylaws.³⁰

a. Compliance Filing

46. According to NERC, a corporation and its affiliates should be treated as a single member of NERC and the overall corporate organization should only be entitled to register within a single membership sector.³¹ As provided in article II, section 4 of the proposed Bylaws, a member may register in any one sector that is consistent with the member's business or other activities. For clarity, NERC has added the following sentence to article II, section 4.b to its Bylaws: "A corporation and its affiliates shall be considered a single member and may register in only one sector, which can be any single sector for which the corporation or any of its affiliates is eligible."

b. Commission Conclusion

47. NERC's proposed modification to section 4.b to its Bylaws complies with our directive to clarify that two affiliates of the same company can only be a member of a single sector of the member representatives committee.

²⁹ While NERC's proposal gives the non-voting representatives a voice in member representatives committee meetings, article VIII, section 10 of NERC's Bylaws provide that such meetings generally are open to anyone who is interested in attending.

³⁰ *Certification Order* at P 77.

³¹ NERC states that it does not consider joint ownership of generation or transmission assets with another separate and distinct entity, standing alone, to mean the entities are affiliated for purposes of this provision. Similarly, entities that own or participate in a joint action agency will not be foreclosed from becoming members of NERC.

4. Voting Rights within the Registered Ballot Body

48. In the *Certification Order*, we found that ISOs and RTOs are not adequately represented when combined in a single registered ballot body segment with Regional Entities and regional reliability organizations and required NERC to create a separate registered ballot body segment for ISOs and RTOs.³² We further directed NERC to respond to the ISO/RTO Council's request for a waiver from the Reliability Standard development process provision that weights the vote of segments with fewer than ten members that might apply to a separate ISO/RTO registered ballot body segment by either addressing the request or, in the alternative, proposing and justifying another approach.³³ As we did with the member representatives committee, we indicated that, in addition to the regional reliability organizations, the Regional Entities should also be represented on the registered ballot body.

49. We also directed NERC to address the concerns raised regarding an entity's ability to belong to multiple registered ballot body segments, and the potential for such provision to permit some companies multiple voices in the ballot pool.³⁴

a. Requests for Rehearing or Clarification

50. ELCON again raises concerns that in this matter the *Certification Order* does not meet the statutory requirement for balanced decisionmaking. In ELCON's view, the *Certification Order* gives excessive voting rights to the ISOs and RTOs, as well as the Regional Entities and regional reliability organizations, in violation of the statutory directive requiring voting rights to be balanced.³⁵

51. ELCON asserts that the requirement that the ISOs and RTOs be given a separate voting segment in the registered ballot body increase the ISO/RTO voting percentage to about 10 percent, without apparent regard to the fact that ISO/RTO Council already has one-third of the votes in the NERC- North American Energy Standards Board (NAESB)-ISO/RTO Council joint interface committee that also influences NERC's proposed

³² *Certification Order* at P 90.

³³ See NERC's Reliability Standards Development Procedure, Draft Version 5.0, Step 9, First Ballot at 19.

³⁴ *Certification Order* at P 90.

³⁵ According to ELCON, section 215(c)(2)(A) of the FPA requires NERC rules to assure fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure.

Reliability Standards.³⁶ Since the joint interface committee will review all standards development proposals received by NERC and NAESB to determine whether either should develop a particular Reliability Standard, the ISOs and RTOs already have a substantial voice in establishing Reliability Standards at the managerial level. ELCON requests that the Commission reconsider its position on ISO/RTO voting rights on the registered ballot body in view of the ISO/RTO Council's role in the joint interface committee.

52. ELCON is further concerned that the *Certification Order* requires Regional Entities to be represented on the registered ballot body, in addition to the regional reliability organizations, without specifying any limitation on the Regional Entities' voting percentage. ELCON submits that the Regional Entities and regional reliability organizations are subsidiary to, and in fact are to be mere extensions of, NERC; hence, any voting participation inherently raises conflict of interest issues and turns upside down the structure calling for the Regional Entities to be subordinate to NERC. Therefore, their voting participation should be eliminated.

53. ISO/RTO Council asks for clarification that the *Certification Order* directed, without qualification, that NERC establish a separate segment for ISOs and RTOs on the registered ballot body and the standards committee³⁷ and must also address the ISO/RTO Council's request for waiver of NERC's procedure for discounting the votes of the registered ballot body segments that have less than ten members or in the alternative propose another approach. ISO/RTO Council indicates that its request for clarification is prompted by NERC's correspondence to its members that implies that NERC interprets the *Certification Order* as permitting it to develop an alternative approach to the Commission's first directive on creating a separate registered ballot body and standards committee segment for ISOs and RTOs.

³⁶ According to ELCON, NERC's ERO application described the joint interface committee, which includes NERC, NAESB and ISO/RTO Council representatives, as playing a critical role in the development process for Reliability Standards, while a primary function of the registered ballot body is to vote on such standards. The joint interface committee's purpose is to ensure that the development of wholesale electric business practices and Reliability Standards is harmonized and to minimize duplication of effort between NERC and NAESB.

³⁷ The standards committee appoints a Reliability Standard drafting team with the necessary technical expertise, competencies, and diversity of views to draft the Reliability Standard based on sound engineering and technical criteria using actual data and lessons learned from operating incidents. *Certification Order* at n.41.

b. Compliance Filing

54. NERC proposes to revise the segment definitions for the registered ballot body in its Rules of Procedure to reserve existing segment (2) for ISOs and RTOs. NERC notes that, by operation of Rule 306.1 of the Rules of Procedure, ISOs and RTOs will have two representatives on the standards committee. NERC, however, opposes waiver of the provision that caps the weighted vote for segments in a ballot pool with fewer than ten members, maintaining that the cap is important and encourages wide and fair participation in its Reliability Standard development process while maintaining a balance of interests. NERC points out that the cap applies when any segment of the ballot pool for a particular vote has fewer than 10 members. As the newly created ISO/RTO segment has 10 members, NERC believes that it would be arbitrary not to apply the cap to all segments.

55. NERC states that, after observing more than 30 ballots, the standards committee noticed that on some ballots an individual voter that was the only participant in a segment effectively exercised as much as 11 percent of the vote, while at the same time an individual voter from another segment with many participants might exercise only 0.2 percent of the vote. NERC received a number of complaints about the perceived unfairness of these situations. NERC submits that the very nature of a weighted-segment voting model means the strength of the vote of individual voters from different segments will be different. Nonetheless, the standards committee believed NERC needed to reduce the disparities in voting strength that could occur (and had occurred), so that participants would not perceive the process as unfair. Accordingly, the Reliability Standard development process was revised with the effect of capping the voting strength of any individual voter at 1 percent of the total vote. The cap applies to each ballot taken, and applies in all segments. The cap reduces the likelihood that any one entity or small group of entities could dominate or have a disproportionate impact on the voting for a proposed Reliability Standard. The registered ballot body approved this change by a weighted vote of 85.6 percent (the un-weighted vote was 181-15).

56. NERC agrees with the *Certification Order* that Regional Entities should be represented, as well as regional reliability organizations, in the registered ballot body. Accordingly, NERC proposes to revise the segment definitions for the registered ballot body in section 305 of the Rules of Procedure. Regional reliability organizations will be moved from existing segment (2) now reserved for ISOs/RTOs to new segment (10). New segment (10) will also include Regional Entities. NERC further notes that the general rule that multiple affiliates within a single segment are treated as a single member will apply.

57. Finally, in response to the *Certification Order* directive to address the concerns raised regarding an entity's ability to belong to multiple registered ballot body segments, NERC responds that the registered ballot body is designed along functional or business

lines. The registered ballot body's purpose is to vote on Reliability Standards, and it is important to have broad participation from representatives in each line of business in the industry on proposed Reliability Standards. Some entities have multiple business lines, and NERC permits an entity to register into each segment for which it qualifies to help ensure maximum participation from industry experts. Because the Reliability Standards can affect entities in more than one line of business differently, NERC believes that those most familiar with the needs and concerns of a particular line of business should be able to vote on standards that will affect them. Further to this point, an integrated utility with several business lines for example, generation, transmission, and serving load should be able to vote on reliability standards in those three segments. In NERC's view, what an organization does, not how it is structured, should determine the segments it can join. NERC asserts that the concerns about potential undue influence in approving Reliability Standards by entities voting in multiple segments are misplaced.

c. Comments on Compliance Filing

58. PG&E asserts that both membership in NERC and participation in the registered ballot body are key functions that allow each entity subject to NERC's authority as the ERO to ensure that concerns specific to each entity are factored into NERC decisions. In its compliance filing, NERC has clarified the role and ability of a corporation and its affiliates to participate in and influence these key decision-making functions at NERC. With regard to membership in NERC: "A corporation and its affiliates shall be considered a single member and may register in only one sector, which can be any single sector for which the corporation or any of its affiliates is eligible."³⁸ Also, within each registered ballot body segment, a corporation and its affiliates are permitted only a single vote. Therefore, PG&E states, a corporation and its affiliates must confer and reach a single position on key issues relating to the ERO, including budgetary and funding issues and proposed Reliability Standards.

59. PG&E submits that, although these restrictions may be reasonable and appropriate in certain circumstances, in other situations, not only may a corporation and its affiliates have different, potentially conflicting, interests, but Commission standards of conduct rules governing the behavior of energy companies may limit communications between the companies. Specifically, the Order No. 2004 standards of conduct³⁹ restrict

³⁸ Compliance Filing at 12.

³⁹ *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. Vol. III Regs. Preambles ¶ 31,155 (2003); Order No. 2004-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,161 (2004); Order No. 2004-B, FERC Stats. & Regs., Regs. Preambles ¶ 31,166 (2004); Order No. 2004-C, FERC Stats. & Regs., Regs. Preambles ¶ 31,172 (2005); Order No. 2004-D, 110 FERC ¶ 61,320 (2005).

communications between the transmission and energy marketing functions of a corporation and its affiliates. Likewise, according to PG&E, where a corporation and its affiliates consist of both regulated utilities and unregulated affiliates, a code of conduct limits the flow of information between the companies.⁴⁰ As a result, PG&E maintains that a corporation and its affiliates bound by Order No. 2004 or the code of conduct will face significant barriers to reaching a single position on ERO issues. Consequently, NERC's rules permitting a corporation and its affiliates to register only in one membership sector or have only a single vote in any one registered ballot body segment may deny a corporation and its affiliates, with separate functions and interests, fair representation and participation in NERC decision-making. Therefore, PG&E requests that the NERC procedures should ensure that all entities have adequate representation in light of Order No. 2004 and the codes of conduct.

60. Finally, Alcoa asserts that NERC's justification for allowing corporate affiliates to vote separately in the registered ballot body, *i.e.*, that each segment would apply its specialized technical expertise and vote on the basis of the technical merits of a given proposed Reliability Standard regardless of the interests of its corporate affiliates, is not logical. Given a corporation's general duty to maximize value for its shareholders and human nature, Alcoa asserts that there is no reason to believe that corporate affiliates would vote along functional lines, as opposed to pursuant to the corporation's overall interests. Therefore, Alcoa argues that this provision only serves to give entities with multiple affiliates more votes.

d. Commission Conclusion

61. We deny ELCON's request for rehearing. Although the ISOs and RTOs participate in the NERC-NAESB-ISO/RTO Council joint interface committee, that committee only reviews the standards development proposals received by NERC. It does not participate in how the Reliability Standards are developed. The ISOs and RTOs are important stakeholders in the NERC process with unique interests in Reliability Standards and should be allowed to participate in developing Reliability Standards. Because of the nature of the Reliability Standard development process, the ISOs and RTOs will not be able to control any vote on the Reliability Standards. Therefore, we disagree with ELCON that the ISOs and RTOs should not be given a voting segment on the registered ballot body.

⁴⁰ See, e.g., *Market Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 87 FERC ¶ 61,063, FERC Stats. & Regs. Vol. IV, Proposed Regulations, ¶ 32,602 at 32,596-599 (2006).

62. For the reasons stated above in regard to the member representatives committee, we also disagree with ELCON that Regional Entity and regional reliability organization participation on the registered ballot body inherently raises a conflict of interest because the Regional Entities/regional reliability organizations will not be able to control the outcome of any vote in the registered ballot body.

63. ELCON has not provided a reason to eliminate the voting rights of Regional Entities and regional reliability organizations in the registered ballot body. Although subordinate to NERC, the Regional Entities and regional reliability organizations are stakeholders in the NERC process and should be allowed to participate in the Reliability Standards development process. Allowing one stakeholder segment that represents Regional Entity and regional reliability organization views allows for balanced decisionmaking because it permits an important stakeholder segment to have a voice in the Reliability Standards development process.

64. We deny the ISO/RTO Council's request for clarification. NERC has satisfied the ISO/RTO Council's request to propose a separate segment for ISOs and RTOs on the registered ballot body and has satisfactorily addressed why it is not planning to waive its weighted voting structure for the new ISO/RTO segment.

65. We disagree with PG&E's contention that the Order No. 2004 standards of conduct or codes of conduct limitations on sharing transactional or other business sensitive information within a corporate family will pose significant barriers to the ability of a transmission provider and its affiliates to reach a single position on ERO issues. PG&E has not identified any particular situation in which the standards of conduct would hinder a transmission provider, its marketing affiliates and its energy affiliates from participating in NERC activities as part of a corporate entity. A transmission provider is permitted to share information necessary to maintain the reliability of the transmission system with its energy affiliates as an exception to the standards of conduct, pursuant to section 358.5(b)(8) of the Commission's regulations. The Commission approved this sharing of day-to-day operational information to help ensure the continuity of transmission providers' operations.⁴¹ As another exception to the standards of conduct, section 358.4(a)(5) of the Commission's regulations authorizes transmission providers to share with their marketing affiliates or energy affiliates senior officers who are not transmission function employees. Pursuant to section 358.4(a)(5), a transmission

⁴¹ *Standards of Conduct for Transmission Providers*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161 at P 203 (2004). There, the Commission emphasized that transmission personnel making such communications cannot be conduits for sharing transmission or customer information with marketing or energy affiliates that would provide these affiliates with an undue preference.

provider may share transmission information with such senior officers.⁴² These exceptions to the standards of conduct should permit corporate affiliates to communicate sufficient information to permit a single vote at ERO functions by a single officer of the corporate parent. Nor has PG&E provided any examples of situations in which code of conduct prohibitions on sharing market information would prevent a corporate parent from making a single, informed vote at a NERC forum.

5. Minimum Transmission Ownership in the Registered Ballot Body

66. In its ERO application, NERC proposed a minimum ownership threshold for transmission entities that are not in an ISO/RTO region, but not one for those in an ISO/RTO region. We stated that we were concerned that similar entities be treated in a similar manner and that all interested persons be given an opportunity to participate. We stated that we did not understand how the minimum ownership requirement comports with inclusiveness and directed NERC to address whether (and why) a minimum ownership threshold is appropriate, and if so, why it is only appropriate for entities that are not in an ISO/RTO region.⁴³

a. Compliance Filing

67. NERC states that the registered ballot body is divided along lines of business and that the definitions and criteria for each segment are how NERC assures a balance of interests in its Reliability Standards development process. The goal is that every individual entity has at least one segment in which it is eligible to participate and that entities be able to participate in each segment in which they have a substantial interest. As a corollary, entities with only an incidental relationship to a particular line of business should not be included in the segment. According to NERC, one concern expressed during the stakeholder process that led to the development of NERC's Reliability Standards development procedure was that an entity with only an incidental interest in a particular segment might nonetheless join that segment and dilute the voting interests of those with substantial business interests in the segment.

⁴² This information sharing may occur provided that a senior officer receiving transmission information does not participate in directing, organizing or executing transmission system operations or marketing functions and does not act as a conduit to share such information with a marketing affiliate or energy affiliate. 18 C.F.R. § 358.4(a)(5)(2) (2006).

⁴³ *Certification Order* at P 93.

68. Thus, for example, one of the criteria for the transmission-dependent utility segment is that the entity depends primarily on the transmission systems of third parties to provide service. If the word “primarily” was omitted, then any entity that used the transmission systems of third parties to provide service, even to a minimal extent, could qualify as a member of that segment. Indeed, a large number of entities could qualify, and the particular viewpoints of those who are truly dependent upon the transmission systems of third parties could be obscured.

69. NERC states that the non-cumulative criteria in the transmission owners segment are the means by which NERC maintains a balance of interests in regard to those entities. According to NERC, each of the entities in the transmission owners segment has a substantial business interest in transmission ownership.⁴⁴ Those entities that do not qualify for the transmission owners segment qualify for at least one other segment. NERC states that segment definitions and criteria must be evaluated as a totality and, as explained above, NERC can revise its segment in the future if an entity or interest was unfairly excluded or limited from the registered ballot body entirely.⁴⁵ NERC claims that it has successfully used this voting model to ballot Reliability Standards for the past three years, and urges the Commission not to upset the balance of interests among industry segments that has been achieved through the segment definitions and criteria.

b. Commission Conclusion

70. The Commission accepts NERC’s compliance filing regarding the minimum ownership threshold for entities that do not meet one of the other prongs for membership in the transmission owners’ segment.⁴⁶ We agree that it is appropriate to balance the criteria for the transmission owners’ segment to include those with a substantial interest

⁴⁴ NERC notes that the particular solution urged by National Grid is to impose the 200 circuit-mile minimum as a threshold eligibility criterion for all transmission owners, thus likely reducing the number of participants in the transmission owners segment.

⁴⁵ See Rules of Procedure § 305.

⁴⁶ Under Rules of Procedure § 305.5.5, ownership of transmission is not the only factor qualifying for eligibility in this segment. Entities are eligible to join the transmission owners segment of the registered ballot body if they (1) own or control at least 200 circuit miles of integrated transmission facility or have an open access transmission tariff or equivalent, (2) are transmission owners that have placed their transmission under the operation control of a regional transmission organization; or (3) are an independent transmission company or organization, merchant transmission developer, or Transco that is not a regional transmission organization.

in the ownership of transmission and exclude those with only an incidental interest in transmission. Further, NERC's statement that every individual entity has at least one segment in which it is eligible to participate and that it can revise its segment in the future if an entity or interest was unfairly excluded or limited from the registered ballot body satisfies our concern that all interested persons should have an opportunity to participate in the registered ballot body.

6. Balancing Authorities, Transmission Operators and Reliability Coordinators within the Registered Ballot Body

71. In the *Certification Order*, given commenters' concerns that there may be instances where balancing authorities, transmission operators, and reliability coordinators do not fit within an existing segment, we directed NERC to explain how the views of these entities, which are subject to ERO certification, will be taken into account in establishing Reliability Standards, or to explain why their participation is not necessary to the process in its compliance filing.⁴⁷

a. Compliance Filing

72. According to NERC, the registered ballot body for NERC's Reliability Standards development process is open to all interested parties. No person or entity with an interest in the reliability of the Bulk-Power System of North America is excluded from joining the registered ballot body and entering at least one segment. NERC is not aware of any instances in which balancing authorities, transmission operators, and reliability coordinators do not fit within an existing segment. In the event an entity cannot meet the criteria for any of the registered ballot body segments, NERC will revise the segment definitions to ensure that all interested parties can register and vote on Reliability Standards.⁴⁸

b. Comments on Compliance Filing

73. Georgia Operators states that, while it appreciates NERC's assurance that action will be taken as necessary on an entity specific basis to ensure that all entities that have an interest in Reliability Standards have a place in the registered ballot body, it sees no reason why the case-by-case approach is preferable to expressly including balancing authorities, transmission operators, reliability coordinators and system operators in the structure of the registered ballot body. In its view, these entities are system operators that

⁴⁷ *Certification Order* at P 90.

⁴⁸ See NERC Bylaws, art. IX, § 2 and art. XI; and Rules of Procedure § 305.6, 316.

perform the same reliability function, share common issues and should be able to express with a single voice their unique interests and perspectives with respect to proposed new or revised Reliability Standards similar to that provided to RTOs and ISOs. The fact that balancing authorities, transmission operators, and reliability coordinators may fit within one or more of the existing registered ballot body segments is irrelevant to whether they should be expressly represented in the registered ballot body. According to Georgia Operators, given that the Commission set aside an entire segment of the registered ballot body for a handful of RTOs and ISOs, declining to allow any representation for the interests of at least 150 other balancing authorities, transmission operators and reliability coordinators may be unfairly discriminatory and prejudicial.

c. Commission Conclusion

74. We find that NERC's commitment to revise the registered ballot body segment definitions to ensure that a balancing authority, transmission operator, reliability coordinator or other interested party can register and vote on Reliability Standards if it does not fit within an existing registered ballot body segment is responsive to our concern. We note that, while Georgia Operators had previously argued in comments on NERC's ERO application that balancing authorities, transmission operators, and reliability coordinators should be specifically included in the registered ballot body segments either as an addition to the ISO/RTO and regional reliability organization segment or within three new segments created (*i.e.* for balancing authorities, transmission operators, and reliability coordinators), we did not direct NERC to undertake this change. Georgia Operators did not take exception to our action on rehearing and therefore has no standing to pursue its request in the context of NERC's compliance filing.

C. Voting in Subordinate Organizational Structures

75. In the *Certification Order*, we noted that Order No. 672 requires that "on a committee or other subordinate organizational structure, no two stakeholder sectors should be able to control the vote on any matter, no single sector should be able to defeat a matter unless the ERO adequately explains why it cannot apply these principles."⁴⁹ Section 1302 of the Rules of Procedure appeared to allow a single sector to control the vote in a committee or other sub-organizational structure which is not established on a sector basis. We also found that NERC had not justified a similar deviation in section 311.3.1.3 of the Rules of Procedure, which states that a regional Reliability Standard

⁴⁹ *Certification Order* at P 105.

development procedure may not be dominated by any single interest category, to the extent that it permits two interest categories or sectors to control the vote.⁵⁰ We directed NERC to correct this in its Rules of Procedure.

1. NERC Compliance Filing

76. To meet our requirement that no two stakeholder sectors should be able to control the vote on any matter on a committee or other subordinate organizational structure, NERC proposes several changes to its Rules of Procedure.

77. First, it proposes to change the title of section 1300 to “Standing Committees” and change “committees” to “standing committees” in sections 1302, 1303, and 1304. NERC further proposes to revise the second sentence of section 1302 to read: “Standing committee membership shall provide for representatives from each sector unless such sector representation will not bring together the necessary diversity of opinions from industry experts with outstanding technical knowledge and experience in a particular subject area.”

78. According to NERC, the revision to section 1302 of the Rules of Procedure recognizes that, in some situations, sufficient expertise may not exist in all sectors on a particular matter. For example, the Critical Infrastructure Protection Committee (CIPC) draws on three technical areas: cyber security, physical security, and operations. NERC indicates that it finds this expertise primarily among the larger organizations and the reliability coordinators. NERC asserts that requiring that membership on the CIPC be related to the sectors or trying to manage sector voting principles would greatly limit the ability of this committee to make informed decisions and provide the necessary counsel to the U.S. Department of Homeland Security, U.S. Department of Energy, and Public Safety and Emergency Preparedness Canada.

79. NERC further points out that, in other situations, even though NERC wants sectors to be represented on committees, some sectors may not select representatives. All standing committee charters will clearly explain their membership structure and whether that structure will allow NERC to apply the principle that no two stakeholder sectors will be able to control the vote on any matter, or that no single sector will be able to defeat a matter. NERC claims that, when the votes by subgroups are not binding on NERC or are subject to final approval by the board or a “properly constituted” standing committee (such as the standards committee), the criteria from Order No. 672 should not be strictly applied. Such voting does not “control” anything; the final approval authority (mostly

⁵⁰ *Id.* at P 105.

vested in the board) has the control. It is important that subordinate organization votes do not block matters from coming to the board, but mechanisms exist where concerned parties can address the board on such matters.

80. With respect to our other concern that NERC's Rules of Procedure permits two interest categories or sectors to control the vote in the regional Reliability Standard development process, NERC proposes to revise section 311.3.1.3 of the Rules of Procedure to state:

Balanced — The regional reliability standards development procedure shall have a balance of interests and shall not permit any two interest categories to control the vote on a matter nor any single interest category to defeat a matter.

2. Comments on Compliance Filing

81. TAPS asserts that NERC failed to adequately correct section 1302 of the Rules of Procedure. NERC's revised second sentence suggests that NERC may exclude a particular sector from a committee if it finds that sector's expertise insufficient. TAPS says that NERC's revised language does not recognize the need for balanced decisionmaking in any ERO committee or subordinate organizational structure. It asserts that a committee made up exclusively of larger organizations and reliability coordinators is unlikely to provide the balanced decisionmaking required by the FPA and the Commission's regulations. In TAPS' view, NERC's approach overlooks the fact that smaller systems have expertise in how smaller systems operate – expertise that large systems often lack.

82. TAPS further maintains that the *Certification Order* did not authorize NERC to allow for committees that fail to achieve balance – whether by sectors or by diversity of experts. Rather, even in committees of experts the Commission required NERC to consider affiliations and relationships, and through board action to structure committees to ensure balanced committees.

83. Since most, if not all, committee actions require NERC Board approval, TAPS states that NERC's position that many votes do not control anything because they are not binding on NERC or are subject to final approval by the board or a "properly constituted" standing committee eliminates the requirement that NERC assure balanced decisionmaking in any ERO committee or subordinate organizational structure. TAPS recognizes that there may be instances where, despite its good faith efforts, NERC is unable to achieve full representation of every sector because a sector may not choose to participate. But TAPS argues that neither the failure of several sectors to participate nor

reliance of a diverse group of industry experts should excuse NERC from complying with statutory requirements of balanced decisionmaking – ensuring decisions are not dominated by one or two sectors.

84. Therefore, to be consistent with the *Certification Order* and the FPA, TAPS states that NERC should be required to modify the original second sentence of section 1302 to state:

Committee membership may be unique to each committee, and ~~can~~ shall provide for balanced decision-making by providing for representatives from each sector or, where sector representation will not bring together the necessary diversity of opinions, technical knowledge and experience in a particular subject area, by bringing together a wide diversity of opinions from industry experts with outstanding technical knowledge and experience in a particular subject area.

85. In addition, to ensure the balanced decision-making section 215 requires, TAPS would revise the final sentence of section 1302 to read:

All committees and other sub-ordinate organizational structures that are established on a sector basis must ensure that no two stakeholder sectors are able to control the vote on any matter, and no single sector is able to defeat a matter.

3. Commission Conclusion

86. The Commission agrees with NERC that in certain circumstances, sector representation may not bring together the necessary opinions, knowledge or experience in a particular subject area. However, we also agree with TAPS that revised section 1302 could be read to suggest that NERC may exclude a particular sector from a committee. The Commission agrees with TAPS that its proposed modifications to section 1302 more correctly reflects the intention that NERC shall have committee representation from each sector unless there is a lack of diversity of opinions, technical knowledge and experience in a particular subject area rather than merely allowing NERC to provide for committee membership by sector. Further, TAPS' proposed modification to the final sentence of section 1302 more clearly reflects the Commission's directives.

87. We disagree with NERC that when the votes by subgroups are not binding on NERC or are subject to final approval by the board or a "properly constituted" standing committee (such as the standards committee), the criteria from Order No. 672 should not be strictly applied. Most decisions by committees or other subordinate structures are subject to final approval by NERC's board. NERC's interpretation would render our

decision in the *Certification Order* regarding voting in committees virtually irrelevant. Therefore, we require NERC to make this modification when it files revisions to its Rules of Procedure.

D. Funding

88. In the *Certification Order*, we accepted NERC's proposal to allocate funding responsibility for ERO reliability program costs among load serving entities on the basis of net energy for load.⁵¹ We denied requests that the Commission should require NERC to allocate costs on a basis other than net energy for load, noting that, in Order No. 672, we had found that funding apportionment method based on net energy for load is a fair and reasonable method for allocating costs that minimizes the possibility of double-counting.⁵² We stated that we would not revisit this determination and that any request to require NERC to allocate costs on a basis other than net energy for load is an impermissible collateral attack on Order No. 672.

1. Requests for Rehearing or Clarification

89. Alcoa requests rehearing of the allocation of ERO costs. First, Alcoa claims that, in Order No. 672, the Commission did not establish net energy for load as the sole allocation methodology for ERO costs. The Commission's statement in Order No. 672 that net energy for load is "one fair, reasonable and uncomplicated method..." did not preclude a party from arguing that some other allocation method would be more appropriate than net energy for load as a method for allocating ERO costs.⁵³ While the Commission found that a funding apportionment method based on net energy for load is a fair and reasonable method for allocating costs that minimizes the possibility of double-counting, it did not approve any particular cost allocation method but directed ERO candidates to propose a formula or method of funding addressing cost allocation and cost responsibility.

90. Second, Alcoa asserts that, since it appears that ERO costs will have a significant demand component, and because net energy for load's allocation mechanism only uses

⁵¹ Net energy for load means balancing authority area generation (less station use), plus energy received from other balancing authority areas, less energy delivered to balancing authority areas through interchange. It includes balancing authority area losses, but excludes energy required for storage at electric energy storage facilities, such as pumped storage. Order No. 672 at n.7.

⁵² *Certification Order* at P 167.

⁵³ Order No. 672 at P 35, 213-14.

energy as a basis for allocation, applying net energy for load to demand-related costs would not produce a more reasonable result than utilizing the Commission's normal procedure of allocating costs on the basis of both demand and energy factors. Further, Alcoa contends that most of the costs associated with NERC's ERO functions, such as overhead, appear to be fixed rather than varying with the amount of energy produced in North America. In a normal cost allocation context, fixed and overhead costs would be considered demand-related rather than energy-related. As section 215 requires that the ERO rules "allocate equitably reasonable dues, fees, and other charges among end users for all activities under this section," Alcoa asserts that it would not be equitable to allocate demand-related costs solely on the basis of energy consumed if an alternative existed that more closely aligned the costs allocated with the factors giving rise to such costs.

91. Third, Alcoa complains that the Commission declined to exempt load served from behind-the-meter generation from the net energy for load mechanism, finding that the allocation of cost responsibility among end users does not depend on how they use or what benefits they receive from the Bulk-Power System. Alcoa asserts that this determination is contrary to established Commission policy regarding generators located behind-the-meter and the allocation of costs to such generators and load served through these resources.⁵⁴ Alcoa claims that, like many other industrial customers, in some locations it has taken significant measures to remain self-sufficient and minimize its reliance on the bulk transmission system, and thus should not be held responsible for funding reliability functions under the *Certification Order's* interpretation of the net energy for load formula. By imposing these reliability-related costs on Alcoa at locations where the company has behind the meter generation, the ERO essentially would charge it for services it does not need and did not ask for.

2. Commission Conclusion

92. We deny Alcoa's request for rehearing. In the *Certification Order*, we accepted NERC's proposal to allocate funding responsibility for ERO reliability program costs

⁵⁴ Alcoa at 8-9, citing *PJM Interconnection, L.L.C.* 107 FERC ¶ 61,113 (2004) (accepting modifications to PJM's tariff to encourage qualifying entities with behind the meter generation to reduce their use of the PJM transmission system); *Occidental Chem. Corp. v. PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,275 at P 14 (2003) (access charges for use of PJM's transmission system should be allocated to network customers based on a network customer's actual use of PJM's system, consistent with the principle of cost causation); *Cal. Indep. Sys. Operator Corp.* 113 FERC ¶ 61,135 at P 79 (2005) (where there is a small subset of generators for which the CAISO incurs no costs whatsoever, the customer should only pay the ... charge when they actually use the CAISO grid).

among load serving entities on the basis of net energy for load as consistent with our directives in Order No. 672. In Order No. 672, we found funding based on net energy for load to be a fair and reasonable method that minimizes the possibility of double-counting.⁵⁵ However, we did not codify any particular formula in our regulations because some adjustment in the formula may be needed in the future without the need to alter the rule. In section 39.4(a) of our regulations, we provided *the ERO applicant* the flexibility to propose a formula or method for the allocation and assessment of ERO costs and stated that any funding proposal *by an ERO applicant* must ensure that costs are allocated equitably consistent with section 215(c)(2)(B) of the FPA.⁵⁶ Therefore, Alcoa's contention that Order No. 672 did not preclude a party from arguing that some other allocation method would be more appropriate than net energy for load as a method for allocating ERO costs is incorrect. We allowed the *ERO Applicant*, NERC, to propose an alternative funding methodology, but ruled that if the ERO Applicant proposed to allocate funding based on net energy for load it would be a fair and reasonable method and we would accept it as consistent with the FPA and our regulations. Therefore, Alcoa's request to require NERC to allocate costs on a basis other than net energy for load is an impermissible collateral attack on Order No. 672.

93. Further, we note that Alcoa has not challenged the use of net energy for load as the basis for allocating the funding responsibility for any of NERC's energy related program costs, except with respect to assigning funding responsibility to load served by behind-the-meter generation. We reiterate that we will not grant a general blanket waiver from the funding obligation to any entity.⁵⁷ Alcoa has not demonstrated how load served by behind-the-meter generation would be entered into the net energy for load calculation so that it would be apportioned an unreasonable or inequitable funding responsibility, if any.⁵⁸ Thus, we deny Alcoa's petition in this regard.

⁵⁵ Order No. 672 at P 213.

⁵⁶ *Id.* at P 213-14 (emphasis added).

⁵⁷ *Certification Order* at P 170 (“We will not grant a general blanket waiver to any entity from the funding obligation because section 215 requires ultimate funding to be allocated among end users, and does not exclude specific types of load, including load served by behind the meter generation, or suggest that allocation of cost responsibility among end users will depend on how they use, or what benefits they receive from, the Bulk-Power System.”)

⁵⁸ In any event, the assignment of funding responsibility to an entity should not affect the applicability of a Reliability Standards to that entity. *Certification Order* at P 219.

94. We also reject Alcoa's request that a demand allocation method should be employed for assigning funding responsibility for any of NERC's fixed costs, infrastructure costs, and overhead program costs. While Alcoa contends that a demand allocation method would be consistent with the Commission's rate making methodologies, it offers no real specifics and fails to demonstrate how the coincident peak demand allocation factors that the Commission uses to allocate demand related costs for ratemaking purposes would be appropriate or could be easily developed on a continent-wide basis for NERC funding purposes.⁵⁹

E. Reliability Standard Development

1. Cost-benefit Analysis

95. In Order No. 672, we stated that the Reliability Standard development process must ensure that each Reliability Standard is technically sound and that its operational specifications are designed to achieve a valuable reliability goal.⁶⁰ In the *Certification Order*, we found that, by specifying the general objectives for which a Reliability Standard must be intended, NERC's proposed Reliability Standard development process met this requirement. We stated that, unless NERC further explores what it means to provide an adequate level of reliability, targeting a valuable reliability goal may not be enough to prevent a Reliability Standard from reflecting the lowest common denominator that merely validates current practices. However, the Commission did not find that it was necessary to specify in advance a type of cost-benefit analysis that the ERO must apply uniformly to all Reliability Standards under development. We noted that it is sufficient that a Reliability Standard achieve its reliability goal effectively and efficiently.

a. Requests for Rehearing or Clarification

96. Alcoa requests rehearing or clarification of the Commission's decision not to require that the Reliability Standard development process include a cost-benefit analysis. In Alcoa's view, the *Certification Order* wrongly equates the cost-effectiveness of a proposed Reliability Standard with whether it reflects the lowest common denominator. According to Alcoa, while adequate reliability must be defined by quantitative metrics (*e.g.*, failure rates) that take into account the probability of adverse events and their impact, inherent in any decision regarding the level of reliability determined to be adequate is a determination of the cost-effectiveness of the measures to be undertaken.

⁵⁹ See, *e.g.*, 18 C.F.R. § 35.13(h)(27) (2006); *Kentucky Utilities Co.*, Opinion No. 184, 24 FERC ¶ 61,158 (1983).

⁶⁰ *Certification Order* at P 239-40.

b. Commission Conclusion

97. We deny Alcoa's request for rehearing. Our holding in the *Certification Order* is not at odds with the notion of cost-effectiveness. Indeed, the Reliability Standard development process should consider, at a high level, as appropriate, the potential costs and other risks to society of a Bulk-Power System failure if action is not taken to establish and implement a new or modified Reliability Standard in response to previous blackouts and the economic impacts associated with such blackouts.⁶¹ However, EPAct 2005 does not mandate a case-by-case cost-benefit analysis and we are not prepared to mandate that the Reliability Standard development process include an analysis of what the cost and benefit implications might be for each potentially affected user, owner or operator of the Bulk-Power System that could be impacted by the proposed Reliability Standard or what the consumers served by these entities are or should be willing to pay, as Alcoa suggests.⁶² Similar arguments were raised in the Order No. 672 rulemaking proceeding,⁶³ and there we identified a variety of factors that might affect our consideration of whether a proposed Reliability Standard satisfies the statutory standard

⁶¹ For example, the reported cost to society of the August 2003 Northeastern regional blackout has been estimated to approximate \$6.4 to \$10.3 billion: *The Economic cost of the Blackout, An issue paper on the Northeastern Blackout, August 14, 2004*, ICF Consulting; *Northeast Blackout Likely to Reduce US Earnings by \$6.4 Billion*, Anderson Economic Group, August 19, 2003.

⁶² We note that this would not be a small undertaking if it were to be applied in all cases. An affected user, owner or operator of the Bulk-Power System may have a variety of options as to how it could meet the requirements and objectives of a proposed Reliability Standard, each with its own unique cost that reflects the respective entity's specific electrical configuration and available resources. Furthermore, the Congressional Budget Office (CBO) has noted that estimates of the value of service reliability vary widely depending upon many factors, such as the type of customer and the time and length of the outage. The CBO reported that "[t]he industry commonly describes consumers' concerns about supply interruptions in terms of "reliability" of service. Studies of the economic value of that reliability (or, equivalently, the costs of interruptions) indicate that many customers would have been willing to pay perhaps 100 times their normal electricity bill for a disrupted period to avoid that loss of power." *Homeland Security and the Private Sector*, Congressional Budget Office, December 2004, Chapter 4 at 34 and n.9.

⁶³ Order No. 672 at P 314.

for approval, including the cost of implementation, but we did not require a formal cost-benefit analysis, which could drag out the Reliability Standard development and approval process.⁶⁴ The Commission intends to retain this approach.

2. ERO Review of Regional Criteria

98. In the *Certification Order*, we found that the definition and scope of regional criteria did not require further clarification than that provided by NERC in section 202.14 of NERC's Rules of Procedure. We stated that a regional criterion is a standard of behavior of a voluntary nature such as the method through which a Regional Entity intends to implement a Commission-approved Reliability Standard.⁶⁵ We pointed out that, although a regional criterion is not enforceable under section 215 of the FPA and cannot preempt a Commission-approved Reliability Standard, inconsistencies between a regional criterion and a Reliability Standard could lead to unnecessary confusion. Therefore, we found that a Regional Entity must avoid adopting any voluntary rule that detracts from a Commission-approved Reliability Standard. Voluntary standards or practices cannot be used to circumvent the mandatory Reliability Standard system.⁶⁶

a. Requests for Rehearing or Clarification

99. On rehearing, TAPS states that the Commission erred in not requiring NERC to clarify the definition and scope of regional criteria,⁶⁷ and to review regional criteria for consistency with Reliability Standards to ensure that they do not result in confusion or differing regional interpretations and applications of the same NERC Reliability Standard.⁶⁸ TAPS contends that regional criteria may not be voluntary where a Regional Entity's bylaws require all its members to adhere to the regional criteria. TAPS further asserts that there is no ascertainable division between a regional Reliability Standard and

⁶⁴ Order No. 672 at P 320-38. For example, among these factors are the lessons learned from past operating incidents, the size of selected affected entities and their costs to implement, and balancing the reliability objective against other vital public interests.

⁶⁵ *Certification Order* at P 281.

⁶⁶ *Id.* at P 616.

⁶⁷ *See* Rules of Procedure § 202.14.

⁶⁸ TAPS notes that sections 314.1 and 314.2 of the Rules of Procedure only provide for NERC to maintain a current catalog of regional reliability criteria, not for mandatory review of regional criteria by NERC.

regional criterion since both are defined as “augmenting” a Reliability Standard.⁶⁹ In addition, where a regional criterion may be intended to clarify and avoid incorrect interpretations of a Reliability Standard,⁷⁰ other interpretations of the Reliability Standard are subject to approval through the ballot pool and incorporated into the Reliability Standard⁷¹ while the regional criterion is not. Thus, in TAPS’ view, a separately-enforceable regional criterion covering the same domain as a NERC Reliability Standard without mandatory NERC review is contrary to section 215 and the goal of encouraging consistency and enforcement of Reliability Standards.⁷² Overlapping definitions of terms with different consequences in terms of approval requirements and enforcement could cause confusion and result in other problems.

b. Comments on Compliance Filing

100. In its comments on NERC compliance filing, TAPS reiterates its rehearing concern that NERC does not resolve or explain the inconsistent regional criteria provisions in its Rules of Procedure. While section 202.14 of the Rules of Procedure states that a regional reliability organization develops regional criteria, section 314.1 of the Rules of Procedure states that a Regional Entity develops regional criteria. TAPS asserts that, because regional reliability organizations and Regional Entities may not be the same organization in a given region, NERC should clarify which organization develops regional criteria.

c. Commission Conclusion

101. TAPS raises a valid point in regard to the fact that NERC’s Rules of Procedure are inconsistent because section 202.14 provides for regional criteria to be developed by regional reliability organizations whereas section 314.1 provides that they are developed by Regional Entities. Having these inconsistent provisions will create confusion. NERC

⁶⁹ See Rules of Procedure § 202.13.

⁷⁰ Reliability Standard Development Procedure, Interpretations of Standards, at 23-24: “If approved, the interpretation is appended to the standard and is effective immediately. The interpretation will stand until such time as the standard is revised through the normal process, at which time the standard will be modified to incorporate the clarifications provided by the interpretation.”

⁷¹ Reliability Standards Development Procedure at 23-24.

⁷² TAPS, however, further submits that regional criteria that pertain to matters outside the scope of section 215(a)(3) of the FPA, *e.g.*, adequacy, should not be subject to the NERC’s review for consistency.

should remove the regional criteria inconsistency by modifying the definition of the term “regional criteria” in section 202.14 of the Rules of Procedure to specify that regional criteria are developed by Regional Entities to be consistent with section 314.1.

102. Having only the Regional Entities specify regional criteria to implement or augment Reliability Standards addresses TAPS’ concerns and the possibility of multiple investigations and enforcement actions pertaining to the same violation. To further accomplish this objective, each Regional Entity should work with NERC to ensure that its regional criteria are not inconsistent with any of NERC’s Reliability Standards. To the extent that NERC wishes to have its Rules of Procedure recognize regional reliability organization developed requirements, for example adequacy requirements, NERC should use terminology other than “regional criteria.”

F. Settlements

103. In its application, NERC explained that, to assure consistency, it reserved the right to participate in Regional Entity settlement processes, and would review all settlements prior to filing a notice of penalty with the Commission. We found that this procedure, along with other safeguards such as regional audits and periodic assessments, provided adequate oversight to assure consistency of Regional Entity settlements of violations of Reliability Standards.⁷³ We indicated that, if future experience shows an unacceptable level of inconsistency among Regional Entity settlements, NERC may propose, or the Commission may require, a change in these Rules. We agreed that the ERO should have the ability to approve or reject a settlement and that, if the ERO rejects a settlement, it may propose a modification to the settlement and request the parties to review the proposal. If the parties do not accept the proposed modification, they may resolve the matter through the adjudication and appeals process.

1. Requests for Rehearing or Clarification

104. TAPS seeks rehearing of the Commission’s finding that NERC’s procedures to review Regional Entity settlements will provide adequate oversight over these settlements. In particular, TAPS asserts that the Commission’s acceptance of NERC’s proposal to review all Regional Entity settlements prior to filing a notice of penalty with the Commission means that NERC will only review a Regional Entity settlement that assesses a penalty. TAPS argues that the ERO must review all Regional Entity

⁷³ *Certification Order* at P 479.

settlements to ensure consistent enforcement. It asserts that a Regional Entity's decision as to whether to press for an admission of a violation and impose a penalty, or to settle short of such action, is an area in which there can be differences among the regions that should be avoided.

2. Commission Conclusion

105. We deny rehearing. While we agree with TAPS that NERC must review all Regional Entity settlements to carry out its enforcement authority, we do not interpret NERC's proposal to mean that NERC would only review settlements in which a Regional Entity assesses a penalty. As noted above, in our *Certification Order*, we stated that the ERO should have the ability to approve or reject a Regional Entity settlement.⁷⁴ This includes all settlements, not only the ones in which a Regional Entity elicits an admission of a violation or assesses a penalty. To remove any possible ambiguity on this issue, we clarify that NERC shall review all Regional Entity settlements.

G. Compliance Registry

106. Section 39.2(c) of our regulations directs each user, owner and operator of the Bulk-Power System to register with the ERO and each applicable Regional Entity in such manner prescribed by the ERO and the applicable Regional Entity. The *Certification Order* found that NERC's proposed compliance registration process and corresponding Rules of Procedure provide a reasonable means to implement the compliance registration requirement with certain revisions and clarifications. We stated that the compliance registry could not be clarified until we consider the scope and applicability of any approved Reliability Standard as it applies to users, owners or operators of the Bulk-Power System.⁷⁵

107. We further noted that the complete registration of "users" of the Bulk-Power System depends on the context and use of the term in a relevant Reliability Standard, and will be addressed by the Commission in Docket No. RM06-16-000. Once we have considered and approved a Reliability Standard and its scope and applicability, NERC's compliance registry should track our determination.

108. Accordingly, we found that NERC and the Regional Entities should not consider the list of registrants as final until the Commission has first considered the types of entities to which a particular Commission-approved Reliability Standard may apply. We indicated that, since many of the owners and operators of the grid, to who most of the

⁷⁴ *Id.* at P 479.

⁷⁵ *Id.* at P 691-92.

Reliability Standards are aimed, can be identified quickly, we urged NERC and the Regional Entities to be as aggressive as practical in completing the preliminary, nonbinding compliance registry prior to the Commission's approval of any of the proposed Reliability Standards submitted in Docket No. RM06-16-000. We stated that this preliminary registry will be helpful in completing the final registrations once we have approved Reliability Standards.⁷⁶ The registry will be considered informative but not dispositive of who is subject to the Commission's jurisdiction for reliability purposes, as this is a matter ultimately for the Commission to decide.

109. Finally, in the *Certification Order*, we stated that NERC's compliance filing must address the concerns raised regarding NERC's proposal to automatically register members of the registered ballot body as NERC members. In addition, we required that NERC must address how it proposes to automatically register entities when membership in NERC imposes certain obligations.⁷⁷

1. Requests for Rehearing or Clarification

110. ELCON challenges our approval of NERC's preliminary compliance registration process without the Commission first defining the term "use" of the Bulk-Power System. According to ELCON, in a line of subdelegation doctrine cases, the D.C. Circuit has ruled that an agency must not subdelegate its ultimate regulatory authority without specifying objective criteria to guide the private entity.⁷⁸ In ELCON's view, the Commission's failure to establish such criteria while NERC proceeds with a quasi-regulatory, nonbinding compliance registration process fundamentally violates this line of cases. ELCON requests that the Commission promptly establish the specific criteria to govern applicability of NERC Reliability Standards and the scope of the registration process, and in the meantime suspend NERC's preliminary compliance registration to avoid not only improper delegation of a regulatory function to a private entity, but also to avoid an inconsistent outcome, confusion, and imposition of burdens on industrial customers seeking to avoid or overturn incorrect applicability and registration decisions.

111. ELCON also challenges the Commission decision to decline to act on its proposal to exclude industrial facilities customers served under a state jurisdictional tariff or

⁷⁶ *Id.* at P 714.

⁷⁷ *Id.* at P 91.

⁷⁸ See *NARUC*, 737 F.2d at 1143 n.41; cf. *Printz v. United States*, 521 U.S. 898, 922-23, (1997); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004).

contract, or customers that are small entities until the Commission determines the scope and applicability of the particular Reliability Standards that it may approve in Docket No. RM06-16-000. In ELCON's view, the statutory exclusion of local distribution facilities from the definition of Bulk-Power System would apply to most industrial customers, which it claims are state jurisdictional retail customers and therefore, by definition, users of local distribution facilities. Accordingly, ELCON contends that the Commission should: (1) recognize that excluding end users and facilities used in local distribution means that the guiding criterion should be potential for material impact on Bulk-Power System reliability, (2) recognize that only users engaging in utility-like functions have potential for material impact on reliability, and (3) establish specific criteria so that the Reliability Standards and associated registration requirements are applied uniformly only to those entities with direct, material and measurable impacts on Bulk-Power System reliability.

112. According to ELCON, in the absence of Commission-established and approved registration criteria, the regions are beginning to register a broad range of entities, including entities with no potential for material impact on the Bulk-Power System.⁷⁹ Case-by-case determinations under each Reliability Standard are not effective because the same issue would arise each time a standard is developed and revised.

113. ELCON submits that the Commission should adopt a definition of user that excludes entities unlikely to have a material impact on reliability. In the alternative, if the Commission continues to postpone resolution of the matter, NERC should suspend efforts to include an entity on the compliance registry upon the filing of a simple notice of objection.

2. Compliance Filing

114. NERC indicates that it has deleted the automatic registration provisions from article II, section 2 of the Bylaws. NERC, however, expects to solicit the registered ballot body, among others, to become members of NERC.

3. Commission Conclusion

115. We deny ELCON's request to delay the preliminary compliance registration process that NERC is applying to candidate users, owners and operators of the Bulk-

⁷⁹ For instance, qualifying facilities that must contract for backup services to protect their host plant should not be treated as if they have a material impact on the grid; instead, the backup service provider should be the entity responsible for the registry requirement.

Power System. First, the Commission is not subdelegating its ultimate regulatory authority to NERC or the Regional Entities through the application of the preliminary compliance registration process. As we pointed out in the *Certification Order*, the preliminary registry will be considered informative but not dispositive of whom is subject to the Commission's jurisdiction for reliability purposes, as this is a matter that is for the Commission to decide.⁸⁰ Commission reliability jurisdiction over users, owners and operators of the Bulk-Power System, as well as the ERO and Regional Entities, is conveyed by section 215 of the FPA, not a compliance registry or the presence or absence of a Commission-approved Reliability Standard that targets a particular defined pool of users, owners or operators of the Bulk-Power System at any point in time.

116. Second, the users, owners or operators that might be affected by a given proposed Reliability Standard cannot be predetermined, but only predicted, prior to the Commission's approval of the Reliability Standard and its proposed scope and applicability. In addition, given the varying nature of the reliability purposes and objectives among different Reliability Standards, the pool of users, owners or operators of the Bulk-Power System that might be subject to one Commission-approved Reliability Standard may not be the same as the pool implicated by another Commission-approved Reliability Standard. Therefore, there need not be a universal definition for the term "user" of the Bulk-Power System which would have to reach the widest pool of candidate users, owners, and operators targeted by the broadest applicability of any of a given set of standards. We believe that it is more appropriate for the term to be interpreted in a specific context on a standard-by-standard basis so that, where a Reliability Standard targets a very narrow set of users for its purpose, other users are not unnecessarily implicated. ELCON may, of course, participate in the standard development process and comment on the proposed applicability of any particular Reliability Standard.

117. Third, we believe that the preliminary compliance registration process also serves as a forum to help better inform and forewarn the entire electric industry about which candidate users, owners or operators may eventually be subject to Commission-approved Reliability Standards. We believe that the nation can ill afford to delay raising the level of awareness among all sectors of the electric industry about the important reliability obligations and responsibilities that candidate users, owners or operators of the Bulk-Power System may face. Although the process could be somewhat burdensome, on occasion, for candidate users, owners or operators that previously may not have had contact with the NERC reliability program, these are the very entities that need to begin considering their possible roles in Bulk-Power System reliability. Finally, the preliminary compliance registration process provides hands-on experience to better inform the electric industry as to how the process might be improved.

⁸⁰ *Certification Order* at P 692.

118. For these reasons, and consistent with the approach we are proposing in the Reliability Standards NOPR, we deny ELCON's requests to delay the preliminary compliance registry process, define the term "user of the Bulk-Power System" and provide for blanket exclusions of small entities and industrial facilities customers, including those served under state jurisdictional tariffs or contracts.⁸¹

119. Finally, the Commission is satisfied that NERC has addressed concerns regarding automatic registration by removing the provision from its bylaws.

H. Definitions

120. In the *Certification Order*, we agreed with TAPS that the definition of "transmission-dependent utilities" in the Bylaws and Rules of Procedure should be consistent. We directed NERC in its compliance filing to amend the Rules of Procedure to match the broader definition in the Bylaws and required that NERC should fully explain or justify whichever definition is chosen.⁸²

121. We also asked NERC to confirm that the definition of independent trustee prohibits an independent trustee from having a relationship that would interfere with his or her exercise of independent judgment in carrying out the responsibilities of a trustee, regardless of whether he or she is an officer, director or employee of an entity with an interest in the outcome of board decisions.⁸³

122. We further directed NERC to adopt definitions of the terms defined in Order No. 672 throughout its documents in its compliance filing.⁸⁴ The Commission also accepted NERC's proposal to delete the definition of "system operator" in its proposed Bylaws and Rules of Procedure.

⁸¹ Although, whether a customer is served under a retail tariff or retail contract is informative, it is not determinative of whether an entity is an owner, user, or operator of the Bulk-Power System.

⁸² *Id.* at P 92.

⁸³ *Certification Order* at P 42.

⁸⁴ *Id.* at P 727-28.

a. Compliance Filing

123. NERC intends to revise the definition of transmission-dependent utilities in the Rules of Procedure to match the definition in article II, section 4.a.v of the Bylaws.⁸⁵ According to NERC, the broader definition in the Bylaws includes entities serving wholesale customers, which means that due to this change, joint action agencies and generation and transmission cooperatives will be permitted to register in the registered ballot body segment for transmission dependent utilities. NERC states that this definition is in keeping with NERC's general policy of having the ballot body segments align with lines of business and allowing an entity to register into each segment for which it qualifies.

124. NERC revised the definition of "independent trustee" in its Bylaws as follows:

An independent trustee is a person (i) who is not an officer or employee of the Corporation, a member or an officer, director, or employee of a member of the Corporation, or an officer, director, or employee of any entity that would reasonably be perceived as having a direct financial interest in the outcome of board decisions, and (ii) who does not have any other relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a trustee.⁸⁶

125. NERC has modified the definitions of "Bulk-Power System," "Electric Reliability Organization," and "Regional Entity" in article I, section 1 of the Bylaws to track the definitions in Order No. 672. NERC states that it also intends to incorporate Order No. 672 definitions in its Rules of Procedure. According to NERC, the definitions of "Electric Reliability Organization" and "Regional Entity" also include language needed to recognize the international character of NERC and certain regional institutions. For clarity, NERC has also added a definition of "applicable government authority" to article I, section 1 of the Bylaws, as follows:

⁸⁵ See Rules of Procedure § 305.5.4. TAPS requested clarification that the Commission's directive to adopt the broader Bylaws definition of transmission dependent utilities for the member representatives committee is mandatory so that joint action agencies will be included in the registered ballot body for standard development purposes. In its protest to NERC's compliance filing, TAPS states that NERC's proposed modification to the definition of transmission dependent utility in the Rules of Procedures satisfies its request for rehearing.

⁸⁶ Bylaws, art. III, § 3.a.

Applicable government authority means the Federal Energy Regulatory Commission within the United States and the applicable governmental authority with subject matter jurisdiction over reliability in Canada and Mexico.

126. NERC further indicates that it has deleted the definition of “system operator” from article I, section 1 of the Bylaws and will delete that definition from section 202 of its Rules of Procedure.

b. Commission Conclusion

127. NERC has complied with the Commission’s directives with regard to definitions and we accept NERC’s compliance filing. However, NERC’s initial compliance filing did not include a redlined version of its Rules of Procedure. NERC indicated that it would make an additional compliance filing, on or about October 18, 2006, covering issues not contained in its September 18 Filing. NERC made its second compliance filing on October 18, 2006, which includes a redlined version of its complete Rules of Procedure.

I. Miscellaneous

1. Open meetings, availability of meetings materials, and public notice

128. In its application, NERC proposed that board meetings will be open to the public, subject to accommodations, unless matters of a confidential nature are going to be discussed. In the *Certification Order*, we required NERC to modify its Rules of Procedure to make the open meeting provision applicable to all meetings of board committees.⁸⁷

129. Second, we found that the Rules of Procedure should be more specific regarding when information regarding upcoming meetings will be given to members, and required NERC to modify articles five and eight of its Bylaws to provide that the material will be sent to members within 24 hours of the time it is provided to board members or members of the member representatives committee.⁸⁸

130. Third, we directed NERC to clarify that the intent of article five, which permits the board to establish meetings to be held without notice, was to establish meetings without

⁸⁷ *Certification Order* at P 122-23.

⁸⁸ *Id.* at P 124.

notice to the trustees and that the public will be given notice of all meetings. Since NERC did not address a similar issue raised with respect to meetings of the member representatives committee; we also directed NERC to amend section 8 of article VIII of its Bylaws to eliminate the provision permitting regular meetings without notice, or reconcile that provision with section 10, which requires notice of all member representatives committee meetings.⁸⁹

a. Compliance Filing

131. NERC proposes to revise article III, section 8 of the Bylaws to provide that all meetings of board committees will be open and that that NERC will provide notice and materials regarding such meetings on its website within 24 hours of the time notice is given to committee members.

132. NERC has also revised article V, section 6 of the Bylaws to require that the results of an action taken by the board or a board committee without a meeting must be made public within seven days of the action, unless the matter is properly subject to confidential treatment. A similar revision has been made to article VIII, section 12, concerning notice of an action taken by the member representatives committee without a meeting.

133. NERC has revised article V, section 4 of the Bylaws to require that notice of board meetings, and all non-confidential material provided to the board, shall be posted to the NERC web site and sent electronically to NERC members within 24 hours of the time it is provided to members of the board. A similar revision has been made to article VIII, section 10, concerning meetings of the member representatives committee.

134. Finally, NERC notes that section 4 of article V of the Bylaws requires notice to members and to the public of all board meetings. To eliminate the potential for confusion, NERC has revised article V, section 1, so that the last phrase reads: “that may be held without further notice to the trustees.” Thus, by virtue of adoption of the resolution setting a regular meeting schedule, trustees will be on notice of regularly scheduled meetings. NERC has made a similar revision to article VIII, section 7 of the Bylaws regarding the member representatives committee.

b. Commission Conclusion

135. NERC has complied with the Commission’s directives with regard to open meetings, availability of meetings materials, and public notice and we accept NERC’s compliance filing.

⁸⁹ *Id.* at P 125.

2. Administrative Correction

136. In the *Certification Order*, NERC was directed to correct an omission at the end of section 305.5.1.4 with regard to transmission organizations and ISOs, which probably meant to state “they are eligible to join Segment 2.”⁹⁰

a. Compliance Filing

137. NERC indicates that it will correct section 305.5.1.4 of the Rules of Procedure to read as follows:

This segment excludes regional transmission organizations and independent system operators that are eligible to join Segment 2.

b. Commission Conclusion

138. NERC’s proposal would comply with the Commission’s directive to modify section 305.5.1.4 of the Rules of Procedure and we accept NERC’s compliance filing. However, NERC has not resubmitted a redlined version of section 305.5.1.4 of the Rules of Procedure. NERC indicates that will make an additional compliance filing, on or about October 18, 2006, covering issues not contained in its September 18 Filing. At that time, NERC must submit a redlined version of section 305.5.1.4 of the Rules of Procedure containing the change proposed above.

The Commission orders:

(A) The requests for rehearing are hereby denied in part and granted in part, as discussed in the body of this order.

(B) NERC’s compliance filing is hereby accepted, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.

⁹⁰ *Id.* at P 93.