

122 FERC ¶ 61,105
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability
Corporation

Docket No. RR06-1-011

ORDER ON COMPLIANCE FILING

(Issued February 6, 2008)

1. On October 19, 2007, the North American Electric Reliability Corporation (NERC) submitted a filing in response to the Commission's September 20, 2007 order.¹ That order directed NERC to modify its Rules of Procedure to change the designation of "required" alerts issued pursuant to sections 807.6.c and 808.2.c of the NERC Rules of Procedure to indicate the seriousness of the recommendation rather than to indicate that they are "required." In this order, the Commission approves NERC's October 19 compliance filing.

Background

2. In a June 27, 2007 order, the Commission discussed changes NERC made to section 807 of its Rules of Procedure concerning the analysis of significant system events.² Section 807.6 of the Rules of Procedure allows NERC, after analyzing a significant system event, to disseminate "operations and equipment alerts" that can require specific actions by Bulk-Power System users, owners and operators. Sections 807.6.c (Analysis of Major Events) and 808.2.c (Analysis of Off-Normal Events and System Performance) of NERC's Rules of Procedure provided that NERC will screen and analyze the findings and recommendations from the analysis, and those with generic applicability will be disseminated to the industry in the form of operations or equipment alerts of three possible types:

¹ *North American Electric Reliability Corp.*, 120 FERC ¶ 61,239 (2007) (September 20 Required Action Order).

² *North American Electric Reliability Corp.*, 119 FERC ¶ 61,248 (2007) (June 2007 Compliance Order).

Advisory — these alerts are purely informational, intended to alert owners, operators, and users of the Bulk-Power System to potential problems;

Recommendation — these alerts are intended to recommend specific action be taken by owners, operators, and users of the Bulk-Power System;

Required Action — these alerts are intended to require specific action by owners, operators, and users of the Bulk-Power System. Such alerts require NERC board approval before issuance.

3. In the June 2007 Compliance Order, the Commission stated that it believed that NERC should issue operations and equipment alerts only under NERC's remedial power.³ On July 9, 2007, in Docket No. RR06-1-009, NERC sought clarification of this statement, asserting that a remedial action directive must be based on a violation or possible violation of a Reliability Standard, whereas the situations covered by sections 807.6 and 808.2 of its Rules of Procedure would not necessarily involve a violation of a Reliability Standard. In the September 20 Required Action Order, the Commission acknowledged that its previous statement was incorrect and that sections 807.6 and 808.2 are not related to NERC's remedial authority.

4. However, the Commission stated that this new understanding raised different concerns. While we recognized the importance of these alerts and that having three levels of alerts (ranging from informational advisories, recommended actions, to "required" actions approved by NERC's board) is beneficial to distinguishing the seriousness of a situation, we found that labeling the most severe alerts issued pursuant to sections 807.6.c and 808.2.c of the Rules of Procedure as "Required Action" alerts was misleading. Therefore, we directed NERC to change the designation of alerts issued pursuant to sections 807.6.c and 808.2.c of the Rules of Procedure to indicate the seriousness of the recommendation rather than to indicate that they are "required."

NERC's Compliance Filing

5. NERC proposes to make a number of changes to sections 807, 808 and 810 of its Rules of Procedure to implement the directives in the September 20 Required Action Order. First, to avoid repetition, NERC proposes to move the identical provisions from

³ See June 2007 Compliance Order at P 64, citing *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 at P 476-77, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006); see also Rules of Procedure, Appendix 4B, Sanctions Guidelines, section 6.

sections 807.6 and 808.2 of the Rules of Procedure to proposed section 810 of the Rules of Procedure, which has been re-captioned “Information Exchange and Issuance of NERC Advisories, Recommendations and Essential Actions.”

6. NERC also proposes to delete the term “alert” and replace it with the terms “Level 1 (Advisories),” “Level 2 (Recommendations)” and “Level 3 (Essential Actions).” NERC maintains that the change of the term “Required Actions” originally found in sections 807.6 and 808.2 to “Level 3 (Essential Actions)” (now found in section 810) indicates the seriousness of the notification while removing the implication that entities are under a legal obligation to implement the Essential Action issuances. In addition, NERC proposes to define Essential Actions as “specific actions that NERC has determined are essential for certain segments of owners, operators, or users of the bulk power system to take to ensure the reliability of the bulk power system.” NERC states that, as was the case under the existing rules for “Required Actions,” Essential Actions would require the approval of the NERC Board of Trustees before they can be issued. NERC states that Advisories, Recommendations, and Essential Actions will be used in situations where NERC intends to place the industry, or segments of the industry, on formal notice of the conclusions from its analysis of events, disturbances, and similar matters.

7. NERC proposes to modify sections 807.6 and 808.2 of the Rules of Procedure to state that NERC will disseminate findings and recommendations from its analyses of major events, and information on other events and on potential vulnerabilities, to the industry “in accordance with section 810.” Additionally, NERC proposes to modify section 808 of the Rules of Procedure to refer to (i) analysis of potential vulnerabilities in the Bulk-Power System brought to NERC’s attention by government agencies, such as the Commission or ERO regulatory authorities in Canada, and (ii) analysis to identify the root causes of events “that have the potential to cause more serious events.”

8. NERC proposes to move the existing requirement that users, owners and operators of the Bulk-Power System provide NERC with detailed and timely operating experience and data from section 808.3 of the Rules of Procedure to a new subsection 810.1. The provision in existing section 808.3 directing NERC members and Bulk-Power System users, owners and operators to evaluate and take appropriate action in response to Recommendations and Essential Actions would be moved to a new subsection 810.4 of the Rules of Procedure. NERC proposes that section 810.4 would also contain a requirement that those to whom Recommendations and Essential Actions are directed must provide reports to NERC, in accordance with reporting date(s) specified by NERC, on the actions the entities have taken and progress made to implement the Recommendations or Essential Actions and resolve the issues identified in those notifications. NERC states that this reporting provision is intended to allow NERC to obtain the information needed to submit to the Commission the reports required by the September 20 Required Action Order and provided for in new section 810.5 of the Rules

of Procedure. NERC states that the proposed reporting provision in section 810.4 of the Rules of Procedure would not apply to Level 1 (Advisories), because NERC would not be requesting action through Advisories.

9. NERC also proposes to add a requirement to the Rules of Procedure that reflects the directive in the September 20 Required Action Order to give the Commission at least five days prior notice of NERC's intention to issue Advisories, Recommendations and Essential Actions. That requirement is contained in a new section 810.5 of the Rules of Procedure.⁴ Proposed section 810.5 includes a provision for issuance on less than five business days notice in extraordinary circumstances. NERC states that new section 810.5 also includes a requirement that NERC file a report with the Commission and other applicable governmental authorities within 30 days after the date NERC specifies for users, owners and operators to report to NERC on the steps they have taken in response to Recommendations or Essential Actions.

10. As stated in proposed section 810.2, which NERC states is essentially the text of existing section 810, in the course of its normal operations, NERC is in regular communication with the industry by means of committee reports, reliability assessments, speeches, press releases and the like to disseminate information on activities and developments throughout NERC's programs. The formal notification procedure for issuance of Advisories, Recommendations and Essential Actions in section 810 is not intended to cover those kinds of activities, and subjecting such activities to a prior notice and reporting requirement would bring NERC's ongoing activities to a halt. NERC does not read the September 20 Required Action Order to intend or require that result.

Procedural Matters

11. Notice of NERC's October 19, 2007 filing was published on October 23, 2007, with comments due on or before November 9, 2007. Edison Electric Institute (EEI) filed a timely protest.

12. EEI requests that the Commission reject NERC's proposed designations of Level 1 (Advisories), Level 2 (Recommendations) and Level 3 (Essential Actions) in section 810 of the Rules of Procedure. EEI states that it believes the NERC proposal is contrary to the Commission's directive in its September 20 Required Action Order that NERC should use a designation of alerts "to indicate the seriousness of the recommendations rather than to indicate that they are 'required.'" According to EEI, NERC's proposal does not remedy this confusion because it continues to blur the nature of NERC's authority in this area.

⁴ NERC proposes to broaden the prior notice requirement in section 810.5 to include prior notice to "other applicable governmental authorities" as well.

13. EEI maintains that the revised section 810 of the Rules of Procedure continues to be misleading. According to EEI, the first dictionary definition of “essential” is “absolutely necessary,”⁵ which confirms the mandatory connotation of the term Essential Actions.

14. Moreover, EEI maintains that the use of the three terms, Advisories, Recommendations and Essential Actions, focuses more on the action to be taken by the registered entity than on the seriousness of the situation, as required by the Commission, and suggests an increasing level of the degree of imperativeness. According to EEI, the use of the term Essential Actions is analogous to the term “good utility practice,” a concept that for the purposes of section 215 of the Federal Power Act (FPA) has given way to explicit enforcement of specific Commission-approved mandatory Reliability Standards.⁶ EEI argues that industry’s experience with an electric sector information sharing and analysis center (ES-ISAC) advisory issued in 2007⁷ serves as an example of the confusion that can result from terms suggesting that an alert or advisory is mandatory. Anecdotal evidence strongly suggests that users, owners and operators of the Bulk-Power System that received the advisory were confused on whether there were compliance-related consequences attached to this activity.

15. For these reasons, EEI suggests that rather than using terms that perpetuate this confusion, NERC should designate the communications issued under section 810 of the Rules of Procedures as “Level 1,” “Level 2” and “Level 3” to indicate the increasing level of seriousness of the situation, as directed by the Commission in the September 20 Required Action Order.

16. For those issues that NERC determines involve more critical matters, including the possible identification of a need for appropriate entities to take immediate and specific actions in response to imminent threats to the Bulk-Power System, EEI states that it believes that section 810 of the Rule of Procedure could be revised to recognize that the outcome of activity taken under sections 807 or 808 of the Rule of Procedure could result in a request that the NERC Board of Trustees approve the use of the urgent and emergency action procedures in the Reliability Standards development process to develop

⁵ EEI at 3, citing <http://dictionary.reference.com/browse/essential>.

⁶ EEI at 4, citing Order No. 693, FERC Statutes and Regulations ¶ 31,242 at P 302 (2007).

⁷ NERC, acting through the ES-ISAC, issued an alert to generator owners, generator operators, transmission owners, and transmission operators identifying a number of short-term measures, mid-term measures and long-term measures designed to mitigate potential cyber vulnerabilities.

a Reliability Standard to address the problem.⁸ According to EEI, using this Commission-approved and ANSI-certified process will allow the Board of Trustees to decide whether a critical and imminent threat to the Bulk-Power System exists, and at the same time provide an opportunity for Bulk-Power System users, owners and operators to participate in the decision to appropriately address the technical aspects of the issue. A Reliability Standard approved by NERC and the Commission under the urgent action process carries the possibility of sanctions for non-compliance. Any emergency Reliability Standard approved by the NERC board and filed for Commission approval under the process could be characterized as a Level 3 communication under section 810 of the Rules of Procedure.

17. With respect to Level 1 and Level 2 communications, EEI asserts that section 810 of the Rules of Procedure should be revised to recognize that NERC may issue a public or a secure communication. Such communications will provide information on particular findings made under analyses or investigations conducted under sections 807 or 808 of the Rules of Procedure. Such alerts would also be recognized as supporting documents under the Reliability Standards Development Process Manual.⁹ NERC may also issue a secure communication for any information that is deemed to include either confidential information or Critical Energy Infrastructure Information (CEII). The ES-ISAC advisory is an example of a communication that might merit such treatment.

Discussion

18. The Commission approves NERC's proposed modifications to sections 807, 808 and 810 of the Rules of Procedure. The Commission believes that EEI's concerns are overstated. The Commission's concern in the September 20 Required Action Order was that NERC's use of the term "required" might indicate that NERC could impose penalties or other sanctions if a registered entity fails to take the corrective action specified in one of these issuances. We believe that this confusion is eliminated with use of the term "Essential Action."

19. Even using EEI's meaning of the term essential as absolutely necessary, we do not view the use of the term Essential Action as indicating that an action is required under section 215 and subject to penalties. The Commission also disagrees with EEI that use of the terms Advisories, Recommendations, and Essential Actions focuses more on the action to be taken by the registered entity than on the seriousness of the situation. As EEI

⁸ NERC Rules of Procedure, Appendix 3A, Standards Development Process Manual, at 26, Version 6.1, effective June 7, 2007.

⁹ NERC Rules of Procedure, Appendix 3A, Standards Development Process Manual, at 34.

acknowledges, the three terms suggest an increasing level of the degree of imperativeness. This is not inconsistent with the Commission's directive in the September 20 Required Action Order. In requiring that NERC modify the Rules of Procedure, the Commission directed NERC to denote the seriousness of the recommendation. The Commission believes that the more serious a recommendation, the more imperative it is to follow.

20. The Commission does not agree with EEI that the use of the term Essential Actions is analogous to the term good utility practice, and EEI has not provided sufficient information as to why it believes the two are analogous.

21. While this year's experience with an ES-ISAC advisory may have resulted in some confusion, the Commission believes that this was caused in part by the misleading language in sections 807.6 and 808.2 of the Rules of Procedure and in part because of the fact that industry is still becoming accustomed to the new mandatory reliability regime. The Commission understands that industry is still adapting to the new aspects to NERC's authority as the ERO, including its authority to issue alerts. However, in this instance, the Commission believes that such confusion is resolved by NERC modification of the Rules of Procedure and the Commission's statements in the September 20 Required Action Order. We do not find it necessary to direct NERC to further modify its Rules of Procedures, as requested by EEI.

22. Further, while we agree with EEI that there are instances in which NERC should issue a secure communication under section 810 of the Rules of Procedure, we do not believe that it is necessary to modify the Rules of Procedure to specifically state that NERC may issue a public or a secure communication. Section 810 does not specifically require a public communication, nor does it prohibit a secure communication. As such, we believe that section 810 appropriately allows NERC to issue Advisories, Recommendations and Essential Actions through either form of communication.

23. Finally, the Commission does not believe it is necessary to revise section 810 of the Rules of Procedure to specifically recognize that the outcome of activity taken under sections 807 or 808 could result in the NERC Board of Trustees requesting that a Reliability Standard be developed under NERC's urgent action process. As stated above, the Commission believes that it is sufficiently clear that an Essential Action, while serious, is not required and is not subject to penalties under section 215 of the FPA. If NERC decides that information discovered pursuant to sections 807 or 808 of the Rules of Procedure requires NERC to develop a Reliability Standard pursuant to its urgent action process, NERC may do so. This option is available to NERC regardless of whether it is specifically stated in section 810 of the Rules of Procedure.

The Commission orders:

(A) NERC's compliance filing is hereby approved, as discussed in the body of this order.

(B) EEI's protest is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.