

141 FERC ¶ 61,241  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability Corporation

Docket No. RR12-8-000

ORDER CONDITIONALLY APPROVING REVISIONS TO NORTH AMERICAN  
ELECTRIC RELIABILITY CORPORATION RULES OF PROCEDURE

(Issued December 20, 2012)

1. On May 7, 2012, the North American Electric Reliability Corporation (NERC) submitted a petition requesting approval of revisions to the NERC Rules of Procedure and its Appendices. Pursuant to section 215(f) of the Federal Power Act (FPA), we conditionally approve the proposed revisions to the Rules of Procedure, with limited exceptions.<sup>1</sup> As discussed in the body of this order, we direct NERC to make a compliance and an informational filing within 60 days of the date of this order.

**I. Background**

**A. EPAct 2005 and Mandatory Reliability Standards**

2. Section 215 of the FPA requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which provide for the reliable operation of the Bulk-Power System, subject to Commission review and approval.<sup>2</sup> On February 3, 2006, the Commission issued Order No. 672 to

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<sup>1</sup> 16 U.S.C. § 824(f) (2006).

<sup>2</sup> *Id.* § 824o(d)(2).

implement the requirements of section 215 of the FPA governing electric reliability.<sup>3</sup> In July 2006, the Commission certified NERC as the ERO.<sup>4</sup>

3. Section 215(f) of the FPA states that the ERO “shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose.”<sup>5</sup> Section 215(f) further provides that a “proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c).”<sup>6</sup>

## **B. NERC Petition**

4. On May 7, 2012, NERC filed a petition requesting approval of revisions to provisions in Sections 300 (Reliability Standards Development), 400 (Compliance Enforcement), 600 (Personnel Certification), 800 (Reliability Assessment and Performance Analysis), 1000 (Situation Awareness and Infrastructure Security), 1400 (Amendments to the Rules of Procedure), and 1700 (Challenges to Determinations) of the NERC Rules of Procedure. The petition also sought to revise NERC Rules of Procedure Appendices 2 (Definitions), 3C (Procedure for Coordinating Reliability Standards Approvals, Remands, and Directives), 4B (Sanction Guidelines), 4C (Uniform Compliance Monitoring and Enforcement Program (CMEP)), 5B (Statement of Compliance Registry Criteria), and 6 (System Operator Certification Program Manual).

5. NERC states that the proposed revisions are the result of a “wide-ranging, comprehensive review of the ROP [Rules of Procedure] and was conducted to identify improvements to the underlying processes reflected in the ROP based on the experience to date of NERC and the Regional Entities ... [and] to further implement actions identified in 2009 in NERC’s Three-Year ERO Performance Assessment Report, to

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

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

<sup>5</sup> 16 U.S.C. § 824o(f).

<sup>6</sup> *Id.*

eliminate inconsistencies, and to make other improvements and clarifications identified by the review teams.”<sup>7</sup>

## **II. Notices of Filings and Responsive Pleadings**

6. Notice of NERC’s petition was published in the Federal Register, 77 Fed. Reg. 28,593 (2012), with interventions and protests due on or before May 29, 2012. Modesto Irrigation District timely filed a motion to intervene. ISO/RTO Council filed a timely motion to intervene and comment. Motions to intervene and protests were timely filed by Occidental Energy Ventures Corp. (OEVC), Midwest Independent Transmission System Operator, Inc. (MISO), and jointly by American Public Power Association, Edison Electric Institute, Electric Consumers Resource Council, Electric Power Supply Association, and National Rural Electric Cooperative Association (collectively, Trade Associations).

7. On May 30, 2012, the Trade Associations filed a corrected motion to intervene and protest. On May 31, 2012, ISO/RTO Council filed an amended motion to intervene and comments. On June 7, 2012, NERC filed a motion to answer the Trade Associations and OEVC protests. On June 14, 2012, ISO/RTO Council filed a motion to answer the OEVC protest. On June 21, 2012, OEVC filed a motion to answer the ISO/RTO Council’s June 14, 2012 answer.

## **III. Procedural Matters**

8. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest or answer, unless otherwise ordered by the decisional authority. We will accept NERC, ISO/RTO Council, and OEVC’s answers because they have provided information that assisted us in our decision-making process.

## **IV. Discussion**

10. Except as otherwise indicated below, the Commission approves NERC’s proposed revisions to the NERC Rules of Procedure and Appendices. Pursuant to section 215(f) of the FPA, we find that the proposed revisions we approve are just, reasonable, not unduly discriminatory or preferential, and in the public interest and that they satisfy the

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<sup>7</sup> NERC Petition at 1 (citing North American Electric Reliability Corporation, Report, Docket No. RR09-7-000 (filed July 20, 2009)).

requirements of section 215(c) of the FPA. These proposed revisions are an improvement over the currently effective NERC Rules of Procedure in that they reflect NERC's accumulated experience, changes in program area processes, Commission orders, stakeholder concerns, and actions or changes identified in the three-year ERO performance assessment process or in renegotiation of the Regional Entity delegation agreements.

**A. NERC Proposed Revisions to Section 300 (Reliability Standards Development)**

11. NERC proposes numerous revisions to Section 300.<sup>8</sup> We address below NERC's proposed revisions to Sections 317 and 318.

**1. Section 317**

12. With respect to Section 317, which currently requires NERC to conduct at least a five-year review of NERC's Reliability Standards, NERC proposes the following revisions:

NERC shall complete a review of each Reliability Standard at least once every five years, or such longer period as is permitted by the American National Standards Institute, from the effective date of the Reliability Standard or the latest revision to the Reliability Standards, whichever is later.<sup>9</sup>

13. NERC states that while the current language was meant to satisfy the American National Standards Institute's (ANSI) accreditation requirements, "it may be possible to obtain relief from ANSI concerning the requirement that each Reliability Standard be reviewed at least once every five years."<sup>10</sup>

**Comments**

14. MISO states that the Commission should reject the proposed revision to Section 317. MISO states that the Reliability Standards "need more consistent review and adjustment than would be permitted under the NERC proposal ... [and that] there is still

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<sup>8</sup> NERC proposes revisions to Sections 304-309, 311-313, 315-320.

<sup>9</sup> In this order, when reproducing the proposed text, underlined text reflects language NERC proposes to add and strikethrough text reflects language NERC proposes to delete.

<sup>10</sup> NERC Petition at 8.

substantial redundancy in many of the Reliability Standards, and a more regular schedule of review would have a positive impact on the administration of and compliance with the Reliability Standards.”<sup>11</sup> Further, MISO states that, in addition to keeping the requirement that NERC conduct a review of each Reliability Standard at least once every five years, the Commission should require NERC to conduct a periodic review, at least every five years, “of the entire set of Reliability Standards, and the manner in which they fit together, for potential improvements.”<sup>12</sup>

### **Commission Determination**

15. We approve NERC’s proposed revision to Section 317 and reject MISO’s protest. The proposed revision to Section 317 does not eliminate the Reliability Standard review requirement currently imposed on NERC. Instead, the proposed revision introduces some flexibility in determining the schedule for such reviews. NERC states that the five-year schedule in the current language was meant to satisfy ANSI accreditation but otherwise carries no special significance. We find that revising Section 317 to allow for a longer review schedule is acceptable to the extent it affords NERC some flexibility in scheduling its Reliability Standard reviews. Contrary to MISO’s protest, the potential change in scheduling of such reviews does not alter the substance of NERC’s reviews. Further, we do not deem it appropriate in this case to adopt MISO’s suggestion that we direct additional review requirements.<sup>13</sup>

### **2. Section 318**

16. Section 318 addresses Coordination with the North American Energy Standards Board (NAESB), with NERC proposing the following revisions:

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<sup>11</sup> MISO Protest at 6.

<sup>12</sup> *Id.*

<sup>13</sup> In addition to the reviews required by Section 317, other avenues are available for MISO to pursue its concerns. For example, NERC is currently reviewing existing Reliability Standard requirements to identify those that provide little protection to the reliable operation of the bulk electric system, are redundant or unnecessary, or those whose removal would increase the efficiency of NERC’s compliance programs. See Project 2013-02: Paragraph 81 website, *available at* [http://www.nerc.com/filez/standards/Project201302\\_Paragraph\\_81.html](http://www.nerc.com/filez/standards/Project201302_Paragraph_81.html). NERC initiated this project in response to the Commission’s FFT Order. *North American Electric Reliability Corp.*, 138 FERC ¶ 61,193, at P 81 (FFT Order), *order on clarification*, 139 FERC ¶ 61,168 (2012).

NERC shall, ~~through a memorandum of understanding,~~ maintain a close working relationship with the North American Energy Standards Board and ISO/RTO Council to ensure effective coordination of wholesale electric business practice standards and market protocols with the NERC Reliability Standards.

NERC states that the reference to the “memorandum of understanding” is being deleted because the memorandum became “unnecessary and has been terminated, with other working mechanisms established with the NAESB and the ISO/RTO Council.”<sup>14</sup>

### **Comments**

17. MISO states that Section 318, as revised, is vague and “virtually meaningless.” MISO contends that “the ISO/RTO Council represents many of the key operators of the Bulk Electric System in the United States, and its members’ experiences with the Reliability Standards, as well as their input into potential changes to both the standards and enforcement practices, have significant value for the administration of the reliability regulatory mechanism under Federal Power Act Section 215.”<sup>15</sup> MISO maintains that NERC should be “required not only to have a close working relationship with the ISO/RTO Council, but also to have more formalized processes in place to receive and consider the input of the ISO/RTO Council.”<sup>16</sup>

### **Commission Determination**

18. We approve NERC’s proposed revision to Section 318. We reject the assertion that elimination of the “memorandum of understanding” reference in Section 318 implies that NERC is not committed to working with the ISO/RTO Council. NERC states that elimination of the reference from Section 318 is due to the termination of the “memorandum of understanding” and reiterates that it will “continue to maintain close working relationships with the NAESB and the ISO/RTO Council to coordinate wholesale electric business standards and market protocols with NERC Reliability Standards.”<sup>17</sup> Given that Section 318 still requires NERC to “maintain a close working relationship with the North American Energy Standards Board and ISO/RTO Council,” the Commission declines to require NERC to develop any “formalized processes” beyond

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<sup>14</sup> NERC Petition at 8.

<sup>15</sup> MISO Protest at 6-7.

<sup>16</sup> *Id.*

<sup>17</sup> NERC Petition at 8.

what is already available to interested entities or what NERC and NAESB or ISO/RTO Council otherwise may agree upon.

**B. NERC Proposed Revisions to Section 400 (Compliance Enforcement)**

19. NERC proposes numerous revisions to Section 400.<sup>18</sup> We address below NERC's proposed revisions to Sections 401.8, 402.5, 402.6, 403.6, 403.10.5, 403.15, 408.1, 409.1, 409.3, 412, and 413.

**1. Section 401.8**

20. In Section 401.8, which currently provides that registered entities will not be subject to multiple enforcement actions by NERC and a Regional Entity, NERC proposes the following revisions:

Multiple Enforcement Actions – A Registered Entity shall not be subject to an enforcement action by NERC and a Regional Entity, or by more than one Regional Entity (unless the Registered Entity is registered in more than one Region in which the violation occurred), for the same violation.

21. NERC states that a registered entity should not be subject to an enforcement action by more than one Regional Entity for the same violation unless the registered entity “is registered, and the violation occurred, in more than one Region.”<sup>19</sup>

**Comments**

22. MISO states that it “appears that what NERC intends here is that a registered entity, under no circumstances, should be subject to multiple enforcement actions for the same violation, and should only be subject to enforcement actions by multiple Regional Entities when they are engaged in a joint enforcement action in circumstances where a violation has occurred in more than one Regional Entity ... [and that] this is the only reasonable interpretation of the revised language.”<sup>20</sup> MISO states that the Commission should “clarify that Section 401.8 is to be read to prohibit multiple enforcement actions always and under all circumstances, and to allow more than one Regional Entity to engage in an enforcement action of a registered entity for the same violation only where such Regional Entities are coordinating on a joint enforcement action. In the absence of

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<sup>18</sup> NERC proposes revisions to Sections 401-403, 407-409, 412-414.

<sup>19</sup> NERC Petition at 10.

<sup>20</sup> MISO Protest at 7.

such a clarification, the Commission should remand this proposed procedural change to NERC for further revision.”<sup>21</sup>

### **Commission Determination**

23. We approve NERC’s proposed revision to Section 401.8 and agree that a registered entity should not be subject to an enforcement action by more than one Regional Entity for the same violation, unless the registered entity is registered and the violation occurred in more than one Regional Entity. We reject MISO’s request that we interpret Section 401.8 to “allow more than one Regional Entity to engage in an enforcement action of a registered entity for the same violation only where such Regional Entities are coordinating on a joint enforcement action.” The proposed revision to Section 401.8 imposes no such requirement. We also reject MISO’s request that we remand this provision to NERC to make that point explicit. While we agree with MISO that there could be efficiencies in conducting joint enforcement actions when a registered entity has committed the same violation in two Regional Entities in which it is registered, MISO does not explain why joint enforcement actions should be required. There may be sound reasons for not conducting a joint enforcement action and, because of that, we will not foreclose that option to the affected Regional Entities.

### **2. Section 402.5**

24. In Section 402.5, which addresses “Authority to Determine Noncompliance, Levy Penalties and Sanctions, and Issue Remedial Action Directives,” NERC proposes the following revisions:

Remedial Action Directives may be issued by NERC or a Regional Entity that is aware of a Bulk Power System owner, operator, or user that is, or is about to engage in an act or practice that would result, in noncompliance with a Reliability Standard, where such Remedial Action Directive is immediately necessary to protect the reliability of the Bulk Power System from an imminent or actual threat.

25. NERC states that the revisions to Section 402.5, as to when a Remedial Action Directive may be issued, is intended to make that provision consistent with the proposed revision to the definition of “Remedial Action Directive” in Appendix 2 of the NERC Rules of Procedure.<sup>22</sup>

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<sup>21</sup> *Id.* at 8.

<sup>22</sup> As proposed in Appendix 2, the revised definition of Remedial Action Directive is: “an action (other than a Penalty or sanction) required by a Compliance Enforcement

### Comments

26. MISO states that the proposed revisions “would allow the issuance of a Remedial Action Directive in circumstances not only where an entity is engaging in a particular act, but also where it is about to engage in an act that might result in non-compliance with a Reliability Standard (and where the reliability of the Bulk Electric System is under threat).”<sup>23</sup> MISO states that, while it does not question the need for such directives under the appropriate circumstances, they should be “appropriately constrained by processes and procedures to ensure that such directives are issued appropriately, and that they facilitate reliability.”<sup>24</sup>

### Commission Determination

27. We approve NERC’s proposed revision to Section 402.5. MISO misapprehends the proposed revision to Section 402.5, which currently allows for the issuance of Remedial Action Directives when an entity is “about to engage in an act or practice that would result in noncompliance with a Reliability Standard” and there is an “imminent” threat to the Bulk-Power System. Under the proposed revision, a Remedial Action Directive could issue when an entity is engaged in or is about to engage in such an act and there is an imminent or actual threat to the Bulk-Power System.

### **3. Section 402.6**

28. Currently effective Section 402.6, which is the “Due Process” subsection of the section addressing “NERC Oversight of the Regional Entity Compliance Monitoring and Enforcement Programs,” provides that:<sup>25</sup>

The appeals process will also allow for appeals to NERC of any findings of noncompliance issued by NERC to a Regional Entity for Reliability Standards and Requirements where the Regional Entity is monitored for compliance to a Reliability Standard. No monetary Penalties will be levied

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Authority that (1) is to bring a Registered Entity into compliance with a Reliability Standard or to avoid a Reliability Standard violation, and (2) is immediately necessary to protect the reliability of the Bulk Power System from an imminent or actual threat.”

<sup>23</sup> MISO Protest at 10.

<sup>24</sup> *Id.*

<sup>25</sup> NERC, in its petition, does not propose revisions to either Sections 402.6 or 404.1 of the NERC Rules of Procedure.

in these matters; however sanctions, remedial actions, and directives to comply may be applied by NERC.

29. Section 404.1 of the Rules of Procedure, which is the “NERC Obligations” subsection of the section addressing “NERC Monitoring of Compliance for Regional Entities or Bulk Power Owners, Operator, or Users,” provides in relevant part that:

NERC shall evaluate compliance and noncompliance with all of the Reliability Standards that apply to the Regional Entities and shall impose sanctions, Penalties, or Remedial Action Directives when there is a finding of noncompliance.

30. In Appendix 2 to the Rules of Procedure, which includes the “Definitions Used in the Rules of Procedure,” “Penalty” is defined in relevant part as “all penalties and sanctions, including but not limited to a monetary or non-monetary penalty.”

#### **Commission Determination**

31. Currently effective Sections 402.6 and 404.1 appear to conflict as to whether Regional Entities can be assessed monetary penalties for non-compliance with a Reliability Standard. While Section 402.6 appears to prohibit monetary penalties, Section 404.1 would seem to allow for monetary penalties. Pursuant to section 215(f) of the FPA, the Commission directs NERC, in an informational filing due within 60 days of this order, to clarify whether NERC may assess monetary penalties against Regional Entities for a violation of a Reliability Standard and, to the extent NERC agrees that there is an inconsistency between the cited sections in the Rules of Procedure, to explain how it proposes to address the inconsistency.<sup>26</sup>

#### **4. Sections 403.6 and 403.10.5**

32. In Sections 403.6 and 403.10.5, which address the submission of Mitigation Plans, NERC proposes the following revisions:

6. Regional Entity Compliance Staff Independence — The Regional Entity Compliance Staff shall be capable of and required to make all determinations of compliance and noncompliance and determine Penalties, sanctions, and Remedial Action Directives and to review and accept Mitigation Plans and other Mitigating Activities.

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<sup>26</sup> This is an informational filing only and will not be noticed or subject to comments.

10.5 A Bulk Power System owner, operator, or user found in noncompliance with a Reliability Standard shall submit a Mitigation Plan with a timeline addressing how the noncompliance will be corrected, unless an enforcement process is used that does not require a Mitigation Plan. The Regional Entity Compliance Staff shall review and ~~approve~~ accept the Mitigation Plan in accordance with Appendix 4C.

33. NERC states that the revision to Section 403.6 is meant to reflect “that not all actions taken by a Registered Entity to correct and prevent recurrence of a noncompliance are embodied in a Mitigation Plan (i.e., “Mitigating Activities”).”<sup>27</sup> NERC states that the revision to Section 403.10.5 is necessary because NERC has adopted enforcement process options that do not require a registered entity to submit a formal Mitigation Plan.<sup>28</sup>

### **Commission Determination**

34. We conditionally approve NERC’s proposed revisions. We agree with NERC that a formal Mitigation Plan may not be necessary in all cases of possible noncompliance because CMEP Section 6.1 only requires the filing of a Mitigation Plan by a registered entity “found to be in violation of a Reliability Standard.” Thus, Mitigating Activities other than Mitigation Plans could apply to nearly all possible violations, with only a small number of Mitigation Plans filed, reviewed by the Regional Entities and NERC before they become effective, and submitted to the Commission pursuant to CMEP Section 6.0.

35. We believe a streamlined approach to mitigation may more quickly and efficiently ensure compliance with Reliability Standards and the reliability of the Bulk-Power System in some situations. The proposed definition of Mitigating Activities nevertheless encompasses all activities to correct and prevent recurrence of noncompliance. The definition does not itself include any concept of documentation, review, or auditing to assess the efficacy of Mitigating Activities outside of the provisions of CMEP Section 6.0 that apply only to Mitigation Plans. While NERC indicates in proposed revisions to specific CMEP provisions that a Compliance Enforcement Authority can review the adequacy and completion of Mitigating Activities, only one of these revisions provides

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<sup>27</sup> NERC Petition at 11. NERC Rules of Procedure, Appendix 2 (Definitions) defines “Mitigating Activities” as “actions taken by a Registered Entity to correct and prevent recurrence of a noncompliance, whether or not the actions are embodied in a Mitigation Plan.”

<sup>28</sup> *Id.* at 12.

any detail about such efforts. In that revision, to CMEP Section 3.1.4.3 relating to compliance audits, NERC proposes that an audit “may include a review of any Mitigating Activities which the Registered Entity has not yet completed.” This proposal would appear to exclude consideration of possible violations for which a Mitigating Activity had been completed.

36. One of the highest priorities of NERC’s CMEP should be adequate and timely mitigation of possible violations so as to return a registered entity to compliance and minimize or prevent future similar violations. A streamlined approach to mitigation must provide controls to ensure that Mitigating Activities are sufficient and timely completed. There also must be sufficient tracking of Mitigating Activities so that they may be audited or otherwise reviewed as NERC proposes in CMEP Section 3.1.4.3 and other CMEP provisions, both as to completed and uncompleted Mitigating Activities.

37. In this regard, we note that NERC indicated in its FFT filing that it would apply a tracking number to what it termed “mitigation activities” regarding possible violations treated as FFTs and that registered entities must “maintain evidence of such corrective actions for possible verification through an audit, spot check, random sampling or other inquiry.”<sup>29</sup> This proposal applied only to possible violations that posed a lesser risk to Bulk-Power System reliability, so additional attention may be warranted as to the scope, completion, and review of Mitigating Activities that could be applied to more serious possible violations. Therefore, we direct NERC to submit a compliance filing within 60 days of this order in which it explains how it and Regional Entities will assess the adequacy and completion of Mitigating Activities on a timely basis, including at least the tracking and review mechanisms to which NERC committed in the FFT filing and that the Commission recognized in the FFT Order.

##### **5. Sections 403.15, 408.1, and 409.1**

38. In Sections 403.15, 408.1, and 409.1, which address appeals of enforcement actions, NERC proposes the following revisions that would allow Regional Entities to appeal decisions of Regional Entity Hearing Bodies:

[403.15] ... The Regional Entity hearing process shall be conducted before the Regional Entity board or a balanced committee established by and reporting to the Regional Entity board as the final adjudicator at the Regional Entity level, provided, that Canadian provincial regulators may act as the final adjudicator in their respective jurisdictions. ... If a Bulk Power System owner, operator, or user or a Regional Entity has completed the Regional Entity

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<sup>29</sup> FFT Order, 138 FERC ¶ 61,193, at P 14. The Commission recognized these mechanisms in approving the FFT proposal with limited conditions. *Id.* P 57.

hearing process and desires to appeal the outcome of the hearing, the Bulk Power System owner, operator, or user or the Regional Entity shall appeal to NERC in accordance with Section 409 of these Rules of Procedure, except that a determination of violation or Penalty that has been directly adjudicated by an Applicable Governmental Authority shall be appealed with that Applicable Governmental Authority.

[408.1] Scope of Review — A Registered Entity or a Regional Entity wishing to challenge a finding of noncompliance and the imposition of a Penalty for a compliance measure directly administered by NERC, or a Regional Entity wishing to challenge a Regional Entity Compliance Monitoring and Enforcement Program audit finding, may do so by filing a notice of the challenge with NERC's ~~D~~irector of ~~C~~ompliance enforcement no later than 21 days after issuance of the notice of finding of violation or audit finding. Appeals by Registered Entities or Regional Entities of decisions of Regional Entity Hearing Bodies shall be pursuant to Section 409.

[409.1] Time for Appeal — A Regional Entity acting as the Compliance Enforcement Authority, or an owner, operator or user of the Bulk Power System, wishing shall be entitled to appeal from a final decision of a Regional Entity Hearing Body concerning that finds an Alleged ~~✖~~Violation of a Reliability Standard, ~~or imposes a proposed~~ Penalty or sanction for violation of a Reliability Standard, a proposed Mitigation Plan, or a proposed Remedial Action Directive, shall file its by filing a notice of appeal with NERC's ~~D~~irector of ~~C~~ompliance ~~enforcement~~, with a copy copies to the Regional Entity and any other Participants in the Regional Entity Hearing Body proceeding, no later than 21 days after issuance of the final decision of the Regional Entity Hearing Body ....

39. NERC states that allowing Regional Entities acting as Compliance Enforcement Authorities to appeal Regional Entity Hearing Body decisions to NERC is “warranted because as the Regional Entity hearing process has evolved over time ... the Hearing Bodies are not extensions of the Regional Entity Compliance Program, but rather are independent tribunals with separation of functions from the Compliance Program, conducting due process hearings and rendering decisions.”<sup>30</sup> NERC further states that the proposed revision allows NERC to fulfill its “ultimate responsibility for the correctness

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<sup>30</sup> NERC Petition at 14.

and consistency of decisions on compliance matters” by instituting a process whereby NERC can review potentially erroneous Hearing Body decisions that are favorable to the registered entity.<sup>31</sup>

### Comments

40. The Trade Associations, MISO, and OEVC state that the Commission should reject the proposed revisions to the NERC Rules of Procedure allowing Regional Entities to appeal decisions of the Regional Entity Hearing Bodies.

41. The Trade Associations protest these revisions because they “would unnecessarily change the enforcement balance now in effect under the [NERC Rules of Procedure] and [are] inconsistent with the spirit of section 215 ... and 18 C.F.R. § 39.7.”<sup>32</sup> The Trade Associations state that, while section 215 and the Commission’s regulations contemplate that the entity to which the penalty would apply can appeal, neither contemplate allowing the Regional Entity to appeal. The Trade Associations contend that the present system provides “appropriate due process while ensuring a reasonably speedy and final result.”<sup>33</sup> The Trade Associations further contend that a Hearing Body may not be sufficiently independent from the Regional Entity so as to warrant providing the Regional Entity with an independent right to appeal.

42. MISO protests that a new right of appeal “potentially subjects registered entities to extended and repeated enforcement actions for the same violation, even where they have been exonerated by an independent Regional Entity Hearing Body.”<sup>34</sup> MISO contends that there are other ways for NERC to ensure consistency. MISO cites using certified questions submitted to the NERC Board of Trustees Compliance Committee under proposed Section 412 and NERC’s authority under proposed Section 413 to review Regional Entity Hearing Body final decisions that are not appealed.

43. OEVC protests that giving Regional Entities the right to appeal is inconsistent with Section 403.15 because it would not make the Regional Entity Hearing Board “the final adjudicator at the Regional Entity level.” OEVC contends that allowing a Regional Entity to appeal eliminates the value of the hearing process at the Regional Entity level because it would allow the Regional Entity to appeal what are effectively its own decisions, infringing the due process rights of registered entities and wasting resources.

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<sup>31</sup> *Id.*

<sup>32</sup> Corrected Trade Associations Protest at 5.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> MISO Protest at 8.

OEVC further contends that the Regional Entity Hearing Body is not a wholly “independent tribunal” because its authority stems directly from delegated power from NERC and/or the Regional Entity.

### **Commission Determination**

44. We approve NERC’s proposed revisions granting Regional Entities a right to appeal Regional Entity Hearing Body decisions. We agree with NERC that there should be an appellate mechanism by which NERC can review potentially erroneous Hearing Body decisions that are favorable to a registered entity.

45. The protests support maintaining the current system by which Regional Entity compliance staff cannot appeal the decisions of Regional Entity Hearing Bodies. With the exception of MISO, however, the protests do not explain how potentially erroneous decisions made by Regional Entity Hearing Bodies benefiting registered entities can be corrected, particularly if the possible error resulted in a finding of no violation when a violation actually occurred.<sup>35</sup> The protests, instead, claim that the proposed revisions would adversely affect the due process rights of registered entities, impose new costs and administrative burdens, and are inconsistent with the spirit of section 215, the Commission’s regulations, and the NERC Rules of Procedure.

46. We reject the assertion that affording Regional Entities the right of appeal is inconsistent with the spirit of section 215, the Commission’s regulations implementing section 215, or the NERC Rules of Procedure. The Trade Associations state that, while “the statute [section 215(e)] and the Commission’s regulation [18 C.F.R. § 39.7(e)(1)] clearly contemplate that the entity to which the penalty would apply can appeal a NERC decision, neither of these provisions contemplate the appeal by a Regional Entity of a finding by its own Hearing Body that no penalty should be applied.” While the Trade Associations are correct that the cited provisions do not explicitly afford a right of appeal to Regional Entities, those provisions do not preclude a Regional Entity right of appeal

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<sup>35</sup> MISO contends that newly-proposed Sections 412 and 413, discussed *infra*, which, respectively, allow Regional Entity Hearing Bodies to submit certified questions to the NERC Board of Trustees Compliance Committee and allow NERC to review all Regional Entity Hearing Body final decisions, ensure consistent interpretation and enforcement of Reliability Standards without giving Regional Entities the right to appeal. While these new tools should help to ensure consistent interpretation and enforcement of Reliability Standards, we agree with NERC that they are not the same as an appellate process wherein the registered entity and Regional Entity could “present their respective positions and arguments as to the correctness of the Hearing Body decision and as to any errors that, it is contended, were made by the Hearing Body.” NERC Petition at 15 n.5.

either.<sup>36</sup> Indeed, for example, allowing an opportunity to correct a potentially erroneous decision of “no violation” by a Regional Entity Hearing Body is consistent with – and certainly does not offend – FPA section 215(e) and its focus on addressing Reliability Standard violations. We also reject OEVC’s assertion that the proposed revisions are inconsistent with revised Section 403.15 of the NERC Rules of Procedure because, if Regional Entities are given the right to appeal, the Regional Entity Hearing Bodies will no longer be “the final adjudicator at the Regional Entity level.” This assertion fails to grasp the difference between the role of the Regional Entity Hearing Body, which is effectively a trial body, and any appeal taken from the Regional Entity Hearing Body to NERC, which is appellate in nature in this instance. In this way, the Regional Entity Hearing Body remains the final adjudicator at the Regional Entity level (i.e., trial level), even if its final decision may be changed on appeal by NERC.

47. With respect to the due process claim, the protests do not explain how a Regional Entity’s right to appeal Regional Entity Hearing Board final decisions to NERC offends due process. An appeal by a Regional Entity is not, as MISO contends, an “extended and repeated enforcement action[] for the same violation, even where they have been exonerated by an independent Regional Entity Hearing Body.” Rather, it is an appellate review process in which NERC, not the Regional Entity, determines whether an independent Regional Entity Hearing Body’s final decision can be upheld based on the record compiled by the Regional Entity Hearing Body.<sup>37</sup> We also reject the Trade Associations’ unproven assertion that “the Regional Entity’s organizational link to, and familiarity with, NERC would dispose NERC to weigh the Regional Entity’s views more heavily than those of the Registered Entity.” The Commission operates from the premise that NERC will carry out its obligations under the NERC Rules of Procedure fairly and without bias. Nothing in the Trade Associations’ protest leads us to conclude otherwise.

48. NERC and the protesters also disagree as to the level of independence between the Regional Entities’ compliance staffs and the Regional Entity Hearing Bodies. The

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<sup>36</sup> Section 215(e) of the FPA provides that “the ERO may impose ... a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission ... if the ERO, after notice and an opportunity for a hearing— (A) finds that the user or owner or operator has violated a reliability standard approved by the Commission ... and (B) files notice and the record of the proceeding with the Commission.”

<sup>37</sup> See Revised NERC Rules of Procedure Section 409.2 (“No factual material shall be presented in the appeal that was not first presented during the proceeding before the Regional Entity Hearing Body.”); revised Section 409.5 (“**Decision** – The Compliance Committee of the NERC Board of Trustees shall decide the appeal, in writing, based upon the notice of appeal, the record of the proceeding before the Regional Entity Hearing Body, the responses, and any reply filed with NERC.”).

protesters assert that a lack of independence makes it inappropriate for a Regional Entity that receives an adverse decision from a Regional Entity Hearing Body to appeal to NERC. Protesters do not provide adequate support for the claim that the Hearing Bodies lack independence. Moreover, revised Sections 403.15, 408.1, and 409.1 allow a Regional Entity to seek NERC review of a Regional Entity Hearing Body ruling against the Regional Entity. This circumstance runs counter to the assertion that the Regional Entity Hearing Body lacks independence. Rather, we agree with NERC that Regional Entity Hearing Bodies are “no longer extensions of the Regional Entity Compliance Program, but rather are independent tribunals with separation of functions from Compliance Program, conducting due process hearings and rendering decisions.”<sup>38</sup> As such, we find it is appropriate to have in place an appeal mechanism for Regional Entities when they believe that a Hearing Body decision is in error.

49. As for any new costs or administrative burdens resulting from Regional Entities having the right to appeal, we are satisfied that such costs or administrative burdens, to the extent they exist, are justified in the interest of ensuring that Reliability Standard violations are correctly addressed consistent with section 215(e).

#### 6. Section 409.3

50. In Section 409.3, which addresses “Response to Notice of Appeal,” NERC proposes the following revisions:

Response to Notice of Appeal by Regional Entity — Within 21 days after the date receiving a copy of the notice of appeal is filed, the Regional Entity shall file the entire record of the ~~matter~~ Regional Entity Hearing Body proceeding with NERC’s ~~Director of Compliance enforcement,~~ Director of Compliance enforcement, ~~with a copy to the Registered Entity filing the notice, together with~~ Within 35 days after the date of the notice of appeal, all Participants in the proceeding before the Regional Entity Hearing Body, other than the Participant filing the notice of appeal, shall file their ~~its~~ responses to the issues raised in the notice of appeal.

51. NERC states that the current requirement that the Regional Entity must provide a copy of the record to the appellant is deleted in the proposal because “all Participants should be expected to maintain their own copies of the record as it is compiled during the hearing.”<sup>39</sup>

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<sup>38</sup> NERC Petition at 14.

<sup>39</sup> *Id.* at 15.

### **Comments**

52. MISO protests the elimination of the current requirement that the Regional Entity provide appellants with a copy of the record from the Hearing Body. MISO contends that eliminating this requirement and requiring the parties to maintain their own copies of the record is “highly unusual, and may affect a participant’s ability to receive a fair and impartial appeal.”<sup>40</sup> MISO states that the record in a Regional Entity Hearing Body proceeding should be maintained by the Regional Entity Hearing Body itself because it eliminates disputes about the record of the proceeding below and saves time and duplication of effort in compiling and keeping that record.

### **Commission Determination**

53. We reject the proposed revision to Section 409.3 that eliminates the requirement that the Regional Entity provide a copy of the entire record of the Regional Entity Hearing Body proceeding to the registered entity that is a party to the appeal. NERC has not explained why the current practice should be altered other than to state that the parties before the Hearing Body should maintain their own copies. MISO further asserts that the record should be maintained by the Hearing Body because that eliminates any potential disputes about what constitutes the record and saves duplication of effort in compiling the record. However, we note that the proposed revision does not change who maintains the Hearing Body record, but whether the Regional Entity is required to provide a copy of the record to the registered entity.<sup>41</sup>

54. NERC is therefore directed to make a compliance filing within 60 days of the date of this order reinstating the provision that the Regional Entity provide a copy of the record to the registered entity.

## **7. Section 412**

55. NERC proposes new Section 412 to establish procedures by which the NERC Board of Trustees Compliance Committee (BOTCC) will accept or reject a question certified to the BOTCC by a Regional Entity Hearing Body and, if the BOTCC accepts the certified question, the procedure for receiving argument and deciding the question. Section 412.1 states that a certified question is limited to a “significant question of law, policy or procedure the resolution of which may be determinative of the issues in the

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<sup>40</sup> MISO Protest at 11.

<sup>41</sup> NERC Rules of Procedure, Appendix 4C (Compliance Monitoring and Enforcement Program), Attachment 2 (Hearing Procedures), at Section 1.7.9 provides that “The Clerk shall maintain the record for all dockets.”

hearing in whole or in part, and as to which there are other extraordinary circumstances that make prompt consideration of the question by the Compliance Committee appropriate ....” Section 412.5 states that the “Compliance Committee’s decision, if any, on the certified question shall only be applicable to the hearing from which the question was certified and to the Participants in that hearing.” NERC explains that this provision was added “to address stakeholder questions ... as to whether the BOTCC’s decision on a certified question in an individual proceeding would have precedential effect and thereafter be applicable to other compliance enforcement matters...”<sup>42</sup>

### **Comments**

56. MISO states that while it supports the use of certified questions to resolve important “questions of law, policy, or procedure,” the decisions of the BOTCC on submitted certified questions should have precedential effect. MISO states that “[m]aking decisions on certified questions broadly applicable would be of immense assistance in providing guidance and clarity to the industry as a whole ... [and the] Commission should require NERC to make resolutions of certified questions broadly applicable, instead of limiting the impact of such decisions to the proceedings in which they are issued.”<sup>43</sup> MISO further states that, although the proposed revision requires NERC to issue a written decision when it declines to address a certified question, the proposal does not explicitly require NERC to provide reasons for the denial. MISO states that the Commission should require NERC to explain its reasons for declining to answer a certified question.

### **Commission Determination**

57. We approve new Section 412.<sup>44</sup> While there may be efficiencies in considering past BOTCC decisions to the extent that they are germane to a similar question posed to the BOTCC, we believe that it is within NERC’s prerogative to determine the precedential value of previous BOTCC decisions. Further, to date, there is very little experience with the Regional Entity hearing process. If future activity suggests that there is a need for greater consistency and clarity in the hearing process, NERC may want to reconsider the precedential value of BOTCC decisions. However, we believe that

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<sup>42</sup> NERC Petition at 21.

<sup>43</sup> MISO Protest at 9.

<sup>44</sup> The Commission approves, for the same reasons, the corresponding changes to Section 1.5.12, Certification of Questions to the NERC Board of Trustees, proposed in Appendix 4C, Attachment 2, Hearing Procedures.

Section 412 satisfies the statutory criteria for approval set forth in FPA section 215(f), and we are not persuaded by MISO's arguments otherwise.

58. Moreover, we reject MISO's request that we require NERC to explain its reasons for declining to answer certified questions. While the proposed revision does not explicitly require NERC to disclose its reasons for declining to answer a certified question, we are not persuaded that such a requirement is necessary.

## **8. Section 413**

59. NERC proposes new Section 413 to provide that NERC shall review and process final decisions of Regional Entity Hearing Bodies concerning Alleged Violations, proposed Penalties or sanctions, or proposed Mitigation Plans that are not appealed pursuant to Section 409 as though the determination was made by the Regional Entity Compliance Program without a hearing to ensure consistency in determinations for similar facts and circumstances and among Regional Entities. Section 413 provides that NERC may require that the Regional Entity Hearing Body's decision be modified by the Regional Entity "in accordance with, as applicable to the particular decision, Sections 5.8, 5.9 and 6.5 of Appendix 4C." NERC states that this provision ensures "consistency in violation, Penalty and Mitigation Plan determinations for similar facts and circumstances."<sup>45</sup>

## **Comments**

60. The Trade Associations protest that the Commission should direct NERC to revise Section 413 "to limit exercise of this authority solely to address incorrect procedural or legal decisions by the Hearing Body."<sup>46</sup> The Trade Associations contend that the reference in Section 413 to Section 5.8 of Appendix 4C, which allows NERC to "advise the Compliance Enforcement Authority of any additional detail or further development of the factual findings that NERC deems necessary before the Notice of Penalty is issued," could allow NERC "in its review and processing of a decision by a Hearing Body to go outside of the record and possibly to have *ex parte* communications with the Compliance Enforcement Authority."<sup>47</sup> The Trade Associations further contend that Section 413 could subject registered entities to "*de novo* review by NERC or NERC could request additional material without additional due process for the Registered Entity ... [and

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<sup>45</sup> NERC Petition at 17.

<sup>46</sup> Corrected Trade Associations Protest at 8.

<sup>47</sup> *Id.* at 7.

NERC could] impose penalties directly in such circumstances, without providing further due process to a Registered Entity at the regional level.”<sup>48</sup>

61. MISO agrees that the reviews provided by Section 413 are important for consistency in enforcement actions across Regional Entities. However, MISO contends that such reviews “should not be used to overturn validly-executed and otherwise uncontested settlement agreements.”<sup>49</sup> MISO states that the Commission should “ensure that NERC’s review in circumstances where a settlement is being considered is performed before any settlement agreement is executed, and incorporates NERC’s concerns into the agreement (rather than leaving those concerns to be addressed after the agreement is executed).”<sup>50</sup>

### **Commission Determination**

62. We approve proposed Section 413 because it will assist NERC in ensuring consistency in violation, penalty and Mitigation Plan determinations for similar facts and circumstances and among Regional Entities. We reject the protests made by the Trade Associations and MISO concerning Section 413.

63. The Trade Associations state that NERC’s review of Regional Entity Hearing Body final decisions under Section 413 could allow NERC to look beyond the record compiled by the Regional Entity Hearing Body and possibly rely on *ex parte* contacts with the Compliance Enforcement Authority. This concern is based on the citation in Section 413 to Section 5.8 of the NERC Compliance Monitoring and Enforcement Program (Appendix 4C to the NERC Rules of Procedure). However, Section 5.8 in Appendix 4C states, “NERC may direct the Compliance Enforcement Authority to revise a Penalty determination, in which case the Registered Entity subject to the Penalty, or the Compliance Enforcement Authority, as applicable, may reopen the proceedings on any issue on which the Penalty was based, irrespective of whether the issue was previously litigated, settled or unopposed.” Accordingly, even if NERC revises a penalty determination based on information not in the record, the registered entity would have the right to reopen the proceedings.

64. With respect to MISO’s concern that NERC reviews of final decisions under Section 413 should not be used to overturn “validly-executed and otherwise uncontested settlement agreements,” Section 5.6 of Appendix 4C, as revised, provides as part of the settlement process that the “Compliance Enforcement Authority shall report the terms of

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<sup>48</sup> *Id.* at 8.

<sup>49</sup> MISO Protest at 10.

<sup>50</sup> *Id.*

all settlements of compliance matters to NERC. NERC will review the settlement for the purpose of evaluating its consistency with other settlements entered into for similar violations or under other, similar circumstances.”<sup>51</sup> NERC states that Section 413 was added because “in order for NERC to perform its function of ensuring consistency in violation, Penalty and Mitigation Plan determinations for similar facts and circumstances and among Regional Entities, it is necessary for NERC to review determinations made by Regional Entity Hearing Bodies concerning Alleged Violations, Penalties and Mitigation Plans just as NERC reviews findings of violations, Penalties and Mitigation Plans determined or accepted by Regional Entity Compliance Staffs.”<sup>52</sup> Because NERC is required to review each settlement agreement pursuant to Section 5.6 “for the purpose of evaluating its consistency with other settlements entered into for similar violations or under other, similar circumstances,” Section 413 would not apply to settlements because to conduct a separate review pursuant to Section 413 would be duplicative of the review already required under Section 5.6.

**C. NERC Proposed Revisions to Section 800 (Reliability Assessment and Performance Analysis)**

65. NERC proposes to revise Sections 807 and 808 to address, respectively, “Analysis of Major Events” and “Analysis of Off-Normal Occurrences, Bulk Power System Performance, and Bulk Power System Vulnerabilities.” NERC states that the revisions are intended to provide for a more consistent use of terms (e.g., “major event” and “occurrences”).

**Comments**

66. MISO states that NERC proposes revisions to Section 808 to expand NERC’s authority to conduct analyses of “off-normal occurrences,” which are described only as occurrences that do not rise to the level of a major event. MISO protests that, while it does not disagree with allowing NERC to perform necessary analyses of non-major events, the definition of “off-normal occurrences” is too vague and should be clarified to specify the types of events that would be subject to NERC analysis.

**Commission Determination**

67. We approve the proposed revision to Section 807 and also direct NERC to submit information in a compliance filing, as discussed below. NERC proposes to revise Section

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<sup>51</sup> Section 5.6 also applies to settlements reached in proceedings where a hearing is requested. See Section 1.8 of Appendix 4C, Attachment 2 (Hearing Procedures).

<sup>52</sup> NERC Petition at 17-18.

807.5 to provide that it will “establish, maintain, and revise from time to time as appropriate based on experience, a manual setting forth procedures and protocols for communications and sharing and exchange of information between and among NERC, the affected Regional Entity or Entities, and relevant governmental authorities, industry organizations and Bulk Power System user, owners, and operators concerning the investigation and analysis of major events.” We note that, in February 2012, NERC informed stakeholders that it planned to develop an ERO Event Analysis Process that would address, *inter alia*, the sharing of lessons learned from event analyses.<sup>53</sup> The Commission directs NERC to clarify in a compliance filing due within 60 days of the date of this order whether proposed Section 807.5 procedures and protocols for sharing of information are intended to implement or formalize the ERO Event Analysis Process, or otherwise explain the relationship, if any, between revised Section 807.5 and the Event Analysis Process.

68. We approve the proposed revision to Section 808. NERC states that, as revised, the phrase “major events” includes events “such as significant losses of Load or generation, significant Bulk Power System disturbances, or other emergencies on the Bulk Power System.”<sup>54</sup> NERC explains that it will analyze occurrences that do not rise to the level of a major event, “to identify the root causes of occurrences or conditions that may be precursors of major events or other potentially more serious occurrences....”<sup>55</sup> We believe that NERC needs flexibility to decide which type of analysis is appropriate for a particular occurrence, and which “off-normal” events it chooses to study. We are not persuaded by MISO’s comments that a more precise definition of “major event” is necessary, and believe that it would reduce NERC’s flexibility in determining the appropriate level of analysis – and thus resources – to apply when studying a system occurrence.

**D. NERC Proposed Revisions to Appendix 4B (Sanction Guidelines),**

69. In Section 3.3.1 (formerly Section 4.3.1) of NERC’s Sanctions Guidelines, NERC proposes revisions stating that, in evaluating a violator’s compliance history, NERC or the Regional Entity will take into account previous violations by affiliates of the violator, particularly with respect to violations of the same or a similar Reliability Standard Requirement, and will evaluate whether any such prior violations reflect recurring

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<sup>53</sup> Electric Reliability Organization Event Analysis Process (February 2012), available at [http://www.nerc.com/files/ERO\\_Event\\_Analysis\\_Process\\_Document\\_Version\\_1\\_Feb\\_2012.pdf](http://www.nerc.com/files/ERO_Event_Analysis_Process_Document_Version_1_Feb_2012.pdf).

<sup>54</sup> NERC Petition at 22 (quoting revised Section 807).

<sup>55</sup> Revised Section 808.

conduct by affiliates that are operated by the same corporate entity or whose compliance activities are conducted by the same corporate entity. NERC states that the proposed revision is consistent with prior Commission guidance and should promote the sharing of compliance information and lessons learned among registered entities that are corporate affiliates.<sup>56</sup>

### **Comments**

70. OEVC protests this revision because it states that taking previous violations by affiliates into account when evaluating a registered entity's compliance history violates section 215 of the FPA. OEVC contends that taking into account the compliance history of affiliated entities in the penalty determination process violates the principles that "[a]ll enforcement activities under Section 215 of the FPA must be directly tied to enforcing compliance with reliability standards, and all penalties must bear a 'reasonable relation to the seriousness of the violation.'"<sup>57</sup> OEVC maintains that the actions of an affiliate do not influence whether a penalty is reasonable in relation to the seriousness of an entity's own violation and, because affiliates often do not remain static, an entity's current affiliates may not have been affiliates at the time of the alleged violation. OEVC also contests NERC's assertion that the proposed revision is consistent with the Commission's past guidance.

### **Commission Determination**

71. We approve the proposed revision to Section 3.3.1 of Appendix 4B. We reject the argument raised by OEVC that the consideration of affiliates in this context is contrary to section 215. The proposed revision requires NERC to consider previous violations by affiliates of the violator to determine whether "any such prior violations reflect recurring conduct by affiliates that are operated by the same corporate entity or whose compliance activities are conducted by the same corporate entity." Consistent with previous Commission guidance, it is reasonable to consider past violations of an affiliate operated by, or whose compliance activities are conducted by, the same parent as the entity subject to penalty because repeat violations may be the result of actions by the controlling parent entity.<sup>58</sup> Moreover, as noted in NERC's petition, Repetitive Violations and Compliance History is only one of nine proposed Adjustment Factors used in determining penalties.

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<sup>56</sup> NERC Petition at 32-33 (citing *North American Electric Reliability Corp.*, 132 FERC ¶ 61,182, at P 7 (2010)).

<sup>57</sup> OEVC Protest at 3 (citing 16 U.S.C. § 824o(e)(6)).

<sup>58</sup> *North American Electric Reliability Corp.*, 132 FERC ¶ 61,182, at P 7 (2010) ("Notices of Penalty should explain how NERC and Regional Entities assessed whether

**E. NERC Proposed Revisions to Appendix 4C (Compliance Monitoring and Enforcement Program)**

72. NERC proposes revisions to Appendix 4C, the Compliance Monitoring and Enforcement Program (CMEP). We address below NERC's proposed revisions to Sections 1.1, 3.0, 3.1.5.4, 3.3.1, 3.4.1, 3.5, 4.1, 4.2, 5.0, 5.3, 5.11, 8.2, CMEP Attachment 1, and CMEP Attachment 2.<sup>59</sup>

**1. Section 1.1**

73. In Section 1.1, NERC proposes to modify the definition of "Confirmed Violation" to read:

Confirmed Violation: An Alleged Violation for which (1) ~~an~~ the Registered Entity has: (1) ~~accepted or not contested~~ the Notice of Alleged Violation and Proposed Penalty or Sanction or other notification of the Alleged Violation ~~finding of the violation by a Regional Entity or NERC and will not seek an appeal~~, or (2) there has been the issuance of a final order from NERC or a Regional Entity Hearing Body finding a violation, Penalty or sanction completed the hearing and appeals process within NERC, or (3) ~~allowed the period~~ time for requesting a hearing or submitting an appeal has to expired, or (4) the Registered Entity has executed a settlement agreement pursuant to Section 5.6 ~~admitted to the violation in a settlement agreement~~.

74. NERC states that the definition has been "expanded to more comprehensively capture the circumstances that, based on experience, constitute a Confirmed Violation."<sup>60</sup> NERC further states that it "intends the term Confirmed Violation to encompass the end-state of the enforcement process for an Alleged Violation, whether that end state is reached by the Registered Entity accepting or not contesting the Alleged Violation, an actual determination by a Regional Entity Hearing Body or NERC that a violation

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instant violations may reflect recurring conduct by the same registered entity or by an affiliate or department that is operated by the same corporate entity ...").

<sup>59</sup> The revision to CMEP Attachment 2 is related to new Section 414 of the Rules of Procedure, which is also addressed below.

<sup>60</sup> NERC Petition at 35.

occurred, the expiration of the time allowed for requesting a hearing or filing an appeal, or execution of a settlement agreement that resolves the Alleged Violation.”<sup>61</sup>

### **Comments**

75. MISO and OEVC protest that NERC’s revised definition of Confirmed Violation could include a settlement in which a registered entity neither admits nor denies a violation. MISO and OEVC question whether the expansion of the definition of Confirmed Violation to include settlements where there has been no specific admission of a violation would cause such settlements to be viewed as negative precedent during future enforcement actions. Moreover, MISO contends that, if that interpretation occurs, registered entities will have less incentive to settle alleged violations and could be more willing to litigate such alleged violations. MISO states that the Commission should clarify that the expansion of the definition of Confirmed Violation to include settlements where the registered entity has neither admitted nor denied a violation will not cause settlements to be deemed to be negative precedent during future enforcement actions.

### **Commission Determination**

76. We approve the proposed modification to the definition of Confirmed Violation. With respect to the protesters’ concerns, we believe that NERC adequately addressed this issue in its petition:

Further, with respect to any concern that a Confirmed Violation is a determination of ‘guilt,’ and the potential impact of the existence of a Confirmed Violation for the Registered Entity on the enforcement process and potential Penalties for future Possible Violations or Alleged Violation, the settlement agreement and the Notice of Penalty for the Confirmed Violation will reflect that the Confirmed Violation was arrived at through a settlement agreement in which the Registered Entity neither admitted or denied the Alleged Violation.<sup>62</sup>

77. Based on NERC’s statement, we do not believe that the expansion of the definition of Confirmed Violation to include settlements where the registered entity has neither admitted nor denied a violation will discourage the settlement process. In addition, NERC’s revision does not change the current practice whereby settlements are part of an entity’s compliance history.<sup>63</sup> Whether settlements are treated as “negative precedent” in

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<sup>61</sup> *Id.*

<sup>62</sup> NERC Petition at 35-36.

<sup>63</sup> *North American Electric Reliability Corp.*, 132 FERC ¶ 61,182, at P 4 n.10

future enforcement proceedings, either as they are now or under the proposed revision, is based on a case-by-case analysis.

## 2. Section 3.0 and CMEP Attachment 1

78. NERC proposes to revise Section 3.0, which addresses “Compliance Monitoring Processes,” in relevant part to state:

The Compliance monitoring processes in this Section Program requires timely information, reports and data from Registered Entities to effectively monitor compliance with Reliability Standards. The Compliance Enforcement Authority has authority to collect Documents, data and information in the manner it deems most appropriate, including requesting copies of Documents, data and information to be made and removing those copies from the Registered Entity’s location in accordance with appropriate security procedures conforming to Section 1500 of the Rules of Procedure. ... If Documents, data, information or other reports to determine compliance requested from a Registered Entity are not received by the Required Date, the Compliance Enforcement Authority may execute the steps described in Attachment 1, Process for Non-submittal of Requested Data.

79. NERC proposes revisions to CMEP Attachment 1, Process for Non-submittal of Requested Data, providing a three-step process to be followed when an entity does not provide requested data. Step 1 provides that the Compliance Enforcement Authority will issue a notice to the registered entity stating that the required date for reporting has passed. Step 2 provides that, if the entity remains non-responsive, and if data is not received within 10 business days, “the Compliance Enforcement Authority may (i) implement a compliance monitoring process directed to the Registered Entity, or (ii) issue a Notice or other notifications of Alleged Violation and Proposed Penalty or Sanction at the Severe Violation Severity Level to the Registered Entity for the Reliability Standard Requirement to which the requested or required data, information or report relates.” Step 3 provides that, if the registered entity fails to produce the requested data within ten days of the notice issued in step 2, the Compliance Enforcement Authority may take any action of which the registered entity was notified in the step 2 notice. Further, Attachment 1 includes a statement that this process is not intended to apply where a registered entity timely requests additional time to respond and works with the Compliance Enforcement Authority in good faith to respond to the request.

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(2010) (treating settlement of prior violation as part of entity’s compliance history).

### Comments

80. OEVC protests that certain elements of the data collection provision should be deleted or revised because they exceed the scope of section 215 of the FPA with respect to the imposition of penalties and sanctions. OEVC states that step 2 of the process set forth in Attachment 1 provides that NERC can “implement a compliance monitoring process directed to the Registered Entity” while step 3 provides that, if the registered entity does not produce the requested or required information, NERC “may take any action ... including issuing a Notice or other notification of Alleged Violation and Proposed Penalty or Sanction at the Severe Violation Severity Level for the Reliability Standard Requirement to which the requested or required data, information or report relates.” OEVC contends that steps 2 and 3 are unlawful because they could be used to penalize a registered entity for action or inaction unrelated to a violation of a Reliability Standard approved by the Commission.<sup>64</sup>

81. MISO is concerned that the possible penalties and procedures set forth in Attachment 1, Process for Non-submittal of Requested Data, do not adequately account for legitimate objections or difficulties that a registered entity might have in responding to a data request. MISO contends that the potential penalty goes beyond what is necessary to compel production and is, instead, punitive. MISO requests that the Commission remand these provisions to NERC to revise them to account for legitimate objections on the part of a registered entity and to more narrowly tailor the sanctions to those that are necessary to encourage compliance with a data request.

### Commission Determination

82. We approve the proposed revisions to Section 3.0 and CMEP Attachment 1.<sup>65</sup> We reject OEVC’s assertion that the potential steps for failure to supply the required information under CMEP Attachment 1 are unlawful. We find that this provision provides reasonable, measured and lawful responses to entities that are non-responsive to requests for data. The Compliance Enforcement Authority has discretion on how to direct its resources, and a decision to direct those resources to more closely monitor an entity that has failed to respond to a request for data is certainly within the Compliance Enforcement Authority’s prerogative. Likewise, in the context of a substantive violation of the requirements of a Reliability Standard, imposing a more severe Violation Severity Level to recognize the alleged violator’s failure to respond to a data request is a

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<sup>64</sup> The Sanction Guidelines at Section 3.3.d (as revised) require consideration in assessing a penalty of a registered entity’s cooperation.

<sup>65</sup> The Commission approves, for the same reasons, the similar changes to Section 6.0, Mitigation of Violations of Reliability Standards, proposed in Appendix 4C.

legitimate consideration in determining the appropriate proposed penalty.<sup>66</sup> We reject OEVC's contention that it is unlawful to consider an entity's action or inaction unrelated to the substance of a violation when determining an appropriate penalty amount. Such rationale would negate consideration of an entity's cooperation during the course of an investigation as a factor in determining a penalty amount.

83. With respect to MISO's concern that the proposed revisions do not adequately account for legitimate objections or difficulties that a registered entity might have in responding to the data request, we find that CMEP Attachment 1 adequately addresses that concern as it expressly provides that the three-step process is not intended to apply where the registered entity requests, prior to the required date for response, clarification, definition of scope, or similar questions concerning the request or seeks additional time to respond and works with the Compliance Enforcement Authority in good faith to respond.

### **3. Sections 3.1.5.4, 3.3.1 and 3.4.1**

84. NERC proposes to revise Section 3.1.5.4, which addresses "Registered Entity Objections to Compliance Audit Team," to read in relevant part:

The Compliance Enforcement Authority will make a final determination on whether the member will participate in the Compliance Audit of the Registered Entity. Nothing in Section 3.1 shall be read to limit the participation generally of NERC staff in the Compliance Audit or to limit the participation generally of FERC staff in a Compliance Audit of a Registered Entity, or involving a portion of the Bulk Power System, over which FERC has jurisdiction (as opposed to participation by individual NERC Staff or FERC staff members to whom the Registered Entity states a valid objection in accordance with Section 3.1.5.4).

85. NERC proposes similar revisions to Sections 3.3.1 and 3.4.1, which address, respectively, "Spot Check Process Steps" and "Compliance Investigation Process Steps." NERC states that registered entities should be able to object to the participation of a particular individual NERC or Commission staff member on an audit team on grounds such as a conflict of interest. NERC asserts that prior Commission orders, while prohibiting registered entities from objecting to NERC or Commission participation generally, were not intended to deny a registered entity the right to object to participation

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<sup>66</sup> The current version of CMEP Attachment 1 allows application of the "Severe" Violation Severity Level for failure to comply with a data request. CMEP Attachment 1 at Step 4 ("Thirty (30) days after the Required Date, a Reliability Standard violation may be applied at the severe Violation Severity Level.").

in a Compliance Audit by an individual NERC staff member or Commission staff member on the same types of grounds that a registered entity can object to participation by a Regional Entity staff member, contractor or industry subject matter expert as a member of the Compliance Audit team.

### **Commission Determination**

86. We reject the proposed revisions to Sections 3.1.5.4, 3.3.1 and 3.4.1 because they assume that the Commission and NERC cannot or will not adequately screen staff members for potential conflicts of interest or bias before selecting members of an audit team. If a registered entity has an objection to the participation in an audit by a particular NERC or Commission staff member, the registered entity should address those concerns to NERC or Commission staff, respectively. This direct consideration is particularly true of participation in CMEP activities by Commission staff members, who are held to legally-enforceable ethical standards established by the Federal Government and the Commission.<sup>67</sup> The proposed revisions, by contrast, place Regional Entities or NERC in the position of deciding whether a NERC or Commission staff member can serve on an audit team, thus inverting the order of authorities established in section 215.

87. NERC is hereby directed to submit a compliance filing within 60 days of the date of this order that removes these revisions from its proposed Rules of Procedure.

### **4. Section 3.5**

88. NERC proposes to revise Section 3.5, which addresses “Self-Reports,” to state:

Self-Reports ~~ing is~~ are encouraged at the time a Registered Entity becomes aware (i) that it has, or may have, of a violation ~~of a~~ Reliability Standard, or (ii) ~~a change in~~ the Violation Severity Level of a previously reported violation has changed. Self-Reports ~~ing~~ of a violation of a Reliability Standard are ~~is~~ encouraged regardless of whether the Reliability Standard requires reporting on a pre-defined schedule in the Compliance Program ~~and~~ or whether the violation is determined outside the pre-defined reporting schedule. If possible, and without delaying the Self-Report, a Self-Report may include the actions that have been taken or will be taken to resolve the violation.

89. NERC states that these revisions are consistent with the change to the definition of Self-Report.

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<sup>67</sup> See 18 C.F.R. Part 3C (2012).

### **Comments**

90. MISO seeks clarification on when an entity will receive credit for self-reporting a violation or a potential violation under NERC's proposed Section 3.5. MISO states that NERC's proposed revisions to Section 3.5 encourage entities to submit Self-Reports not only when such an entity is aware that it violated a Reliability Standard, but also when it becomes aware that it "may have" violated a Reliability Standard. MISO requests that the Commission clarify that a regulated entity that waits to self-report under Section 3.5 until after it has conducted its own internal inquiry, and has made a determination regarding its compliance with one or more Reliability Standards, will receive full credit for self-reporting, as long as there was not an unreasonable delay between the discovery of the issue and the time the self-report is submitted. MISO states that such a clarification is consistent with self-reporting as set forth in the Commission's Penalty Guidelines.<sup>68</sup>

### **Commission Determination**

91. We approve NERC's proposed revisions to Section 3.5. NERC's proposed revisions are consistent with the Commission's prior efforts to encourage self-reporting by registered entities and its guidance on appropriate aspects of the self-reporting process.<sup>69</sup> MISO's concern over when an entity is eligible to receive credit for a self-report is addressed in Section 3.3.3 of NERC's Sanction Guidelines, which states that "NERC or the Regional Entity shall consider whether a violator reported the violation by a Self-Report, prior to detection or intervention by NERC or the Regional Entity."

### **5. Sections 4.1 and 4.2**

92. NERC proposes to revise Section 4.1, which addresses "NERC Compliance Monitoring and Enforcement Program Implementation Plan," to add language stating that "NERC may update and revise the NERC Implementation Plan during the course of the year as necessary. Regional Entities have discretion to make modifications to the NERC Implementation Plan with respect to individual Registered Entities." NERC proposes to revise Section 4.2, which addresses "Regional Implementation Plan," to include similar language for Regional Entities. Other than identifying the changes in the petition, NERC does not address the changes.

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<sup>68</sup> (Citing *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010)).

<sup>69</sup> See, e.g., *North American Electric Reliability Corp.*, 139 FERC ¶ 61,248, at PP 26-38 (2012) (providing clarifications on the nature of self-reporting and the value of various types of self-reports of possible violations by registered entities).

### **Commission Determination**

93. The Commission approves NERC's proposed revisions to Sections 4.1 and 4.2. The Commission notes that Sections 4.1 and 4.2 currently state that the Implementation Plans for NERC and the Regional Entities will be posted on their respective websites, and those provisions are retained in the revised versions of Sections 4.1 and 4.2. The Commission expects that updates and revisions to the NERC and Regional Entities Implementation Plans, now permitted under the revised language, will be posted on their respective websites in accordance with this existing requirement.

### **6. Section 5.0 and Sanction Guidelines Section 2.2**

94. NERC proposes to insert in CMEP section 5.0 a provision stating that the CMEP enforcement process "may not be the most appropriate, efficient or desirable means by which to achieve the overall objectives of the Compliance Program for NERC, the Compliance Enforcement Authority and the Registered Entity. In such circumstances, other approaches may be considered and applied." NERC observes that the current Sanction Guidelines includes a similar statement, but proposes to delete it, "as the statement relates to compliance enforcement processes and therefore is more appropriately placed in [the CMEP]."<sup>70</sup>

### **Commission Determination**

95. We approve NERC's proposed revisions to Section 5.0 and Sanction Guidelines Section 2.2. Although NERC does not define or describe "other procedures," we understand that they would be used under limited circumstances and that a registered entity has a choice as to whether to be subject to them.<sup>71</sup> We also clarify that the "other procedures" should be limited to a reasonable exercise of NERC's enforcement discretion. We expect that any broader changes that NERC is contemplating to its CMEP process will be addressed in a separate proceeding before the Commission.<sup>72</sup>

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<sup>70</sup> NERC Petition at 54. The currently effective provision of the Sanction Guidelines Section 3.2 provides, "[A]bsolute adherence to the Compliance Monitoring and Enforcement Programs, to the exclusion of other options, may not be the most appropriate, efficient or desirable means by which to achieve the end goal in all circumstances, to all entities party to a violation."

<sup>71</sup> NERC Petition at 54.

<sup>72</sup> See, e.g., Agenda Compliance Committee (November 6, 2012), pages 10-11 of PDF document, available at [http://www.nerc.com/docs/bot/botcc/BOTCC\\_Open\\_11-12a-complete.pdf](http://www.nerc.com/docs/bot/botcc/BOTCC_Open_11-12a-complete.pdf) (addressing NERC's Compliance Enforcement Initiative).

## **7. Section 5.3**

96. NERC proposes to revise Section 5.3, which addresses “Notification to Registered Entity of Alleged Violation,” to change the language requiring that “NERC shall forward a copy of the Notice of Alleged Violation to FERC” to now read that “NERC shall notify FERC of the Alleged Violation.” In the petition, NERC does not explain the basis for this change.

### **Commission Determination**

97. Under the proposed revision, NERC would no longer be obligated to forward a copy of the Notice of the Alleged Violation to the Commission and, instead, would only be required to “notify” the Commission. We note that NERC also proposes to specify in Section 5.3 the categories of information that a Compliance Enforcement Authority would provide to a registered entity in a “notification” of Alleged Violation. The Commission accepts NERC’s proposed revisions to Section 5.3 with the understanding that NERC will provide to the Commission the same information the registered entity receives in a “notification” of Alleged Violation.

## **8. Section 5.11**

98. NERC proposes to add new Section 5.11, Special Procedures for an Enforcement Action Against an ISO/RTO Where the Monetary Penalty May be Allocated by the ISO/RTO to Other Entities. NERC states that Section 5.11 allows an ISO/RTO to request that the Compliance Enforcement Authority make a determination during the enforcement process for a Notice of Possible Violation issued to the ISO/RTO that one or more other entities were responsible in whole or in part for actions or omissions that caused or contributed to the violation and that the specified other entity or entities can request and be allowed to participate in the enforcement process. NERC further states that Section 5.11.4 expressly disclaims that the Compliance Enforcement Authority will determine whether and to what extent a penalty imposed on the ISO/RTO should be allocated to other entities. NERC states that such an allocation determination would be made by the Commission in a separate proceeding pursuant to section 205 of the FPA.

### **Comments and Answers**

99. OEVC protests that proposed Section 5.11 grants preferential treatment to ISO/RTOs, and is therefore discriminatory, in that it allows only ISO/RTOs to have NERC determine that “one or more specified other entities were responsible, in whole or in part, for actions or omissions that cause or contributed to the violation.” OEVC states that NERC has not provided a legal basis to grant special treatment to ISO/RTOs and, thus, Section 5.11 violates section 215 of the FPA.

100. ISO/RTO Council responds that OEVC ignores Commission precedent addressing the allocation of reliability penalty costs that are initially assessed against ISO/RTOs to

entities that actually caused a Reliability Standard violation. ISO/RTO Council states that Commission precedent recognizes that ISO/RTOs are differently situated from other registered entities because they “may have insufficient reserves to pay penalties assessed pursuant to section 215 of the [Federal Power Act].”<sup>73</sup> ISO/RTO Council states that the Commission established rules that allow ISO/RTOs to seek Commission permission to directly allocate reliability penalties if certain conditions are met. ISO/RTO Council explains that one of the conditions is a due process requirement that entities potentially subject to a penalty allocation receive notice and an opportunity to fully participate in the Compliance Monitoring and Enforcement Program conducted by NERC or the Regional Entities. ISO/RTO Council maintains that Section 5.11 is not unduly discriminatory or preferential to ISO/RTOs and merely conforms NERC’s Rules of Procedure to Commission precedent. ISO/RTO Council further states that OEVC’s assertion that non-ISO/RTO entities would benefit from Section 5.11 is irrelevant because non-ISO/RTOs do not have the characteristics that led the Commission to permit ISO/RTOs to make direct allocations of penalty costs to other entities.

101. OEVC replies that the proposed Special Procedures in Section 5.11 are impermissible under section 215 of the FPA because they would afford special treatment to ISO/RTOs. OEVC states that Commission precedent addressing the allocation of reliability penalty costs under section 205 of the FPA does not support affording preferential treatment to ISO/RTOs through the proposed Special Procedures under section 215 of the FPA. OEVC states that, even if they were relevant, the Special Procedures are not required for ISOs/RTOs to provide notice to targeted entities. OEVC contends that proposed Section 1.2.12 of Attachment 2 to Appendix 4C of the Rules of Procedure specifically addresses the ability of an entity to fully participate in a proceeding in which it may be contractually liable to an ISO/RTO for reliability penalty costs. Thus, OEVC concludes that the proposed Special Procedures are not required for ISOs or RTOs to satisfy the due process requirement that entities potentially subject to a penalty allocation receive “notice and an opportunity to fully participate in the Compliance Monitoring and Enforcement Program conducted by NERC or NERC’s Regional Entities.”<sup>74</sup>

### **Commission Determination**

102. We approve NERC’s proposed new Section 5.11. Proposed new Section 5.11 is consistent with Commission precedent on this subject:

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<sup>73</sup> ISO/RTO Council at 7 (quoting *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247, at P 1 (2008) (Guidance Order)).

<sup>74</sup> OEVC Reply at 3-4.

In the event an RTO or ISO itself is assessed a monetary penalty, the Commission will entertain a section 205 filing by that RTO or ISO to directly assign the costs of the penalty to another entity. However, to ensure due process to that targeted entity, the Commission will not entertain any such filing unless the targeted entity has been notified during the course of the investigation or other inquiry into, or hearing of that matter, that an RTO or ISO believes that the targeted entity may be responsible for a violation. It is thus imperative for an RTO or ISO that believes another entity is responsible for a violation to so notify the Regional Entity as soon as possible. Furthermore, to avoid duplicative investigations and hearings, the Commission repeats that it does not intend any section 205 direct assignment proceeding to function as a second, de novo review of the investigation. Rather, such a section 205 proceeding will be limited to the question of whether penalty costs should be assigned to an entity already identified during the investigative or hearing stage of the enforcement process.<sup>75</sup>

103. We reject OEVC's assertion that this precedent does not support proposed Section 5.11. OEVC claims that this precedent is irrelevant to the Rules of Procedure as they pertain to section 215 because it deals exclusively with the allocation of reliability penalty costs under section 205. The last sentence from the passage above, however, states that "a section 205 proceeding will be limited to the question of whether penalty costs should be assigned to an entity *already identified during the investigative or hearing stage of the enforcement process.*" The "investigative or hearing stage of the enforcement process" refers to a section 215 process. In that process, the Commission stated that the Compliance Enforcement Authority, if appropriate, may assign responsibility to the non-ISO/RTO entity.<sup>76</sup> Proposed Section 5.11, which permits ISO/RTOs to identify other parties potentially responsible in whole or in part for a violation during an enforcement action and to request that a Compliance Enforcement Authority make a determination as to their responsibility, is consistent with this precedent and provides due process to non-ISO/RTO entities.

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<sup>75</sup> Guidance Order, 122 FERC ¶ 61,247 at P 23.

<sup>76</sup> *Id.* P 23, n.38 ("The Regional Entity ... may then consider the acts or omissions of such entity in the investigative or hearing process, and may assign responsibility to the entity if appropriate").

104. We reject OEVC's assertion that proposed Section 5.11 is unduly discriminatory or preferential because it treats ISO/RTOs differently from other registered entities that have contractual arrangements whereby they can allocate some or all of a monetary penalty to another entity. As the Commission previously determined, we recognize the importance of ISOs and RTOs in providing transmission service, enhancing reliability and administering electric energy markets throughout the country, and acknowledge that these entities, to the extent they operate as not-for-profit organizations funded by their customers, may have insufficient reserves to pay penalties assessed pursuant to section 215 of the FPA.<sup>77</sup> On that basis, we find that the treatment of ISO/RTOs in proposed Section 5.11 is not unduly discriminatory or preferential.

## **9. Section 8.2**

105. NERC proposes to revise Section 8.2, "Reporting to Applicable Governmental Authorities and Public Disclosure," to read:

~~Regional Entities shall report a Confirmed Violation to NERC at the same time the Notice of Confirmed Violation is issued to the Registered Entity.~~ NERC will publicly post on its website each Notice of Penalty, with any Critical Energy Infrastructure Information or other Confidential Information redacted (unless posting of the Critical Energy Infrastructure Information or Confidential Information has been determined to be permissible in accordance with Section 1500 of the Rules of Procedure) ~~with the identify of the violator~~, together with any statement submitted by the Registered Entity, when NERC files the Notice of Penalty with FERC pursuant to Section 5.9.

NERC does not explain in its petition the reason for removing the requirement that the identity of the violator be included in the public posting.

### **Commission Determination**

106. We reject the proposed revision to Section 8.2 removing the requirement that NERC identify violators in the public posting of the Notice of Penalty, subject to the restrictions imposed by 18 C.F.R. § 39.7(b)(4). NERC does not provide any justification for removing this requirement. The Commission finds that, particularly since NERC's website offers the most accessible point to view Notices of Penalty, removing this requirement would reduce transparency.

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<sup>77</sup> *Id.* P 1.

107. NERC is hereby directed to submit a compliance filing within 60 days of the date of this order that restores the deleted language to Section 8.2.

**10. CMEP Attachment 2 and Section 414 of Rules of Procedure**

108. NERC proposes to revise Section 1.2.12, Interventions, of CMEP Attachment 2, Hearing Procedures, to allow intervention in Regional Entity Hearing Body proceedings under limited circumstances. NERC states that, while it recognizes that the Commission previously concluded that only the Commission can authorize intervention in NERC or Regional Entity hearings concerning compliance and imposition of Penalties, the proposed revisions will improve the administration of hearings under the Hearing Procedures, and potentially avoid delays and interruptions to the proceedings, if the Regional Entity Hearing Body is authorized to consider requests for intervention and to allow intervention in the limited, defined circumstance set forth in proposed Section 1.2.12(b). Proposed Section 1.2.12(b) states that:

The Hearing Body may allow a Person to intervene only if the Hearing Body determines that the Person seeking intervention has a direct and substantial interest in the outcome of the Alleged Violation, proposed Penalty or sanction, Mitigation Plan, or Remedial Action Directive that is the subject of the proceeding.

Proposed Section 1.2.12(b) provides the following two examples of direct and substantial interest in the outcome:

(1) that the Person seeking intervention has received a Notice of Alleged Violation or a Remedial Action Directive involving the same Reliability Standard requirement(s) and arising out of the same event or occurrence as the existing Respondent(s) that is the subject of the proceeding, or

(2) that the Person seeking intervention will or may be contractually or legally liable to the original Respondent(s) for payment of all or a portion of the proposed Penalty or sanction that is the subject of the proceeding...

109. Proposed new Section 414 of the Rules of Procedure establishes appellate procedures for grants or denials of motions for intervention made under revised Section 1.2.12. Any appeal is first made to NERC and then to the Commission.

### **Commission Determination**

110. We approve the proposed revisions to Section 1.2.12 allowing Regional Entity Hearing Bodies to permit third parties to intervene. Until now, only the Commission could authorize interventions.<sup>78</sup> We determine that the standard for intervention proposed by NERC (i.e., “direct and substantial interest in the outcome of the Alleged Violation, proposed Penalty or sanction, Mitigation Plan, or Remedial Action Directive that is the subject of the proceeding) is just, reasonable, not unduly discriminatory or preferential, and in the public interest, and satisfies the requirements of section 215(c). What is more, NERC’s examples of what is a “direct and substantial interest” are consistent with Commission precedent.<sup>79</sup> We agree with NERC that, as revised, Section 1.2.12 “will improve the administration of hearings under the Hearing Procedures, and potentially avoid delays and interruptions to the proceedings while a potential intervenor prosecutes a request for intervention at the Commission.”<sup>80</sup> As proposed in revised Section 1.2.12, the Hearing Body’s decision granting or denying intervention can be appealed pursuant to new Section 414 of the Rules of Procedure to NERC and then to the Commission.

#### **F. Rules of Procedure Revision Process**

111. The Trade Associations and OEVC raise concerns regarding the process by which NERC revises its Rules of Procedure. The Trade Associations state that they asked NERC to implement specific changes in this process “to ensure greater transparency and notice to stakeholders for any future revisions to the [Rules of Procedure].”<sup>81</sup> The Trade

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<sup>78</sup> *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, at P 150, *order on reh’g*, 120 FERC ¶ 61,260 (2007) (citing *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006)); NERC Petition at 71 (citing *Monongahela Power Co., West Penn Power Co., The Potomac Edison Co., and PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,226 (2011)).

<sup>79</sup> *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 at P 150 (stating that an exception to the general rule against third party intervention is when more than one registered entity receives a notice of alleged violation for the same event or transaction); *Monongahela*, 135 FERC ¶ 61,226 at P 16 (authorizing intervention when intervenor was potentially subject to a direct assignment of monetary penalties resulting from the enforcement action).

<sup>80</sup> NERC Petition at 70.

<sup>81</sup> Corrected Trade Associations Protest at 9.

Associations request that the Commission direct NERC to implement these changes and make a compliance filing. Similarly, OEVC states that the “lack of transparency in the [Rules of Procedure] revision process frustrates stakeholder participation and impedes meaningful progress by precluding consideration of alternative ideas and solutions that stakeholders may have otherwise been able to provide if they understood the ‘basis and purpose’ for proposed revisions.”<sup>82</sup> OEVC requests that the Commission direct NERC to adopt a more comprehensive and transparent process for modifying the Rules of Procedure to more resemble the Standards Development Process.

112. In response, NERC states that the instant petition does not propose changes to NERC’s processes for revising its Rules of Procedure of the kind requested by the Trade Associations and OEVC. NERC states that it would be premature for the Commission to direct NERC to make changes to its processes, when NERC has not developed any such changes through its internal processes, obtained NERC Board approval for any such changes, or proposed any such changes. NERC states that it is aware of the concerns of the Trade Associations and OEVC and that NERC staff is reviewing the process for Rules of Procedure changes and whether any revisions or enhancements are needed.

#### **Commission Determination**

113. NERC has not proposed changes to the process for changing its Rules of Procedure commensurate with the comments. However, in its answer NERC commits to considering this issue. The Commission expects NERC will follow through on that effort and propose any changes if necessary for future proposed Rules of Procedure changes.

#### **The Commission orders:**

(A) NERC’s revised Rules of Procedure are hereby conditionally approved, with limited exceptions, as discussed in the body of this order.

(B) NERC is hereby directed to submit a compliance and an informational filing within 60 days from the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>82</sup> OEVC Protest at 12.