

150 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability Corporation

Docket No. NP15-1-000

ORDER ON REVIEW OF NOTICE OF PENALTY

(Issued March 19, 2015)

1. On October 30, 2014, the North American Electric Reliability Corporation (NERC) submitted a Notice of Penalty filing to the Commission, assessing a \$52,000 penalty against NextEra Energy Resources, LLC (NextEra) for violations of Reliability Standards under section 215(e) of the Federal Power Act (FPA).¹ According to the Notice of Penalty, NextEra's failure to timely reduce the output of a generator pursuant to an out of merit energy instruction issued by a reliability coordinator, the Electric Reliability Council of Texas, Inc. (ERCOT), violated the provisions of two Reliability Standards that require an entity to comply with directives or reliability directives issued by a reliability coordinator.² NextEra filed an application with the Commission for review of the Notice of Penalty on November 26, 2014. NextEra asks the Commission to find that NextEra did not receive such a directive pursuant to mandatory Reliability Standards and, accordingly, to reverse the NERC Notice of Penalty.

2. In this order, the Commission finds that NextEra violated two Reliability Standards by failing to timely comply with such a directive. Further, the Commission is not persuaded by other substantive and procedural arguments provided by NextEra, as

¹ 16 U.S.C. § 824o(e) (2012).

² The NERC Glossary of Terms Used in Reliability Standards defines "reliability coordinator" as "[t]he entity that is the highest level of authority who is responsible for the reliable operation of the Bulk Electric System, has the Wide Area view of the Bulk Electric System, and has the operating tools, processes and procedures, including the authority to prevent or mitigate emergency operating situations in both next-day analysis and real-time operations. . . ."

discussed below. Accordingly, the Commission affirms the \$52,000 penalty assessed by NERC.

I. Background

A. Section 215 of the Federal Power Act

3. Section 215 of the FPA authorizes the Commission to certify and oversee an electric reliability organization (ERO) responsible for developing and enforcing mandatory Reliability Standards that are applicable to users, owners and operators of the Bulk-Power System.³ Exercising this statutory authority, the Commission certified NERC as the ERO in 2006.⁴ As contemplated under FPA section 215(e)(4), NERC has delegated certain oversight and enforcement authority to eight Regional Entities, including the Texas Reliability Entity, Inc. (Texas RE), which has enforcement and oversight responsibility for NextEra relevant to this proceeding.⁵

4. Pursuant to FPA section 215(e)(1), NERC as the ERO has the authority to “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.”⁶ NERC and the Regional Entities to which NERC delegates compliance and enforcement authority identify potential violations using various compliance tools, including audits, spot checks, investigations, required self-certifications, and voluntary self-reporting.

5. The FPA and Commission regulations require NERC to file a Notice of Penalty with the Commission before a penalty that NERC or a Regional Entity assesses for a violation of a Reliability Standard can take effect.⁷ Each such penalty determination is

³ 16 U.S.C. § 824o.

⁴ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh’g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,190, *order on reh’g*, 119 FERC ¶ 61,046 (2007), *rev. denied sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

⁵ *See North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh’g*, 120 FERC ¶ 61,260 (2007).

⁶ 16 U.S.C. § 824o(e)(1).

⁷ 16 U.S.C. § 824o(e)(1), (2); *see also 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.

(continued ...)

subject to Commission review, either on the Commission's own motion or by application for review by the recipient of the penalty, within thirty days from the date NERC files the applicable Notice of Penalty.⁸ In the absence of an application for review of a penalty or other action by the Commission, each penalty filed by NERC is affirmed by operation of law upon the expiration of the applicable thirty-day period.⁹

B. Reliability Standards IRO-001-1 and TOP-001-1

6. In Order No. 693, the Commission approved 83 Reliability Standards as mandatory and enforceable, pursuant to FPA section 215(d).¹⁰ Relevant to the immediate proceeding, the Commission, in Order No. 693, approved two Reliability Standards that pertain to compliance with reliability directives issued by a reliability coordinator. First, Reliability Standard IRO-001-1 (Reliability Coordination – Responsibilities and Authorities) has the following stated purpose: “Reliability Coordinators must have the authority, plans, and agreements in place to immediately direct reliability entities within their Reliability Coordinator Areas to re-dispatch generation, reconfigure transmission, or reduce load to mitigate critical conditions to return the system to a reliable state.” Requirement R8 of Reliability Standard IRO-001-1 requires applicable entities to comply with directives issued by the reliability coordinator or notify the reliability coordinator of an inability to comply with directives, as follows:

Transmission Operators, Balancing Authorities, Generator Operators, Transmission Service Providers, Load-Serving Entities, and Purchasing-Selling Entities shall comply with Reliability Coordinator directives unless such actions would violate safety, equipment, or regulatory or statutory requirements. Under these circumstances, the Transmission Operator, Balancing Authority, Generator Operator, Transmission Service Provider, Load-Serving Entity, or Purchasing-Selling Entity shall immediately inform the Reliability Coordinator of the inability to perform the directive so that the Reliability Coordinator may implement alternate remedial actions.

¶ 31,204 at P 506, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁸ 16 U.S.C. § 824o(e)(2).

⁹ 16 U.S.C. § 824o(e)(2).

¹⁰ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

7. Second, Reliability Standard TOP-001-1 (Reliability Responsibilities and Authorities) has the following stated purpose: “To ensure reliability entities have clear decision-making authority and capabilities to take appropriate actions or direct the actions of others to return the transmission system to normal conditions during an emergency.” Requirement R3 of Reliability Standard TOP-001-1, likewise, sets out the requirement to comply with reliability directives as follows:

Each Transmission Operator, Balancing Authority, and Generator Operator shall comply with reliability directives issued by the Reliability Coordinator, and each Balancing Authority and Generator Operator shall comply with reliability directives issued by the Transmission Operator, unless such actions would violate safety, equipment, regulatory or statutory requirements.

II. NERC Notice of Penalty Filing and Stipulated Facts

A. Parties

8. NextEra, a subsidiary of FPL Group, Inc., owns or controls generation facilities in 24 states. In the Texas RE region, NextEra is registered on the NERC compliance registry as the generator owner and generator operator for two natural gas fired generation sites as well as numerous wind powered generation sites, with a total nameplate rating of approximately 5,189 MW. NextEra is the entity responsible for responding to the out of merit energy instructions issued by ERCOT, which is registered on the NERC compliance registry as the reliability coordinator and transmission operator for the Texas RE region.¹¹

9. As mentioned above, Texas RE is a Regional Entity under a delegation agreement between NERC and Texas RE pursuant to section 215(e)(4) of the FPA. Headquartered in Austin, Texas RE is a non-profit corporation that has delegated oversight and enforcement authority for the ERCOT region.

¹¹ See Notice of Penalty Att. B-7.vi (Texas Commission Joint Stipulated Facts) at 1 (defining out of merit energy as “Energy provided by a Resource selected by ERCOT outside the bidding process to resolve a reliability or security event”).

B. Stipulated Facts

10. In the proceeding before the Commission, as well as in the underlying NERC, Texas RE, and Public Utility Commission of Texas (Texas Commission) proceedings, the parties stipulated the following facts.¹²

11. At 11:29 a.m. on October 12, 2008, ERCOT issued a written electronic out of merit energy instruction to NextEra instructing NextEra to reduce the output of one of its wind generation stations to zero MW.¹³ ERCOT issued the out of merit energy instruction to NextEra to address an overloading transmission line. NextEra did not reduce the output as instructed within one hour.¹⁴ At 12:14 p.m., ERCOT issued an “Operating Constraint Limit 1” (OC1), a zonal congestion management tool redirecting generation within certain zones, to maintain system stability limits. At 12:28 p.m., ERCOT deactivated the OC1 because other generators reduced their output at ERCOT’s direction.

12. At 12:59 p.m., an ERCOT operator called the NextEra operator and asked whether the NextEra operator had seen the out of merit energy instruction. The NextEra operator stated that he did not see the out of merit energy instruction and that he would now comply.¹⁵ At 1:04 p.m., an ERCOT shift supervisor called the NextEra operator to ask why the NextEra operator had not followed the out of merit energy instruction. The NextEra operator stated that he did not comply with the out of merit energy instruction because he was busy and missed the out of merit energy instruction.¹⁶ The ERCOT shift supervisor informed the NextEra operator that if NextEra had complied with the out of merit energy instruction when ERCOT issued it, ERCOT probably would not have had to issue the OC1.¹⁷ At 1:13 p.m., NextEra reduced the generator output as instructed in the out of merit energy instruction.

¹² See Notice of Penalty, Att. B-7.vi (Texas Commission Joint Stipulated Facts).

¹³ *Id.* at 1. ERCOT protocols require entities to acknowledge receipt of an out of merit energy instruction within one hour.

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.*

C. Texas RE Proceedings

13. Following a “spot check” investigation, on February 22, 2011, Texas RE issued a notice of alleged violation, alleging that NextEra violated Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3 by failing to comply with the ERCOT out of merit energy instruction on October 12, 2008.¹⁸ Texas RE recommended assessing a monetary penalty of \$52,000 for the violations (\$21,000 for violating Reliability Standard IRO-001-1 and \$31,000 for violating Reliability Standard TOP-001-1). Pursuant to Texas RE’s rules at that time, NextEra filed a complaint with the Texas Commission, then the hearing body for Texas RE, challenging the Texas RE allegations.¹⁹

14. On November 15, 2012, the Texas Commission issued a final recommendation concluding that: (1) NextEra violated Reliability Standard IRO-001-1 Requirement R8; (2) the out of merit energy instruction was a directive as the term is used in in IRO-001-1 Requirement R8; (3) no penalty should be imposed on NextEra because it did not know and reasonably should not have known that its failure to comply with the out of merit energy instruction would constitute a violation of a Reliability Standard; (4) NextEra did not violate Reliability Standard TOP-001-1 Requirement R3 because there was no declared emergency in effect at the time ERCOT issued the out of merit energy instruction; and (5) if Texas RE imposed a penalty contrary to the Texas Commission final recommendation, the penalty should not exceed \$21,000 for the violation of Reliability Standard IRO-001-1.²⁰ Pursuant to the Texas RE rules, Texas RE compliance staff appealed the Texas Commission Final Recommendation Order to the Texas RE board of directors (Texas RE Board).

15. On January 17, 2013, the Texas RE Board issued a decision (Texas RE Board Decision) following a *de novo* review of the Texas Commission Final Recommendation Order.²¹ The Texas RE Board reversed the Texas Commission Final Recommendation

¹⁸ Notice of Penalty, Att. A.b. (Texas RE Notice of Alleged Violation).

¹⁹ Notice of Penalty, Att. B-2.i (NextEra Complaint). Subsequently, the Texas RE delegation agreement was revised so that the Texas RE directors act as the hearing body. *North American Electric Reliability Corporation*, Docket No. RR13-7-000 (Aug. 19, 2013) (delegated letter order).

²⁰ Notice of Penalty, Att. B-12.iii (Texas Commission Final Recommendation Order).

²¹ Notice of Penalty, Att. B-13.i (Texas RE Board Decision).

Order and found that a monetary penalty of \$52,000 was appropriate. The Texas RE Board concluded among other things that: (1) ERCOT's out of merit energy instruction constituted a directive and reliability directive under Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3, respectively; (2) NextEra knew or should have known that its failure to comply with the out of merit energy instruction would violate the Reliability Standards; (3) Reliability Standard TOP-001-1 Requirement R3 applies in the absence of system emergencies; and (4) the appropriate penalty for NextEra's violations is \$52,000.²² NextEra appealed the Texas RE Board Decision to the NERC Board of Trustees Compliance Committee (Compliance Committee).

D. NERC Compliance Committee Decision and Notice of Penalty

16. On July 15, 2014, the NERC Compliance Committee issued a Decision on Appeal of Violation Determination (Compliance Committee Decision) upholding the Texas RE Board Decision.²³ The Compliance Committee Decision addressed fourteen claims of error by NextEra regarding the Texas RE Board's determination and concluded that, "[a]fter engaging in a reasoned analysis of the arguments and evidence before it, the NERC Compliance Committee affirms the Decision of the Texas RE Board."²⁴ The Compliance Committee decision upheld the Texas RE Board determinations that NextEra violated Reliability Standards IRO-001-1 and TOP-001-1 because the ERCOT out of merit energy instruction was a directive and a reliability directive and that Reliability Standard TOP-001-1 applies in non-emergency situations. The Compliance Committee Decision also addressed NextEra's claims of procedural errors.

17. NERC submitted a Notice of Penalty to the Commission on October 30, 2014, assessing a \$52,000 penalty against NextEra for violations of Reliability Standards IRO-001-1 (Reliability Coordination — Responsibilities and Authorities) Requirement R8 and TOP-001-1 (Reliability Responsibilities and Authorities) Requirement R3.

III. NextEra Application for Review of Notice of Penalty

18. On November 26, 2014, as amended on December 17, 2014, NextEra filed an Application for Review of Penalty asking the Commission to review the NERC Notice of Penalty and "set aside" the penalty because NERC and the Texas RE Board "failed to

²² *Id.* at 25.

²³ Notice of Penalty, Att. B-16.vi (NERC Compliance Committee Decision).

²⁴ *Id.* at 10.

meet their burden demonstrating that reliability violations have in fact occurred.²⁵ NextEra states that it is challenging the assessment of the \$52,000 penalty because it believes that the out of merit energy instruction ERCOT issued does not constitute a directive or a reliability directive pursuant to Reliability Standards IRO-001-1 Requirement R8 or TOP-001-1 Requirement R3, respectively.

19. NextEra states that it “has never denied that its operator failed to respond timely to ERCOT’s [out of merit energy] instruction” issued on October 12, 2008, and that “failing to respond . . . violated ERCOT Protocol 5.4.4.”²⁶ Rather, NextEra challenges whether the fact that the NextEra operator failed to respond timely to the ERCOT out of merit energy instruction automatically constitutes a violation of Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3. NextEra argues that the ERCOT out of merit energy instruction is not a directive or a reliability directive pursuant to the two Reliability Standards.²⁷ NextEra asserts that, for Reliability Standards IRO-001-1 or TOP-001-1 to apply, ERCOT should have identified the out of merit energy instruction as a directive or reliability directive using three-part communication.²⁸ According to NextEra, it has received out of merit energy instructions pursuant to ERCOT’s market protocols, but had no real or constructive knowledge that the out of merit energy instruction constituted a directive or reliability directive pursuant to Reliability Standards IRO-001-1 or TOP-001-1.

20. Further, NextEra argues that NERC erred by failing to find that Reliability Standard TOP-001-1 Requirement R3 is limited to emergencies, as suggested by the purpose statement of the standard. NextEra also contends that the NERC Compliance Committee erred procedurally: (1) by effectively eliminating the burden of persuasion from the Texas RE compliance staff; (2) in accepting parol evidence provided by a Texas RE board member; (3) by failing to ensure consistent interpretation of Reliability Standards by all Regional Entities; and (4) by applying an erroneous standard of review to the Texas RE Board Decision.

²⁵ NextEra Application at 1.

²⁶ *Id.* at 2.

²⁷ *Id.* at 3.

²⁸ *Id.* at 6.

IV. Order Initiating Review and Responsive Pleadings

21. On November 28, 2014, the Commission issued an Order Initiating Review of the Notice of Penalty.²⁹ The Commission established a filing deadline of December 18, 2014 for submission of answers, interventions or comments. NERC filed an answer to NextEra's application for review. Texas RE and Trade Associations³⁰ filed timely motions to intervene and comments. On January 15, 2015, NextEra filed a motion for leave to answer and answer. Exelon Corporation filed a timely motion to intervene.

A. NERC Answer

22. NERC answers that: (1) the undisputed facts in the record provide ample support for the determination of the NERC Compliance Committee; (2) the NERC Compliance Committee correctly found that NextEra violated Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3; and (3) at all stages of the proceedings, NextEra was afforded proper due process.

23. NERC avers that the record evidence demonstrates that ERCOT regularly used out of merit energy instructions to give direction to market participants in the ERCOT region.³¹ NERC argues that, while "directive" was not a defined NERC term at the time of the incident, the out of merit energy instruction was clearly a directive within the common meaning of the word, i.e., "an order or instruction, particularly from a central authority."³² NERC contends that both the plain meaning and the context in which the term directive appears in Reliability Standards IRO-001-1 and TOP-001-1 support the NERC Compliance Committee conclusion that ERCOT issued a directive for the purposes of those Reliability Standards when it issued the out of merit energy instruction to NextEra.³³ Noting that NextEra does not dispute that the out of merit energy instruction contained clear instructions regarding the actions ERCOT expected NextEra

²⁹ *North American Electric Reliability Corp.*, 149 FERC ¶ 61,186 (2014).

³⁰ Trade Associations include the Edison Electric Institute (EEI), the American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA), and the Electric Power Supply Association (EPSA).

³¹ NERC Answer at 2.

³² *Id.* at 8 (quoting NERC Compliance Committee Decision at 27 and *The American Heritage Dictionary of the English Language* (5th ed. 2014)).

³³ *Id.* at 8.

to take, NERC cites the definition of “Out of Merit Energy” indicating that ERCOT issued out of merit energy instructions for reliability purposes.³⁴ NERC adds that ERCOT issued the out of merit energy instruction to address transmission line overloading, which is a reliability issue.

24. Regarding NextEra’s argument that it did not violate Reliability Standard TOP-001-1, NERC contends that the purpose statement of a Reliability Standard serves as a general guideline and not as an enforceable requirement.³⁵ NERC also notes that some of the Requirements within Reliability Standard TOP-001-1 include specific language indicating that they apply “during a system emergency,” while other Requirements are not similarly qualified.

B. Comments

25. Texas RE supports NERC’s response and emphasizes that NextEra has never disputed the fact that its operator failed to timely respond to an out of merit energy instruction from ERCOT.³⁶ Texas RE adds that the Texas RE Board and the NERC Compliance Committee weighed the evidence and determined that the violations and penalty in the docket are appropriate. Further, Texas RE expresses concern that, “[i]f registered entities can escape responsibility for compliance with directives by making post-hoc claims regarding ambiguity when there is no indication of any real-time ambiguity or confusion, Texas RE is concerned that the task of assuring the reliability of the electric grid may be unnecessarily complicated and reliability compromised.”³⁷

26. Trade Associations urge the Commission to reverse the NERC Compliance Committee Decision and, in doing so, address the due process issues raised by NextEra.³⁸ Trade Associations claim that many registered entities with process issues similar to

³⁴ *Id.* at 9 (quoting NERC Compliance Committee Decision at 12 (defining “Out of Merit Energy” as energy provided by a generator “outside the bidding process to resolve a reliability or security event”)).

³⁵ *Id.* at 12.

³⁶ Texas RE Comments at 3-5.

³⁷ *Id.* at 5.

³⁸ Trade Associations Comments at 4.

those described by NextEra have agreed to settlements rather than pursue a lengthy and expensive appeal process.³⁹

27. Trade Associations reiterate NextEra's alleged procedural infirmities. Trade Associations argue that the record of the original Texas RE investigation is flawed because Texas RE did not contact ERCOT when gathering evidence to determine the ERCOT operator's intent when issuing the out of merit energy instruction. Trade Associations contend that the nature of a dispatch instruction or two-way communication involving actionable requirements should be made clear at the time it occurs. Trade Associations also argue that the NERC Compliance Committee erred in applying an "arbitrary and capricious" standard of review for the Texas RE Board Decision and, rather, should have conducted a *de novo* review of the underlying decision.⁴⁰ Further, Trade Associations contend that parol evidence is not acceptable in enforcement matters. Trade Associations express concern that the NERC Compliance Committee's use of statutory interpretation principles for "unambiguous" purpose statements may render the purpose statements meaningless, and further argue that NERC should consistently interpret purpose statements in order to satisfy due process requirements.⁴¹

C. NextEra Answer

28. In its answer, NextEra argues that the Commission should not "brush aside" the procedural due process concerns that it raises in its application for review because failure to adhere to proper procedural due process will undermine enforcement of Reliability Standards.⁴² NextEra contends that communications made pursuant to market protocols should not be treated as communications made pursuant to the Reliability Standards absent additional evidence. Finally, NextEra argues that NERC's analysis defining the term "directive" was incomplete because Texas RE compliance staff did not meet their burden of persuasion, which should have included interviewing ERCOT staff.⁴³

³⁹ *Id.*

⁴⁰ *Id.* at 6-7.

⁴¹ *Id.* at 7-9.

⁴² NextEra Answer at 3.

⁴³ *Id.* at 8-9.

V. Discussion**A. Procedural Matters**

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁴⁴ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁴⁵ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NextEra's answer because it has provided information that assisted us in our decision-making process.

B. Commission Determination

31. Pursuant to section 215(e)(2) of the FPA and section 39.7 of the Commission's regulations, the Commission affirms the \$52,000 penalty assessed by NERC.⁴⁶ As explained below, we find that the out of merit energy instruction issued by ERCOT constitutes a directive and reliability directive pursuant to Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3, respectively. We further find that NextEra's failure to respond timely to the ERCOT out of merit energy instruction resulted in a violation by NextEra of Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3. Below, we discuss our findings that NERC: (1) reasonably concluded that NextEra violated Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3, (2) reasonably interpreted Reliability Standard TOP-001-1 to apply in certain non-emergency situations, and (3) provided adequate procedural due process to NextEra.

⁴⁴ 18 C.F.R. § 385.214 (2014).

⁴⁵ 18 C.F.R. § 385.213(a)(2) (2014).

⁴⁶ See 16 U.S.C. § 824o(e)(2); 18 C.F.R. § 39.7 (2014).

1. NERC Reasonably Concluded that ERCOT Issued a Directive for Purposes of the Reliability Standards in Effect When the Incident Occurred

a. NERC Compliance Committee Decision

32. In its July 2014 Decision, the NERC Compliance Committee found that the ERCOT out of merit energy instruction was a directive and reliability directive under Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3, respectively. The Compliance Committee adopted the following rationale of the Texas RE Board:

The language and context of IRO-001-1 R8 are sufficient to support the [Texas Commission]'s conclusion that the [out of merit energy instruction] was a directive. Moreover, the definition of [out of merit energy] is energy provided by a generator "outside the bidding process to resolve a reliability or security event," which indicates that ERCOT issues [out of merit energy instructions] for reliability purposes. The stated purpose of IRO-001-1 is to ensure that Reliability Coordinators have the authority to direct reliability entities to take the actions needed to return the system to a reliable state. Requirement 8 makes clear that directives are the means for Reliability Coordinators to exercise this authority. The [out of merit energy instruction] issued at 11:29 [AM CST] on October 12, 2008 clearly required NextEra to reduce the output of Capridge 4 to 0 MW by 12:00 [PM CST], and the parties stipulate that an [out of merit energy instruction] was issued to address overloading of the San Angelo-Menard transmission line. The [out of merit energy instruction] meets the plain meaning of directive, and falls within the context of IRO-001-1 as it was issued by ERCOT to return the system to a reliable state within normal operating limits.⁴⁷

33. Further, the NERC Compliance Committee disagreed with the Texas RE Board regarding the relevance of the operator's intent and found "that whether the operator intended the [out of merit energy instruction] to be a directive pursuant to a Reliability Standard is irrelevant to a determination of whether NextEra failed to comply with the Standard."⁴⁸ The NERC Compliance Committee also explained that:

⁴⁷ NERC Compliance Committee Decision at 12 (quoting Notice of Penalty, Att. B-13.i (Texas RE Board Decision) at 8).

⁴⁸ *Id.* at 19.

The Texas RE Board did not rely on the intent of the ERCOT operator. Rather, the Texas RE Board relied on evidence in the record, including evidence that NextEra frequently received [out of merit energy instructions] and complied with them without raising concerns about their legal implications. . . . In addition, the Texas RE Board cited the ERCOT Reliability Plan in effect at the time and the fact that the Plan makes clear that ERCOT, as the Reliability Coordinator for its region, has the authority to direct generators to take actions to ensure reliable operations.⁴⁹

34. In addition, the NERC Compliance Committee distinguished between an electronic dispatch instruction like the October 12, 2008 out of merit energy instruction and a verbal directive under the ERCOT Protocols. The NERC Compliance Committee concluded that “the recipient of the [out of merit energy] order is not required to repeat back immediately what is contained in the written instruction.”⁵⁰

b. NextEra Application

35. NextEra argues that NERC erred in finding that the out of merit energy instruction was a directive and reliability directive pursuant to Reliability Standards IRO-001-1 and TOP-001-1, respectively. NextEra asserts that a reliability coordinator “must *intend* a communication—in this case, the electronic [out of merit energy] dispatch instruction—to be a directive or reliability directive.”⁵¹ According to NextEra, Texas RE’s investigation of the underlying incident was flawed, in part, because Texas RE failed to investigate (or provide evidence at hearing of) the ERCOT operator’s intent in issuing the directive.⁵² Similarly, NextEra alleges that the NERC Compliance Committee erred in finding that the ERCOT operator’s intent is irrelevant and argues that the NERC Compliance Committee “appears to argue that even if the ERCOT operator never intended to issue a directive . . . NERC can override ERCOT’s intent and interpret the [out of merit energy]

⁴⁹ *Id.* at 20-21 (footnotes omitted).

⁵⁰ *Id.* at 23.

⁵¹ NextEra Application at 18 (emphasis in original).

⁵² *Id.* at 19, 22. NextEra contends that Texas RE had the burden of persuasion to demonstrate the ERCOT operator’s intent but failed to offer any evidence on the issue. NextEra suggests that, while not dispositive, an Incident Report provided by ERCOT to Texas RE regarding the October 12, 2008 events creates ambiguity regarding the ERCOT operator’s intent since the report identified a possible ERCOT Protocol violation, and left blank the report section on possible NERC Reliability Standards violations. *Id.* at 19.

instruction to be a directive. . . .”⁵³ Further, NextEra contends that the Texas RE and NERC Compliance Committee erred in relying on evidence that “NextEra frequently received [out of merit energy instructions] and complied with them without raising concerns. . . .” since compliance with an instruction “simply means that the [NextEra] operator acted in a manner consistent with ERCOT Protocols and good utility practice.”⁵⁴

36. NextEra also argues that the Texas RE investigation was flawed because Texas RE’s lead investigator was relatively new to Texas RE in 2010, received less than a week of training before being assigned to the NextEra investigation, and was not involved in evaluating NERC Reliability Standards in 2008 when the incident occurred. NextEra also faults Texas RE investigative staff for failing to consider a July 2009 memorandum from NERC stating its views on the proper communication of directives.

37. In addition, NextEra contends that ERCOT Power Operations Bulletin No. 388, which was in effect at the time of the incident at issue here, makes clear that an out of merit energy dispatch instruction is not a directive in ERCOT. According to NextEra, the bulletin repeatedly states that “all directives shall be in a clear, concise, and definitive manner. Ensure the recipient of the directive repeats the information back correctly. Acknowledge the response as correct or repeat the original statement to resolve any misunderstandings.”⁵⁵ NextEra claims that the Texas RE compliance staff sought to limit the applicability of the bulletin by claiming that it applies only to verbal communications. NextEra states that the Commission should find that, had ERCOT issued a directive or reliability directive through the out of merit energy instruction, ERCOT procedures for issuing directives required ERCOT operators to employ three-part communications. NextEra argues that, because this did not occur, ERCOT did not issue a directive or reliability directive.⁵⁶ According to NextEra, the bulletin is particularly informative because the out of merit energy instruction was issued pursuant to ERCOT Protocol 5.4.4, which does not itself address the issuance of directives. NextEra also argues that, even if the NERC Compliance Committee properly interpreted the definition of directive and reliability directive, the NextEra operator could not have reasonably known of that interpretation at the time ERCOT issued the out of merit energy instruction.

⁵³ *Id.* at 19-20.

⁵⁴ *Id.* at 20 (quoting NERC Compliance Committee Decision at 20-21).

⁵⁵ *Id.* at 23-24 (quoting Notice of Penalty, Att. B-7(iii), Exh. NEE-12).

⁵⁶ *Id.* at 24.

38. Further, NextEra takes exception with the Texas RE Board reasoning that “[n]either IRO-001-1 nor TOP-001-1 requires that directives be issued in a particular manner.”⁵⁷ NextEra argues that ERCOT should have used three-part communication pursuant to Reliability Standard COM-002-2 (Communication and Coordination) Requirement R2 if the out of merit energy instruction was in fact a directive pursuant to IRO-001-1 and TOP-001-1.⁵⁸ Likewise, NextEra claims that NERC erred in concluding that “the preponderance of the evidence supports the conclusion that the October 12, 2008 [out of merit energy] instruction was a directive regardless of whether three-part communication was required by ERCOT and NextEra.”⁵⁹ NextEra argues that, based on this rationale, “since ERCOT failed to employ three-part communications NextEra should have been omniscient and realized ERCOT intended the [out of merit energy] instruction to be a directive.”⁶⁰

c. NERC Answer and Comments

39. In its answer to NextEra, NERC contends that, in determining that the out of merit energy instruction was a directive, the Texas RE Board and the NERC Compliance Committee applied the plain, ordinary meaning of the word “directive,” which is defined as “an order or instruction, particularly from a central authority.”⁶¹ NERC explains that the “context of the Reliability Standards in which the term ‘directive’ appears is also

⁵⁷ *Id.* at 30 (quoting Texas RE Decision at 10). *See also* NERC Compliance Committee Decision at 13 (quoting Texas RE language).

⁵⁸ Reliability Standard COM-002-2, Requirement R2 provides:

Each Reliability Coordinator, Transmission Operator, and Balancing Authority shall issue directives in a clear, concise, and definitive manner; shall ensure the recipient of the directive repeats the information back correctly; and shall acknowledge the response as correct or repeat the original statement to resolve any misunderstandings.

⁵⁹ NextEra Application at 31 (quoting Compliance Committee Decision at 28).

⁶⁰ *Id.* at 31.

⁶¹ NERC Answer at 8 (citing NERC Compliance Committee Decision at 27; and *American Heritage Dictionary of the English Language* (5th ed. 2014)). NERC states that a court interpreting a statute is bound by the “literal or usual meaning of its words” unless this would lead to “absurd results.” *Id.*

illustrative.”⁶² Namely, the purpose of Reliability Standard IRO-001-1 is to ensure that reliability coordinators have the authority to direct entities to take the actions needed to return the system to a reliable state. Similarly, Reliability Standard TOP-001-1 is designed to provide reliability entities with the authority to direct the actions of others. NERC maintains that, applying the definition and context in a straightforward manner to the facts in the case, it is clear that ERCOT issued a directive for purposes of Reliability Standards IRO-001-1 and TOP-001-1.

40. NERC asks that the Commission reject NextEra’s *ad hoc* interpretation that would avoid the plain meaning of “directive” and, instead, require an examination of: (1) ERCOT’s intent when issuing the instruction; and (2) whether ERCOT complied with other Reliability Standards and documents not explicitly referenced in Reliability Standards IRO-001-1 and TOP-001-1 when communicating the instruction. NERC contends that neither consideration advanced by NextEra is relevant to the determination of whether NextEra violated the subject Reliability Standards. Rather, NERC asserts that, applying the plain meaning of the term directive, Texas RE compliance staff “stated a *prima facie* case through the testimony and evidence presented at the [Texas Commission] hearing that a directive had been issued, thus meeting the burden of persuasion in the proceeding.”⁶³

41. Trade Associations comment that, while NextEra has accepted full responsibility for failing to respond to the ERCOT dispatch instruction, the Commission must address whether a Regional Entity can make an *ex post* determination on what the operator should have intended in issuing the instruction without developing supporting evidence of the actual intent of the operator. Further, Trade Associations state that the Commission should clarify that a violation of a market rule or protocol does not automatically equate to a reliability violation.

42. NextEra, in its answer to NERC, states that, while a dictionary definition (e.g., plain, ordinary meaning of a term) may be the starting point of the inquiry in interpreting the meaning of the term “directive,” the purpose and context in which the term is used must be considered. According to NextEra, NERC does not adequately address the “context” but, rather, simply indicates that an out of merit energy instruction is equivalent to a directive under a Reliability Standard. Thus, NextEra disagrees with NERC’s claim that the Texas RE staff met its burden of persuasion and posits that the Texas RE staff should have interviewed the ERCOT operator, which did not happen.

⁶² *Id.* at 8.

⁶³ *Id.* at 10.

d. Commission Determination

43. The Commission finds that the ERCOT electronic communication issued to NextEra on October 12, 2008 constituted a directive and reliability directive for purposes of Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3, respectively. At the time of the 2008 incident, neither Texas RE nor NERC had defined directive or reliability directive.⁶⁴ Given that circumstance, it was reasonable for Texas RE and NERC to apply the common, dictionary definition of directive as “an order or instruction, particularly from a central authority.”⁶⁵ We find that the common, dictionary definition aptly describes the ERCOT out of merit energy instruction issued to NextEra that clearly required NextEra to curtail its generator output by a certain time to address a reliability issue - overloading on a transmission line. This is not to say that every dispatch instruction automatically equates to a directive pursuant to Reliability Standards.⁶⁶ However, we determine that the specific communication issued by ERCOT to NextEra meets the common understanding of the term directive, or reliability directive, as used in IRO-001-1 and TOP-001-1.

44. Moreover, we agree with NERC and NextEra that the application of the common definition of the term “directive” is not the end of the analysis; and that the context in which the term is used must also be considered.⁶⁷ Based on our review of the record and arguments submitted by the parties to the proceeding, we are persuaded that the context in which the term directive is used also supports the conclusion that the ERCOT communication constituted a directive. In particular, we agree with NERC that IRO-001-

⁶⁴ NERC Compliance Committee Decision at 11; NextEra Application at 18.

⁶⁵ NERC Answer at 8 (citing Compliance Committee Decision at 27; and *American Heritage Dictionary of the English Language* (5th ed. 2014)). Cf. Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 461 (directing NERC to define the term “sabotage” as used in Reliability Standard CIP-001-1 and determining that, in the interim, the common, dictionary understanding of the term “should suffice in most instances”).

⁶⁶ Trade Associations ask the Commission to “clarify that a violation of a market rule or protocol does not automatically equate to a reliability violation,” indicating that “while not explicit in this case” this proposition seems to be an “undercurrent” in the record. Trade Associations Comments at 9. As indicated in the text above, we limit our determination to specific facts in the immediate proceeding and do not draw any general conclusions about equating market rule violations and non-compliance with Reliability Standards.

⁶⁷ See NERC Answer at 8; NextEra Answer to Answer at 9-10.

1 is intended to ensure that reliability coordinators have the authority to direct reliability entities to take the actions – including the “re-dispatch of generation” – needed to return the system to a reliable state.⁶⁸ In that context, Requirement R8 clearly states that directives are the means for a Reliability Coordinator to exercise this authority.⁶⁹ Moreover, the ERCOT out of merit energy instruction, which directed the re-dispatch of generation to address transmission line overloading, corresponds to the language and context of both IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3.⁷⁰

45. Further, we are not persuaded by NextEra’s arguments that the Texas RE Board and NERC Compliance Committee erred by failing to consider additional evidence that would provide context as to whether the ERCOT out of merit energy instruction was a “directive” pursuant to the two Reliability Standards. First, we are not persuaded by NextEra’s claim that Texas RE and NERC erred by failing to determine the intent of the ERCOT operator at the time he communicated the out of merit energy instruction. Rather, we believe that objective evidence that the reliability coordinator gave a directive based on the content of the communication is adequate – if not preferable - to probing the mind of the operator. As indicated by the NERC Compliance Committee Decision, the reliability coordinator gave a command or instruction to another registered entity to take a clear and specific action to address a reliability matter – in the immediate proceeding, the re-dispatch of generation to resolve a transmission line overloading.⁷¹ While NextEra contends that the operator could have simply intended NextEra to follow the instruction based on ERCOT market rules and good utility practice (and NERC’s rationale could result in “overriding” the intent of the ERCOT operator), we question the value and practicality of this approach. Taken to its logical conclusion, this rationale could result in a registered entity questioning a reliability coordinator in real time whether an instruction is a directive, and the source of authority for that directive. Rather, we believe the better approach is that - assuming the reliability coordinator’s instruction is clear and unambiguous - the generator operator or other registered entity must follow the instruction unless such action would violate safety, equipment or regulatory or statutory

⁶⁸ See Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 889 (“IRO-001-1 requires that a reliability coordinator have . . . the authority to act and direct reliability entities to maintain system operations under normal, contingency and emergency conditions”).

⁶⁹ NERC Compliance Committee Decision at 12 (quoting Texas RE Board Decision at 8).

⁷⁰ See NERC Answer at 9-10 and citations to record therein.

⁷¹ NERC Compliance Committee Decision at 19-21.

requirements – as prescribed by IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3. The fact that there may be dual authorities for issuing the instruction should not open up an inquiry as to whether the reliability coordinator intended to issue the directive under one authority and not the other.⁷²

46. Moreover, we are not persuaded by NextEra’s argument that, if ERCOT intended the instruction issued pursuant to ERCOT market rules to constitute a directive or reliability directive, ERCOT should have issued the out of merit energy instruction pursuant to Reliability Standard COM-002-2, which requires three-part communication. While NERC and Texas RE contend that neither IRO-001-1 nor TOP-001-1 require the that directives be issued in a particular manner, NextEra argues that COM-002-2 requires three-part communication in issuing all directives under any of the 22 Reliability Standards that include the word “directive” (but do not explicitly reference COM-002-2). On this matter, the NERC Compliance Committee concluded that a preponderance of the evidence supports the conclusion that the ERCOT instruction was a directive regardless of whether three-part communication was required by ERCOT and NextEra, explaining:

Reliability Standard COM-002-2 R2 does not define “directive,” but does provide the protocols to use when issuing directives. Specifically, R2 requires entities to use three-part communication. Three-part communication as listed in R2 cannot be accomplished with written directives. Therefore, COM-02-2 R2 implicitly applies to the use of three-part communication in verbal exchanges. The justification for three-part communications in verbal exchanges is to ensure the message is accurately conveyed and understood. When communicating in writing, the possibility of misunderstanding between the parties is lessened. . . .⁷³

We agree with NERC’s rationale and conclude that the application of three-part communication is not determinative whether the electronically communicated directive was issued under the TOP and IRO standards.

⁷² Because of our conclusion, we find it unnecessary to analyze NextEra’s claim that, because ERCOT did not identify possible Reliability Standard violations in the 2008 Incident Report, “ERCOT’s silence creates ambiguity as to its intent.” NextEra Application at 19. Nor do we view this as evidence of Texas RE staff’s “flawed” investigation. In particular, we do not believe that a lack of identification of a possible violation of a reliability standard by ERCOT precluded Texas RE or NERC from making an independent determination that such a violation occurred.

⁷³ NERC Compliance Committee Decision at 27-28.

47. We are also not persuaded by NextEra's argument that ERCOT Power Operations Bulletin No. 388 makes clear that an out of merit energy instruction is not a directive. Fundamentally, the bulletin revises the ERCOT Transmission and Security Desk Procedure Manual and appears to address directives issued pursuant to ERCOT protocols. The bulletin does not specifically mention Reliability Standards or directives that fall within the scope of Reliability Standards. Moreover, while NextEra is correct that the bulletin repeatedly states that "all directives" shall be in a clear, concise, and definitive manner" using three-part communication, this language never appears in the bulletin as a general statement but, rather appears in specific scenarios, following a specific verbal script. For example, as to the verbal issuance of an emergency notice, the bulletin states:

Typical script: "This is ERCOT operator [first and last name]. ERCOT is issuing an Emergency Notice for [state Emergency Notice]. [TO] please repeat this directive back to me. That is correct, thank you."

All directives shall be in a clear, concise and definitive manner. Ensure the recipient of the directive repeats the information back correctly. Acknowledge the response as correct or repeat the original statement to resolve any misunderstandings.⁷⁴

The bulletin mentions out of merit energy instructions in only two provisions. First, section 2.2.3, step 9, provides that, if an out of merit energy instruction becomes necessary, certain generator units that cannot respond to market deployments may be deployed to zero output, which would be considered a local technique (referenced in step 8).⁷⁵ Second, section 2.2.12, which prescribes actions for the overload of a specific autotransformer, identifies one option as issuing an out of merit energy VDI (verbal dispatch instruction) to a specific generator to relieve the overload.⁷⁶ In light of the

⁷⁴ Bulletin, section 2.5.4 (Issue and Emergency Notice), step 3. Other provisions have a similar "script" followed by the "all directives" language. *E.g.*, Bulletin, section 2.2.6 (Pre-Contingency Action Plans), step 3; section 2.5.2 (Issue an Advisory), step 3; section 2.5.6 (Implement EECPP), step 1b.

⁷⁵ *See* Bulletin, section 2.2.3 (Zonal Congestion Management), step 9.

⁷⁶ *Id.*, section 2.2.12 (Post-Contingency Overload of the Sandow Autotransformer), step 1. This provision does not include a script or state that "all directives" must use three-part communication. Steps for issuing Verbal Dispatch Instructions are set forth in section 2.6.1 of the bulletin. While requiring three-part communication for such instructions, the bulletin revised section 2.6.1 to apply only to transmission owners and not generators.

above, we disagree with NextEra that the bulletin supports the general proposition that all ERCOT operator directives must be issued verbally using three-part communication. Rather, while definitive that in certain circumstances when verbal communications are used they must be in three-part communication, the bulletin is ambiguous regarding the expectation regarding out of merit energy instructions – both with regard to the acceptable use of electronic communication to issue a directive and the necessary use of three-part communication.⁷⁷

48. We also find unpersuasive NextEra’s arguments related to the July 2009 NERC management memorandum (not presented to the NERC Board of Trustees for approval) regarding three-part communications.⁷⁸ We fail to see how this document sheds any light on the incident at issue in this proceeding that occurred nine months earlier.⁷⁹

49. In sum, we find that the ERCOT electronic communication issued to NextEra on October 12, 2008 constituted a directive and reliability directive for purposes of Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3, respectively. The ERCOT communication is consistent with the plain, dictionary meaning of the term “directive.” Other evidence regarding the context and purpose of the communication supports the determination that the ERCOT communication was a directive for the purposes of these requirements.

⁷⁷ See NERC Compliance Committee Decision at 24 (“references to the issuance of directives in ERCOT Bulletin #388 appear to be addressing verbal communications and do not expressly require the use of three-part communications for electronic instructions”).

⁷⁸ See *id.* at 26-27.

⁷⁹ Based on its position regarding the communication of directives, NextEra also asserts that it did not have actual or “constructive knowledge” that its inaction violated a Reliability Standard. NextEra Application at 41-48. However, NextEra understood or should have understood that it had received an instruction to take clear and specific action in response to ERCOT order, but did not do so. In this circumstance, we are not persuaded that NextEra should be exonerated from monetary penalties based on an alleged lack of constructive knowledge. In Order No. 693, the Commission found that “if a dispute arises over compliance and there is a legitimate ambiguity regarding a particular fact or circumstance, that ambiguity can be taken into account in the exercise of the Commission's enforcement discretion.” Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 275.

2. Applicability of Reliability Standard TOP-001-1 Requirement R3 in Non-Emergency Conditions

a. NERC Compliance Committee Decision

50. The NERC Compliance Committee, affirming the Texas RE Board, concluded that Reliability Standard TOP-001-1 Requirement R3 is not limited to emergency conditions. While acknowledging that the purpose of Reliability Standard TOP-001-1 is “[t]o ensure reliability entities have clear decision-making authority . . . to return the transmission system to normal conditions during an emergency,” the Compliance Committee maintained that “the purpose statement of a Reliability Standard is a general guideline and not an enforceable Requirement.”⁸⁰ The Compliance Committee explained that TOP-001-1 has eight Requirements, of which only Requirements R1 and R5 have language limiting the Requirements to emergencies, while other Requirements are silent. Noting that principles of statutory construction and contract interpretation (1) favor interpretations that give meaning to all of the words of a statute and (2) indicate that the presence of limiting language in one part of a statute that is omitted in another part is intentional, the NERC Compliance Committee reasoned, “[i]f the purpose statement of TOP-001-1 is interpreted as descriptive rather than limiting, it gives effect to the language contained in both R1 and R5 and does not contradict the language throughout the [Reliability] Standard.”⁸¹ Elsewhere in the Decision, the NERC Compliance Committee recited the Texas RE Board rationale that certain Requirements of Reliability Standard TOP-001-1 apply in non-emergency situations, such as the Requirement R5, which requires the transmission operator to notify the reliability coordinator of “anticipated emergencies.”⁸²

b. NextEra Application

51. NextEra argues that the NERC Compliance Committee erred in finding that the issuance of reliability directives pursuant to Reliability Standard TOP-001-1 Requirement R3 is not limited to emergencies. NextEra asserts “that the ‘emergency’ condition in the purpose section elicits the intent of the requirements and thus limits the applicability of the Standard’s requirements to emergencies” and notes that the Texas Commission

⁸⁰ Compliance Committee Decision at 36 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 253).

⁸¹ NERC Compliance Committee Decision at 36.

⁸² *Id.* at 13.

agreed with this rationale in concluding that NextEra did not violate Reliability Standard TOP-001-1.⁸³

52. NextEra contends that NERC's explanation - that the purpose statement is descriptive and not limiting - is inconsistent with NERC's interpretation of Reliability Standard COM-002-2, would result in compliance gaps, and would make the purpose section in Reliability Standards superfluous. NextEra also takes issue with the Compliance Committee's reliance on statutory interpretation, arguing that "nothing in section 215 [of the FPA] equates a Reliability Standard developed by the ERO to a Congressional statute."⁸⁴

53. NextEra argues that separating the requirements from the purpose section of a Reliability Standard is inconsistent with NERC's past practice and could result in future uncertainty on the meaning of standards. Noting that the phrase "real-time emergencies" appears in the purpose statement and Requirement R1 of Reliability Standard COM-002-2 but not Requirement R2, NextEra asserts that a consistent approach would result in Requirement R2 applying in both normal and real-time emergencies. According to NextEra, this would undermine a NERC Board-approved interpretation that relies on the purpose statement to support that three-part communication is only required during real-time emergencies.⁸⁵ NextEra argues that the NERC Compliance Committee's approach to applying rules of statutory interpretation would create other problems in the enforcement of other Reliability Standards such as TOP-001-1 and PRC-005-2. NextEra claims that the NERC Compliance Committee's position that the purpose section of a standard is guidance is at odds with Commission Order No. 753, where the Commission was called upon to review an interpretation of Reliability Standard TOP-001-1 Requirement R8, and concluded that "[t]he interpretation supports the stated purpose of the Reliability Standard."⁸⁶

⁸³ NextEra Application at 32.

⁸⁴ *Id.* at 33.

⁸⁵ *Id.* at 34. NextEra notes that the Commission has not approved the Reliability Standard COM-002-2 interpretation. *Id.* at 29.

⁸⁶ NextEra Application at 35 n.93 (citing *Electric Reliability Organization Interpretation of Transmission Operations Reliability Standard*, Order No. 753, 136 FERC ¶ 61,176, at P 14 (2011)).

c. NERC Answer and Trade Associations Comments

54. NERC maintains that compliance is to be measured only by whether the entity met or failed to meet the terms in a specific, self-contained Reliability Standard.⁸⁷ NERC contends that the purpose statement of a standard, like Measures and Levels of Non-Compliance, serve as general guidelines and not an enforceable requirement. NERC asserts that the NERC Compliance Committee's application of principles of statutory construction and contract interpretation is sound; and the purpose statement of Reliability Standard TOP-001-1 should be interpreted as descriptive to give effect to all of the language of the Requirements of the standard while avoiding internal contradictions.

55. Trade Associations support NextEra, arguing that the Commission should evaluate how the NERC Compliance Committee should use the purpose statement in a Reliability Standard, especially where the purpose statement contains a limit to the applicability of the standard that is not explicitly stated in the Requirements. Trade Associations express concern that the Compliance Committee's approach will effectively read out purpose statements altogether. According to Trade Associations, adoption of the Compliance Committee's argument would mean that registered entities would have to go requirement-by-requirement to determine if the scope of the requirement differs from its stated purpose because a limiting (or expansive) word is missing.

d. Commission Determination

56. We affirm NERC's conclusion that Reliability Standard TOP-001-1 Requirement R3 is not limited to emergency conditions. Moreover, we agree with NERC that the purpose statement of a Reliability Standard does not control the applicability of the standard. This understanding is consistent with the Commission's statement in Order No. 693 that "the most critical element of a Reliability Standard is the Requirements" as the "the Requirements within a standard define what an entity must do to be compliant. . . ."⁸⁸ While other language of a Reliability Standard may assist in interpreting a requirement where an ambiguity exists, the purpose statement of a Reliability Standard alone does not control the scope or applicability of a Reliability Statement even though the purpose statement of a Reliability Standard may provide useful context for interpreting the Requirements.⁸⁹ Moreover, a reasonable reading of the

⁸⁷ NERC Answer at 12.

⁸⁸ Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 253.

⁸⁹ *Id.* at PP 253, 280 (discussing relevance of compliance information set forth in a Reliability Standard).

purpose statement would be as a declaration of minimum qualifications for reliability entities, i.e., to ensure reliability entities “have clear decision-making authority and capabilities” that would allow them “to take appropriate actions or direct the actions of others to return the transmission system to normal conditions during an emergency,” and not a limit on the use of that authority or capabilities to only emergency situations. Further, we agree with the NERC Compliance Committee that the language and context of the Requirements of Reliability Standard TOP-001-1 make it reasonably clear that some provisions, including Requirement R3, apply in non-emergency conditions—particularly here, where ERCOT issued the out of merit energy instruction to avert a potential emergency. We note that, while some requirements of Reliability Standard TOP-001-1 explicitly apply during emergency conditions, other requirements (including Requirement R3 at issue here) do not include an explicit limitation to emergency conditions.⁹⁰ While the clarity of the language of the Reliability Standard TOP-001-1 may not be optimal because of the wording of the purpose statement, on balance, we find that it was reasonable for the NERC Compliance Committee to conclude that Reliability Standard TOP-001-1 Requirement R3 applies to non-emergency conditions in addition to emergency conditions.

57. In response to Trade Associations, our determination does not render the purpose statement of a Reliability Standard meaningless, as it can provide context and guidance when interpreting an otherwise potentially ambiguous requirement of a standard. However, as discussed above, and consistent with Order No. 693, the requirements of a Reliability Standard set forth the enforceable obligation with which applicable entities must apply. Further, we are not persuaded by NextEra’s characterization that the BOTCC Decision undermines prior NERC Board of Trustees actions. Rather, the BOTCC Decision is consistent with the Commission’s explanation that the purpose statement of a Reliability Standard may provide useful context for interpreting the Requirements. In addition, we are not persuaded by NextEra’s argument that Order No. 753 supports NextEra’s position. In that order, while the Commission stated that NERC’s interpretation supported the purpose of the Reliability Standard, the Commission concluded that the NERC interpretation was “consistent with the language of *the requirement.*”⁹¹ It is on that basis – not the purpose statement – that the Commission

⁹⁰ As observed by the Texas RE Board, one provision explicitly requires action in anticipation of emergency conditions. *See* NERC Compliance Committee Decision at 36 (quoting Texas RE Board Decision at 22); *see also* Reliability Standard TOP-001-1 Requirement R5 (requiring that “Transmission Operators shall inform its Reliability Coordinator . . . of real time *or anticipated emergency conditions*, and take actions to avoid, when possible, or mitigate the emergency”) (emphasis added).

⁹¹ Order No. 753, 136 FERC ¶ 61,176 at P 14 (emphasis added).

approved the interpretation. Moreover, the interpretation addressed the division of registered entity responsibilities under a specific Requirement, R8, which explicitly applies to system emergencies; the interpretation does not address the broader question of whether the standard as a whole applies to non-emergency situations. Finally, we believe in any event that the Compliance Committee's decision supports the TOP-001-1 purpose statement because an entity's failure to respond to directives to prevent emergency situations reasonably is related to that entity's capability to take appropriate actions, as directed, during an emergency.

3. NERC Procedure, Process, and Standard of Review of the Texas RE Board Decision

58. NextEra and Trade Associations raise several concerns regarding the procedural due process during the proceedings leading to this proceeding before the Commission. Below, we address the following claims of procedural error: (1) application by the NERC Compliance Committee of an arbitrary and capricious standard of review to the Texas RE Board decision; (2) acceptance of parol evidence; and (3) failure to ensure consistency among regions in interpreting a Reliability Standard.

a. Application of Arbitrary and Capricious Standard of Review

i. NextEra Application

59. NextEra claims that the NERC Compliance Committee erroneously applied an "arbitrary and capricious" standard of review. NextEra argues that neither NERC nor Texas RE is part of the judicial system and thus it is unclear why an arbitrary and capricious standard is appropriate. In addition, NextEra argues that the arbitrary and capricious standard of review conflicts with the *de novo* standard of review that the Commission previously found should be employed by NERC.⁹²

ii. NERC Answer and Trade Associations Comments

60. NERC answers that the NERC Compliance Committee applied a proper standard of review when affirming the Texas RE Board Decision. NERC explains that the review is based upon specific information set forth in section 409 of the NERC Rules of Procedure, which pertains to appeals of final decisions from Regional Entity hearing

⁹² NextEra Application at 48-49 (quoting ERO Certification Order, 116 FERC ¶ 61,026 at P 491).

bodies.⁹³ NERC notes that the Commission, in approving section 409, found that “NERC’s procedures afford appropriate deference to the Regional Entities’ role as reliability managers and their familiarity with operating conditions by prohibiting consideration on appeal of any fact that is not in the record compiled by the Regional Entity.”⁹⁴ While NERC acknowledges that the Commission also stated that the ERO “should have *de novo* review authority on appeal in matters where consistency is desirable, such as the interpretation of standards, . . . or when determining whether the factual record supports a particular penalty or remedial action,”⁹⁵ NERC contends that the immediate proceeding pertains to the particular facts and circumstances surrounding the NextEra incident and does not have such broad implications.

61. Trade Associations assert that the Commission should not accept the wrongful use of an arbitrary and capricious standard of review. Rather, according to Trade Associations, the Commission should find that NERC has the “authority and responsibility” to conduct a *de novo* review as set forth in the ERO Certification Order.

iii. Commission Determination

62. While the NERC Compliance Committee Decision certainly could have been clearer on the matter, we find that the Decision does not adopt an “arbitrary and capricious” standard of review as claimed by NextEra. In an upfront summary of its findings, the NERC Compliance Committee Decision states that “after engaging in a reasoned analysis of the arguments and evidence before it, the [NERC Compliance Committee] affirms the Decision of the Texas Board.”⁹⁶

⁹³ NERC Rules of Procedure, section 409.5 (Decision), provides:

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. At its discretion, the Compliance Committee may invite representatives of the entity making the appeal and the other Participants in the proceeding . . . to appear before the Committee.

⁹⁴ NERC Answer at 16 (citing, ERO Certification Order, 116 FERC ¶ 61,062 at P 491).

⁹⁵ *Id.*

⁹⁶ NERC Compliance Committee Decision at 10.

63. While the NERC Compliance Committee Decision references the “arbitrary and capricious” standard in three specific instances, we disagree with NextEra that the Decision adopted this standard of review. Rather, it is clear that, in each instance, the Decision simply responded to NextEra’s arguments raised before the NERC Compliance Committee that the Texas RE Board “acted arbitrarily and capriciously.”⁹⁷ In each instance, the NERC Compliance Committee provides a caveat that it “does not address here the appropriateness of applying the ‘arbitrary and capricious’ standard to the decisions of the Texas RE Board” and then proceeds to find that “nevertheless” the Texas RE Board did not act arbitrarily and capriciously.⁹⁸ Moreover, in each instance, the NERC Compliance Committee also engaged in a review of the evidence before reaching its conclusions that we substantively uphold in our review as discussed above.

64. Going forward, NERC has the responsibility to articulate the legal standard of review that NERC applies in reviewing the determination of a Regional Entity hearing body. Regardless of what the NERC Compliance Committee standard of review was, based on our own independent review of the record, we find that Texas RE acted properly in finding violations of the Reliability Standards.

b. Parol Evidence

i. NERC Compliance Committee Decision

65. In response to NextEra’s claim that the Texas RE Board relied on parol evidence and other documents that were not part of the record, the NERC Compliance Committee found that “the Texas RE was entitled to take official notice of information available outside of the record of the proceeding during oral arguments regarding the development of the TOP Reliability Standards. Moreover, the NERC Compliance Committee finds that Texas RE based its decision on the language of the TOP Reliability Standard and Requirement at issue, Reliability Standard TOP-001-1 Requirement R3.”⁹⁹

66. The NERC Compliance Committee explained that, while the Texas RE Board was hearing oral arguments, in response to a question of a Texas RE Board member, another Board member provided information regarding the development of the TOP Reliability Standards and sketched a diagram that was accepted into evidence without objection.

⁹⁷ See *id.* at 18-19, 28-29, 31-32; *compare*, Notice of Penalty, Exh B-15 (NextEra appeal to NERC) at 3-4.

⁹⁸ See, e.g., NERC Compliance Committee Decision at 19.

⁹⁹ NERC Compliance Committee Decision at 17.

The NERC Compliance Committee concluded that this exchange did not create reversible error, explaining that the Texas RE Board based its decision on the language of TOP-001-1. In addition, the Compliance Committee Decision noted that, while neither the Texas RE nor NERC Rules of Procedure specifically address the taking official notice of information outside of the record, the NERC Rules do exempt hearing proceedings from the generally recognized rules of evidence.¹⁰⁰

ii. NextEra Application

67. NextEra contends that Texas RE and the NERC Compliance Committee went beyond the record evidence and developed separate theories that were not part of the underlying proceeding and go beyond the four corners of the Reliability Standard itself. NextEra claims that, in finding that Reliability Standard TOP-001-1 Requirement R3 is applicable, both the Texas RE Board and NERC Compliance Committee impermissibly rely, in part, on information introduced by a Texas RE Board member. According to NextEra, the information provided on the “history” of Reliability Standard TOP-001-1 is “immaterial to the enforcement of Standards” under FPA section 215 and, therefore, the Commission should reject the expansion of the record based on parol evidence.¹⁰¹

iii. NERC Answer and Trade Associations Comments

68. NERC reiterates that the NERC Compliance Committee and the Texas RE Board did not rely on the “historical” evidence at issue but, rather, they based their decisions on the language of Reliability Standard TOP-001-1 Requirement R3.¹⁰²

69. Trade Associations comment that use of parol evidence is unacceptable and unnecessary since the purpose statement of Reliability Standard TOP-001-1 does not contain an ambiguity that would lead to the use of secondary sources.

iv. Commission Determination

70. We are not persuaded by NextEra and Trade Associations that the Texas RE Board or NERC Compliance Committee erred by accepting parol evidence into the record. Procedurally, NextEra does not cite to any source that parol evidence must be

¹⁰⁰ *Id.* (citing NERC Rules of Procedure, App. 4C (Compliance Monitoring and Enforcement Program), Att. 2 (Hearing Procedure), section 1.6.11(b)).

¹⁰¹ NextEra Application at 37.

¹⁰² NERC Answer at 13 n.36.

excluded. To the contrary, the hearing procedures set forth in the NERC Rules of Procedure explicitly provide that “[t]he admission of evidence shall not be limited by the generally recognized rules of evidence as applied in the courts of the United States”¹⁰³ Substantively, NextEra has not adequately demonstrated that the admission of the parol evidence was beyond “harmless error,” as the written Decisions do not rely on the parol evidence and, based on our review, it appears that the material at issue was simply “supporting,” background information. Accordingly, we deny NextEra’s request on this issue.

c. Regional Consistency

i. NextEra Application

71. NextEra states that NERC, in its oversight role, is obligated to ensure consistency among regions to which it delegated duties and functions. NextEra claims that it is not aware of any Regional Entity besides Texas RE that has found a violation of Reliability Standards IRO-001-1 Requirement R8 or TOP-001-1 Requirement R3 for failing to follow a written dispatch instruction. NextEra asserts that “Independent System Operators (ISOs) in other regions have adopted similar rules to ERCOT for the communication of directives, and we would be surprised if they have not been audited by their respective Regional Entities.”¹⁰⁴ NextEra contends that NERC retains broad authority regarding matters of national consistency, and its failure to exercise that authority in the proceeding constituted error.

ii. NERC Answer and Trade Associations Comments

72. NERC answers that it and the Regional Entities are committed to ensuring and promoting consistency across the ERO enterprise. NERC contends, however, that the immediate proceeding pertains to the specific facts and circumstances whether NextEra complied with the provisions of specific Reliability Standards, and the NERC Compliance Committee properly considered the facts and circumstances presented to it in accordance with the NERC Rules of Procedure.

¹⁰³ NERC Rules of Procedure, App. 4C, Att. 2 (Hearing Procedure), section 1.6.11(b), (stating “[t]he admission of evidence shall not be limited by the generally recognized rules of evidence as applied in the courts of the United States”). *Cf.*, *BP America Inc.*, 147 FERC ¶ 61,130 at P 21 n.46 (2014) (stating that the Commission is not strictly bound by the Federal Rules of Civil Procedure, although they may serve as a “guideline”).

¹⁰⁴ NextEra Application at 39.

73. Trade Associations argue that confidence in the NERC compliance monitoring and enforcement program is based upon the consistent implementation of that program.

iii. Commission Determination

74. We agree that NERC, as the ERO, is responsible to ensure consistent compliance outcomes and consistent interpretation of the Reliability Standards. While we understand the potential difficulty of “proving a negative,” i.e., that other Regional Entities treat out of merit energy instructions differently than Texas RE, NextEra has not provided any information beyond speculation that would suggest that the proceeding raises issues of inconsistency among regions. In this circumstance, we are not persuaded that NERC erred in declining to delve further into matter. Accordingly, we reject NextEra’s request regarding this issue.

VI. Conclusion

75. We affirm the findings of the NERC Compliance Committee Decision that NextEra violated Reliability Standards IRO-001-1 Requirement R8 and TOP-001-1 Requirement R3 by failing to timely comply with a reliability directive. Further, we are not persuaded by other substantive and procedural arguments against NERC’s determination provided by NextEra or other parties, for the reasons discussed above. Accordingly, we affirm the \$52,000 penalty assessed against NextEra.

The Commission orders:

The Notice of Penalty against NextEra, including the assessment of a \$52,000 penalty amount, is hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.