

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

North American Electric Reliability            )            Docket No. RR06-1-003  
Corp.    )

**Request for Clarification, or in the Alternative Rehearing, of the  
National Rural Electric Cooperative Association**

Pursuant to § 313 of the Federal Power Act (“FPA”), 16 U.S.C. § 825*l*, and Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713, the National Rural Electric Cooperative Association (“NRECA”) respectfully requests clarification, or in the alternative rehearing, of the Commission’s Order on Compliance Filing issued in this proceeding on January 18, 2007, 118 FERC ¶ 61,030 (2007) (the “Order”), addressing the non-governance compliance filing of the North American Electric Reliability Corporation (“NERC”).

**Introduction and Summary**

NERC's non-governance compliance filing was generally very sound, and the Commission's Order properly accepted NERC's filing in most respects. The Commission's general acceptance of the filing will help enable NERC to fulfill the statutory functions of the Electric Reliability Organization ("ERO") under § 215 of the Federal Power Act and promote the reliable operation of the bulk-power system to the benefit of both the industry and the public consumers. The Order in most respects is thus a positive development, and NRECA supports the majority of the Commission’s findings.

At the same time, NRECA is concerned that some aspects of the Commission's Order appear without clarification to be inconsistent with § 215. Absent clarification, these elements of the Order have the potential to prevent NERC from complying with the procedural requirements of § 215(c)(2)(D), preclude the Commission from benefiting from the ERO’s technical expertise

as required by § 215(d)(2), and permit the Commission effectively to prescribe the text or substance of a Reliability Standard contrary to the allocation of responsibilities under § 215(d)(2) and (d)(4), as well as the Commission's own statement in Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006) at ¶ 34.

Accordingly, because NRECA does not believe that this was the Commission's intent in its Order, NRECA requests that the Commission clarify its Order to that effect in several respects. Alternatively, if the Commission cannot make the requested clarifications, then the Order is inconsistent with § 215 and the Commission should grant rehearing to eliminate the Order's statutory overreach.

NRECA also seeks clarification or in the alternative rehearing of certain additional matters relating to the procedures for the ERO in response to a Commission remand or order to develop a standard addressing a specific matter, the statement of all penalties on a per day basis, and the development of Violation Risk Factors, addressed below.

#### **Statement of Issues and Specification of Errors**

In accordance with Rules 203(a)(7) and 713(c)(1) and (2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.203(a)(7), 713(c)(1), and 713(c)(2), NRECA provides the following statement of issues and specification of errors to be addressed through clarification or, in the alternative, rehearing.

1. The Commission should clarify that ¶ 28 reflects the Commission's expectation that the ERO will make reasonable efforts to meet time frames suggested by the Commission and that the ERO will give due consideration to Commission recommendations regarding the process the ERO will use to consider Reliability Standards in "extraordinary circumstances." Such clarification will prevent unnecessary conflicts between the Commission and the ERO, ensure

the Commission appropriately defers to the ERO's technical expertise with respect to the substance of Reliability Standards and the procedures necessary to adopt technically robust Reliability Standards, and achieve compliance with the procedural requirements of § 215(c)(2)(D) in all cases. In the alternative, NRECA seeks rehearing of ¶ 28 of the Order to specify that the Commission will not impose binding deadlines on standards development or binding directives that the ERO invoke expedited processes for developing Reliability Standards.

2. The Commission should clarify ¶ 29 of the Order that NERC develop a procedure for initiating development of a new or revised Reliability Standard in response to a Commission directive. Section 309.2 of NERC's Rules of Procedure already specifies such a procedure consistent with ¶ 29.

3. The Commission should clarify ¶¶ 87-88 of the Order to indicate that penalties need not be specified at the maximum of \$1 million per violation per day where a Reliability Standard is not framed in terms of daily compliance or a finding that each day such standard is not complied with amounts to a new violation is inconsistent with the Reliability Standard itself. In the alternative, NRECA seeks rehearing of ¶¶ 87-88 because the direction without clarification is inconsistent with the Reliability Standards approved by the Commission.

4. The Commission should clarify ¶ 91 of the Order to allow the ERO to continue to develop Violation Risk Factors through its Standards Development Process in accordance with § 215. In the alternative, NRECA seeks rehearing of ¶ 91 as inconsistent with § 215.

## Discussion

- 1. The Commission should clarify that it does not intend in ¶ 28 to impose binding deadlines on the ERO or to require the ERO to invoke its urgent action standards development procedures. In the alternative, NRECA seeks rehearing of ¶ 28.**

NRECA understands and shares the Commission's concern that Reliability Standards must be developed in a reasonable time frame. Moreover, at times, emergency situations will require the ERO to move more quickly than its regular standards development process will allow. NRECA also understands that, as the Federal agency responsible for overseeing the ERO, the Commission feels pressure to ensure that the ERO moves expeditiously to address urgent reliability risks. It is reasonable, therefore, for the Commission, to direct the ERO's attention to certain matters, to establish timeframes for action, and to recommend that the ERO use its urgent action or emergency action procedures when circumstances warrant.

At the same time, NRECA is concerned that the Order could be read as enabling the Commission to impose binding deadlines on the ERO and requirements for the ERO to invoke its expedited standards development procedures. That reading of the Order would be inconsistent with several elements of the reliability regime Congress created in § 215. In particular, NRECA is concerned that Commission efforts to dictate the timing and procedures for standards development would prevent NERC from complying with the procedural requirements of § 215(c)(2)(D), preclude the Commission from benefiting from the ERO's technical expertise as required by § 215(d)(2), and permit the Commission effectively to prescribe the text or substance of a Reliability Standard contrary to the allocation of responsibilities under § 215(d)(2) and (d)(4), as well as the Commission's own statement in Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006) at ¶ 34.

The basic division of responsibility under § 215 is that the ERO develops the standards and the Commission reviews them. Congress mandated that NERC as the ERO "provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties." 16 U.S.C. § 215(c)(2)(D). NERC must follow these procedures so that its actions as the ERO will be valid. The Commission's powers under § 215 are limited to approving, disapproving, and remanding proposed standards, and directing NERC to develop a Reliability Standard "that addresses a specific matter." Furthermore, § 215(d)(2) instructs the Commission to "give due weight to the technical expertise of the [ERO] with respect to the content of a proposed standard or modification to a reliability standard."

This allocation of responsibility could be frustrated if the Commission gives NERC very specific direction as to what a Reliability Standard should contain and then does not afford NERC enough time and discretion as to its procedures to consider desirable alternatives. This concern is hardly speculative as the Commission has been quite specific to date in specifying what changes to the proposed Reliability Standards it believes are required and directing NERC to make those changes. *See, e.g.*, NRECA Comments on the Proposed Reliability Standards filed in Docket No. RM06-16-000 on January 3, 2007 (noting that the Commission's various "directives" as to particular standards were matters to be considered by the ERO and not directed by the Commission).

Determinations as to how quickly a standard should be developed and what procedures should be utilized necessarily entail the exercise of technical expertise, and Congress directed that the Commission should defer to the ERO in such matters, and not vice versa. Indeed, nowhere in § 215 is the Commission explicitly authorized to impose a deadline on the ERO or to

require the ERO to use expedited procedures. Such powers also cannot be fairly implied or inferred from the statutory language or legislative scheme. While it is certainly permissible for the Commission to make a recommendation that the ERO act within a specified period or invoke its urgent action or emergency process, and while the ERO can be expected to give due regard to the Commission's views, the ultimate decision as to how quickly to act and under what procedures must be that of the ERO.

The problem with ¶ 28, absent clarification, is particularly well illustrated by the Order's statement at n.18 that NERC's remedy if it disagrees with a Commission directive is to seek rehearing. Without clarification, every time that the ERO and the industry believes that more time or process is required to adopt a technically robust Reliability Standard, the ERO and the industry will be forced to litigate the matter. While the ERO and the industry file for rehearing, file a petition for review, and wait for Commission action on remand, critical resources and staff attention will be diverted from the more important matter of adopting an effective Reliability Standard.

Moreover, from a legal perspective, the Commission's willingness to reconsider an individual binding deadline or process requirement, does not address the underlying statutory violation. By setting a binding deadline or imposing a specific requirement, the Commission would be expressing disinterest in the ERO's technical judgment as to the time or process required to develop a technically robust standard in violation of § 215(d)(2). And – if the deadline or required process were abbreviated enough – such an order would prevent the ERO from satisfying its due process requirements under § 215(c)(2)(D). By preventing any other alternatives from being adequately considered, such an order would effectively enable the

Commission to dictate the terms of the standard inconsistent with § 215(d)(4) and the Commission's own statement in Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006) at ¶ 34.

True, the ERO could seek rehearing of the Commission's order. But, the ERO will be under undue pressure to comply instead. In the time that rehearing and a petition to review would take, the Commission's deadline would have long passed and the ERO staff, officers and board would be subject to Commission penalties under § 215(e)(5). In this case, therefore, rehearing would be no remedy for what the Commission lacks the power to do in the first place.

Fortunately, the Commission can avoid all of these challenges by clarifying that ¶ 28 does not reflect a Commission determination that it has the authority to impose binding deadlines and procedural requirements. If instead, the Commission clarifies ¶ 28 to reflect its expectation that the ERO will be responsive to Commission recommendations on timing and process, no litigation will ever be required and there will never be a risk that a proposed deadline or procedural requirement would violate § 215. No resources will be diverted from standards development to litigation. No unnecessary discord will be created between the ERO and FERC. There will be no challenge that a reliability standard inadequately protected the reliable operation of the bulk power system because the Commission imposed undue pressure on the ERO to bypass due process.

NRECA does not believe that the requested clarification will in any way undermine the Commission's – and NRECA's – goal that the ERO should have the flexibility and speed to respond expeditiously to emergency situations. Because the ERO is subject to continuing Commission oversight and budget control, it can be expected that the ERO will be responsive to Commission recommendations with respect to timing and procedure. Certainly, the ERO and the

industry have the same incentive as the Commission to protect the reliable operation of the bulk power system.

NRECA further notes that there is a superior mechanism for addressing matters where speed is critical. As discussed at page 14 of NERC's compliance filing, the ERO can use remedial action directives to address these threats to reliability. Remedial action directives can be issued more quickly than even the most expedited Reliability Standard, and they can remain in effect as long as needed to address any emergency. But, just as importantly, remedial action directives can easily be amended or cancelled when the emergency passes. They can also be easily replaced when, and if needed, permanent standards are developed through the ERO's § 215(c)(2)(D) procedures and approved by the Commission. After the emergency has passed, the industry will not be "stuck with" a broadly applicable Reliability Standard that no one in the industry believes is a good tool for preserving the reliable operation of the Bulk-Power System. Actions taken in the face of a perceived emergency or other threat are the measures that are most likely to reflect a rush to judgment, to allow less consideration of alternative, more refined approaches, and to carry the most severe unintended consequences. NRECA urges the Commission to give more consideration to the availability of the more flexible and appropriate alternative of issuing remedial action directives than rushing to adopt hastily considered standards.

Accordingly, NRECA urges the Commission to clarify ¶ 28 of the Order so as to avoid any potential conflict with § 215 and Order No. 672-A. The simplest solution, and the one that is most consistent with the statute, is for the Commission to clarify that any directives as to deadlines and procedures are suggestions to be considered by NERC in the exercise of its technical expertise through its statutorily-required processes. Another approach is for the

Commission to forebear, at the present time, from ruling on whether it has authority to set timelines. Rather, the Commission should indicate that it may address that issue if, and when, it needs to, as there is no apparent need to do so at the present time, especially when such matters are apt to be a distraction and result in a diversion of resources that are better focused on the development of the standards themselves. If, however, the Commission has determined that it has and intends to exercise the power to impose firm deadlines on the ERO and require it to invoke procedures that will prevent the ERO from exercising its technical expertise and following its procedures for developing Reliability Standards, then the Commission should grant rehearing so as to eliminate the statutory conflict.

**2. Since NERC has already established a process to initiate development of a new or revised Reliability Standard in response to a Commission order, there is no basis for the Order in ¶ 29 to require NERC to do so.**

The Order asserts at ¶ 29 that NERC's "Rules of Procedure ... are silent regarding the procedure for initiation of the development of a new or revised Reliability Standard in response to a Commission remand or directive pursuant to section 215(d)(5) of the FPA."

In fact, § 309.2 of NERC's Rules of Procedure squarely addresses how NERC is to proceed following a Commission remand or order to develop a standard:

**Remanded Reliability Standards and Directives to Develop Standards** — If an ERO governmental authority remands a reliability standard to NERC or directs NERC to develop a reliability standard, NERC shall within five (5) business days notify all other applicable ERO governmental authorities, and shall within thirty (30) calendar days report to all ERO governmental authorities a plan and timetable for modification or development of the reliability standard. Standards that are remanded or directed by an ERO governmental authority shall be modified or developed using the *Reliability Standards Development Procedure*. NERC shall, during the development of a modification for the remanded standard or directed standard, consult with other ERO governmental authorities to coordinate any impacts of the proposed standards in those other jurisdictions. The

urgent approval action procedure may be applied if necessary to meet a timetable for action required by the ERO governmental authorities.<sup>1</sup>

The provision calls for NERC to report a plan and timetable for modifying a plan and timetable within thirty days of such an order, and calls for application of the urgent approval action procedure if necessary to meet a timetable. Moreover, the provision calls for development of the procedure without need for any further action on the Commission's part.

The provision appears more than sufficient to meet the Commission's stated concerns. The procedure also eliminates any need for the Commission to require NERC to develop a procedure for considering Commission orders to develop or modify standards separately from its ANSI-certified standards development process, especially if such a procedure were to prevent or limit NERC's efforts to develop their own views and apply their own technical expertise for the reasons previously stated in item 1.

Accordingly, the Commission should grant clarification or rehearing of ¶ 30 of the Order so as not to require NERC to develop procedures that already exist in its Rules of Procedure.

**3. The Order's apparent insistence at ¶¶ 87-88 that all penalties be specified at the maximum of \$1 million per violation per day misconstrues the nature of some standards and violations thereof.**

The Order at ¶¶ 87-88 directs NERC to incorporate the maximum statutory penalty amount of \$1 million per occurrence per day and "to state all penalties in the Base Penalty Amount Table on a per violation, per day basis." It appears that the Order misunderstands or misstates the nature of some of the standards and their associated violations.

Some standards apply to behavior that covers a period of time that ranges from an instant to a day and applies to misconduct that continues indefinitely unless corrected. For such

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<sup>1</sup> The provision was part of NERC's application filed April 4, 2006, for certification as the ERO.

violations, *e.g.*, failure to operate within limits, it is very possible to determine a violation on a per day basis because there is the potential for at least one violation per day.

However, other standards measure conduct and violations over a longer period of time. For example, there may be a standard that requires some check or test to be performed or some study or documentation to be prepared on a periodic basis, such as every week, month, or year, or the standard may require that a certain number of checks or entries be performed or entries made over such a period, *i.e.*, the standard is not framed in terms of daily compliance. The practice of finding a continuing violation for every day that any such violation continues or goes unremediated seems nonsensical as the standard could have been complied with had the proper check, documentation, or report been done on just one of those days. Moreover, the approach seems unduly harsh as it would equate violations of standards that require periodic compliance with those that require compliance on a daily or even real-time basis. NERC's approach of basing an occurrence of a violation on the nature of the standard seems entirely reasonable.

Accordingly, the Commission should clarify that ¶¶ 87-88 of the Order does not require NERC to treat all penalties on a daily violation basis or, as a less desirable alternative, the Commission should clarify the basis, if any, on which it has a different understanding of the nature of the standards and their violation. Alternatively, the Commission should grant rehearing as to this matter.

**4. NERC's Board of Trustees should not develop the Violation Risk Factors under § 1400 of NERC's Rules of Procedure pursuant to ¶ 91 of the Order.**

NRECA is concerned that ¶ 91 of the Order could result in the Violation Risk Factors being developed by the Board of Trustees and not through NERC's standard development process and/or without a vote of even NERC's Registered Ballot Body. NRECA does not believe that such action is appropriate or permissible.

The process specification in § 1400 of NERC's Rules of Procedure referenced in ¶ 91 is, by its terms, applicable only to changes in the Rules of Procedure themselves. Nothing in § 1400 purports to address changes in substantive matters such as the Reliability Standards themselves or the associated Violation Risk Factors. Second, and closely related, NERC's Reliability Standards Development Procedure (Appendix 3A to NERC's Rules of Procedure and Attachment 3 to NERC's non-governance compliance filing) specifies that the risk factor is one of the performance elements of a Reliability Standard. Because the Violation Risk Factor is part of the standard itself, it can be developed by NERC only through its ANSI-certified standards development process. Third, since the penalties are "where the rubber hits the road" in terms of compliance and enforcement of the standards, it is vitally important that the violation risk factors be developed by NERC, utilizing its technical expertise as exercised through its standards development process, and not dictated by its Board or the Commission.

NRECA appreciates the Commission's frustration that NERC has not yet been able, through its standards development process, to reach final agreement on the violation risk factors. However, those risk factors are of immense importance, there is room for reasonable disagreement as to how they should be stated, and it is vital that they be developed through industry consensus, and not dictated by a narrow segment, the Board, or the Commission itself. NERC continues to give the Violation Risk Factors much attention, and all are hopeful that consensus will be achieved shortly.

Regardless, the delay to date is not a reason for the Commission to run roughshod over NERC, for the Commission to exceed its statutory role under § 215, or to cause NERC to violate its procedures. Such actions would only make enforcement more difficult as alleged violators could, with plausible justification, claim that the resulting penalties were *ultra vires*. Moreover,

as noted in ¶ 30 of the Order, the Commission can impose penalties on its own in the absence of NERC's final approval of its Violation Risk Factors.

Accordingly, the directive in ¶ 30 of the Order is unnecessary as well as legally improper, and the Commission should clarify that NERC is not required to amend section 1400 of its Rules of Procedure to address the Violation Risk Factors. An alternative, albeit a less desirable one, would be for the ERO to adopt Violation Risk Factors on some alternate basis, such as a vote of the Registered Ballot Body. Alternatively, the Commission should grant rehearing as to this matter.

### **Conclusion**

NRECA respectfully requests the Commission to clarify, or in the alternative grant rehearing of, the Order consistent with the foregoing comments.

Respectfully submitted,

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Dated: February 20, 2007

Counsel for National Rural Electric  
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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have this day served the foregoing document by electronic means and upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 20th day of February, 2007.

**/s/ Robert D. Rosenberg**  
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