

December 14, 2016

VIA ELECTRONIC FILING

Kirsten Walli, Board Secretary
Ontario Energy Board
P.O Box 2319
2300 Yonge Street
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Re: *North American Electric Reliability Corporation*

Dear Ms. Walli:

The North American Electric Reliability Corporation hereby submits Notice of Filing of the North American Electric Reliability Corporation of Proposed Revisions to the Rules of Procedure.

Please contact the undersigned if you have any questions concerning this filing.

Respectfully submitted,

/s/ Shamai Elstein

Shamai Elstein
*Senior Counsel for the North American Electric
Reliability Corporation*

Enclosure

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**ONTARIO ENERGY BOARD
OF THE PROVINCE OF ONTARIO**

**NORTH AMERICAN ELECTRIC)
RELIABILITY CORPORATION)**

**NOTICE OF FILING OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
OF PROPOSED REVISIONS TO THE RULES OF PROCEDURE**

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December 14, 2016

TABLE OF CONTENTS

I.	NOTICES AND COMMUNICATIONS	2
II.	PROPOSED REVISIONS.....	2
	A. Basis for Proposed Revisions	2
	B. Proposed Revisions Summary.....	3
	C. Proposed Revisions Development.....	5
	D. Proposed Revisions to Section 400	6
	E. Proposed Revisions to Appendix 2	7
	F. Proposed Revisions to Appendix 4C.....	8

- Exhibit A** Clean and Redline Versions of Section 400 to the NERC Rules of Procedure
- Exhibit B** Clean and Redline Versions of Appendix 2 to the NERC Rules of Procedure
- Exhibit C** Clean and Redline Versions of Appendix 4C to the NERC Rules of Procedure
- Exhibit D** Comments on Proposed Revisions

**ONTARIO ENERGY BOARD
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**NOTICE OF FILING OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
OF PROPOSED REVISIONS TO THE RULES OF PROCEDURE**

The North American Electric Reliability Corporation (“NERC”) provides notice of specific revisions to the following parts of the NERC Rules of Procedure (“ROP”) to provide a uniform and more streamlined approach to hearings for the Regional Entities:

- **Section 400:** Compliance Enforcement;
- **Appendix 2:** Definitions Used in the Rules of Procedure; and
- **Appendix 4C:** Compliance Monitoring and Enforcement Program.

The current ROP contemplate that hearings to resolve contested noncompliance, mitigation plans, remedial action directives, penalties, or sanctions may be conducted by each Regional Entity. NERC proposes revisions to incorporate the Consolidated Hearing Process within the ROP, which would provide Regional Entities an option to select NERC to manage the hearing process.

The clean and redlined versions of the ROP are attached to Appendix A as follows:

- **Exhibit A** Clean and Redline Versions of Section 400 to the NERC Rules of Procedure;
- **Exhibit B** Clean and Redline Versions of Appendix 2 to the NERC Rules of Procedure; and

- **Exhibit C** Clean and Redline Versions of Appendix 4C to the NERC Rules of Procedure.

The proposed revisions are just, reasonable, not unduly discriminatory or preferential, and in the public interest.

I. NOTICES AND COMMUNICATIONS

Notices and communications regarding this filing may be addressed to the following:

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II. PROPOSED REVISIONS

A. Basis for Proposed Revisions

NERC proposes changes to Section 400, and Appendices 2 and 4C of the ROP to incorporate the Consolidated Hearing Process. The purpose of the proposed Consolidated Hearing Process is to increase efficiencies, enhance consistency, and streamline costs in the ERO Enterprise¹ hearing process. The proposed process allows the ERO Enterprise to centralize the hearing process, by eliminating duplicative processes at the Regional Entity level. At the same time, the proposed process preserves a Regional perspective by having up to two members on the

¹ The term “ERO Enterprise” refers to the NERC and the eight Regional Entities.

Hearing Body nominated by the Regional Entity. Moreover, to the extent that the Regional Entities select this proposed Consolidated Hearing Process, it also provides the ERO Enterprise with increased consistency of process.

There are also additional cost savings from consolidated training sessions for potential Hearing Body members. Rather than each Regional Entity developing and implementing training on the hearing process to its board members and staff, there could be joint training sessions. This would also allow for consistent messaging regarding the hearing process.

B. Proposed Revisions Summary

Under the proposed process, the consolidated Hearing Body will generally be composed of five members, including the Hearing Officer. To maintain a Regional perspective, up to two members may be nominated by the Regional Entity from which the case originates. The NERC Board of Trustees Compliance Committee (BOTCC) will appoint two members, chosen among NERC trustees not serving on the BOTCC at the time of the request for hearing.

A Hearing Officer will be selected by the four Hearing Body members. If a Regional Entity chooses to appoint one or no representative, then the BOTCC will select additional members to fill those vacancies among NERC trustees not serving on the BOTCC at the time of the request for hearing. In the event a Regional Entity chooses not to appoint members to the Hearing Body and there are not four NERC trustees available to participate in the Hearing Body, as determined by the BOTCC, the Hearing Body may be composed of three members (three NERC trustees not serving on the BOTCC). If two stakeholder members are appointed by the Regional Entity, the stakeholders shall not represent the same industry segment.

To ensure that hearings are conducted in a full, fair and impartial manner, the ROP provisions governing ex parte communications that prevent communications directly or indirectly

with any person concerning any issue in the proceeding outside of the hearing process remain applicable to Hearing Body members. Hearing Body members must also be free from any applicable conflict of interest or the existence of any other circumstance that could interfere with the impartial performance of his or her duties.

Unless noted below, the conduct of the hearing under either the Regional Entity Hearing Process or the Consolidated Hearing Process would follow the existing rules, among others, relating to timing of activities, filings, service, participation, and evidence.

In addition, under either hearing process, the decision of the Hearing Body would be appealable as a matter of right to the NERC BOTCC. The appealed issues would be reviewed under a *de novo* standard. In the Federal Energy Regulatory Commission's ("FERC") order certifying NERC as the Electric Reliability Organization (ERO), FERC directed NERC to review appealed matters *de novo*.² The BOTCC would generally have one hundred and eighty (180) days to render its decision, subject to extension for good cause with written notice to all participants. The remaining ROP timing provisions related to Hearing Body decisions were also revised to allow for good cause extensions with notice to all participants.

Regional Entities will select either the existing Regional Entity Hearing Process or the proposed Consolidated Hearing Process. The selection will be in effect for each Regional Entity for a minimum of six months. Hearings will be conducted pursuant to the process in effect at the Regional Entity at the time the registered entity submits a hearing request. A Regional Entity may change its selected process by giving notice to NERC six (6) months prior to the change becoming effective.

² "[T]he ERO should have *de novo* review authority on appeal in matters where consistency is desirable, such as the interpretation of standards, the application of penalty factors to specific facts, and whether the factual record supports a particular penalty or remedial action." *Order Certifying N. Am. Elec. Reliability Corp. as the Elec. Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 1,062 at P 491 (2006).

C. Proposed Revisions Development

After developing the proposed revisions along with the Regional Entities, NERC publicly posted the changes on July 26, 2016 for a 45-day comment period ending on September 9, 2016. NERC notified various stakeholder groups of the 45-day comment period through a July 26, 2016 email announcement. NERC received four sets of comments from industry stakeholders. The commenters suggested a consolidated Hearing Body of either five or three members to prevent impasse. Under the proposed revisions, the Hearing Body would include up to two members appointed by the Regional Entity, two NERC Trustees, and a Hearing Officer serving as the tie-breaker. This Hearing Body composition strikes the appropriate balance of adjudicators to ensure a Regional perspective is maintained.

The commenters also raised concerns regarding removing ex parte communications restrictions. Nonetheless, under the proposed revisions, there were no changes made to the rules governing ex parte restrictions. Additionally, Hearing Body members must be free from conflicts of interest and the existence of any other circumstances that could interfere with the impartial performance of his or her duties.

Comments were reviewed and are attached herein as **Exhibit D**. NERC, with input from Regional representatives, addressed each comment. NERC posted a further revised draft of the ROP changes incorporating comments received and accompanying materials on the NERC website on October 18, 2016, at least fifteen days prior to consideration of these revisions by the NERC Board of Trustees (“Board”), as contemplated in NERC’s process for proposed revisions to the ROP. That posting included a document indicating how each comment received was considered.³ On

³ NERC, *Board of Trustees Package*, Agenda Item 6c (Attachment 4 Consideration of Comments), (NERC Rules of Procedure Amendment – Consolidated Hearing Process), (November 2, 2016), available at http://www.nerc.com/gov/bot/Agenda%20highlights%20and%20Mintues%202013/Board_November_2_2016_Agenda_Pkg_Final.pdf

November 2, 2016, the Board approved the ROP revisions.

D. Proposed Revisions to Section 400

The proposed changes to ROP Sections 403, 407, 408, 409, 412, 413, and 414 relate primarily to consistency with terminology. The additional proposed revisions to Section 400 also describe the Regional Entity Hearing Process and Consolidated Hearing Process, in addition to explicitly inserting the standard of review related to appeals and a time frame for the BOTCC to render a decision on an appeal. The disposition of certified questions is also clarified.

The following are specific proposed revisions to Section 400 (see **Exhibit A**).

- Section 403.4 to provide that the Regional Entity board or compliance panel reporting directly to the Regional Entity board will designate a “Hearing Body” (with appropriate recusal procedures) that will be vested with the authority for conducting all compliance hearings pursuant to the selected process under Section 403.15.
- Section 403.15 to require Regional Entities to select either the Regional Entity Hearing Process or the Consolidated Hearing Process to conduct all hearings. Section 403.15 also provides that a Regional Entity may change its selected hearing process by giving notice to NERC six (6) months prior to the modification becoming effective. Sections 403.15(A) and (B), respectively, propose the composition of the Hearing Body involved in each hearing process.
- The proposed revisions to numerous Section 400 rules, including 407.1, 408.1, 409, 412, 413, and 414, remove references to the defined term “Regional Entity Hearing Body” and replace it with the defined term “Hearing Body,” which is discussed further below.
- Section 409.1 to set forth that the BOTCC shall render a decision to an appeal from a

final decision of a Hearing Body within one hundred and eighty (180) days, subject to an extension for good cause with written notice to all participants, following the receipt by NERC's Director of Enforcement.

- Section 409.3 to remove "Regional Entity" and reference the defined term "Clerk" to account for both hearing processes.
- "Registered Entity" was deleted from Section 409.4 and replaced with "party" for clarity.
- Section 409.5 to reflect that the BOTCC would review an appeal of a Hearing Body's decision under a *de novo* standard.
- The proposed revisions to Section 412.1 add references to the "Compliance Committee" to be consistent with existing references to the "Compliance Committee" in Section 412, among other relevant provisions, including Sections 408.8, 409.5, and 414.4.

E. Proposed Revisions to Appendix 2

In order to align the glossary of terms with the Consolidated Hearing Process, the following are proposed revisions to Appendix 2 (see **Exhibit B**).

- "Clerk" was revised to explicitly include NERC as a Compliance Enforcement Authority that can assign an individual to perform administrative tasks relating to the conduct of hearings as described in Attachment 2, Hearing Procedures, to Appendix 4C.
- "Confirmed Violation" was modified to delete reference to the Regional Entity Hearing Body and replace it with "Hearing Body."
- "Consolidated Hearing Process" was added for clarity. Consolidated Hearing Process means the process pursuant to Section 403.15B used to conduct hearings and issue

decisions concerning disputed compliance matters in accordance with Attachment 2, Hearing Procedures, of Appendix 4C.

- “Director of Enforcement” was added because the ROP references Director of Enforcement, among other instances, in Section 409 (appeals from final decisions of hearing bodies) and Section 414 (appeals of decisions of hearing bodies granting or denying motions to intervene in hearing body proceedings). Director of Enforcement means the NERC Director of Enforcement or of the Compliance Enforcement Authority, as applicable, or other individual designated by the Compliance Enforcement Authority who is responsible for the management and supervision of Enforcement Staff, or his or her designee.
- “Hearing Body” was revised to mean the body designated by the Compliance Enforcement Authority to conduct hearings and issue decisions concerning disputed compliance matters in accordance with Attachment 2, Hearing Procedures, of Appendix 4C.
- “Hearing Officer” was revised to refer to, among others, an individual employed or contracted by the Compliance Enforcement Authority or NERC to preside over hearings conducted pursuant to Attachment 2, Hearing Procedures, of Appendix 4C.

F. Proposed Revisions to Appendix 4C

Under Appendix 4C, the proposed revisions account for both hearing processes in the hearing procedures section. The proposed revisions to Appendix 4C are as follows (see Attachments 3A and 3B).

- Section 1.1.1(b) to reflect both hearing processes, including clarifying that Hearing Body decisions, under either hearing process, would require a majority vote to be

consistent with other provisions addressing interlocutory reviews (1.4.4(e)) and Hearing Body final orders (1.7.8(b)).

- Section 1.1.4(b) regarding the interpretation of hearing procedures was deleted because it was no longer consistent with the proposed composition of hearing bodies under both hearing processes.
- The definitions contained in Section 1.1.5 were deleted and intentionally left blank because they were duplicative of the definitions contained in Appendix 2.
- Several proposed revisions relate to modifying procedural rules to incorporate both hearing processes involving issues such as the submission of documents (1.2.3), service (1.2.4), computation of time (1.2.5), location of hearings (1.2.10), disqualification (1.4.5), ex parte communications (1.4.7(b)(4)), and documents that may be withheld by staff (1.5.7(b)).
- The addition of Section 1.3.1(h) to explicitly incorporate the Consolidated Hearing Process in the procedural rules governing initiation of the hearing process. Likewise, Section 1.9.1(c) was added to incorporate the Consolidated Hearing Process in the initiation of a remedial action directive hearing.
- Section 1.3.4(h) regarding the shortened hearing procedure was revised to require that the Hearing Body issue a final order within one hundred and twenty (120) days of the notice of hearing, subject to an extension for good cause with written notice to all participants.
- Section 1.4.2(a) to clarify that a Hearing Officer shall preside over each hearing conducted pursuant to these Hearing Procedures. Section 1.4.2(c) was also modified to clarify that the Hearing Officer shall disclose his or her employment history and

professional affiliations.

- Section 1.4.3(7) to provide that if the Compliance Enforcement Authority has adopted the Consolidated Hearing Process under ROP Section 403.15B, the Hearing Officer will cast the deciding vote in the event any Hearing Body vote results in a tie.
- Section 1.5.12 adds references to the “Compliance Committee” to be consistent with ROP Section 412.1 that provides that the BOTCC considers and resolves certified questions.
- Section 1.7.8(c) governing the Hearing Body final order to require that the Hearing Body issue a final order within thirty (30) days following the last to occur of the initial opinion, exceptions or replies thereto, or oral argument, subject to an extension for good cause with written notice to all participants.

Respectfully submitted,

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EXHIBITS A – D