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

ORDER DIRECTING NERC TO PROPOSE) Docket No. RR09-6-000
MODIFICATION OF ELECTRIC)
RELIABILITY ORGANIZATION)
RULES OF PROCEDURE)

**REQUEST OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
FOR REHEARING AND RECONSIDERATION, MOTION FOR STAY AND
REQUEST FOR PUBLIC CONFERENCE**

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I. INTRODUCTION

Pursuant to Rules 212 and 713¹ of the Federal Energy Regulatory Commission's ("FERC" or the "Commission") Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.713, the North American Electric Reliability Corporation ("NERC") requests rehearing of the Commission's March 18, 2010 Order Directing NERC to Propose Modification of Electric Reliability Organization ("ERO") Rules of Procedure ("March 18 RSDP Order").² NERC also requests that the Commission reconsider one aspect of the March 18 RSDP Order. In addition, NERC requests that the Commission stay the Commission's order directing that NERC propose modifications to the NERC Rules of Procedure and FAC-008, and further, that the Commission convene a public conference to consider the issues raised in this case.

The March 18 RSDP Order directed NERC to propose specific modifications to its Rules of Procedure that pertain to the development of Reliability Standards, which are embodied in Section 300 and Appendix 3A of NERC's Rules of Procedure (collectively referred to herein as "Standards Development Process").

According to the Commission, the current Standards Development Process allows a drafting team to propose a standard that does not meet FERC's directives, which could place the NERC Board of Trustees in a position where it is faced with a choice of approving a standard that does not meet FERC's directives or rejecting the standard. The Commission stated that the Standards Development Process provides ballot body members with the opportunity to ballot down the new or revised Reliability Standard. Thus, the ballot body may effectively veto a Commission directive by refusing to approve a new or modified Reliability Standard intended to comply with the Commission's directive.

¹ 18 C.F.R. §§ 385.212 and 385.713 (2010).

² *North American Electric Reliability Corporation*, 130 FERC ¶ 61,203 (2010) ("March 18 RSDP Order").

Accordingly, the March 18 RSDP Order directs NERC to propose modifications to its Rules of Procedure to (1) assure that the standards drafting teams comply with Commission directives by developing new or revised Reliability Standards that satisfy applicable Commission directives, and (2) assure that a negative vote of the ballot body cannot block NERC's ability to file new or modified Reliability Standards that satisfy applicable Commission directives with the Commission.

NERC's Standards Development Process is a consensus-based standards process that is currently accredited by the American National Standards Institute ("ANSI") as meeting the requirements for a consensus-based standards process.

The Commission approved NERC's consensus-based process for developing Reliability Standards when it certified NERC as the ERO under Section 215 of the Federal Power Act.³ NERC's rationale for utilizing a consensus-based process is that it provides fair representation and balances the interests of all stakeholders throughout North America. The NERC Standards Development Process serves two fundamental purposes:

- (1) It ensures that those with the technical knowledge and expertise with planning and operating the technically complex bulk power system are engaged in setting standards applicable to the transmission grid; and
- (2) It takes account of the cross-border nature of the interconnected transmission system that must operate to a common set of rules and provides a forum where interests from both sides of the international border can develop mutually satisfactory reliability solutions.

³ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, III FERC Stats. & Regs. ¶ 31,204 (2006) ("Order No. 672"); *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 (2006) ("ERO Certification Order").

Because the March 18 RSDP Order may undercut both of those fundamental purposes, NERC seeks rehearing of that order. Additionally, the Commission should grant NERC's Motion for Stay in order to hold a technical conference to provide parties the opportunity to analyze the issues of the directives to modify the Standards Development Process and FAC-008.

II. STATEMENT OF ISSUES FOR REHEARING

Pursuant to 18 C.F.R. § 385.713, NERC seeks rehearing on the following issues. As discussed in greater detail below, the Commission should grant NERC's Motion for Stay in order to hold a technical conference to provide parties the opportunity to analyze the issues of the directives to modify the Standards Development Process and FAC-008.

- A. Issue 1: The Commission's order that NERC modify its Standards Development Process such that the Commission can dictate the specific content of a Reliability Standard is inconsistent with the requirements in Section 215 that NERC must follow in developing Reliability Standards.** *See e.g., National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (courts and agencies are to "give effect to the unambiguously expressed intent of Congress.").
- B. Issue 2: The Commission's order that NERC modify its Standards Development Process such that the Commission can dictate the specific content of a Reliability Standard is inconsistent with the requirements in Section 215 and in the Commission's regulations and orders that NERC obtain recognition as the ERO in Canada.** *See e.g., North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 at P 151 (2006) ("ERO Certification Order").
- C. Issue 3: The Commission's order that NERC modify its Standards Development Process such that the Commission can dictate the specific content of a Reliability Standard is not justified or supported by the record in this case.** *See e.g., Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 (2007) (Order No. 693), *reh'g denied*, 120 FERC ¶ 61,053 (2007) ("Order No. 693-A"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). *See also* 5 U.S.C. § 706(2)(A).

III. ARGUMENT

A. **Issue 1: The Commission’s order that NERC modify its Standards Development Process such that the Commission can dictate the specific content of a Reliability Standard is inconsistent with the requirements in Section 215 that NERC must follow in developing Reliability Standards.**

Section 215 requires the ERO to develop Reliability Standards under rules that ensure “reasonable notice and opportunity for public comment, due process, openness, and balance of interests.”⁴ Section 215(d)(2) also requires the Commission to give due weight to the technical expertise of the ERO with respect to the content of a standard.⁵ Section 215(d)(5) provides that the Commission may order the ERO to submit a proposed Reliability Standard or a modification to a Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Reliability Standard appropriate to carry out Section 215.⁶ There are limits, however. The Commission does not have authority to dictate the content or text of a Reliability Standard. Rather, it may either approve a Reliability Standard (or modifications thereto) or remand it to the Standards Development Process to consider and address any issues.⁷

The statutory requirements for “reasonable notice and opportunity for public comment, due process, openness, and balance of interests” are the hallmarks of a consensus-based process.

NERC’s Standards Development Process is accredited by ANSI as a consensus-based standards process:

In order to maintain ANSI accreditation, standards developers are required to consistently adhere to a set of requirements or procedures known as the “*ANSI Essential Requirements*,” that govern the consensus development process. Due process is the key to ensuring that ANSs are developed in an environment that is equitable, accessible and responsive to the requirements of various stakeholders.

⁴ 16 U.S.C. § 824o(c)(2)(D) (2005).

⁵ 16 U.S.C. § 824o(d)(2).

⁶ 16 U.S.C. § 824o(d)(5).

⁷ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (courts and agencies are to “give effect to the unambiguously expressed intent of Congress.”).

The open and fair ANS process ensures that all interested and affected parties have an opportunity to participate in a standard's development. It also serves and protects the public interest since standards developers accredited by ANSI must meet the Institute's requirements for openness, balance, consensus and other due process safeguards.

That is why American National Standards are usually referred to as "open" standards. In this sense, "open" refers to a process used by a recognized body for developing and approving a standard. The Institute's definition of openness has many elements, but basically refers to a collaborative, balanced and consensus-based approval process. The content of these standards may relate to products, processes, services, systems or personnel.

In its role as the only accreditor of U.S. voluntary consensus standards developing organizations, ANSI helps to ensure the integrity of the standards developers that use our [*ANSI Essential Requirements: Due process requirements for American National Standards*](#). A separate process, based on the same principles, determines whether standards meet the necessary criteria to be approved as American National Standards. Our process for approval of these standards (currently numbering approximately 10,000) is intended to verify that the principles of openness and due process have been followed and that a consensus of all interested stakeholder groups has been reached.

The hallmarks of this process include:

- Consensus must be reached by representatives from materially affected and interested parties
- Standards are required to undergo public reviews when any member of the public may submit comments
- Comments from the consensus body and public review commenters must be responded to in good faith
- An appeals process is required

ANSI's use of the terms "open" and "openness" to describe standards is meant to characterize documents that have undergone this kind of consensus-based, transparent process.⁸

During the legislative process that led to adoption of Section 215, Congress was fully aware that the standard-setting process required in Section 215 was a consensus-based process, and that is what Congress intended. During U.S. Senate consideration of an energy bill during

⁸ American National Standards Institute, http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1, visited April 12, 2010.

2002, the Senate debated two different approaches to reliability legislation. Senator Tom Daschle's so-called "Daschle Bill" contained reliability language that would have given the authority to develop Reliability Standards to FERC. Then-Senator Craig Thomas was proposing, instead, the approach that had been supported by both the Secretary of Energy Advisory Board's Task Force on Electric System Reliability ("DOE Task Force") and the Clinton Administration to establish a "participant-run, FERC-overseen electric reliability organization."⁹ The Thomas Amendment was the basis for what eventually became Section 215 of the Federal Power Act.

Section 215(d)(5), which authorizes the Commission to order the ERO to submit a new or modified Reliability Standard, does not negate the requirements in Section 215(c)(2)(D) the ERO must use to develop that standard, namely, using a process that provides for reasonable notice and opportunity for public comment, due process, openness, and balance of interests.

It is to no avail for the Commission to tell NERC that in making the required changes to its standards process, NERC must still have a process that assures reasonable notice and opportunity for public comment, due process, openness, and balance of interests. It is as if the Commission said, "When dealing with our directives, you cannot use a consensus-based process, but whatever you come up with must still be a consensus-based process." The Commission's directive in the March 18 RSDP Order goes to the fundamental nature of how Section 215 requires NERC to develop Reliability Standards.

In addition, as noted above, Section 215(d)(2) of the Federal Power Act requires that the Commission "give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard." In

⁹ 148 Cong. Rec., S1873 (March 14, 2002).

Order No. 693, the Commission noted that it would defer to the “technical expertise” of the ERO with respect to the content of a Reliability Standard.¹⁰ The Commission stated:

Pursuant to Section 215(d)(2) of the FPA and § 39.5(c) of the Commission’s regulations, the Commission will give due weight to the technical expertise of the ERO with respect to the content of a Reliability Standard or to a Regional Entity organized on an Interconnection-wide basis with respect to a proposed Reliability Standard or a proposed modification to a Reliability Standard to be applicable within that Interconnection.

Additionally, the Commission noted in Order No. 693 that NERC could respond to a Commission directive with an alternative approach that produces an equally effective alternative to the Commission’s proposal. Here, however, the Commission is effectively precluding NERC’s technical expertise, which includes the valuable input of industry experts across North America that have operational and planning experience spanning many years, on the issues from being considered and preventing NERC from proposing an equally effective alternative. The Commission’s order therefore accomplishes indirectly that which it is prohibited from doing directly, in contravention of well-established judicial precedent.¹¹

B. Issue 2: The Commission’s order that NERC modify its Standards Development Process such that the Commission can dictate the specific content of a Reliability Standard is inconsistent with the requirements in Section 215 and in the Commission’s regulations and orders that NERC obtain recognition as the ERO in Canada.

Following major Western system power outages in the summer of 1996, the Secretary of Energy formed the DOE Task Force to advise “on critical institutional, technical, and policy issues that need to be addressed in order to maintain bulk electric system reliability in the context

¹⁰ *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 at P 8 (2007) (“Order No. 693”), *reh’g denied*, 120 FERC ¶ 61,053 (2007) (“Order No. 693-A”).

¹¹ As the Commission is well aware, the Courts have consistently held that the Commission cannot do indirectly that which it cannot do directly. *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978).

of a more competitive industry.”¹² The DOE Task Force issued its Final Report on September 29, 1998, recommending the passage of legislation allowing for the establishment of mandatory and enforceable Reliability Standards. The DOE Task Force recommended that a self-regulatory organization (“SRRO”) develop reliability standards rather than FERC. Importantly, the DOE Task Force recommended that FERC have no authority to modify such standards, as explained in the following passage of its Final Report:

The FERC would have regulatory oversight to ensure compliance with and ultimately resolve disputes over any SRRO mandatory reliability standards. The SRRO would produce mandatory standards applicable to all participants in the domestic and international bulk-power system. The FERC would either confirm SRRO mandatory standards or deny them and refer them back to the SRRO with comments requesting revision and resubmittal of the standards.¹³

The DOE Task Force adopted this approach to standard-setting, in part, because “[t]ransmission grid reliability is a North American issue; the reliability relationships with Canada and Mexico must be preserved.”¹⁴ As explained below:

In recognition of the international nature of the interconnected transmission grid, the Task Force has taken the position that mandatory electric reliability standards must be developed by the SRRO and approved by the FERC in accordance with the Administrative Procedures Act. Standard development needs to be done by a single entity that can represent all countries using the interconnected transmission grid. Also, SRRO development of the mandatory standards would avoid the imposition of federally developed standards on those portions of the interconnected transmission grid located in Canada and Mexico. Currently, the Canadian government and electric industry is represented in NERC and it will be necessary to include both Canadian and Mexican representation in the SRRO. The interests of the United States would be protected by enabling the FERC to require the SRRO to develop or modify standards as necessary. It would be incumbent upon the SRRO to develop mandatory standards that are acceptable to all three countries.¹⁵

¹² *Maintaining Reliability in a Competitive U.S. Electricity Industry: Final Report of the Task Force on Electric System Reliability*, U.S. Department of Energy, p. vii (September 29, 1998).

¹³ *Id.* at 67.

¹⁴ *Id.* at 61.

¹⁵ *Id.* at 68.

As noted above, the “Daschle Bill” contained reliability language that would have given the authority to develop reliability standards to FERC. In contrast, then-Senator Thomas was proposing, instead, the approach that had been supported by both the DOE Task Force and the Clinton Administration to establish a “participant-run, FERC-overseen electric reliability organization.” As support for the latter approach, Senator Thomas noted the importance of an independent standard-setting body from the perspective of the international grid, as explained in the following passage from the debate:

The Daschle bill also fails to account for the international nature of our transmission grid. Canada is already part of a seamless North American grid, and Mexico is also an interconnect.

If reliability is given to FERC, as in the Daschle bill, FERC will be trying to set standards applicable to and affecting transmission in Canada and Mexico, over which FERC has no authority. I fear Canada and Mexico simply will not allow their systems to be regulated directly or indirectly by FERC. After all, of course, they are sovereign nations.

If these two nations withdraw from collaborative efforts, not only will it jeopardize the reliability of the entire North American grid, it will certainly also seriously impair cross-border trade in electricity. Continued international trade is critical to our supply of power. As we have seen in California, even a minor shortfall of electricity can create significant problems in terms of price spikes and blackouts. In short, we need to have that Canadian component. And they are a voluntary part of this system.

148 Cong. Rec., S1874 (March 14, 2002).

Section 215(c)(2)(E) requires the ERO to take steps to seek recognition in Canada and, as appropriate, in Mexico. At the time the Commission certified NERC as the ERO, it urged NERC to continue to seek recognition in Canada and Mexico, as appropriate.¹⁶

NERC has made great progress in achieving recognition in carrying out the functions of an international ERO and in gaining acceptance of NERC’s reliability standards as the governing standards for reliability in Canada. Unlike in the U.S., Canada has no federal FERC-equivalent

¹⁶ ERO Certification Order at P 151.

with plenary jurisdiction over electricity matters. Instead, under the Canadian Constitution, jurisdiction over electricity matters is largely given to the provincial governments. NERC has formal recognition through agreements, memoranda of understanding and other documentation from the provinces of Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, and Nova Scotia, and also with the National Energy Board of Canada (which has jurisdiction limited to international power lines). In 2009, the British Columbia Utilities Commission adopted all of NERC's Reliability Standards as mandatory within the province.

Central to achieving that level of recognition was the fact that NERC's Reliability Standards are developed in an international industry forum, where experts from both sides of the border can work together to develop standards that take account of interests on both sides of the border and reach mutually acceptable reliability solutions. NERC is concerned that the changes the Commission is requiring NERC to make in the standards development process could seriously erode the acceptance of NERC standards in Canada. Canadian federal and provincial government officials have made clear to NERC that a process where the Commission can dictate the specific content of Reliability Standards is not what they had in mind when they, along with the U.S. Department of Energy, signed on to the *Principles for an Electric Reliability Organization that can Function on an International Basis* (filed with the Commission August 3, 2005). Because the changes directed by the Commission to NERC's Standards Development Process could undermine the acceptance of NERC's standards in Canada and jeopardize NERC's status as an international ERO, NERC requests rehearing of those requirements.

C. Issue 3: The Commission’s order that NERC modify its Standards Development Process such that the Commission can dictate the specific content of a Reliability Standard is not justified or supported by the record in this case.

According to the Commission, the basis of the directive is a “growing concern that the current voting process in the ERO rules of procedure can be used to prevent compliance with Commission directives to address particular reliability matters.”¹⁷ As the basis for its concern, FERC points to a single circumstance: the 57% affirmative weighted segment vote received by FAC-008-1 when it was presented to the ballot body.¹⁸ In Order No. 693, FERC gave three directives for changes to FAC-008. The standards drafting team prepared a revised standard to address the directives, but the revised standard received only 57% affirmative vote. Negative voters indicated that the presence of the response to one of the Commission’s directives was a principal reason for their negative votes. The Commission had directed that the limiting component(s) be identified and that the increase in rating based on the next limiting component(s) be defined for all critical facilities, including facilities that limit total transfer capability, limit delivery of generation to load, or bottle generation. According to the Commission, this would provide additional transparency and sufficient information so that the most cost-effective solutions to increase facility ratings can be identified.

According to the Commission, the ERO does not have discretion not to comply with the Commission’s directive.¹⁹ The position the Commission has asserted in the March 18 RSDP Order with respect to directives directly contravenes its pronouncements in Order No. 693 as to the nature and purpose of directives. In Order No. 693, the Commission explained that, through the use of directives, it provides guidance but does not dictate an outcome; rather, it will consider

¹⁷ March 18 RSDP Order at P 2.

¹⁸ As evidence that a proposed reliability standard has achieved consensus support among the stakeholders, NERC’s Commission-approved standards process contains both a high quorum requirement (75%) and a supermajority affirmative vote requirement (66-2/3%). With an affirmative vote of 57.5%, proposed FAC-008-1 was not approved.

¹⁹ March 18 RSDP Order at P 23.

an equivalent alternative approach provided that the ERO demonstrates that the alternative will address the Commission's underlying concern or goal as efficiently and effectively as the Commission's proposal, example or directive.

31. We emphasize that we are not, at this time, mandating a particular outcome by way of these directives, but we do expect the ERO to respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is as effective as or more effective than the Commission's example or directive. . . .

185. With regard to the many commenters that raise concerns about the prescriptive nature of the Commission's proposed modifications, the Commission agrees that a direction for modification should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process. However, in identifying a specific matter to be addressed in a modification to a Reliability Standard, it is important that the Commission provide sufficient guidance so that the ERO has an understanding of the Commission's concerns and an appropriate, but not necessarily exclusive, outcome to address those concerns. Without such direction and guidance, a Commission proposal to modify a Reliability Standard might be so vague that the ERO would not know how to adequately respond.

186. Thus, in some instances, while we provide specific details regarding the Commission's expectations, we intend by doing so to provide useful guidance to assist in the Reliability Standards development process, not to impede it.[] We find that this is consistent with statutory language that authorizes the Commission to order the ERO to submit a modification "that addresses a specific matter" if the Commission considers it appropriate to carry out Section 215 of the FPA.[] In the Final Rule, we have considered commenters' concerns and, where a directive for modification appears to be determinative of the outcome, the Commission provides flexibility by directing the ERO to address the underlying issue through the Reliability Standards development process without mandating a specific change to the Reliability Standard. Further, the Commission clarifies that, where the Final Rule identifies a concern and offers a specific approach to address the concern, we will consider an equivalent alternative approach provided that the ERO demonstrates that the alternative will address the Commission's underlying concern or goal as efficiently and effectively as the Commission's proposal.

187. Consistent with Section 215 of the FPA and our regulations, any modification to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through NERC's Reliability Standards Development Process. The Commission's directives are not intended to usurp or supplant the Reliability Standard development procedure. Further, this allows the ERO to take into consideration the international nature of Reliability Standards and incorporate any modifications requested by our counterparts in Canada and Mexico. Until the Commission approves NERC's proposed modification to a Reliability Standard, the preexisting Reliability Standard will remain in effect.

188. We agree with NERC’s suggestion that the Commission should direct NERC to address NOPR comments suggesting specific new improvements to the Reliability Standards, and we do so here. We believe that this approach will allow for a full vetting of new suggestions raised by commenters for the first time in the comments on the NOPR and will encourage interested entities to participate in the ERO Reliability Standards development process and not wait to express their views until a proposed new or modified Reliability Standard is filed with the Commission. As noted throughout the standard-by-standard analysis that follows, various commenters provide specific suggestions to improve or otherwise modify a Reliability Standard that address issues not raised in the NOPR. In such circumstances, the Commission directs the ERO to consider such comments as it modifies the Reliability Standards during the three-year review cycle contemplated by NERC’s Work Plan through the ERO Reliability Standards development process. The Commission, however, does not direct any outcome other than that the comments receive consideration.²⁰

Thus, all modifications to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through NERC’s Reliability Standards Development Process. As the Commission made perfectly clear in Order No. 693, its directives are not intended to usurp or supplant the Reliability Standards Development Process, nor are they intended to effectuate a particular outcome.

The single instance identified in the March 18 RSDP Order with respect to FAC-008 does not support or justify the Commission’s action.²¹ To the contrary, the current process has worked to develop Reliability Standards and to address Commission directives. From Order No. 890²² (issued in February 2007) up to but not including the orders issued on March 18, 2010, the Commission has issued approximately 550 non-Violation Risk Factor (“VRF”)/non-Violation

²⁰ Order No. 693 at PP 31, 185-188 (internal footnotes omitted) (emphasis added).

²¹ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); and 5 U.S.C. § 706(2)(A).

²² *Preventing Undue Discrimination and Preference in Transmission Service*, 72 FR 12266 (Mar. 15, 2007) (“Order No. 890”), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh’g*, 73 FR 2984 (Jan. 16, 2008) (“Order No. 890-A”), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, 123 FERC ¶ 61,299 (2008) (“Order No. 890-B”), *order on reh’g*, 126 FERC ¶ 61,228 (2009) (“Order No. 890-C”).

Severity Level (“VSL”) directives to NERC.²³ To date, approximately 175 (or one-third) non-VRF/non-VSL directives have been completed and filed in Reliability Standards. Over 100 additional directives are being addressed through the Standards Development Process and projects that contain those directives are expected to be completed in 2010 or early fall 2011. Also, through the Standards Development Process, NERC has completed 130 VRF/VSL directives. In total, counting all directives accomplished (including VRFs/VSLs), NERC has completed nearly half (45%) of the directives in filings for Commission action.²⁴

Each year, NERC files with the Commission an update of its annual standards work plan with a description of the schedule and timetable by which NERC intends to address the outstanding directives from various Commission orders. Except when the Commission has stated a priority for particular directives (as it did with the Order No. 890 directives), NERC has told the Commission each year that it will address the Commission’s directives as a part of NERC’s ongoing 5-year cycle of reviewing and updating its Reliability Standards.

A revised Reliability Standard addressing the two remaining Order No. 693 directives pertaining to FAC-008 will be considered by the NERC Board of Trustees at its May 2010 meeting and thereafter filed with the Commission. The single instance identified in the March 18 RSDP Order with respect to a FAC-008 directive does not justify the action taken by the Commission to require a fundamental change in NERC’s Standards Development Process. This is especially so where, as described more fully in the next section, the FAC-008 directive at issue

²³ Of those filed, NERC has completed nearly half of the 110 Order No. 706 CIP directives, directives associated with Version 2 and Version 3 of the CIP Reliability Standards, as well as implementation plans for the nuclear plants, almost all of the ATC order directives, all FAC-010, -011, and -014 directives, and directives to revise NUC-001.

²⁴ NERC currently has 26 Reliability Standards before the Commission for action, 18 NERC continent-wide and 8 Regional Entity standards, as well as pending Interpretations regarding Commission-approved Reliability Standards, dating back to 2008.

does not even relate to reliability matters – it has to do with markets and enabling more efficient transmission.

**IV. REQUEST FOR RECONSIDERATION OF COMMISSION’S ORDER NO. 693
DIRECTIVE REGARDING FAC-008.**

In the March 18 RSDP Order, the Commission directs NERC, within 90 days after a Commission order ruling on changes to NERC’s standards development procedure, to “fully comply” with its Order No. 693²⁵ directive to develop certain modifications to Reliability Standard FAC-008-1. The directive at issue is the directive that caused the FAC-008 reliability standard to receive less than the required 66-2/3% affirmative vote that would indicate a consensus.

NERC recognizes that the time for seeking rehearing of Order No. 693 is long passed. However, circumstances have changed since the Commission issued Order No. 693. In Order No. 729 (approving NERC’s reliability standards related to available transfer capability), the Commission recognized there was a line between reliability and markets, and further recognized that NERC’s business was reliability, not markets. There the Commission said:

. . . the ERO’s statutory functions are properly focused on the reliability of the Bulk-Power System and the Commission does not intend to broaden that focus here.²⁶

and

. . . expanding the availability of the implementation documents to entities beyond the registered entities listed in the Reliability Standards may stretch the role of the ERO beyond ensuring reliability of the Bulk-Power System and could be duplicative of the associated NAESB standard requirements. Therefore, upon further consideration, the Commission declines to adopt the NOPR proposal to direct the ERO to modify MOD-001-1 to expand the availability of the implementation documents beyond those entities with a demonstrated reliability need to access such information.²⁷

²⁵ *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242 (2007) (Order No. 693), *reh’g denied*, 120 FERC ¶ 61,053 (2007) (“Order No. 693-A”).

²⁶ Order No. 729 at P 109.

²⁷ Order No. 729 at P 147.

Importantly, as the ballot body determined through the Standards Development Process, the single instance cited in the March 18 RSDP Order with regard to the FAC-008 directive is not a reliability directive and does not serve a reliability purpose. Rather, the Commission stated that identification of the second limiting element would provide transparency. Transparency is a market or competitive issue term, not a reliability term.

The requirement in Order No. 693 to change FAC-008 to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element were removed as a limiting element serves a commercial or market purpose, not a reliability purpose.²⁸ The Commission recognized in Order No. 729 that it would not require the ERO to cross the line into market-related matters. Because the FAC-008 directive does not relate to reliability matters, the Commission should apply the later-developed principles from Order No. 729, grant reconsideration on the issue, and withdraw the directive to supply information regarding the additional capacity that might be available if the first limiting element were removed as a limit.

NERC does not dispute that such information could be of value to the marketplace in aiding it to identify cost-effective ways of increasing the available transfer capability of the system. But the Reliability Standards, with their potential for significant financial penalties, should not be the vehicle for making information available so that the markets can function more effectively and efficiently. The Commission has ample authority under other provisions of the Federal Power Act to achieve that result. And even if the Commission's authority under other parts of the Federal Power Act were limited or unavailable, it still cannot and should not attempt

²⁸ As the Commission recognized in Order No. 693, the identification of the most limiting element is directly related to reliability, and that is already a separate requirement in FAC-008.

to regulate what is essentially market-related activity by means of the Reliability Standards. The Commission wisely reached that conclusion in Order No. 729, and it should do so here.

V. MOTION FOR STAY AND REQUEST FOR PUBLIC CONFERENCE

An outside reader of the collection of reliability-related orders that the Commission issued on March 18 would come away with the impression that the Commission intends a significant shift in the way it implements Section 215 and relates to NERC as the ERO. In that collection of orders the Commission has:

- Ordered a fundamental change in NERC's Standards Development Process;
- Announced a substantial change in how penalties will be calculated for violations of Reliability Standards;²⁹
- Ordered NERC to submit revised Reliability Standards on BAL-003 and TPL-002 on very short timeframes;
- Proposed to remand two standards (BAL-004-1 and BAL-002-WECC-1) that NERC had previously filed; and
- Proposed to reject a NERC interpretation of TPL-002 and substitute the Commission's own interpretation.

Significantly, with respect to the fundamental issues relating to how the Commission expects to relate to NERC as the ERO, there has been very little discussion. The Commission should grant NERC's Motion for Stay in order to hold a technical conference to provide the Commission, stakeholders, and NERC the opportunity to discuss the issues at stake in the Standards Development Process directive and related matters. NERC and all stakeholders would benefit from an open dialogue about the status of implementation of Section 215 and how the

²⁹ The Policy Statement is now subject to a comment period.

Commission expects that to evolve. NERC filed its three-year performance assessment on July 20, 2009, as required by the ERO Certification Order and has not yet received any feedback on that filing. That docket might serve as an appropriate vehicle for a general examination of the relationship between NERC and the Commission going forward. If it is not the Commission's intention to work a significant shift in the way it relates to NERC and the users, owners, and operators of the bulk power system, then a public conference would provide an opportunity for all interested participants to reach a common understanding, or at least recognize and understand their differences. NERC offers to provide whatever assistance it can in helping to arrange such a conference.

As discussed above, NERC is requesting that the Commission grant a Motion for Stay to stay the directives in this Order until such time that a technical conference can be held and written comments can be submitted to address the issues identified in the March 18 RSDP Order. The Commission may grant a Motion for Stay in a proceeding when "justice so requires."³⁰ The test for determining whether a Motion for Stay should be granted is: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.

A. Whether the Moving Party Will Suffer Irreparable Injury Without the Stay

Based on the Commission's directive in the March 18 RSDP Order, NERC will suffer irreparable injury if the stay is not granted. As discussed above, FERC is narrowly-prescribing directives that exempt any alternative means of compliance – even though NERC was granted

³⁰ 5 U.S.C. §705 (2000). This section provides: "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

the authority to propose alternatives in the event that an equivalent or better, alternative proposal to a Commission directive is available. NERC's authority to recommend standards with respect to FAC-008 based on its technical expertise is also challenged.

By prohibiting NERC in this way, FERC is essentially undermining NERC's ability to serve as the ERO under Section 215 of the Federal Power Act, which mandates that NERC shall establish Reliability Standards for the reliability of the bulk power system. The Commission's March 18 RSDP Order directly challenges NERC's authority to write standards given its technical expertise as the ERO for North America. The change could also undermine the acceptance of NERC standards in Canada. Accordingly, there is little doubt that NERC as the moving party will suffer irreparable injury if the stay is not granted.

B. Whether Issuing the Stay Will Substantially Harm Other Parties

Issuing the stay will not substantially harm other parties. In fact, issuing the stay will provide NERC and other parties (*i.e.*, the electric industry) with the opportunity to evaluate the Commission's directives to determine whether the proposal is in the best interests of continent-wide reliability. The comments provided in response to the Notice of Proposed Rulemaking leading up to the Final Rule clearly demonstrate that there are reliability issues that must be resolved before NERC can recommend a modification to the FAC-008 standard in compliance with the Commission's directive.

Granting the Motion for Stay and agreeing to hold a technical conference will provide NERC and the industry the necessary time to fully evaluate the technical considerations of the Commission's directive and its impact on reliability. In NERC's technical judgment, additional time to consider the issues does not pose a risk to the reliable operation of the bulk power system, as defined in Section 215(a)(4). Accordingly, issuing the stay will not harm other

parties, and is necessary in this proceeding so that NERC can evaluate changes to its Standards Development Process and address the FAC-008 standard that is in the best interests of reliability.

C. Whether a Stay is in the Public Interest

One concern with the Commission's directive in the March 18 RSDP Order is whether NERC must develop and enforce a market-driven directive under the auspices of a reliability directive. Such a requirement directly contravenes the Commission's latest pronouncements in Order No. 729 regarding NERC's role in reliability and not market matters. Therefore, granting a Stay is in the public interest and should be granted in order to afford NERC an opportunity to consider the Commission's directive and a proposal that is best for the reliable operation of the bulk power system.

VI. CONCLUSION

For the reasons set forth in this filing, NERC requests that the Commission issue an order granting the request for rehearing on the requirement that NERC change its Standards Development Process. Further, NERC requests that the Commission reconsider and withdraw its directive with respect to FAC-008. Finally, NERC requests that the Commission stay the requirement to modify NERC's standards development process and convene a public conference to consider the general issues regarding how the Commission intends to implement Section 215 going forward.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 19th day of April, 2010.

/s/ Rebecca J. Michael

Rebecca J. Michael

*Attorney for North American Electric Reliability
Corporation*