

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Filing of Privileged Materials and)
Answers to Motions)
)

Docket No. RM12-2-000

**COMMENTS OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING**

Pursuant to the Notice of Proposed Rulemaking (“NOPR”) issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) in the above docket on December 16, 2011,¹ the North American Electric Reliability Corporation (“NERC”) hereby submits its comments.

I. Background

Among other issues, in the NOPR, the Commission proposed changes to its rules and regulations relating to the filing of privileged material. Specifically, the Commission proposed to establish for filing purposes two categories of privileged material: privileged material and Critical Energy Infrastructure Information material. The proposed changes would result in a single set of uniform procedures for filing privileged materials.² As is relevant to NERC’s comments, FERC proposed to revise section 388.112 of its regulations to require that filers claiming privileged treatment would be required to include a protective agreement along with the filing and must provide the material for which privilege is claimed to intervening parties who sign the agreement.³ The protective agreement would be self implementing and would not

¹ Filing of Privileged Materials and Answers to Motions, 137 FERC ¶ 61,219 (2011) (“NOPR”).

² See NOPR at P 11.

³ See NOPR at P 16 (d).

require action or approval by the Commission. The Commission's Model Protective Order may be used as a guide for protective agreements.⁴ Persons would be able to obtain access to the privileged materials by making a written request to the filer for a copy of the complete unredacted document, including an executed copy of the protective agreement and a statement of its right to party or participant status or a copy of its intervention.⁵ The filer of the privileged material would be obligated to provide a complete, unredacted copy of the document to a person submitting such a request within 5 days after receipt, or file an objection with the Commission.⁶

The proposed change is intended to reduce potential delays in processing of matters associated with the need, under the current rules, for the Commission to issue an order adopting a proposed protective order before parties can obtain access to privileged material submitted in a proceeding.⁷

The proposed regulations include a few exceptions to this requirement such as those relating to landowner lists, certain cultural resources and liquefied natural gas facility information, and proceedings set for hearing for settlement procedures in accordance with the Commission's Rules of Practice and Procedure.⁸

II. Comments

NERC appreciates the Commission's efforts to reassess and streamline its regulations to ensure that they are efficient, effective and up to date, as well as the Commission's desire to facilitate the Commission's ability to review and process filings which include privileged materials. However, NERC requests that the Commission clarify that the above procedures will not apply to the filing by NERC of a Notice of Penalty ("NOP"). Similarly, NERC requests that

⁴ *Id.*

⁵ See NOPR at P 16 (f).

⁶ *Id.*

⁷ See NOPR at P 10.

⁸ See NOPR at P 16 (g).

the Commission clarify that the above procedures will not apply to a filing by NERC of remediated issues in a Find, Fix, Track and Report spreadsheet (“FFT”) or to other communications or exchanges of documents between NERC and FERC that are not made through formal filings.

NERC submits NOPs and FFTs on a monthly basis. Many of these submittals contain information that is submitted as nonpublic pursuant to 18 CFR § 39.7(b)(4). Very few NOPs have been reviewed by the Commission, either on the Commission’s own motion or by request of a party and, consequently, very few of these proceedings are likely to become public pursuant to 18 CFR § 39.7(e)(7). NERC understands that the Commission intends the proposed rules to apply to those proceedings in which a right to intervention exists.⁹ However, given the proposed regulation’s requirement that a protective agreement be included with the filing, the proposed regulation could be read as requiring that protective agreements be submitted with the filings of NOPs in anticipation of a potential review (when a right to intervention would exist with respect to the same proceeding). That requirement would be unduly burdensome in light of the rate of NOP proceedings that are reviewed by the Commission. Finally, NERC and FERC regularly exchange communications and documents through means other than formal filings. These exchanges are nonpublic by nature and should not require the submittal of a protective agreement. Therefore, NERC requests that the Commission clarify in the final rule that NERC is not required to submit a protective agreement with NOP and FFT filings or other communications or documents that are not exchanged through formal filings. To the extent necessary, a decision by the Commission to review a NOP may include instructions for NERC to submit a protective agreement within a specified amount of time to cover nonpublic information submitted in connection with a particular NOP.

⁹ See proposed section 388.112 (b)(2).

III. Notices and Communications

Notices and communications with respect to this filing may be addressed to:

Gerald W. Cauley
President and Chief Executive Officer
North American Electric Reliability
Corporation
3353 Peachtree Road NE
Suite 600, North Tower
Atlanta, GA 30326-1001
(404) 446-2560

David N. Cook*
Senior Vice President and General Counsel
North American Electric Reliability
Corporation
1325 G Street N.W., Suite 600
Washington, D.C. 20005-3132
(202) 644-8047
david.cook@nerc.net

Rebecca J. Michael*
Associate General Counsel for Corporate and
Regulatory Matters
Sonia C. Mendonça*
Attorney
North American Electric Reliability
Corporation
1325 G Street, N.W.
Suite 600
Washington, DC 20005-3132
(202) 644-8052
rebecca.michael@nerc.net
sonia.mendonca@nerc.net

*Persons to be included on the Commission's service list are indicated with an asterisk. NERC requests waiver of the Commission's rules and regulations to permit the inclusion of more than two people on the service list.

IV. Conclusion

NERC respectfully requests that the Commission take action consistent with these comments when it issues its final rule in this proceeding.

Respectfully submitted,

/s/ Sonia C. Mendonça

Gerald W. Cauley
President and Chief Executive Officer
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Corporation
3353 Peachtree Road NE
Suite 600, North Tower
Atlanta, GA 30326-1001
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Senior Vice President and General Counsel
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Washington, D.C. 20005-3132
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Rebecca J. Michael
Associate General Counsel for Corporate
and Regulatory Matters
Sonia C. Mendonça
Attorney
North American Electric Reliability
Corporation
1325 G Street, N.W.
Suite 600
Washington, DC 20005-3132
(202) 644-8052
rebecca.michael@nerc.net
sonia.mendonca@nerc.net

Dated: February 27, 2012