

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation))	Docket No. NP10-18-000
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REQUEST OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION, FLORIDA RELIABILITY COORDINATING COUNCIL, INC., MIDWEST RELIABILITY ORGANIZATION, NORTHEAST POWER COORDINATING COUNCIL, INC., SOUTHWEST POWER POOL REGIONAL ENTITY, TEXAS RELIABILITY ENTITY INC. AND WESTERN ELECTRICITY COORDINATING COUNCIL FOR CLARIFICATION, OR, IN THE ALTERNATIVE, REHEARING AND MOTION TO INTERVENE OUT-OF-TIME OF FLORIDA RELIABILITY COORDINATING COUNCIL, MIDWEST RELIABILITY ORGANIZATION, NORTHEAST POWER COORDINATING COUNCIL INC., SOUTHWEST POWER POOL REGIONAL ENTITY AND TEXAS RELIABILITY ENTITY INC.

I. INTRODUCTION

Pursuant to Rules 212, 214 and 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§385.212, 385.214 and 385.713, the North American Electric Reliability Corporation (“NERC”), Florida Reliability Coordinating Council, Inc. (“FRCC”), Midwest Reliability Organization (“MRO”), Northeast Power Coordinating Council, Inc. (“NPCC”), Southwest Power Pool Regional Entity (“SPP RE”), Texas Reliability Entity, Inc. (“Texas RE”) and Western Electricity Coordinating Council (“WECC”) (collectively, “NERC and the Identified Regional Entities”) request clarification or, in the alternative, rehearing, of the order of the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued on March 17, 2011 in this docket.¹ In addition, FRCC, MRO, NPCC, SPP RE and Texas RE move to intervene in this proceeding out-of-time.

¹ *North American Electric Reliability Corporation*, “Order on Review of Notice of Penalty,” 134 FERC ¶ 61,209 (2011) (March 17 Order).

In the March 17 Order, the Commission affirmed a Notice of Penalty (“NOP”) submitted by NERC regarding Turlock Irrigation District (“Turlock”) and permitted the penalty established by the settlement agreement between Turlock and WECC, which was approved by the NERC Board of Trustees Compliance Committee, to become effective on the date of the order. The Commission also provided notice regarding the principles that will guide FERC’s review of NOPs in the future.

Although the March 17 Order provides valuable guidance for future NOPs, some statements in the order could have the effect of undermining the rigorous events analysis program that NERC is developing with users, owners and operators of the bulk power system and could also hinder NERC’s ability to implement its Compliance Monitoring and Enforcement Program (“CMEP”)² and Sanction Guidelines (“Sanction Guidelines”)³ effectively. NERC and the Identified Regional Entities seek to clarify such statements to avoid unintended consequences.

Accordingly, for the reasons discussed below, NERC and the Identified Regional Entities request that the Commission grant clarification or, in the alternative, rehearing, of the March 17 Order, consistent with the discussion below.

II. REQUEST FOR CLARIFICATION

A. FERC should clarify that its statements in the March 17 Order were not intended to disallow self-reporting (or self-disclosure) of potential violations under any circumstance or to eliminate incentives to do so.

In the March 17 Order,⁴ the Commission stated that:

When a registered entity informs a Regional Entity of a potential violation through a report required more quickly by another standard than by the one that the registered entity may have violated, [FERC] will expect the Regional Entity

² The CMEP is found in Appendix 4C to the NERC Rules of Procedure.

³ The Sanction Guidelines are found in Appendix 4B to the NERC Rules of Procedure.

⁴ See P 47.

and NERC to remove self-reporting as a mitigating factor when assessing a penalty amount. The Regional Entity and NERC may recognize the registered entity's cooperation thereafter as a separate mitigating factor in the penalty determination [], if justified.

The Commission's order suggests that an entity that reports a potential violation of one standard in a report required by another standard may receive cooperation credit but not self-report credit.⁵ While the Commission properly recognizes that credit may be warranted at the discretion of NERC and the Regional Entities, the Commission effectively disallows credit for any further self-reporting of violations once an entity has experienced a reportable event and then reported the event. As a result, the order may diminish the incentive for a registered entity to self-evaluate its compliance performance following an event. This is directly contrary to efforts NERC and the Regional Entities have underway for enhancing reliability and fostering a culture of compliance. This is also contrary to prior Commission's statements on the value of self-reports.

An example will illustrate the point. Registered entities are required to submit an OE-417 form⁶ if an event occurs on the system that meets the criteria for a "reportable event." For example, the loss of 50,000 customers for one hour or more is a reportable event. In accordance with the FERC-approved Reliability Standard EOP-004-1,⁷ the initial report form OE-417 Schedule 1 is due within one hour and Schedule 2 is due within 48 hours of the event. The report calls for only basic information, and, because of the requirement for prompt reporting,

⁵ *Id.* at P 46. In P 46 of the March 17 Order, the Commission found that Turlock did not self-report the FAC-003-1 violation because another standard, EOP-004-1, R3 required the load shedding associated with the disturbance to be reported.

⁶ According to DOE's web site, "[t]he Electric Emergency Incident and Disturbance Report (Form OE-417) collects information on electric incidents and emergencies. The Department of Energy uses the information to fulfill its overall national security and other energy emergency management responsibilities, as well as for analytical purposes." <http://www.oe.netl.doe.gov/oe417.aspx>. Copies of OE-417 Schedules 1 and 2 and the NERC Operating Security Limit and Preliminary Disturbance Report are available at <http://www.oe.netl.doe.gov/oe417.aspx> and <http://www.nerc.com/files/EOP-004-1.pdf>, respectively.

⁷ See <http://www.nerc.com/files/EOP-004-1.pdf>.

only basic information may be available. The report may only say “outage due to severe weather in the area” or “outage of a transmission line.” NERC is promoting a rigorous event analysis program that encourages registered entities to dig deep and develop a thorough understanding of the causal factors for the event, so that all users, owners and operators of the bulk power system may learn from the experience. Further examination may reveal a variety of factors that contributed to the event, the correction of which may reduce the likelihood of similar events in the future. That behavior should be encouraged. Yet, the Commission’s statement that if an entity is required to submit a report for any aspect of the matter, it cannot be given credit for self-reporting does not provide appropriate incentives for registered entities to engage in that behavior.⁸

In contrast to OE-417, a self-report specifically pertains to the possible noncompliance of a NERC Reliability Standard. Information to be provided includes: (1) identification of how the violation was found; (2) an explanation of the noncompliance, including identification of the applicable Reliability Standard Requirement(s); (3) designation of a reliability impact (minimal, moderate, severe) that the noncompliance had or could have had on the interconnection; (4) a description of any mitigating factors for the noncompliance; (5) description of the plan to become compliant; (6) identification of the schedule by which one would become compliant; and (7) explanation of any additional relevant information. While the forms of self-reports have evolved over time, the basic information requested has remained the same.

In Turlock’s specific case, consider the contents of the disturbance report under EOP-004-1 R3, which Turlock was required to submit to inform WECC that it had experienced a loss of firm load, in contrast to the information provided in Turlock’s self-report. The disturbance

⁸ It should also be noted that the occurrence of a reportable event is not alone an indicator that a violation has occurred.

report focused on the description of the disturbance including the amount of generation tripped, frequency variation, transmission lines tripped, demand tripped and restoration time. Although the report form requested information on actions to prevent recurrence, it did not describe the non-compliance with specific Reliability Standards, risk assessment or related mitigation efforts. The contents and purposes of the two documents are clearly different. Other NERC Reliability Standards require the submittal of certain forms within a specified time period in response to triggering events. This includes the Alert 3 Report included in EOP-002-2.1. EOP-002-2.1, related to Capacity and Energy Emergencies, requires a Deficient Balancing Authority or Load Serving Entity declaring an Energy Emergency Alert 3 to complete a report in the form set forth in the Reliability Standard and send it to the Reliability Coordinator for review within two business days of the incident.⁹ That report similarly does not require information regarding possible noncompliance with Reliability Standards. As a result of the March 17 Order, if there is an underlying violation associated with the declaration of the Alert 3, self-report credit for such violation would not be available.

At present, when an event occurs and a registered entity submits a compliance self-assessment, NERC and the Regional Entities apply the tools already in place and their four years of experience gained to date to determine the quality and timing of the self reporting to determine the level of credit due, if any. As recent NOPs on file with the Commission make clear, each situation involving a self-report is evaluated on its merits to determine if the registered entity should receive full, partial or no credit. NERC submits this is the appropriate approach and the actual nomenclature of self-report credit helps to send the proper signal to the registered entity of the value in its actions. To foster a culture of compliance, which necessarily leads to improved reliability, the Commission should continue to encourage a strong, aggressive

⁹ This form is available at http://www.nerc.com/files/EOP-002-2_1.pdf.

compliance review by the registered entity in all cases and at all stages through the use of incentives such as the self-report credit. Moreover, the Commission should not erode the flexibility of NERC and the Regional Entities in applying mitigating factors in accordance with the CMEP and the Sanction Guidelines.

Simply stating that cooperation credit applies as a possible mitigating factor is not enough. NERC and the Identified Regional Entities urge the Commission to clarify that it did not intend to disallow self-reporting under any circumstances or to eliminate incentives for self-reporting. Without clarification, the order may have a chilling effect with respect to NERC's efforts generally, and specifically in the events analysis program, to encourage registered entities to undertake on-going, in-depth assessments of their compliance with NERC Reliability Standards and to report the results. To the extent the Commission declines to make the requested clarifications, NERC and the Identified Regional Entities seek rehearing and urge reversal of the Commission's position.

B. In accordance with the NERC Sanction Guidelines, NERC and Regional Entities adjust penalty amounts to account for desirable behavior on the part of registered entities, when appropriate, and the flexibility should be retained.

The Commission should clarify that it is not eroding the flexibility of NERC and the Regional Entities in applying the CMEP and NERC Sanction Guidelines in determining the appropriate mitigating factors to be considered in a penalty determination. As discussed in the NERC Sanction Guidelines, the promotion and enforcement of compliance with the reliability standards by owners, operators, and users of the bulk power system is an essential part of NERC's mission. To achieve its mission, NERC and the Regional Entities monitor and verify compliance with Reliability Standards' requirements and hold the owners, operators, and users of the BPS accountable for violations. A significant element of the CMEP is the determination and

the possible levying of penalties, sanctions, or remedial actions. These are valid and necessary mechanisms for NERC and the Regional Entities to effectuate enforcement and promotion of compliance to the Reliability Standards, in part because they can:

- promote compliance behavior;
- provide deterrence to future incidents, actions or situations of noncompliance by the violator or others;
- implement actions that will promptly correct behavior;

Penalties, sanctions, and remedial actions levied or applied for the violation of a reliability standard must bear a *reasonable relation* to the seriousness of the violation while also reflecting consideration of certain factors. Section 215(e)(6) of the Federal Power Act (“FPA”) provides that:

Any penalty imposed shall bear a reasonable relation to the seriousness of the violation and take into consideration the efforts of the user, owner, or operator to remedy the violation in a timely manner.

Penalties levied for a given violation are based on all facts and other information relevant to the incident or situation. To that end, the Sanction Guidelines include factors which NERC and the Regional Entities will consider while determining the penalty or sanction to be levied. The presence of some factors within a violation aggravates the seriousness of that violation and should cause an increase or expansion of the penalty to be levied. Conversely, the presence of some other factors mitigates that seriousness and should cause a reduction of the penalty to be levied. Also, some factors may mitigate or aggravate, and should have commensurate impact. The Sanction Guidelines describe many of these factors. Additional factors may also be considered to determine a given penalty, sanction, or remedial action, as NERC or the Regional Entity deems appropriate under the circumstances. Where additional factors or facets are used

they are specifically identified and their use will be justified. The effect of using these factors or facets on the penalty, sanction, or remedial action determined will also be fully and clearly disclosed. As discussed below, this flexibility, which is contemplated in the Commission-approved CMEP and Sanction Guidelines, is essential for NERC and the Regional Entities to perform their compliance monitoring and enforcement functions.

In setting monetary penalties, NERC or the Regional Entity determines an initial value range for the Base Penalty Amount by considering two factors regarding the violation: the Violation Risk Factor (“VRF”) of the requirement violated and the Violation Severity Level (“VSL”) assessed for the violation. Following the establishment of a Base Penalty Amount, NERC or the Regional Entity applies adjustment factors. The Final Penalty Amount can be further adjusted depending on the violator’s financial ability to pay the penalty. Also, if the violation was an economic choice, NERC or the Regional Entity will ensure that the penalty set will disgorge any unjust profits or economic benefits. At the conclusion of this review the Final Penalty Amount will be set.

The Sanction Guidelines provide examples of the types of factors that may result in an adjustment of a monetary penalty.¹⁰ Among such factors, NERC or the Regional Entity consider self-disclosure and voluntary corrective action by the violator and the degree and quality of cooperation by the violator in the violation investigation and in any remedial action directed for the violation.¹¹ As explained in the Sanction Guidelines, these and other adjustment factors provide the opportunity to NERC or the Regional Entity to adjust the Base Penalty Amount to reflect the specific facts and circumstances material to each violation and violator.

¹⁰ See Section 4.3 of Appendix 4B to the NERC Rules of Procedure.

¹¹ *Id.*

Specifically, the Sanction Guidelines direct NERC or the Regional Entity to consider whether a violator self-disclosed the violation prior to detection or intervention by NERC or the Regional Entity, and any action undertaken by the violator to correct the situation. NERC seeks clarification that the Commission did not intend to negate these salutary provisions of the Sanction Guidelines. In addition, cooperation with NERC or the Regional Entity in the investigation of the violation and any remedial action arising from it is another factor that will be considered and that may result in the adjustment of a violator's penalty. Consideration of this factor may result in an increase, a decrease or no change to the penalty.

In the March 17 Order, the Commission has not adequately supported the elimination of self-report credit where another reporting obligation is in place. Because NERC and the Regional Entities have flexibility to adjust the level of credit, even in the case of self reporting, there is no need for the Commission to dictate another specific type of credit to be applied when an entity attempts to self disclose violations.

C. Proactive self reporting should be encouraged at every juncture.

The Commission should encourage and not eliminate incentives for self disclosures by registered entities. As the Commission has recognized in the context of its own Penalty Guidelines,¹² self-reports:

add significant value to overall industry compliance, and the Commission will continue to place great importance on self-reporting. As we stated in the 2005 Policy Statement, “[c]ompanies are in the best position to detect and correct violations of our orders, rules, and regulations, both inadvertent and intentional, and should be proactive in doing so.”[] Providing credit for self-reporting gives organizations an incentive to detect and correct violations early. Self-reporting also assists the Commission's review of violations and facilitates the process of providing remedies to affected parties.

¹² *Enforcement of Statutes, Orders, Rules, and Regulations*, “Revised Policy Statement on Penalty Guidelines,” 132 FERC ¶ 61,216 (2010) P 141 (citing 2005 Policy Statement, 113 FERC ¶ 61,068, P 24).

Similarly, “cooperation that is in good faith, consistent, and continuing will help provide Enforcement staff with sufficient information to understand the circumstances of how and why the violation occurred as well as the identity of the relevant personnel involved in the violation. As is the case with good-faith self-reports, this type of cooperation should lead to a better informed and prompt conclusion of staff’s inquiry.”¹³

However, the value of self-reporting is not limited to allowing enforcement authorities to uncover violations that would not otherwise be uncovered. While this is an important benefit of self-reporting, there is another aspect that must be properly valued. As part of the NERC Events Analysis program, a registered entity is expected and encouraged to conduct a rigorous analysis of the event or situation that focuses on the relevant facts and applicable Reliability Standards as well as on the possible violations. Such an analysis is valuable to NERC and the Regional Entities because it helps narrow the issues and focus the attention on the relevant facts and applicable requirements.

As the Commission is aware, NERC is expanding event reporting in the Events Analysis program and expects there will be 200 to 300 events per year. It is imperative that there be appropriate and effective incentives for a registered entity to self-evaluate their compliance performance following an event. NERC seeks assurance that the Commission intends for NERC and the Regional Entities to continue placing an emphasis on registered entities’ conducting a rigorous analysis of system events and that appropriate incentives will be in place to encourage such behavior.

Importantly, when considering any adjustment factor, NERC and the Regional Entities take into account the specific circumstances of a particular case. As a result, a self-report does not always result in the same amount of credit in every case. Specifically, a self-report that is

¹³ *Id.* P 142.

submitted in a situation where the registered entity is required to evaluate its compliance such as in preparation of an audit, or a self-certification, or in connection with another type of reporting requirement, may result in a smaller adjustment than a fully voluntary self-report. This distinction is already made by NERC and the Regional Entities as a regular part of their CMEPs. However, even in those situations, a self-report by a registered entity has significant value if it helps narrow the issues and focus the attention on the relevant facts and applicable requirements. Such a self-report may also contain information that the registered entity is not otherwise required to provide as part of other reporting requirements. Any credit awarded in those circumstances would be commensurate with the quality of the information and analysis supplied by the registered entity.

It is important that registered entities continue to prepare and submit such self-reports, which may have a lesser value as an adjustment factor, but which are nevertheless valuable to NERC and Regional Entities. As noted, these self-reports may contain analysis and information that is different than what is contained in other, unrelated reports that the registered entity may be required to submit. Also, these self-reports help reinforce a culture within the registered entity of conducting rigorous self-assessments and reporting potential violations. NERC and the Regional Entities seek to continue to promote that behavior and for that, require the flexibility to recognize and value these types of self-reports even if they are recognized and valued differently than other types of self-reports.

III. STATEMENT OF ISSUES/SPECIFICATION OF ERROR **ALTERNATIVE REQUEST FOR REHEARING**

If the Commission disagrees with NERC's request for clarification discussed in section II above, NERC and the Identified Regional Entities, in the alternative, request rehearing with respect to these aspects of the March 17 Order. Pursuant to 18 C.F.R. §385.713(c) (2010),

NERC and the Identified Regional Entities seek, in the alternative, rehearing on the following issues:

- FERC erred in finding that Turlock did not self-report the FAC-003-1 violation because another standard, EOP-004-1, R3 required the load shedding associated with the event to be reported.
- FERC erred in concluding that self-report credit is not appropriate when there is a separate reporting obligation under a particular Reliability Standard.

With respect to both issues, FERC has failed to properly support its findings and conclusions and, therefore, failed to engage in reasoned decision-making. The courts have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) and that FERC's failure to do so prevents courts from evaluating whether or not the agency engaged in reasoned decision-making, *New York v. FERC*, 535 U.S. 1 (2002).

In further support of its alternative request for rehearing, NERC and the Identified Regional Entities respectfully refer the Commission to the discussion in section II of this filing.

IV. MOTION TO INTERVENE OUT-OF-TIME OF FLORIDA RELIABILITY COORDINATING COUNCIL, INC., MIDWEST RELIABILITY ORGANIZATION, NORTHEAST POWER COORDINATING COUNCIL, INC., SOUTHWEST POWER POOL REGIONAL ENTITY AND TEXAS RELIABILITY ENTITY, INC

Pursuant to Rules 212 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§385.212 and 385.214, FRCC, MRO, NPCC, SPP RE and Texas RE move to intervene in this proceeding out-of-time.¹⁴ FRCC, MRO, NPCC, SPP RE and Texas RE are five of the eight Regional Entities to which NERC has delegated certain statutory functions under Section 215 of the Federal Power Act, pursuant to delegation agreements between NERC and each of these entities. Among other functions, FRCC, MRO, NPCC, SPP RE and Texas RE are

¹⁴ WECC submitted a separate motion to intervene in this proceeding on March 18, 2011.

responsible for compliance monitoring and enforcement of NERC Reliability Standards in their respective regions.

In the March 17 Order, the Commission has made statements that may affect entities other than NERC and Turlock. Thus, as a result of these statements, FRCC, MRO, NPCC, SPP RE and Texas RE determined that they have interests that will be directly and substantially affected by this proceeding, which cannot be adequately represented by another party, and that their participation is in the public interest.

There is good cause to permit these entities to intervene out-of-time. As stated above, the March 17 Order broadened the scope of the proceeding, triggering the need for these entities to intervene only after the regular time for interventions. In addition, this late intervention will not disrupt the proceedings or cause any prejudice to, or additional burdens upon the existing parties. This late intervention also will not delay or defer any procedural schedule. Finally, the entities seeking intervention accept the record of the proceeding as it stands.

For these reasons, FRCC, MRO, NPCC, SPP RE and Texas RE respectfully submit that they have satisfied the requirements of the Commission's rules for intervention and request that the Commission grant the late intervention and allow these entities to become parties to this proceeding.

The contact information for designated representatives to whom correspondence, pleadings, and other papers in relation to this proceeding should be addressed and the persons whose names are to be placed on the Commission's official service list are designated as follows:

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V. CONCLUSION

For the reasons set forth in this filing, NERC and the Identified Regional Entities request that the Commission grant clarification of the March 17 Order consistent with the discussion herein. Alternatively, if the Commission does not grant the request for clarification, then for the reasons set forth in this filing, the Commission should grant rehearing and modify the March 17 Order consistent with the discussion herein. Finally, FRCC, MRO, NPCC, SPP RE and Texas RE respectfully request that the Commission grant their motion to intervene out-of-time for the reasons discussed herein.

Respectfully submitted,

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Dated: April 18, 2011

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, DC this 18th day of April, 2011.