

SCHIFF HARDIN LLP

A Limited Liability Partnership

Owen E. MacBride
(312) 258-5680
Email: omacbride@schiffhardin.com

233 SOUTH WACKER DRIVE
SUITE 6600
CHICAGO, ILLINOIS 60606

Tel.: 312.258.5500
Fax: 312.258.5700

www.schiffhardin.com

February 19, 2013

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

**Re: North American Electric Reliability Corporation
Docket No. RR12-8-000
Informational Filing of the North American Electric Reliability Corporation in
Response to December 20, 2012 Commission Order**

Dear Ms. Bose:

The North American Electric Reliability Corporation (NERC) hereby submits the “Informational Filing of the North American Electric Reliability Corporation in Response to December 20, 2012 Commission Order.”

NERC’s filing consists of: (1) this transmittal letter and (2) the Informational Filing, which follows this transmittal letter, both of which are being transmitted in a single pdf file.

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

Respectfully submitted,

/s/ Owen E. MacBride
Owen E. MacBride

Attorney for North American Electric
Reliability Corporation

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. NOTICES AND COMMUNICATIONS.....1

III. INFORMATIONAL ITEM FROM DECEMBER 20, 2012 ORDER.....2

IV. CONCLUSION.....6

I. INTRODUCTION

The North American Electric Reliability Corporation (“NERC”) submits this informational filing in response to P 31 of the order issued by the Commission on December 20, 2012, in this docket.¹ The December 20, 2012 Order approved proposed revisions to NERC’s Rules of Procedure (“ROP”) which NERC had filed with the Commission on May 7, 2012.² The Commission stated that the filing in response to P 31 of the December 20, 2012 Order will be an informational filing only and will not be noticed or subject to comment.³ The December 20, 2012 Order also directed NERC to submit a compliance filing address certain other items, which NERC is submitting concurrently but separately in this docket.

II. 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
Suite 600, North Tower
Atlanta, GA 30326
(404) 446-2560
(609) 467-0474 – facsimile

Owen E. MacBride*
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
(312) 258-5680
(312) 258-5700 – facsimile
omacbride@schiffhardin.com

Charles A. Berardesco*
Senior Vice President and General Counsel
Rebecca J. Michael*
Associate General Counsel for Corporate
and Regulatory Matters
1325 G Street, N.W., Suite 600
Washington, D.C. 20005
(202) 400-3000
(202) 644-8099 – facsimile
charles.berardesco@nerc.net
rebecca.michael@nerc.net

Monica M. Berry
Schiff Hardin LLP
225 Franklin Street, 26th Floor
Boston, MA 02110
(617) 848-5736
(617) 848-5784 – facsimile
mberry@schiffhardin.com

*Persons to be included on the Commission’s official service list. NERC requests waiver of the limitation to two persons on the service list.

¹ *Order Conditionally Approving Revisions to North American Electric Reliability Corporation Rules of Procedure*, 141 FERC ¶ 61,241 (2012) (“December 20, 2012 Order”).

² *Petition of the North American Electric Reliability Corporation for Approval of Revisions to its Rules of Procedure*, Docket No. RR12-8-000, filed May 7, 2012.

³ December 20, 2012 Order at P 31, footnote 26.

III. INFORMATIONAL ITEM FROM DECEMBER 20, 2012 ORDER

PP 28-31 of the December 20, 2012 Order (footnotes omitted⁴):

NERC stated in PP 28-31 of the December 20, 2012 Order:

28. Currently effective Section 402.6, which is the “Due Process” subsection of the section addressing “NERC Oversight of the Regional Entity Compliance Monitoring and Enforcement Programs,” provides that:

The appeals process will also allow for appeals to NERC of any findings of noncompliance issued by NERC to a Regional Entity for Reliability Standards and Requirements where the Regional Entity is monitored for compliance to a Reliability Standard. No monetary penalties will be levied in these matters; however sanctions, remedial actions, and directives to comply may be applied by NERC.

29. Section 404.1 of the Rules of Procedure, which is the “NERC Obligations” subsection of the section addressing “NERC Monitoring of Compliance for Regional Entities or Bulk Power Owners, Operator, or Users,” provides in relevant part that:

NERC shall evaluate compliance and noncompliance with all of the Reliability Standards that apply to the Regional Entities and shall impose sanctions, Penalties, or Remedial Action Directives when there is a finding of noncompliance.

30. In Appendix 2 to the Rules of Procedure, which includes the “Definitions Used in the Rules of Procedure,” “Penalty” is defined in relevant part as “all penalties and sanctions, including but not limited to a monetary or non-monetary penalty.”

31. Currently effective Sections 402.6 and 404.1 appear to conflict as to whether Regional Entities can be assessed monetary penalties for non-compliance with a Reliability Standard. While Section 402.6 appears to prohibit monetary penalties, Section 404.1 would seem to allow for monetary penalties. Pursuant to section 215(f) of the FPA, the Commission directs NERC, in an informational filing due within 60 days of this order, to clarify whether NERC may assess monetary penalties against Regional Entities for a violation of a Reliability Standard and, to the extent NERC agrees that there is an inconsistency between the cited sections in the Rules of Procedure, to explain how it proposes to address the inconsistency.

As set forth above, the Commission directed NERC to explain the assessment of Penalties with respect to Regional Entities and to address the issue it identified in the cited provisions of the NERC ROP.

⁴ In footnote 25 to P 28 of the December 20, 2012 Order, the Commission correctly noted that NERC’s filing had not proposed any revisions to either §402.6 or §404.1 of the ROP.

NERC Response:

NERC reads the cited ROP provisions as stating that NERC will not assess monetary Penalties against Regional Entities in situations in which the Regional Entity is not performing a reliability function as a Registered Entity but rather violates a Reliability Standard that is applicable to the Regional Entity as a Regional Entity. If a Regional Entity, in its role as a Regional Entity, is a Responsible Entity under a Reliability Standard and violates the Reliability Standard, the Regional Entity will not be assessed a monetary Penalty (but may be assessed a non-monetary Penalty or other sanction, or a Remedial Action Directive may be issued). In contrast, if a Regional Entity is acting as a Registered Entity to perform a reliability function, the ROP provisions applicable to Registered Entities apply and the Regional Entity may be assessed a monetary Penalty for a violation of a Reliability Standard applicable to that reliability function. There is only a limited set of Reliability Standards remaining in which a Regional Entity, in its role as a Regional Entity, is a Responsible Entity and not an entity performing a Registered Entity reliability function.

As background, in Order No. 693, in which the Commission approved NERC's initial set of operations and planning standards, the Commission indicated that "regional reliability organizations" should not be listed in the Applicability section of Reliability Standards as entities required to comply with them, because regional reliability organizations are not users, owners or operators of the Bulk Power System.⁵ This reasoning is equally applicable to the Regional Entities as the successors to the regional reliability organizations. Additionally, §215(e) of the Federal Power Act specifies that the Electric Reliability Organization "may impose a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission," which indicates that a penalty may not be imposed on a Regional Entity for violating a Reliability Standard that is applicable to the Regional Entity. Further,

⁵ *Mandatory Standards for the Bulk Power System*, Order No. 693, 118 FERC ¶ 61,218 (2007), at PP 146-160.

§100, “Applicability of Rules of Procedure,” of the ROP states that “Regional Entities shall comply with each approved Reliability Standard that identifies Regional Entities as responsible entities. A violation by NERC or a Regional Entity of such a Reliability Standard shall constitute a violation of these Rules of Procedure.” However, NERC would have no statutory authority to impose a monetary penalty on a Regional Entity for violating a provision of the ROP.

Accordingly, if a Regional Entity, in its role as a Regional Entity, is a Responsible Entity under a Reliability Standard and violates the Reliability Standard, the Regional Entity will not be assessed a monetary Penalty. However, such a Regional Entity may be assessed a non-monetary Penalty or other sanction, or a Remedial Action Directive may be issued.

Over time (since the issuance of Order No. 693), NERC has eliminated “regional reliability organizations” from being listed in the Applicability section of many of the original operations and planning standards, and has also replaced references to “regional reliability organization” in Reliability Standards with “Regional Entity.” However, references to “regional reliability organization” or “Regional Entity” remain in the Applicability sections of a few Reliability Standards. For example, in the currently-effective Version 3 Critical Infrastructure Protection (“CIP”) standards, CIP-002-3 through CIP-009-3, “Regional Entity” is included in the list of “Responsible Entities.” Under the Version 4 CIP standards, which the Commission has approved and which currently have a mandatory effective date of April 1, 2014, the Regional Entity continues to be listed as a Responsible Entity. However, under the Version 5 CIP Standards, which NERC filed with the Commission for approval on January 31, 2013 (Docket No. RM13-05-000), the Regional Entity will no longer be a Responsible Entity (if the Version 5 CIP standards are approved as submitted on this point).

In addition to the limited number of Reliability Standards in which they are listed as a Responsible Entity, Regional Entities may perform reliability functions as Registered Entities.

Currently, the Florida Reliability Coordinating Council, Southwest Power Pool, Inc. and Western Electricity Coordinating Council are each a Registered Entity for certain reliability functions. In its capacity as a Registered Entity, a Regional Entity may be found to be in noncompliance with an applicable Reliability Standard and may be assessed a monetary Penalty with respect to the violation (as well as non-monetary Penalties or other sanctions, or be the subject of a Remedial Action Directive).

Both §402.6 and §404.1 of the ROP are intended to apply to the situation in which the Regional Entity, in its role as the Regional Entity, violates a Reliability Standard that lists the Regional Entity as a Responsible Entity, and not to the situation in which a Regional Entity is performing a reliability function as a Registered Entity. Consistent with the above discussion, ROP §402.6 expressly states that no monetary Penalties will be levied where a Regional Entity is found to be in noncompliance with a Reliability Standard. ROP §404.1 is included in ROP §404, “NERC Monitoring of Compliance for Regional Entities or Bulk Power Owners, Operators, or Users;” the scope of §404 is NERC’s monitoring of Regional Entity compliance with Reliability Standards.⁶ ROP §404.1 says that NERC shall impose “Penalties” when there is a finding of noncompliance by a Regional Entity, without any statement that no monetary Penalties will be applied; however, NERC interprets and applies §404.1 to be consistent with ROP §402.6, *i.e.*, that any Penalties that may be imposed on a Regional Entity for violating a Reliability Standard that is applicable to Regional Entities will be a non-monetary Penalty. NERC respectfully submits that, in light of this interpretation, and because there is a limited remaining number of Reliability Standards that list the “Regional Entity” in the Applicability section (*e.g.*, when the Version 5 CIP standards are approved and become effective, the CIP standards will no longer include Regional Entities in the “Applicability” section), it is not necessary to propose and

⁶ See ROP §401.1.

process a revision to ROP §404.1 to explicitly specify that a monetary Penalty will not be assessed to the Regional Entity in this situation.

As indicated above, the provisions of the ROP that refer to compliance monitoring, identification of violations, assessment of Penalties, and similar matters, with respect to compliance with Reliability Standards by Registered Entities or by users, owners, and operators of the Bulk Power System, will continue to encompass Regional Entities in their performance of reliability functions as Registered Entities. In such situations, a monetary Penalty may be imposed on the Regional Entity for a violation of a Reliability Standard that is applicable to it as a Registered Entity.

IV. CONCLUSION

The North American Electric Reliability Corporation requests that the Commission accept this filing as compliant with the informational directive in the December 20, 2012 Order.

Respectfully submitted,

Gerald W. Cauley
President and Chief Executive Officer
North American Electric Reliability
Corporation
3353 Peachtree Road
Suite 600, North Tower
Atlanta, GA 30326
(404) 446-2560
(609) 467-0474 – facsimile

/s/ Owen E. MacBride
Owen E. MacBride
Schiff Hardin LLP
233 South Wacker Drive, Suite 6600
Chicago, IL 60606
(312) 258-5680
(312) 258-5700 – facsimile
omacbride@schiffhardin.com

Charles A. Berardesco
Senior Vice President and General Counsel
Rebecca J. Michael
Associate General Counsel for Corporate
and Regulatory Matters
North American Electric Reliability Corporation
1325 G Street, N.W., Suite 600
Washington, D.C. 20005
(202) 400-3000
(202) 644-8099 – facsimile
charles.berardesco@nerc.net
rebecca.michael@nerc.net

Monica M. Berry
Schiff Hardin LLP
225 Franklin Street, 26th Floor
Boston, MA 02110
(617) 848-5736
(617) 848-5784 – facsimile
mberry@schiffhardin.com

CERTIFICATE OF SERVICE

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

Dated at Chicago, Illinois, this 19th day of February, 2013.

/s/ Owen E. MacBride
Owen E. MacBride

Attorney for North American
Electric Reliability Corporation