

133 FERC ¶ 61,061
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

North American Electric Reliability
Corporation

Docket No. RR10-11-000

ORDER CONDITIONALLY APPROVING REVISED *PRO FORMA* DELEGATION
AGREEMENT, REVISED DELEGATION AGREEMENTS WITH REGIONAL
ENTITIES, AMENDMENTS TO RULES OF PROCEDURE AND CERTAIN
REGIONAL ENTITY BYLAWS

(Issued October 21, 2010)

1. On June 9, 2010, as supplemented on June 17, 2010, the North American Electric Reliability Corporation (NERC) petitioned the Commission to approve: (i) a revised *Pro Forma* Delegation Agreement, (ii) revised Delegation Agreements between NERC and each of the eight Regional Entities,¹ (iii) amendments to the NERC Rules of Procedure (ROP), and (iv) amendments to the Bylaws of two Regional Entities (FRCC and MRO), which are included in their respective Delegation Agreements with NERC.

2. The Commission conditionally approves the agreements, amendments, and bylaws in NERC's petition, to become effective on January 1, 2011. As discussed in the body of this order, the Commission directs NERC to modify the *Pro Forma* Delegation Agreement, revised Delegation Agreements, amendments to the NERC ROP, and certain amendments to the FRCC and MRO Bylaws. NERC and the Regional Entities shall address the modifications in a filing due within 120 days of the date of this order.

¹ The eight Regional Entities are: Florida Reliability Coordinating Council (FRCC); Midwest Reliability Organization (MRO); Northeast Power Coordinating Council, Inc. (NPCC); ReliabilityFirst Corporation (RFC); SERC Reliability Corporation (SERC); Southwest Power Pool, Inc. (SPP RE); Texas Reliability Entity (Texas RE); and Western Electricity Coordinating Council (WECC).

I. Background

3. On February 3, 2006, the Commission issued Order No. 672 to implement the requirements of section 215 of the Federal Power Act (FPA) governing electric reliability.² In July 2006, the Commission, pursuant to section 215 of the FPA,³ certified NERC as the Electric Reliability Organization (ERO).⁴ The Commission accepted, conditionally, NERC's proposal to delegate certain ERO functions to its designated Regional Entities. In addition, the Commission accepted, conditionally, NERC's proposed *Pro Forma* Delegation Agreement, including the NERC *Pro Forma* Compliance Monitoring and Enforcement Program (CMEP) and CMEP Hearing Procedures.

4. In April 2007, pursuant to section 215(e)(4) of the FPA and section 39.8 of the Commission's regulations, 18 C.F.R. § 39.8 (2007), NERC entered into separate Delegation Agreements with eight Regional Entities, through which NERC delegated certain ERO functions. Specifically, NERC delegated authority to the Regional Entities to audit, investigate, and otherwise ensure that users, owners, and operators of the Bulk-Power System comply with NERC's mandatory Reliability Standards, subject to ERO oversight.⁵ Further, the Delegation Agreements address: (i) regional Reliability Standards development; (ii) registration of entities that must comply with Reliability Standards; and (iii) other services supporting NERC's functions, including reliability assessments, event analysis and training and education.

II. NERC Filing

5. In its June 9, 2010 petition, NERC proposes revisions to the *Pro Forma* Delegation Agreement and its attachments, the Delegation Agreements with the eight Regional Entities, and amendments to the NERC ROP and to FRCC's and MRO's

² *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

³ 16 U.S.C. § 824o (2006).

⁴ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

⁵ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 654.

Bylaws. NERC requests that the Commission approve its proposals effective January 1, 2011.

6. NERC proposes revisions to the following sections of the *Pro Forma* Delegation Agreement: (i) Delegation of Authority (Section 4); (ii) Enforcement of Compliance with Reliability Standards (Section 6); (iii) Delegation-Related Activities (Section 7); (iv) Oversight of Performance of Delegated Functions and Related Activities (new Section 8); (v) Funding (Section 9); (vi) Term and Termination (Section 12); and (vii) Dispute Resolution (Section 18).

7. NERC's proposed revisions to the Delegation Agreements with the eight Regional Entities are generally limited to conforming the Delegation Agreements to the language contained in the revised *Pro Forma* Delegation Agreement. Each proposed Delegation Agreement, however, contains deviations from the revised *Pro Forma* Delegation Agreement.

8. NERC proposes amendments to the following sections of the NERC ROP: (i) Compliance Enforcement (Section 400); (ii) Organization Registration and Certification (Section 500); (iii) Reliability Assessment and Performance Analysis (Section 800); (iv) Situation Awareness and Infrastructure Security (Section 1000); (v) Annual NERC Business Plans and Budgets (Section 1100); (vi) Regional Delegation Agreements (Section 1200); (vii) Audit of Regional Entity Compliance Programs (Appendix 4A); (viii) Sanction Guidelines (Appendix 4B); and (ix) CMEP (Appendix 4C).

9. NERC, FRCC and MRO request approval of amendments to the Bylaws of FRCC and MRO. The proposed amendments to the FRCC Bylaws center on the "Compliance Committee" provision (Section 5.4). The proposed amendments to the MRO Bylaws are manifold, covering several sections.

10. In its June 17, 2010 supplement, NERC provides a revised version of the proposed amendments to Section 500 of the NERC ROP. The revised version reflects the amendments to Section 500 that the Commission approved on June 10, 2010 (*viz.*, after the June 9, 2010 filing date of NERC's petition) in Docket No. RR10-8-000 concerning updates to the organization registration and certification procedures relating to registration appeals and Joint Registration Organization agreements.

III. Notices and Responsive Pleadings

11. Notices of NERC's filings were published in the *Federal Register*, 75 Fed. Reg. 35,010 (2010) and 75 Fed. Reg. 36,380 (2010), with interventions and protests due on or before July 9, 2010. Motions to intervene were timely filed by SPP RE, Modesto Irrigation District, Dominion Resources Services, American Municipal Power, Inc., and Edison Electric Institute. Motions to intervene and comments were timely filed by

FRCC, FirstEnergy Companies (FirstEnergy) and, jointly, by ISO New England Inc. and the Electric Reliability Council of Texas, Inc. (collectively, the ISOs). A motion to intervene and protest and a separate motion for clarification were timely filed by Nebraska Public Power District (NPPD).

12. NERC moved for leave to submit an answer on July 26, 2010. NPPD moved for leave to reply to NERC's answer on July 30, 2010.

IV. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest or an answer, unless otherwise ordered by the decisional authority. We will accept NERC's answer and NPPD's reply because they provided information assisting us in our decision-making process.

V. Discussion

A. Revisions to the NERC *Pro Forma* Delegation Agreement

15. Except as otherwise indicated below, the Commission approves NERC's proposed *Pro Forma* Delegation Agreement. The revised *Pro Forma* Delegation Agreement is an improvement to NERC's and the Regional Entities' activities and relationships, reflecting lessons learned from the first four years of experience operating under section 215 of the FPA.

1. Oversight of Performance of Delegated Functions and Related Activities (New Section 8)

a. NERC Filing

16. Proposed Section 8 is new and "sets forth processes and procedures which the Parties intend shall be used in NERC's oversight of [REGIONAL ENTITY]'s performance of its Delegated Authority and related activities." In proposed Section 8, the parties to the agreement contemplate creating reports, directives, and written guidance that, generally, they intend to be made public.⁶ However, in some instances, proposed

⁶ NERC June 9, 2010 Filing, Attachment 1A at Section 8(a)(i) ("performance goals, measures and parameters and the form of performance reports . . . shall be made public").

Section 8 allows the NERC President or the NERC Board of Trustees to withhold information that would otherwise be made public.

17. The first provision permitting NERC to withhold information is in proposed Section 8(a)(iii). This provision allows the NERC President to withhold a final action plan submitted to NERC by a Regional Entity as part of NERC's evaluation of the Regional Entity's performance of its delegated functions and related activities. Next, proposed Section 8(c)(iv) allows NERC and the Regional Entity to collaborate on whether a directive NERC issued to the Regional Entity should be made public. If no agreement is reached, the NERC President may withhold the directive, provided the NERC President "makes a written determination stating a specific reason for maintaining a particular directive as non-public." Finally, proposed Section 8(d) provides that the NERC Board of Trustees, or a Board committee to which the NERC Board of Trustees has delegated authority, can withhold otherwise public written guidance or directions as to how Regional Entities should perform delegated functions and related activities.

b. Commission Determination

18. In proposed Section 8, there is a presumption that plans, reports, directives, and written guidance on the Regional Entities' performance of delegated functions and related activities should be publicly disclosed. The Commission agrees with this public disclosure presumption. We also endorse NERC's reservation of the discretion to withhold information from the public, as set forth in proposed Sections 8(a)(iii), (c)(iv) and (d), when the NERC President or NERC Board of Trustees articulates a specific need for non-public treatment.

19. As drafted, proposed Section 8 does not address whether the Commission and its staff would have access to information withheld from the public. We do not believe that the intent of proposed Section 8 is to facilitate the withholding of information from the Commission, and NERC has explicitly stated that rules-based limitations do not apply to the Commission in other instances.⁷ However, NERC has not made such a statement in proposed Section 8. In addition, section 39.2(d) of the Commission's regulations, 18 C.F.R. § 39.2(d) (2010), requires NERC and each Regional Entity to provide the Commission with such information as is necessary to implement section 215 of the FPA. Accordingly, we require NERC and the Regional Entities to clarify that the Commission and its staff will have full access to information made non-public under proposed

⁷ See, e.g., NERC June 9, 2010 Filing, Attachment 14A at Section 3.1.5.4 ("Registered Entity Objections to Compliance Audit Team," which allows registered entities to object to, and possibly have excluded, audit team members, but provides that "[n]othing in this paragraph shall be read to limit the participation of NERC or FERC staff in the Compliance Audit.").

Sections 8(a)(iii), (c)(iv), and (d) of the revised *Pro Forma* Delegation Agreement (and the revised Delegation Agreements with the Regional Entities that adopt the relevant portions of proposed Section 8).⁸

20. The Commission and its staff will treat such information as non-public, subject to the provisions of Rule 388.112 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 388.112 (2010), which covers information submitted to the Commission or its staff under a claim of confidentiality or privilege.

2. Funding (Section 9 and Exhibit E, Section 8)

a. NERC Filing

21. The revised *Pro Forma* Delegation Agreement deletes Section 8(j) in the current *Pro Forma* Delegation Agreement.⁹ The deleted section empowers NERC to review the Regional Entities' financial books and records from time to time, but no less frequently than every three years, to ensure that the documentation supports the appropriate funding of delegated functions. NERC submits that Section 8(j) is no longer necessary because the right to review financial records exists in proposed Section 8 of Exhibit E to the revised *Pro Forma* Delegation Agreement.

22. Proposed Section 8 of Exhibit E provides that, pursuant to Sections 9(h)-(i) of the revised *Pro Forma* Delegation Agreement, NERC will review the Regional Entities' quarterly and annual financial statements and supporting documentation submitted by the Regional Entities. Sections 9(h)-(i) of the *Pro Forma* Delegation Agreement require the Regional Entity to submit unaudited quarterly interim financial statements to NERC no later than 20 days after the end of the fiscal quarter and audited financial statements with supporting materials no later than May 1 of the following year.

b. Commission Determination

23. NERC has been given the flexibility to develop a system of accounts, provided it has a level of detail and record-keeping comparable to the Commission's Uniform System of Accounts.¹⁰ When it first proposed its system of accounts and record-keeping, NERC stated that: (i) it had a level of detail comparable, in light of NERC's programs

⁸ This access would not relate to information from or about a Canadian or Mexican entity or reliability regulator in the absence of any agreement authorizing such access.

⁹ In the current *Pro Forma* Delegation Agreement, the "Funding" provisions are found in Section 8.

¹⁰ *North American Electric Reliability Corp.*, 121 FERC ¶ 61,057, at P 73 (2006).

and operations, to the Commission's Uniform System of Accounts; and (ii) that its accounting practices and procedures complied with generally accepted accounting principles.¹¹ NERC also provided a copy of its document retention policy listing the length of retention based on record-type, with periods ranging from one year to permanent retention.¹² These materials make up the financial books and records of NERC and the Regional Entities.

24. Proposed Section 8 of Exhibit E does not clearly authorize NERC to review all underlying financial records. Instead, under the proposal, NERC may only review the financial statements and the supporting documents used to produce financial statements. It is important that NERC continue to have the ability to review underlying financial records of the Regional Entities. In Order No. 672, the Commission stated that, in general, the Commission oversees the ERO and the ERO oversees any approved Regional Entity. The Commission required that the ERO periodically audit each Regional Entity's ongoing compliance with the relevant statutory and regulatory criteria and performance in enforcing Reliability Standards.¹³ For it to effectively execute its responsibility as the ERO, NERC must have the ability to review the underlying financial records of the Regional Entities to make certain that income, revenue and expenses from non-statutory activities are properly segregated; to ensure that funds are adequately controlled; and to guarantee compliance with the requirements established in section 215 of the FPA and Part 39 of the Commission's regulations.

25. Thus, we direct NERC to revise Section 8 of Exhibit E of the *Pro Forma* Delegation Agreement (and the revised Delegation Agreements with the Regional Entities that adopt the relevant portions of proposed Section 8 of Exhibit E) to provide that NERC may review all financial records of the Regional Entities, including records not used to prepare financial statements.¹⁴

¹¹ *Id.* P 74-76.

¹² *Id.* P 76.

¹³ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 772-773.

¹⁴ For the same reasons, the Commission's directive applies to NERC's proposed deletion of nearly identical language in Section 1104.3 of the ROP.

3. Term and Termination (Section 12)

a. NERC Filing

26. Proposed Section 12 changes the *Pro Forma* Delegation Agreement term from three years to five years, starting on the effective date of the Delegation Agreement.¹⁵ In addition, NERC proposes including a renewal provision for successive five-year terms. Further, consistent with Order No. 672, proposed Section 12 requires NERC to conduct audits to ensure that the Regional Entities meet all applicable statutory and regulatory requirements to maintain eligibility for delegation.¹⁶ NERC states that a five-year initial term for the proposed *Pro Forma* Delegation Agreement, beginning on the proposed January 1, 2011 effective date, is consistent with the current Delegation Agreements because they have a three-year initial term that began on May 2007 (the original effective date) and a five-year renewal term.

b. Commission Determination

27. The Commission conditionally approves NERC's proposed revisions to Section 12. We believe that NERC's proposal provides for consistency in timing between the next ERO Self Certification, which is due in four years, and its delegation to the Regional Entities.

28. NERC has completed only five of eight audits of the Regional Entities, and these audits focused on process, not quality of output.¹⁷ We are therefore concerned that extending the audit period will delay NERC's review of the Regional Entities' performance quality for as many as five years. Accordingly, we direct NERC to submit a plan for timely auditing the Regional Entities, explaining: (i) when it will complete the first round of audits;¹⁸ and (ii) when it will perform the second round of audits.

¹⁵ In the current *Pro Forma* Delegation Agreement, the "Term and Termination" provisions are found in Section 11.

¹⁶ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 773 ("we require the ERO periodically to audit each Regional Entity's ongoing compliance with relevant statutory and regulatory criteria and performance in enforcing Reliability Standards and report the results to the Commission").

¹⁷ NERC June 9, 2010 Filing at 65.

¹⁸ As explained below, it is our expectation that NERC will complete such initial audits by the end of calendar year 2011.

B. Revisions to the Regional Entity Delegation Agreements; Amendments to the FRCC and MRO Bylaws

29. Except when otherwise indicated below, the Commission approves the revised Delegation Agreements between NERC and the eight Regional Entities and the amended FRCC and MRO Bylaws, which are included in their respective Delegation Agreements with NERC.¹⁹

1. FRCC Bylaws

a. NERC Filing

30. NERC and FRCC propose amending Section 5.4 of FRCC's Bylaws, which addresses the "Compliance Committee" provisions. Under the amendment, the Compliance Committee "is charged with the responsibility of promoting reliability of the bulk power system within the FRCC through compliance related activities" and provides language that permits the Compliance Committee to establish subcommittees and task forces as deemed necessary. The amendment also clarifies that the Compliance Committee is "separate and distinct" from the Board Compliance Committee. Finally, the proposed amendment removes language stating that the Compliance Committee "is charged with responsibility for the development and implementation of programs to ensure compliance for both FRCC Regional Reliability Standards and NERC Reliability Standards."

b. Commission Determination

31. The Commission staff audited FRCC.²⁰ As accepted by the Commission, the audit report recommended that FRCC:

Revise its bylaws to clarify that: (a) the FRCC RE is responsible for the operations of the RE and the effective and efficient implementation of the CMEP to meet the guidance of NERC and the Commission; and (b) the Compliance Committee serves as an advisor to the Board and the FRCC RE

¹⁹ We agree with NERC that a decision regarding the proposed changes to Section 9(j) and Section 5 of Exhibit E in the proposed Delegation Agreements with FRCC and SPP RE should be consistent with our determination in pending Docket No. RR10-7-001. *See* NERC Request for Reconsideration, Docket No. RR10-7-001 (filed August 6, 2010). Accordingly, the Commission will address the proposed revisions in that proceeding.

²⁰ *Florida Reliability Coordinating Council, Inc.*, 131 FERC ¶ 61,262, at Attachment A (2010).

on technical aspects of the CMEP for which the Board or the FRCC RE seeks guidance; and

Clarify that the role of the Compliance Committee with respect to the administration of the CMEP is to provide technical advice and assistance to the compliance staff when the compliance staff requests such assistance.²¹

32. The amendment to Section 5.4 represents an improvement but should be consistent with the recommendations made as a result of the Commission's order accepting the Commission staff's audit report of FRCC. The audit report, accepted by the Commission after NERC filed its present petition for approval of the revised Delegation Agreement with FRCC, recommended that FRCC "[r]evise its bylaws to clarify that: (a) the FRCC RE is responsible for the operations of the RE and the effective and efficient implementation of the CMEP to meet the guidance of NERC and the Commission." In response to the audit report, FRCC provided clarification and concurred with the recommendations.²²

33. We direct NERC and FRCC to revise Section 5.4 of Exhibit B to include language specifying FRCC's authority over the CMEP, as recommended in the FRCC audit report and consistent with FRCC's concurrence.

34. Additionally, the proposed language in Section 5.4 that charges the Compliance Committee with "the responsibility of promoting reliability of the bulk power system within the FRCC through compliance related activities" should not be interpreted to allow the Compliance Committee to re-establish the provision on guidance to FRCC compliance staff that, in a July 12, 2010 order, the Commission deleted from Exhibit D to FRCC's current Delegation Agreement with NERC, in agreement with NERC's proposal in Docket No. RR10-7-000.²³

2. MRO Bylaws

a. NERC Filing

35. NERC and MRO propose to eliminate the term "Organizational Standards" in the Bylaws based on a recommendation from the MRO Standards Committee.

²¹ *Id.* at 10-11, 25.

²² *Florida Reliability Coordinating Council, Inc.*, 131 FERC ¶ 61,262 at P 18.

²³ *North American Electric Reliability Corporation*, 132 FERC ¶ 61,024, at P 28 (2010).

“Organizational Standards” means a “standard, including adequacy requirements, outside the authority of NERC that has been duly approved by the board of directors of the [MRO]. Organizational Standards do not include Reliability Standards approved by NERC. Such Organizational Standards may be filed with the appropriate regulatory authorities.”²⁴ MRO states that it no longer needs to retain this term in its Bylaws.

b. Commission Determination

36. The Commission approves the proposed amendments to MRO’s Bylaws with the following exception. The amendment to Section 18.1 eliminates enforcement of regional criteria, which MRO refers to as “Organizational Standards.” However, as amended, Section 18.1 reads, “The Corporation shall be responsible for making final determinations regarding whether a Member has violated a Reliability Standard in accordance with the NERC Rules of Procedure.” All registered entities must adhere to Reliability Standards, however, whether they are MRO members or not. There are no differences between the enforcement procedures for members and non-member registered entities in the United States as they pertain to Reliability Standards. We, therefore, direct NERC and MRO to clarify Section 18.1 or replace “Member” with “Registered Entity.”

C. Amendments to the NERC Rules of Procedure

37. Except as otherwise indicated below, the Commission approves the proposed amendments to the NERC ROP.

1. Scope of the NERC Compliance Enforcement Programs (Section 401)

a. NERC Filing

38. NERC proposes amending Section 401.11, which addresses the public posting of compliance related information. Section 401.11, as amended, provides that NERC shall publicly post each confirmed violation, penalty or sanction, and final audit or investigation report on its web site, subject to the confidentiality requirements of the NERC ROP, when an owner, operator, or user agrees: (i) to a possible or alleged violation or a report of audit or investigation; (ii) the time for submitting an appeal expires; or (iii) all appeal processes are complete. Further, amended Section 401.11.3 states that, once critical energy infrastructure or other confidential information has been redacted, NERC will prepare a public posting which contains the name of the entity, the nature, time period, the circumstances, any mitigation plan and “sufficient facts to assist

²⁴ NERC June 9, 2010 Filing, Attachment 10 at Section 1.18.

owners, operators and users to evaluate whether they are engaged or are engaging in similar activities.”

39. Amended Section 401.12 provides that, “NERC compliance monitoring and enforcement program staff shall periodically review and analyze all reports of possible, alleged and confirmed violations to identify trends and other pertinent reliability issues.”

b. Comments

40. The ISOs contend that the proposed amendments to Section 401.11.3 create unduly high expectations. Specifically, the ISOs argue that reviewing a Notice of Penalty is unlikely to “enable” a registered entity to determine if it is engaged in similar activities. The ISOs question the utility of the Notices of Penalty because, the ISOs claim, they will be based on case-specific facts or, in the case of settlement agreements, on either a high-level description of facts or a high-level description of the relationship between those facts and the alleged violation.

41. The ISOs prefer that Section 401.11.3 state that Notices of Penalty “assist” entities in evaluating whether they are engaged in similar activities.²⁵ The ISOs therefore request that Section 401.11.3 be revised to more accurately describe the nature and value of the Notice of Penalty disclosures using the word “assist.”

42. In addition, the ISOs request that the Commission require NERC to revise Section 401.12: (i) to establish the time frame under which the CMEP staff will “review and analyze” reports; and (ii) to specify that the purpose of the section is to inform relevant NERC committees on the manner in which Reliability Standards are being adhered to and to advise industry, Regional Entities and Applicable Governmental Authorities on potential risks to reliability.

c. NERC Answer

43. NERC answers that the language proposed in Section 401.11.3 has been transferred from current Section 408.6.3, with the substitution of the word “assist” for “enable” being the only difference. NERC states that the amendment reflects an objective to strive for excellence rather than to create unduly high expectations. NERC points out that the word change was made because registered entities are (or should be) involved in self-assessments of their compliance activities.

44. NERC answers that the ISOs’ suggested change to Section 401.12 is unnecessary because NERC staff reviews and analyzes reports of violations on an ongoing basis. In

²⁵ ISO New England Inc. and Electric Reliability Council of Texas, Inc July 9, 2010 Comments at 14.

addition, NERC states that public presentations are made at each of the quarterly NERC Board of Trustees and Member Representatives Committee meetings, which a significant number of stakeholders attend. NERC further submits that NERC staff participates in the Regional Entity compliance workshops, which include discussions of trends and compliance issues. Lastly, NERC points out that information on reliability trends, Notices of Penalty, and Compliance Analysis Reports are publicly posted on NERC's website.²⁶

d. Commission Determination

45. The Commission agrees that registered entities should evaluate their compliance activities by monitoring Notices of Penalty. We disagree with the ISOs' contention that Section 401.11.3 requires changes to "more accurately describe the nature and value of Notice of Penalty disclosures." The Commission notes that while the ISOs argue that the word "assist" should be incorporated into the amended NERC ROP, revised Section 401.11.3 already states the objective that public Notices of Penalty "assist" registered entities to evaluate whether they are engaging in similar activities. Contrary to the statements made by the ISOs and NERC in their respective comments and answer, Section 401.11.3, as amended, does not use the word "enable."²⁷ Moreover, the Commission has issued several guidance orders to NERC to help ensure that Notices of Penalty include sufficient facts and reasoning to explain the basis for assessed penalties.²⁸ Accordingly, the Commission will not direct NERC to revise Section 401.11.3 at this time.

46. The Commission accepts NERC's explanation that its staff currently reviews and analyzes reports of violations on an ongoing basis; discusses and presents the information to the relevant committees, Regional Entities, industry, and Applicable Governmental Authorities; and posts the information on the NERC website. Accordingly, we find that NERC already complies with the request made by the ISOs regarding Section 401.12.

²⁶ See NERC, Reliability and Assessments, *available at* <http://www.nerc.com/page.php?cid=4>; Compliance Violation Statistics, *available at* <http://www.nerc.com/page.php?cid=3/304>; Enforcement and Mitigation, *available at* <http://www.nerc.com/filez/enforcement/index.html>; Compliance Analysis Reports, *available at* <http://www.nerc.com/page.php?cid=3/329> (focusing on the most frequently violated standards).

²⁷ The word "enable" appears in Section 408.6.3 of the current ROP, which NERC proposes to delete. See NERC June 9, 2010 Filing, Attachment 11B at 39.

²⁸ See, e.g., *North American Electric Reliability Corp.*, 132 FERC ¶ 61,182 (2010); *North American Electric Reliability Corp.*, 129 FERC ¶ 61,119 (2009).

2. NERC Oversight of the Regional Entity Compliance Enforcement Programs (Section 402)

a. NERC Filing

47. NERC proposes amending Section 402.1.3 to change the frequency of its audits concerning how each Regional Entity Compliance Enforcement Program implements the NERC CMEP from at least once every three years to at least once every five years. NERC contends that since the Regional Entity programs “have been established and functioning for approximately three years, and an initial round of NERC audits has been conducted, NERC and the Regional Entities determined that the frequency of these audits could be lengthened to a maximum of five years.”²⁹ NERC states that these audits will be conducted based on “(among other things) Appendix 4C [the CMEP] and any directives in effect pursuant to the delegation agreement.”³⁰

48. NERC further proposes to eliminate Section 402.1.3.2, which requires NERC to perform an audit validation of Regional Entity compliance audits of registered entities. Specifically, Section 402.1.3.2 states that NERC shall establish a program to audit Bulk-Power System owners, operators, and users to evaluate how well the Regional Entity’s Compliance Enforcement Program is meeting its delegated authority and responsibility. NERC contends that the process is time-consuming for NERC and the Regional Entities and burdensome for the registered entity being re-audited. NERC states that it and the Regional Entities agree that this audit validation requirement is an inefficient use of resources and that NERC has “other tools available to monitor the effectiveness of the Regional Entities’ Compliance Enforcement Programs.”³¹

b. Commission Determination

49. In the ERO Certification Order, the Commission found that its “regulations require the ERO to conduct its self-assessment, including an assessment of each Regional Entity, after three years and every five years thereafter. Therefore, we see no need to require NERC to conduct audits of Regional Entities more frequently.”³² We therefore approve NERC’s proposed revision to Section 402.1.3 concerning the frequency of NERC audits of the Regional Entities’ implementation of the CMEP. We note that NERC’s revision

²⁹ NERC June 9, 2010 Filing at 65.

³⁰ *Id.*

³¹ *Id.* at 66.

³² *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 at P 719.

does not affect its authority to conduct these audits more frequently than required, conduct other scheduled evaluations of the Regional Entities, such as the annual evaluation of each Regional Entity compliance program to determine its effectiveness, or conduct other audits or reviews of Regional Entities as appropriate pursuant to the Delegation Agreements or otherwise to address specific issues involving CMEP implementation.

50. Regarding NERC's proposal to eliminate its requirement to perform an audit validation as part of its audit of a Regional Entity, NERC has not provided a sufficient explanation to support its contention that Regional Entity audit validation is "a burden to the registered entities that were re-audited."³³ NERC offers no evidence that Regional Entity audit validation requires significant participation by registered entities that would make the process unduly burdensome to such entities. Indeed, the audit validation's purpose is to test the audit techniques and robustness of the Regional Entity's audit program—it is not to review the compliance of a registered entity. Accordingly, we direct NERC to provide in its compliance filing a further explanation and justification for eliminating the audit validation requirement, including an explanation of what other tools NERC has that it believes are sufficient to monitor the effectiveness of the Regional Entities' Compliance Enforcement Programs.³⁴

3. NERC Oversight of the Regional Entity Compliance Enforcement Programs (Section 403)

a. NERC Filing

51. NERC proposes amending Section 403 to require that each Regional Entity's Compliance Enforcement Program: (i) conform to and comply with NERC's uniform CMEP, found in Appendix 4C to the ROP, except for those deviations that are stated in the Regional Entity's Delegation Agreement; and (ii) meet all the attributes set forth in Section 403. In Section 403.10, which requires all Bulk-Power System owners, operators, and users to submit to NERC and Regional Entities timely and accurate information, NERC proposes to delete the phrase "in accordance with established procedures of NERC and the regional entity."

³³ NERC June 9, 2010 Filing at 66.

³⁴ We note that contrary to NERC's statement that "an initial round of NERC audits has been conducted," NERC has, in fact, to date only audited five Regional Entities. NERC June 9, 2010 Filing at 65. The Commission expects NERC to complete the initial auditing process by the end of calendar year 2011.

b. Comments

52. The ISOs argue that “the development and use of understandable criteria and procedures is crucial in order for the Filing Parties to meet their goal of responsiveness in the information submittal process.”³⁵ The ISOs request that the Commission remand Section 403.10 to NERC for additional work so that it can provide an appropriate level of detail in the criteria and procedures for information submittals.

c. NERC Answer

53. NERC answers that section 39.2(d) of the Commission’s regulations, 18 C.F.R. § 39.2(d) (2010), allows NERC to request information from the users, owners, and operators of the Bulk-Power System to carry out its responsibilities under section 215 of the FPA and that Section 403.10 is consistent with section 39.2(d). NERC states that the NERC ROP specify criteria and procedures for requesting and obtaining information in various contexts. Further, NERC argues that there will be different types of requests for information and different circumstances under which the information will be requested, and that it is not necessary or appropriate to identify each and every such situation in the NERC ROP. NERC affirms that specific information requests will identify the applicable criteria and procedures as to which entities must submit the requested information, and questions regarding any specific information request can be directed to and resolved with the requesting entity based on the particular circumstances applicable at the time.

d. Commission Determination

54. The Commission accepts NERC’s explanation that information requests issued in the compliance and enforcement areas may cover different forms and types of requests for information, as well as different circumstances under which the information will be requested. We also accept NERC’s commitment that specific information requests will identify the applicable criteria and procedures for entities to submit the requested information and that the requesting entity will seek to resolve any questions regarding information requests at the time of the request. Therefore, the Commission will not direct NERC to revise Section 403 at this time.

³⁵ ISO New England Inc. and Electric Reliability Council of Texas, Inc. July 9, 2010 Comments at 15-16.

4. Reliability Assessment and Performance Analysis (Section 800)

a. NERC Filing

55. NERC proposes to amend Sections 807 and 808 of its ROP by adding subsections to clarify NERC's and the Regional Entities' authority to request and obtain information from Bulk-Power System users, owners, and operators concerning major system events, off-normal events, potential Bulk-Power System vulnerabilities, and Bulk-Power System performance. As amended, Sections 807(c) and 808(3) state, "Each user, owner, and operator of the bulk power system shall provide NERC and the applicable regional entities with such information as is necessary to enable NERC and the applicable regional entities to carry out their responsibilities under this section." Also, NERC proposes to amend Sections 808.1 and 808.2 by adding references to Regional Entities, in addition to NERC, as having responsibilities for the activities and analyses in Section 800.

b. Comments

56. FirstEnergy comments that it is important for NERC and the Regional Entities to undertake and oversee event analysis. Furthermore, FirstEnergy states that Sections 807 and 808 rightly require each user, owner, and operator of the Bulk-Power System to provide NERC and the applicable Regional Entities with such information as is necessary to enable them to assess reliability and analyze performance of the Bulk-Power System. However, FirstEnergy asserts that NERC and the Regional Entities should take measures to develop practical processes and methods that will result in analyses that produce lessons learned that enhance Bulk-Power System reliability. FirstEnergy notes that an effort is underway at NERC to formulate such practical processes and materials that will achieve an overall program that is holistic and effective. FirstEnergy states that once this effort is completed, NERC should revisit Sections 807 and 808 of the ROP for further potential revision.

57. The ISOs comment that the revised event analysis provisions in Section 808 require greater specificity. Specifically, the ISOs contend that they want to be prompt and responsive to information requests that support ERO analyses, but are concerned that the non-specific language of Section 808, standing alone, will make it difficult to meet the expectations of ERO personnel making such requests. Also, the ISOs state that Section 808 does not specify any criteria or procedure by which NERC or Regional Entities will request information and registered entities will supply it. The ISOs cite Section 1600 of the NERC ROP as evidence that it is possible to develop more detailed procedures for information requests and responses. The ISOs point out that the ROP should contain actual procedures and recommend that the Commission remand Section 808 to NERC for additional work to provide an appropriate level of detail in the criteria and procedures for data requests. Finally, the ISOs cite to NERC's event analysis efforts as a possible source for criteria and procedures.

c. NERC Answer

58. In answer to FirstEnergy's comments, NERC states that no specific changes were proposed or identified by FirstEnergy during the NERC drafting process. In addition, NERC notes that revisiting ROP Sections 807-08 after NERC revises its processes for event analysis is premature and not warranted at this time. However, NERC acknowledges that future revisions to NERC's processes for event analysis may necessitate or warrant further amendments to the NERC ROP.

59. In answer to the ISOs' comments, NERC states that, given the potentially wide range of off-normal events, potential system vulnerabilities, and system performance that may need to be analyzed, specifying detailed criteria and procedures for information requests in Section 808 could limit the flexibility of NERC and the Regional Entities when requesting specific items of information needed in light of the particular circumstances of the analyzed event. Further, NERC affirms that specific information requests will identify the applicable criteria and procedures upon which entities must submit the requested information, and questions regarding any specific information request can be directed to and resolved with the requesting entity based on the particular circumstances applicable at the time.

d. Commission Determination

60. The Commission approves the proposed amendments to Sections 807 and 808, which add new subsections and references to Regional Entities, as proposed. With respect to FirstEnergy's proposal that NERC and the Regional Entities should take measures to develop practical processes and methods that will result in analyses producing lessons learned, we agree with NERC that the request is premature and does not merit changes at this time. Regarding the ISOs' concern about a need for more specific criteria and procedures for information requests, we agree with NERC that this could limit the flexibility of NERC and the Regional Entities and will not direct NERC to amend the proposed sections.

61. The Commission recently concluded in the Three-Year ERO Assessment Report Order that NERC cannot timely and effectively analyze every event that occurs and must, therefore, select a subset of events to analyze fully, which will provide important "lessons learned."³⁶ We also concluded that the Commission's staff needs timely access to detailed event information.³⁷ Lastly, we directed NERC to revise event analysis

³⁶ *North American Electric Reliability Corp.*, 132 FERC ¶ 61,217, at P 169 (2010) (Three-Year ERO Assessment Report Order).

³⁷ *Id.* P 170.

provisions in Section 800 to address a need to develop communication protocols between NERC, the Commission and the Regional Entities for use during events.³⁸ We noted that these written protocols will help avoid possible delays and miscommunications involved in establishing *ad hoc* procedures case-by-case and that the protocols shall, at a minimum, establish: (i) contact person(s), (ii) phone and e-mail addresses, (iii) a communication hierarchy, (iv) minimum information that will be made available, and (v) a communication time line to ensure that relevant information is provided to NERC and the Commission in a timely manner.

62. Consistent with the Three-Year ERO Assessment Report Order as relevant here, NERC must revise the event analysis provisions in Section 800: (i) to comply with the Commission's directive on "lessons learned;" (ii) to ensure that sufficient and timely information on each event, such as the sequence of events, one-line diagrams, and other relevant reports are received by the Commission staff in accordance with the Reliability Standards and upon request; and (iii) to develop communication protocols between NERC, the Commission and the Regional Entities for use during events. NERC will file these revisions within six months from the date of the Three-Year ERO Assessment Report Order.³⁹

5. Process for Considering Registered Entity Requests to Transfer to Another Regional Entity (Section 1208)

a. NERC Filing

63. NERC proposes the addition of Section 1208 to the NERC ROP, which describes a "Process for Considering Registered Entity Requests to Transfer to Another Regional Entity." To begin the process, the registered entity submits a transfer request to both Regional Entities. The Regional Entities then consult with each other regarding the request and determine if they agree or disagree that the request is appropriate based on the criteria listed in proposed Section 1208.2. If one or both of the Regional Entities find the transfer request appropriate, the request is then submitted to NERC for approval. If the NERC Board of Trustees approves the transfer, then the related amended Delegation Agreements are filed with the Commission for approval. The transfer is not effective unless it is approved by the Commission.

³⁸ *Id.* P 171.

³⁹ *Id.* P 169-171, ordering para. E.

b. Protest

64. NPPD's protest consists of substantive and procedural objections to the proposed Section 1208, which it asks the Commission to reject. Specifically, NPPD contends that Section 1208 creates a largely opaque process for transfer requests, uses evaluation criteria related primarily to the financial interests of the affected Regional Entities, and offers little, if any, procedural safeguards, including filing and completion deadlines, to assure that the process is conducted in a fair, efficient, and timely manner.

65. NPPD's substantive objections are that the evaluation criteria set out in Section 1208.2 (and repeated in subsections 1208.3 and 1208.4) unduly emphasize the financial and operational impact of a proposed transfer and create a bias toward maintaining the *status quo*. NPPD states that evaluation of a transfer should, instead, focus on whether the transfer "promotes effective and efficient administration of bulk power system reliability."⁴⁰

66. NPPD also objects to proposed Section 1208 on procedural grounds in that the proposed language does not "provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests" that NERC procedures must offer according to section 215(c)(2)(D) of the FPA.⁴¹ NPPD points out that: (i) Section 1208.2 provides no means for a registered entity to reply to comments or participate in a consultation between the affected Regional Entities that may occur with respect to a requested transfer; (ii) Section 1208.2 contains no deadlines for resolving the registered entity's request; (iii) Sections 1208.3 and 1208.4 provide no opportunity for the registered entity to be heard by NERC regarding the transfer request; (iv) Section 1208.5 does not provide a deadline for NERC to post the transfer request for comment; and (v) Section 1208.6 does not provide a registered entity with a means for petitioning the Commission directly if NERC denies the transfer request. For these reasons, NPPD asks the Commission to reject proposed Section 1208.

67. In addition, NPPD filed a separate motion for clarification regarding the effect of the proposed rule on NPPD's pending transfer request with MRO. Specifically, NPPD requests the Commission clarify that the proposed Section 1208 does not govern consideration of pending transfer requests and that such requests should not be delayed pending the outcome of the instant proceeding.⁴²

⁴⁰ Nebraska Public Power District July 9, 2010 Protest at 4 (*citing* 16 U.S.C. § 824o(e)(4)(C) (2006)).

⁴¹ *Id.*

⁴² Nebraska Public Power District July 9, 2010 Motion for Clarification at 1.

c. NERC Answer and NPPD Reply

68. NERC answers that it already advised NPPD that it does not intend to apply proposed Section 1208 to NPPD's request to be placed within SPP RE for compliance monitoring and enforcement purposes.⁴³

69. NERC states that NPPD's contention that the Section 1208 process is intended to preserve the *status quo* is unfounded. NERC supports this statement by explaining that a registered entity does not have a right to choose the Regional Entity that will be its Compliance Enforcement Authority, or define the priorities of a Regional Entity or NERC by virtue of a request to be transferred to a different Regional Entity. NERC also states that the determination to be made is whether the Delegation Agreements of two Regional Entities should be amended so as to delegate compliance monitoring and enforcement authority over a registered entity to a different Regional Entity.⁴⁴

70. As to the procedural issues that NPPD raises, NERC states that NPPD is overlooking the complexities involved in the consideration of a transfer request. NERC asks the Commission to decline to adopt any timeline for the process outlined in proposed Section 1208 and allow NERC and the Regional Entities to prioritize their workload.

71. In its reply, NPPD asks the Commission to confirm that NERC and NPPD correctly view proposed Section 1208 as prospective so as to resolve any further controversy. NPPD also points out that adding a statutory mandate as the guiding principle for the evaluation process would assure that it conforms to statutory and regulatory criteria used to determine the validity of Delegation Agreements.

d. Commission Determination

72. The Commission approves Section 1208 as proposed by NERC. The Commission agrees with NERC that "a registered entity does not have a right to choose the Regional Entity that will be its Compliance Enforcement Authority."⁴⁵ In addition, as the Commission stated in Order No. 672, it is important that the footprint of a Regional Entity makes sense from a reliability perspective and does not overlap with another regional footprint. The Commission explained that any change in size, scope or

⁴³ NERC July 26, 2010 Answer at 17.

⁴⁴ *Id.* at 19-20. In the *Pro Forma* Delegation Agreement, the Regional Entity's geographical boundaries are defined in "Exhibit A – Regional Boundaries." NERC June 9, 2010 Filing, Attachment 1A at Exhibit A.

⁴⁵ NERC July 26, 2010 Answer at 19.

configuration of a Regional Entity would constitute an amendment to the Delegation Agreement, and any such amendment would be subject to review by the ERO and approval by the Commission.⁴⁶ This process, under which the Commission must approve any change to the boundary of a Regional Entity to which the ERO has agreed, indicates that boundary changes should be carefully considered and should serve to improve the effectiveness or efficiency of the Regional Entities' and NERC's administration of reliability, and should not merely benefit an individual registered entity.

73. In response to NPPD's assertion that the financial factors in proposed Section 1208 are given unfair weight and preserve a bias for retaining the *status quo*, we point out that, since Order No. 672, the Commission has promoted consistency of treatment of registered entities as between the Regional Entities and assigned initial responsibility to ensure that consistency to NERC as the ERO.⁴⁷ This consistency ensures that registered entities will have no justification to shop for a favorable Regional Entity because the authority delegated to the Regional Entities will be applied in the same way among the regions. As a result, the transfer of registered entities between two Regional Entities should be the exception and not the rule. We leave to NERC's discretion the appropriate time required for processing transfer requests and deny NPPD's request that we direct incorporation of a specific timeline in Section 1208.

74. The Commission does not agree with NPPD's comments directed at the asserted "procedural defects" of proposed Section 1208. The Commission agrees with NERC that a registered entity, through its transfer request and other provisions in Section 1208, will have an opportunity to be heard regarding the transfer request. Under NERC's proposal, the Regional Entities involved in the transfer request must post the request on their respective web sites for 21 days for public comment, at which time the registered entity may comment. Once NERC receives a transfer request, it must post information concerning the proposed transfer on its web site for public comment for at least 21 days prior to taking action, at which time the registered entity may again provide comments. The Commission also believes that the registered entities' due process rights are further preserved under NERC's proposal because an aggrieved registered entity has the option of appealing a decision of the NERC Board of Trustees to the Commission.⁴⁸ Finally, the Commission agrees with NERC that the Regional Entities and NERC must have the

⁴⁶ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 671.

⁴⁷ See, e.g., *id.* P 47, 561, 610, and 712.

⁴⁸ The Commission believes that the language in proposed Section 1208.6 should be edited as follows to correct a typographical error: ". . . that FERC order amendments to the delegation agreements of the two ~~registered~~ regional entities to effectuate the proposed transfer."

freedom to consult with one another, before rendering a decision, about a pending transfer request without the involvement of the registered entity.

75. In response to NPPD's motion for clarification, the Commission clarifies that proposed Section 1208 is prospective and does not apply to NPPD's transfer request with MRO. Moreover, consistent with NERC's representation, we understand that NERC is moving forward on consideration of the transfer request based on that understanding.

6. Audit of Regional Entity Compliance Programs (Appendix 4A)

a. Planning or Pre-Audit

i. NERC Filing

76. In the "Planning or Pre-Audit" section of Appendix 4A, the first paragraph states that the NERC audit team leader (ATL) must send a Notification of Intent to Audit letter to the Regional Entity CEO "at least sixty (60) days prior to the on-site audit."⁴⁹ This section also provides that the NERC ATL will send the pre-audit questionnaire and request(s) for information to the audited Regional Entity "within the same 60 day period [the 60 days before the on-site audit.]"⁵⁰

ii. Commission Determination

77. Although this section does not state at what point within the 60 days the NERC ATL will send the pre-audit questionnaire and request(s) for information, the Regional Entity is required to provide its responses 30 days before the on-site audit. The proposed language is silent regarding the length of time a Regional Entity has to respond to the pre-audit questionnaire and request(s) for information once it receives the documents. Potentially, NERC could send the pre-audit questionnaire and information request(s) 31 days before the start date of the on-site audit, thereby normally giving the Regional Entity just one day to respond if it must respond 30 days before the on-site audit.

78. We therefore direct NERC to revise its language to state, instead, the minimum amount of time the audited Regional Entity is given to respond *after* it receives the pre-audit questionnaire and information request(s).

⁴⁹ NERC June 9, 2010 Filing, Attachment 12A at 2-3.

⁵⁰ *Id.* at 3.

b. Reporting**i. NERC Filing**

79. In the last paragraph of the section entitled “Reporting,” NERC proposes the following language: “If there are exceptions to the identified audit scope, the regional entity shall develop a corrective action plan to resolve the exceptions noted by the audit and provide quarterly updates to NERC on the status of the corrective actions until completed.”⁵¹

ii. Commission Determination

80. The Commission directs NERC to clarify the meaning of the proposed language in this section. Specifically, it is unclear whether the term “exceptions” relates to problems with the scope of the NERC audit or, instead, to failures by the Regional Entity that are identified in the course of the NERC audit.⁵²

7. Sanction Guidelines: Settlement Request (Appendix 4B, Section 3.3)**a. NERC Filing**

81. In amended Appendix 4B, “Sanction Guidelines of the North American Electric Reliability Corporation,” NERC proposes to amend Section 3.3, “Settlement Request,” to state that NERC or a Regional Entity may decline to enter into or continue settlement negotiations after a Possible Violation (or an Alleged Violation) becomes a Confirmed Violation.

b. Comments

82. FirstEnergy objects to the proposed amendment and suggests that settlement discussions on mitigation plans, penalties and sanctions should remain open until a relevant Notice of Penalty has been issued and submitted to the Commission. FirstEnergy posits that the proposed revision to Section 3.3 may be problematic for several reasons. First, according to FirstEnergy, the proposed revision may restrict unduly the course of settlement discussions. Second, FirstEnergy notes that the proposed revision fails to distinguish settlement discussions that address the facts and

⁵¹ *Id.* at 4.

⁵² In the context of Appendix 4A, “exceptions” appears to refer to ways in which the audited Regional Entity fails to meet its requirements for implementing the Compliance Monitoring and Enforcement Program and other NERC Rules of Procedure.

circumstances surrounding a Possible (or an Alleged) Violation from settlement discussions addressing mitigation plans, penalties and sanctions that follow a Confirmed Violation. Finally, FirstEnergy indicates that the proposed revision, in combination with Section 5.6 of the CMEP, raises due process concerns. Section 5.6 of the CMEP, as currently in effect, provides that, “NERC may direct the Regional Entity to revise a penalty determination, in which case the Registered Entity subject to the penalty, or the Compliance Staff of the Regional Entity, may reopen the proceedings on any issue on which the penalty was based.” Pursuant to NERC’s direction under Section 5.6, FirstEnergy states that a Regional Entity may be required to reopen an investigation of a Confirmed Violation, which could entail revisiting the facts and circumstances of the underlying penalty and/or the terms of the Mitigation Plan. FirstEnergy believes that it would be unfair to allow the Regional Entity under such circumstances the option to decline to reopen settlement discussions with that entity.

c. NERC Answer

83. NERC answers that the proposed amendments are appropriate because, “[T]here must be a point of finality in the processing of violations.”⁵³ NERC explains that a Confirmed Violation is, by definition, an Alleged Violation for which an entity has: (i) accepted the finding of the violation by a Regional Entity or NERC and will not seek an appeal; (ii) completed the hearing and appeals process within NERC; (iii) allowed the time for requesting a hearing or submitting an appeal to expire; or (iv) admitted to the violation in a settlement agreement. NERC states that, prior to the point in time at which a Confirmed Violation is determined, the registered entity can request settlement negotiations at any time, including prior to the issuance of the Notice of Alleged Violation. NERC notes that, even if the registered entity does nothing until it receives a Notice of Alleged Violation, it then has 30 days to respond to that notice and, after responding, 40 days to negotiate with the Regional Entity. NERC states that it is not unreasonable to expect the registered entity to take advantage of these time periods to engage in settlement negotiations if it is, in fact, interested in negotiating a settlement agreement.

84. With respect to FirstEnergy’s due process argument, NERC answers that no changes to the proposed NERC ROP are required. NERC states that Section 5.6 of the amended CMEP makes clear that, if NERC rejects a settlement, the Regional Entity will attempt to negotiate a revised settlement agreement with the registered entity, including any changes to the settlement specified by NERC. NERC concludes that, if a revised settlement cannot be reached, the enforcement process will continue to conclusion.

⁵³ NERC July 26, 2010 Answer at 15.

d. Commission Determination

85. The Commission approves NERC's proposed revisions to Appendix 4B, Section 3.3. First, the restrictions that NERC has elected to put in place do not seriously limit a party's ability to engage in good faith negotiations to resolve a dispute over an Alleged Violation of a Reliability Standard. As NERC explains in its answer to FirstEnergy's comments, parties are granted at least 40 days of negotiation time after filing their answer to the Notice of Alleged Violation, which can be extended by the Regional Entity or NERC. This time period, coupled with the 30-day time period for a response to a Notice of Alleged Violation, is sufficient to engage in good faith negotiation to resolve a dispute. Second, although the settlement process described in Appendix 4B has been used extensively by NERC and the Regional Entities to process Alleged and Confirmed Violations, the Commission notes that settlement is not the sole enforcement mechanism available to NERC for the processing of penalties. The impartial hearing process described in Attachment 2 of the CMEP offers an alternative means of equitable redress for those registered entities that have received a Notice of Alleged Violation of one or more Reliability Standards. Because a fair alternative exists, the Commission grants NERC discretion to place reasonable restrictions on the settlement process.

86. Further, the Commission is persuaded that the restriction that NERC seeks to impose with the additional language in Section 3.3 is consistent with the overall aims of improving the efficiency of the settlement process. There must be an end-point for negotiations to settle and process disputes in a reasonable amount of time. Given the fact that there are currently thousands of Alleged Violations in queue for processing, this restriction furthers the interests of the entire Bulk-Power System by promoting expeditious resolution and thus efficiency at the ERO and Regional Entity level. Finally, revised Section 3.3 does not preclude NERC or a Regional Entity from entering into or continuing settlement discussions after a violation becomes confirmed; indeed, NERC's proposal recognizes their discretion to do so. Nor does NERC's proposed revision prohibit a registered entity from requesting settlement discussions after a violation becomes confirmed.

87. Finally with respect to FirstEnergy's due process argument, we agree with NERC that no change to Section 3.3 is necessary because Section 5.6 of the amended CMEP makes clear that, if NERC rejects a settlement, the Regional Entity will attempt to renegotiate the settlement with the registered entity. We interpret the language in Section 5.6 of NERC's amended CMEP to mean that the Regional Entity will attempt to renegotiate with the registered entity for a reasonable amount of time, after which, if agreement on a penalty amount cannot be reached, the enforcement process will continue to conclusion. Thus, the parties in question will not lose their rights to renegotiation but simply have those rights limited by a reasonable restriction on the time to come to agreement on an alternative penalty amount. The Commission believes that this policy will serve as an effective deterrent against allowing negotiations to drag on unreasonably,

thereby increasing the efficiency of the settlement process. Further, a registered entity may apply for a review by the Commission of a contested penalty imposed by NERC or a Regional Entity. In light of these factors, the Commission sees no compelling reason to modify Section 3.3 of the Sanction Guidelines.

8. CMEP (Appendix 4C, Section 8, ROP Sections 402.4, 1506.1)

a. NERC Filing

88. NERC proposes to adopt the terms “Possible Violation,” “Alleged Violation,” and “Confirmed Violation” in the revised CMEP (Appendix 4C) to establish consistency among the Regional Entities as to when potential violations of Reliability Standards must be entered into the NERC and Regional Entity tracking systems and notices must be given to registered entities. Further, NERC proposes to revise the CMEP by deleting process charts and revising text “to more consistently use defined terms (capitalized to indicate the term is a defined term) and acronyms.”⁵⁴ In addition, defined terms are generally not capitalized in the body of the ROP but are capitalized in Appendix 4C and other appendices.

b. Comments

89. The ISOs contend that the revised definition of “Confirmed Violation” requires conforming changes to ROP Sections 402.4 and 1506.1 and to CMEP Section 8.0 relating to public disclosure of both “Confirmed Violations” and settlements reached with respect to “Alleged Violations.” The ISOs state that the changes they propose would clarify provisions relating to the public disclosure of “Confirmed Violations” and settlements reached with respect to “Alleged Violations.” The ISOs also request that NERC be made to explain why certain terms are capitalized in the CMEP but not in the main body of the NERC ROP.

c. NERC Answer

90. NERC answers that the revisions proposed by the ISOs are not needed. NERC points out that Section 402.4 and CMEP Section 8.0 only relate to Notices of Confirmed Violation and that public posting and filing requirements relating to settlement agreements are separately addressed in ROP Sections 401.11 and 1506.1 and in CMEP Section 5.6. Further, NERC states that Section 401.11.3 and Section 5.6 already provide that Confirmed Violations and settlement agreements, including the identity of the settling registered entity, are publicly disclosed in the Notices of Penalty filed with the

⁵⁴ NERC July 26, 2010 Filing at 95.

Commission unless public disclosure would reveal critical energy infrastructure information or other confidential information.

91. NERC next answers that, when the revisions were being made to the NERC ROP, NERC considered addressing the capitalization of defined terms throughout the document but decided that capitalizing the defined terms in the ROP sections would necessitate numerous additional amendments. NERC states that introducing significant, additional amendments for non-substantive purposes would unduly complicate its filing. In addition, NERC states that it could address the capitalization of the defined terms in Sections 100–1600 of the NERC ROP in connection with a future filing for approval of amendments.

d. Commission Determination

92. The Commission agrees with NERC that the conforming changes proposed by the ISOs are unnecessary. Where a Bulk-Power System user, owner, or operator, settles an “Alleged Violation” without admitting a violation of the Reliability Standards, the proper treatment under the ROP and Appendices is as a settlement, not as an “Alleged Violation.” As noted by NERC in its reply, ROP Sections 401.11.3 and CMEP Section 5.6 address the public disclosure of settlement agreement information where there has been no admission of violation. Therefore, we disagree with the ISOs’ contention that the revised definition of “Confirmed Violation” requires conforming changes to ROP Sections 402.4 and 1506.1 and CMEP Section 8.0. Accordingly, the Commission rejects the ISOs’ conforming changes. However, we note that ROP Section 401.11 (as compared to 401.11.3) does not alert the reader that settlements which do not result in a “Confirmed Violation” are among the permissible public postings to be discussed in the subsections of 401.11 (specifically, 401.11.3). Although not raised by the ISOs, this omission could cause confusion and we direct NERC to remedy it.

93. The Commission also agrees with NERC that addressing the capitalization of the defined terms would have created a significant number of additional amendments in this filing and accepts NERC’s commitment to address the capitalization of the defined terms in future filings. Therefore, the Commission will not direct NERC to capitalize the defined terms in a compliance filing. However, since capitalization of a term suggests that it has a defined meaning, the Commission encourages NERC to consider submitting a filing correcting the capitalization before January 1, 2011, the date the revised Delegation Agreements and the supporting documents become effective, so that NERC and the Regional Entities will have consistent documents in this respect going forward.

9. CMEP: Compliance Investigation (Appendix 4C, Section 1.1.8)

a. NERC Filing

94. In CMEP Section 1.1.8, NERC proposes to delete the word “Violation” from the term “Compliance ~~Violation~~ Investigation.” “Compliance Investigation” is defined as “[a] comprehensive investigation, which may include an on-site visit with interviews of the appropriate personnel, to determine if a violation of a Reliability Standard has occurred.”

b. Comments

95. The ISOs contend that the definition of “Compliance Investigation” suggests that system disturbances will generally lead to a Compliance Investigation. The ISOs argue that: (i) disturbances do not necessarily imply non-compliant conduct; (ii) counting each disturbance as a Possible Violation creates a “misleading impression of unreliability;” and (iii) such an approach contradicts NERC’s statement in the Three-Year Assessment Report that it would separate event analysis from Compliance Violation Investigations.⁵⁵ The ISOs request that the Commission remand these aspects of the ROP to NERC to make changes that resolve these concerns.

c. NERC Answer

96. NERC answers that the ISOs are overstating the case. NERC states that it “does not hold the view that every system disturbance is necessarily due to a violation of a Reliability Standard.”⁵⁶ NERC argues that it is nevertheless obligated to study system disturbances in order to both understand what happened as well as to evaluate whether any violations may have occurred.

d. Commission Determination

97. We agree with NERC and the ISOs that system disturbances can occur without being caused by a violation. We disagree, however, with the ISOs that the CMEP suggests otherwise. Moreover, Compliance Investigations may be initiated for a variety of reasons. Certainly, one possible reason is a system disturbance.

⁵⁵ ISO New England, Inc. and Electric Reliability Council of Texas, Inc. July 9, 2010 Comments at 9 (citing North American Electric Reliability Corp. Report, Docket No. RR09-07-000, Appendix A at 11 (filed July 20, 2009)).

⁵⁶ NERC July 26, 2010 Answer at 6.

98. The goal of the Reliability Standards is to ensure reliable operation of the Bulk-Power System, and it may be appropriate to initiate a Compliance Investigation after a disturbance to the Bulk-Power System. This does not necessarily mean, however, that every disturbance will be the subject of a Compliance Investigation, or that every such Compliance Investigation will identify a Possible Violation.

99. Accordingly, we deny the ISOs' request and approve NERC's proposal.

10. CMEP: Preliminary Screen (Appendix 4C, Sections 1.1.22 and 5.1)

a. NERC Filing

100. Section 5 of the CMEP describes the enforcement process undertaken after the Compliance Enforcement Authority receives or identifies evidence of noncompliance with a Reliability Standard by a registered entity. NERC proposes amending the CMEP, by formulating steps between the first indication that a standards violation may have occurred and the filing of a Notice of Penalty with the Commission.

101. Specifically, NERC proposes adding a new "Preliminary Screen" step to the CMEP. NERC defines "Preliminary Screen" in Section 1.1.22 to mean: "[a]n initial evaluation of evidence indicating potential noncompliance with a Reliability Standard has occurred or is occurring, conducted by the Compliance Enforcement Authority for the purpose of determining whether a Possible Violation exists, and consisting of an evaluation of whether (1) the entity allegedly involved in the potential noncompliance is registered, and (2) the Reliability Standard requirement to which the evidence of potential noncompliance relates is applicable to the entity and is enforceable."

102. NERC also proposes amending Section 5.1 to outline the criteria by which a Preliminary Screen determines whether a Possible Violation exists. Section 5.1 repeats the twin determining criteria from Section 1.1.22 almost verbatim: (i) the entity involved must be a registered entity; and (ii) the Reliability Standard "is applicable to the entity, and is enforceable."⁵⁷

⁵⁷ In revised CMEP Section 5.1, NERC requires the Compliance Enforcement Authority to maintain records of all Preliminary Screens, proposes an outline of the required contents of each Notice of Possible Violation, proposes record retention requirements for a registered entity, and proposes reporting and tracking requirements for Notices of Possible Violation. See NERC June 9, 2010 Filing, Attachment 14A at 21.

b. Comments

103. The ISOs argue that the definition of Preliminary Screen is internally ambiguous, purporting to be an “initial evaluation of evidence,” which suggests a review of substantive noncompliance evidence, but which actually is limited to a jurisdictional determination of whether the entity is registered and subject to the Reliability Standard at issue.

c. NERC Answer

104. NERC answers that the purpose of establishing these defined stages in the enforcement process is to bring consistency to the work performed among the Regional Entities. NERC also explains that a Preliminary Screen does not entail a review of the evidence but rather involves a verification that the entity was responsible for compliance with the Reliability Standard whose violation is being claimed.

d. Commission Determination

105. We disagree with the ISOs that the definition of Preliminary Screen is internally inconsistent. While NERC refers to the Preliminary Screen as an “initial evaluation of evidence,” nothing in the proposed language of the CMEP suggests that this initial evaluation includes a substantive analysis of evidence of noncompliance. NERC makes clear in proposed Sections 1.1.22 and 5.1 of the CMEP that in a Preliminary Screen, a Compliance Enforcement Authority would evaluate the evidence in order to make just two initial determinations: (i) whether the potentially non-compliant entity is a registered entity; and (ii) whether the relevant Reliability Standard establishes an obligation for the entity to comply with the requirement(s) at issue. Therefore, we reject the comments of the ISOs regarding the internal inconsistency of the proposed scope of Preliminary Screens.

106. However, we are concerned about the use of the proposed phrase “and is enforceable” in Sections 1.1.22 and 5.1, which could be misinterpreted as granting a Compliance Enforcement Authority discretion to determine whether a particular Reliability Standard is enforceable. A Reliability Standard’s enforceability in the United States is solely determined by Commission approval of the standard pursuant to section 215(d) of the FPA.⁵⁸ The Compliance Enforcement Authority, rather, must determine whether an entity it finds to be registered is obligated to comply, based on any of its

⁵⁸ See 16 U.S.C. § 824o(e)(1) (2006) (reliability standards that may be enforced by the ERO are those approved by the Commission); *see also* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 22 (in the United States, “[o]nly a Reliability Standard approved by the Commission is enforceable”).

registered functions, as described in the Reliability Standard requirement(s) at issue. In this way, NERC or a Regional Entity can determine whether the requirement(s) may be enforced as to the registered entity. For example, if an entity is registered as a transmission provider, and an applicable Reliability Standard requirement obligates a transmission provider to perform a duty or to take an action, that requirement is enforceable as to the entity. Accordingly, subject to this interpretation, we approve CMEP Sections 1.1.22 and 5.1.

107. The CMEP does not require a registered entity to retain records relating to a Possible Violation until it receives a Notice of Possible Violation pursuant to revised CMEP Section 5.1. This provision, as proposed by NERC, does not establish any time period for completing the Preliminary Screen that NERC describes as essentially a ministerial process. To increase the probability that data and records relating to a Possible Violation remain available to a Compliance Enforcement Authority after completion of a Preliminary Screen, we direct NERC in its responsive filing to establish in Section 5.1 a reasonable maximum time period for completion of a Preliminary Screen.

**11. CMEP: Compliance Audit Observers or Other Participants
(Appendix 4C, Section 3.1.5.3)**

a. NERC Filing

108. NERC proposes to add a new CMEP Section 3.1.5.3 to address participation in a Compliance Audit by persons other than the audit team of the Regional Entity conducting the audit. Specifically, this subsection addresses participation by: (i) NERC staff, which may include NERC contractors; (ii) members of the Regional Entity's compliance staff, in addition to the audit team; (iii) with permission of the Regional Entity, compliance staff from other Regional Entities; (iv) representatives of Applicable Governmental Authorities, including the Commission, to whose reliability jurisdiction the registered entity is subject; and (v) at the request of the registered entity, representatives of other registered entities to attend the audit for educational purposes.

109. NERC further proposes that the audit team leader, or other staff of the Regional Entity conducting the audit "will communicate in advance with any observers or other attendees to ensure there are no undue disruptions to the audit . . . no conflicts of interest, and no other considerations that in the judgment of the Compliance Audit team leader may be detrimental to the conduct and quality of the audit. . . . the Compliance Audit team leader . . . shall work with the proposed observers or attendees to facilitate observation in a less disruptive manner; or, alternatively . . . to schedule their

participation in, observation of, or attendance at a different Compliance Audit in which such issues are not presented.”⁵⁹

b. Commission Determination

110. The Commission rejects NERC’s proposal to allow representatives of other registered entities to attend Compliance Audits. We recognize that there might be some potential benefits from, for example, faster dissemination of lessons learned from Compliance Audits. The Commission, nevertheless, finds that this proposal could reduce the overall effectiveness of the Compliance Audits. The frank exchange of information and views, particularly confidential information, between the Regional Entity auditors and the registered entity being audited may be hindered by the presence of another registered entity. It also is not clear to us how a possible violation that is discovered during a Compliance Audit attended by representatives of other registered entities could remain non-public until NERC files a Notice of Penalty with the Commission, as required by section 39.7(b)(4) of the Commission’s regulations.⁶⁰ For these reasons, the Commission rejects NERC’s proposal to allow, at the request of the registered entity, representatives of other registered entities to attend the audit for educational purposes. Moreover, NERC and the Regional Entities have other, more appropriate tools at their disposal to educate registered entities without potentially introducing a disruptive element that may, in fact, hinder the Regional Entities in the performance of their compliance duties.⁶¹

111. Although NERC does not indicate that the audit team leader would have discretion to limit the participation of NERC or Commission observers in a Compliance Audit, the lack of such language could result in confusion. CMEP Section 3.1.5.4 currently provides, “Nothing in this paragraph shall be read to limit the participation of NERC or FERC staff in a Compliance Audit conducted in the United States.” To address our concern, we direct NERC to amend this sentence to replace the phrase “this paragraph” with “Section 3.1.”

⁵⁹ NERC June 9, 2010 Filing, Attachment 14A at 10. By using the phrase “any observes or other attendees,” it appears that NERC is referring to participation by Commission staff and others.

⁶⁰ 18 C.F.R. § 39.7(b)(4) (2010).

⁶¹ Such relevant tools include compliance workshops, seminars, and the dissemination of “lessons learned” information.

12. CMEP: Spot Checking (Appendix 4C, Sections 3.3 and 3.3.1)**a. NERC Filing**

112. NERC proposes certain non-substantive or conforming changes to CMEP Sections 3.3 and 3.3.1. These sections detail the process that a Compliance Enforcement Authority (NERC or a Regional Entity) will follow while conducting Spot Checking of a registered entity's compliance with the Reliability Standards. Section 3.3 states that Spot Checking may be initiated by the Compliance Enforcement Authority at any time to verify or confirm Self-Certifications, Self Reporting, and Periodic Data Submittals. The section further states that Spot Checking may be random or may be initiated in response to events, as described in the Reliability Standards, or to operating problems, or system events. The Compliance Enforcement Authority reviews the information submitted to verify the registered entity's compliance with the Reliability Standard. Compliance auditors may be assigned to the Spot Checking process by the Compliance Enforcement Authority as necessary.

b. Commission Determination

113. While we approve NERC's proposed changes to CMEP Sections 3.3 and 3.3.1, we direct NERC to revise its Spot Checking process so that Regional Entities are required to submit their spot check reports to NERC in the same manner as they do Compliance Audit Reports.⁶² Currently, Regional Entities are not required to submit spot check reports to NERC under either CMEP Section 3.3 or Section 8.0 (Reporting and Disclosure). However, Spot Checking, as defined in CMEP Section 1.1.29 and described in Section 3.3, is similar to a targeted Compliance Audit because it is used to assess compliance with particular Reliability Standards or in response to a specific event or operating problem. Section 3.3.1 further establishes a process for Spot Checking that is similar to the process for conducting Compliance Audits in CMEP section 3.1.6. We believe that requiring Regional Entities to submit spot check reports to NERC, and requiring NERC to provide them on a non-public basis to the Commission, will further NERC's and the Commission's oversight into whether enforcement of the Reliability Standards is conducted consistently and accurately. As such, NERC is directed to revise Section 3.3 and/or Section 3.3.1 to include a reporting component for spot check reports similar to that included in the second paragraph of Section 3.1.6 for Compliance Audit Reports. However, Spot Checks also are similar in nature to Compliance Investigations because they focus on compliance with respect to specific situations and events. Just as there is no provision in CMEP Section 3.4 for the public disclosure of documents relating to Compliance Investigations, we see no reason for a public posting of spot check reports.

⁶² NERC June 9, 2010 Filing, Attachment 14A at Section 3.1.6.

13. CMEP: Presence of Counsel (Appendix 4C, Section 3.4.1)**a. NERC Filing**

114. NERC proposes to amend CMEP Section 3.4.1 to authorize NERC or the Regional Entity to exclude registered entity representatives or their counsel when testimony is being taken or interviews conducted in a Compliance Investigation.

115. Revised Section 3.4.1 states in part:

The Compliance Enforcement Authority shall determine in each case (i) whether representatives of the Registered Entity shall be allowed to be present when an interview is taking place or testimony is being taken, and (ii) whether, and by what method, the interview or testimony shall be recorded; provided, that counsel for the person being interviewed or giving testimony may be present when the interview is being conducted or testimony is being taken (regardless of whether such counsel also represents the Registered Entity).

b. Comments

116. The ISOs express concern over the discretion given to the Compliance Enforcement Authority under the proposed amendment. The ISOs argue that registered entities should be entitled to have counsel attend Compliance Investigation interviews and other instances where testimony is given by employees because the employee will likely be viewed as speaking for the registered entity.⁶³ Further, the ISOs argue that Section 555(b) of the Administrative Procedure Act allows for a person to be accompanied and represented by counsel when compelled to appear before an agency. The ISOs argue that a registered entity should be viewed as a “person” present at interviews of employees “because the employee will be deemed to be speaking for the company in such circumstances.”⁶⁴

117. FirstEnergy also expresses concerns over the proposed amendment. FirstEnergy argues: (i) that the proposed amendments do not comport with due process; (ii) that the proposed amendments exceed NERC’s authority; and (iii) that no authority exists in

⁶³ ISO New England, Inc. and Electric Reliability Council of Texas, Inc. July 9, 2010 Comments at 13-14.

⁶⁴ *Id.* at 14.

section 215 of the FPA or the Commission's regulations that would permit NERC or the Regional Entities to compel sworn testimony.⁶⁵

c. NERC Answer

118. NERC answers that the proposed amendment is consistent with the Commission's directive in paragraphs 70-71 of the April 19, 2007 Order⁶⁶:

70. We believe that NERC must provide in its investigative procedures for an entity to provide a response under oath to a request for documents or information or to provide testimony under oath, when appropriate in the discretion of the compliance enforcement authority. Because the Uniform Compliance Program provides for determinations of violations that could lead to substantial penalty assessments, Regional Entities and NERC must have available a mechanism to ensure that factual submissions and statements by witnesses bearing upon these determinations possess a high degree of veracity. We direct NERC to revise section 3.4 accordingly.

71. . . . We also disagree with APPA that section 3.4 requires revision in order to expressly permit a registered entity's management and counsel to be represented at investigative interviews and to provide that a record of these interviews be created. We leave it to the investigative team's discretion to admit representatives of an entity's management to an interview of an employee, contractor or consultant, in light of the particular circumstances of the interview. Counsel for an entity may attend an interview, if the person being interviewed states or agrees that the entity's counsel also represents him or her. Likewise, counsel representing the person being interviewed may attend the interview, whether or not the counsel also represents the entity. We also leave to the discretion of the investigative team whether a record of an interview should be made and if so, how the interview should be recorded.

119. NERC states that in this order the Commission addressed the ability of NERC or the Regional Entity to take sworn statements on the record and to exercise discretion with respect to attendance by counsel for and management of the registered entity.⁶⁷ In addition, NERC contends that when the Commission approves a NERC or Regional

⁶⁵ FirstEnergy Companies July 9, 2010 Comments at 6-8.

⁶⁶ *North American Electric Reliability Counsel*, 119 FERC ¶ 61,060, at P 70-71 (2007) (April 19, 2007 Order).

⁶⁷ NERC July 26, 2010 Answer at 13-14.

Entity ROP or amendment, it becomes lawful consistent with both section 215 of the FPA and the Commission's regulations requiring Commission approval of Delegation Agreements.

d. Commission Determination

120. The Commission approves proposed Section 3.4.1 and agrees that NERC's amendment is consistent with the Commission's April 19, 2007 Order. As we stated in the April 19, 2007 Order, excluding representatives of the registered entities or their counsel from interviews of employees is justified in certain instances:

[W]e believe that in some circumstances, the presence of management personnel of an entity could benefit an investigative interview. At that time, an entity's management could explain its position on the subjects of the interview and provide additional information to the investigative team. Of course, an entity's management could also provide this information in separate interviews. In contrast, when an employee being interviewed may provide information that is adverse to the entity's management, the presence of management personnel could intimidate the employee.⁶⁸

121. Given these competing concerns, we believe it is appropriate that the Compliance Enforcement Authority have the discretion to exclude registered entity representatives, and their counsel, when interviewing employees and to determine the method of recording.

122. The Commission rejects the arguments raised in the comments. As we stated in the April 19, 2007 Order, as part of the enforcement regimen, the Regional Entities and NERC must be able to ensure the accuracy of factual submissions and statements by requiring parties to respond under oath to requests for documents or testimony. The comments fail to provide a basis for mandating that representatives of the registered entities or their counsel be present whenever an employee is interviewed. What is significant for due process is that under the proposed amendment the interviewee has her counsel present. In most cases, it is likely that counsel for the interviewee will also be counsel to the registered entity, thus rendering the concerns raised in the comments moot. This premise is supported by the fact that the registered entity will generally select who

⁶⁸ April 19, 2007 Order, 119 FERC ¶ 61,060 at P 71 n.51.

to produce for interview. But there may be instances where this is not the case, and as long as the interviewee has the right to have her counsel present and represent her, due process is satisfied. In sum, we believe that the amendments proposed by NERC are appropriate and consistent with our prior directives.

14. CMEP: Reporting and Disclosure (Appendix 4C, Section 8.0)

a. NERC Filing

123. The term “Alleged Violation” currently refers: (i) to a potential violation for which the Compliance Enforcement Authority has determined that evidence exists to indicate a registered entity has violated a Reliability Standard; and (ii) the first stage of the enforcement process. As a result of the changes to the CMEP proposed by NERC, “Alleged Violation” would no longer constitute the first stage of the enforcement process, and would now mean a possible violation for which a Compliance Enforcement Authority has determined based on an assessment of the facts and circumstances surrounding the possible violation that evidence indicates that a registered entity has violated a Reliability Standard.

b. Commission Determination

124. The Commission approves the proposed amendment to CMEP Section 8.0. NERC may adopt terminology that works best for the management of its procedures. This amendment, however, does not change any obligation that NERC may have to report to the Commission allegations of a standards violation.⁶⁹

The Commission orders:

(A) NERC’s revised *Pro Forma* Delegation Agreement, revised Delegation Agreements with the eight Regional Entities, amendments to the NERC ROP, and amendments to the Bylaws of FRCC and MRO are hereby conditionally approved, as discussed in the body of this order.

⁶⁹ See generally *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, at P 200 (2007). We understand that some allegations will not survive the preliminary screening procedure and many will be dismissed for valid reasons at some point during the enforcement process. Nevertheless, the Commission requires this information to conduct proper oversight.

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(B) NERC is hereby directed to submit a compliance filing within 120 days from the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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