

**UNITED STATES OF AMERICA**  
**Before the**  
**FEDERAL ENERGY REGULATORY COMMISSION**

**NORTH AMERICAN ELECTRIC )**  
**RELIABILITY CORPORATION )**

**Docket No. RR10-11-000**

**MOTION OF THE**  
**NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION**  
**TO SUBMIT ANSWER TO COMMENTS ON**  
**PETITION FOR APPROVAL OF REVISED PRO FORMA DELEGATION**  
**AGREEMENT, REVISED DELEGATION AGREEMENTS WITH THE EIGHT**  
**REGIONAL ENTITIES, AND AMENDMENTS TO THE NERC RULES OF**  
**PROCEDURE**

The North American Electric Reliability Corporation (“NERC”), pursuant to 18 C.F.R. §§ 385.212 and 385.213, respectfully requests leave to submit this answer to the comments filed in response to NERC’s *Petition for Approval of Revised Pro Forma Delegation Agreement, Revised Delegation Agreements with the Eight Regional Entities, and Amendments to the NERC Rules of Procedure* filed on June 9, 2010 and amended on June 17, 2010 (“NERC Petition”). Four sets of substantive comments were filed by the due date of July 11, 2010.<sup>1</sup> NERC requests leave to file this answer to the filings by the ISOs, FirstEnergy and NPPD, all of which were addressed to proposed changes in NERC’s Rules of Procedure (“ROP”), in order that the Federal Energy Regulatory Commission (“Commission”) has a complete and accurate record upon which to make an informed decision.

**I. MOTION FOR LEAVE TO FILE ANSWER**

The Commission’s rules do not permit the filing of answers to protests, unless otherwise ordered. *See* 18 C.F.R. § 385.213(a)(2) (2010). The Commission has, however, granted motions

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<sup>1</sup> Comments in support of the NERC Petition were submitted by Florida Reliability Coordinating Council. Comments also were filed (i) jointly by ISO New England Inc. and Electric Reliability Council of Texas, Inc. (the “ISOs”); (ii) FirstEnergy Service Company (“FirstEnergy”), on behalf of its affiliated FirstEnergy Companies; and (iii) Nebraska Public Power District (“NPPD”), which submitted a Motion to Intervene and Protest and a Motion for Clarification.

for leave to file such answers if they will clarify the issues in dispute, ensure a complete and accurate record, or otherwise provide information that will assist the Commission in its decision-making process.<sup>2</sup> To ensure that the Commission has a complete and accurate record upon which to make a decision, NERC requests leave to submit this answer to the filings of the ISOs, FirstEnergy, and NPPD.

## II. ANSWER

As noted above, the comments filed by the ISOs, First Energy and NPPD are addressed to various proposed revisions to the NERC ROP, and not to the proposed revised *pro forma* Delegation Agreement or the eight individual Delegation Agreements. As described in the NERC Petition, NERC posted proposed amendments to the ROP on its website for a 45-day comment period, as required by its Bylaws.<sup>3</sup> Comments were received from a total of 17 individuals and organizations, including the ISOs, FirstEnergy and NPPD.<sup>4</sup> NERC and the Regional Entities considered these comments and made a number of changes to the proposed amendments before they were submitted to the NERC Board of Trustees for approval.<sup>5</sup> In the NERC Petition, the proposed amendments to the ROP were described and explained in detail in a

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<sup>2</sup> See, e.g., *San Diego Gas & Electric v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,219, at P14, n. 7 (2004) (answer was accepted as it “provided information that assisted [the Commission in its] decision-making process”); *Michigan Electric Transmission Co.*, 106 FERC ¶ 61,064, at P 3 (2004) (the permitted answer “provides information that clarifies the issues”); *North American Electric Reliability Corporation, Order Certifying NERC as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 61,062, at P 24 (2006) (reply comments of NERC and others accepted “because they have provided information that assisted us in our decision-making process”); *North American Electric Reliability Corporation, Order Conditionally Accepting 2007 Business Plan and Budget of the North American Electric Reliability Corporation, Approving Assessments to Fund Budgets and Ordering Compliance Filings*, 117 FERC ¶ 61,091, at P 18 (2006) (same); *North American Electric Reliability Corporation, Order on Compliance Filing*, 119 FERC ¶ 61,248, at P 6 (2007) (same); *North American Electric Reliability Corporation, Order on Compliance Filing*, 127 FERC ¶ 61,209 (2009), at P 5 (same).

<sup>3</sup> NERC Petition at pp. 62-63.

<sup>4</sup> All the comments that were received are posted on NERC’s Web site at [www.nerc.com](http://www.nerc.com) under “Governance” – “Rules of Procedure” – “Proposed Changes to NERC Rules of Procedure and Appendices – March 16, 2010 Posting.”

<sup>5</sup> NERC Petition at p. 63.

total of 58 pages of text in the narrative Petition.<sup>6</sup> Therefore, the ISOs' assertions that NERC did not provide for sufficient stakeholder input on the proposed ROP amendments, and has not sufficiently explained the amendments in its filing, as required by 18 C.F.R. § 39.10, is unfounded.<sup>7</sup> Appropriate opportunity was provided for stakeholder input on the proposed amendments; the stakeholder comments received were considered and used in revising the final set of amendments for NERC Board approval; and the basis and purpose of the proposed rule changes are discussed in detail in the NERC Petition.

As to the ISOs' further comments that the proposed amendments do not meet the standards for acceptance by the Commission, NERC respectfully disagrees and rests on the explanations for the amendments presented in the NERC Petition and on the further explanations provided in this Answer with respect to the specific amendments commented on by the ISOs, FirstEnergy and NPPD. NERC has adequately supported the amendments as being just, reasonable, not unduly discriminatory or preferential and in the public interest.

## **1. ROP Definitions and Conforming Changes**

### **Preliminary Screen**

ISOs seek clarification of the new defined term "Preliminary Screen" in the ROP, stating it is not clear if it involves an analysis of the evidence of noncompliance, or why a "positive finding" under the Preliminary Screen should lead to a finding of Possible Violation.<sup>8</sup> By way of background, under the current NERC Compliance Monitoring and Enforcement Program ("CMEP"), Appendix 4C to the ROP, if a possible failure of a registered entity to comply with an applicable Reliability Standard is identified, it is designated as an "Alleged Violation" and a

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<sup>6</sup> NERC Petition at pp. 63-122.

<sup>7</sup> *Motion to Intervene and Comments of ISO New England, Inc. and Electric Reliability Council of Texas, Inc.* ("ISO Comments") at pp. 4-5.

<sup>8</sup> ISO Comments at pp. 6-8.

Notice of Alleged Violation is issued to the registered entity. Under the current CMEP, this term is used until dismissal or conclusion of the assessment process, both before and after any substantive review occurs. However, the Regional Entities have adopted the practice of issuing to registered entities notices variously styled as “Initial Notice of Alleged Violation,” “Preliminary Notice of Violation,” “Preliminary Notice of Alleged Violation,” and similar terms, before issuing the “Notice of Alleged Violation” called for by the current CMEP. The “Preliminary Notice of Alleged Violation” and similarly-styled notices issued by the Regional Entities are not expressly provided for in the current CMEP. To bring consistency to these practices and establish a common form and content of an initial notice to the registered entity that a possible noncompliance with an applicable Reliability Standard has been identified and is under review, the proposed amendments establish the defined terms “Possible Violation” and “Notice of Possible Violation,” and procedures for their identification and issuance.

Additionally, the “Possible Violation” also determines the point at which the Regional Entity must report to NERC, and NERC must report to the Commission, the discovery of evidence or allegations of noncompliance with a Reliability Standard, as required by previous Commission directives. The Commission requires the Regional Entities to provide to NERC, and NERC to provide to the Commission, early notice to the Commission of evidence and allegations of violations, before they have been fully determined to be Alleged Violations, in some instances within 48 hours after discovery.<sup>9</sup> Establishing consistency of the definition and procedures is fully consistent with the Commission’s previous orders and expectations for such early notice.

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<sup>9</sup> *Order Accepting ERO Compliance Filing, Accepting ERO/Regional Entity Delegation Agreements, and Accepting Regional Entity 2007 Business Plans*, 119 FERC ¶ 61,060 (2007) (“April 19, 2007 Order”), at PP 200-201, citing 18 C.F.R. § 39.7(d).

*See* the detailed discussion and explanation of the amendments to the CMEP processes and the related definitions at pages 95-97, 109-114, and 117-119 of the NERC Petition.

Thus, with the proposed amendments, the various steps that have been in place (both formally and informally) during the pendency of an “Alleged Violation” under the current CMEP are more expressly defined and set forth to provide greater transparency and consistency in the process. The Preliminary Screen is the very first (preliminary) step in evaluating the discovery, through the various compliance monitoring methods, of an entity’s possible failure to comply with an applicable and enforceable Reliability Standard. It does not entail a review of evidence of noncompliance, but rather consists 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.” (Amended Appendix 4C, § 1.1.22) Before the “Possible Violation” step is reached, the Preliminary Screen requires a verification that the entity is included on the NERC Compliance Registry and was responsible for compliance with an enforceable Reliability Standard for the period at issue.

Once an affirmative determination has been made that an entity passes the Preliminary Screen, the possible failure to comply with an applicable Reliability Standard is designated as a “Possible Violation,” and a “Notice of Possible Violation” is issued to the registered entity.<sup>10</sup> The “Possible Violation” is reported to NERC, and by NERC to the Commission, for tracking purposes, and is then subject to a substantive review of the evidence to determine if there is sufficient evidence to allege a violation. If sufficient evidence is found, the matter is designated as an “Alleged Violation,” and a “Notice of Alleged Violation” is issued to the registered entity.

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<sup>10</sup> As noted above, the uniform “Notice of Possible Violation” replaces the notices variously styled as “Initial Notice of Alleged Violation,” “Preliminary Notice of Violation,” “Preliminary Notice of Alleged Violation” and so forth heretofore used by the Regional Entities.

On the other hand, if the Preliminary Screen results in a determination that the entity was not registered and/or was not subject to an applicable, enforceable Reliability Standard that may have been violated, then no further action is taken.

### **Possible Violation**

The ISOs also express concern that, under the amended CMEP, any “system disturbance” will result in a finding of “Possible Violation” and that every “system disturbance” will result in a Compliance Investigation.<sup>11</sup> NERC respectfully submits that the ISOs’ concerns are overstated. NERC does not hold the view that every system disturbance is necessarily due to a violation of a Reliability Standard. Nevertheless, NERC and the Regional Entities have an obligation to review system disturbances to understand what happened and why and also to evaluate whether there were in fact any violations of Reliability Standards, and whether new or revised Reliability Standards are required to prevent “preventable” system disturbances. In all events, prior to a determination being made that there is a “Possible Violation,” there must be identification of a Registered Entity’s possible failure to comply with an applicable and enforceable Reliability Standard – neither NERC nor a Regional Entity would issue a “Notice of Possible Violation” simply because a system disturbance has occurred.<sup>12</sup>

More generally, NERC respectfully submits that the ISOs are attaching undue consequences to the identification of a “Possible Violation” and issuance of a “Notice of Possible Violation.” A “Possible Violation” is **not** an “Alleged Violation.” Rather, “[a]fter issuing the Notice of Possible Violation, the Compliance Enforcement Authority conducts an assessment of the facts and circumstances surrounding the Possible Violation to determine whether evidence

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<sup>11</sup> ISO Comments at p. 8.

<sup>12</sup> Per the definition of “Notice of Possible Violation,” NERC or the Regional Entity must be able to provide a brief description of the Possible Violation that has been identified and the Reliability Standard requirement(s) and the date(s) involved. Amended Appendix 4C, § 1.1.19.

exists to indicate the Registered Entity has violated the subject Reliability Standard requirement(s), or whether the Possible Violation should be dismissed.”<sup>13</sup> As explained at pages 117-118 of the NERC Petition, “The Possible Violation stage is the stage at which the Regional Entity first has identified a possible failure by a Registered Entity to comply with a Reliability Standard that is applicable to the Registered Entity, **but the Regional Entity has not taken the additional investigative or assessment steps to determine that the matter is an Alleged Violation**” (emphasis added).

### **Capitalization of Terms in the ROP**

The ISOs question why the terms “possible violation,” “alleged violation,” and “confirmed violation” are capitalized in Appendix 4C but not in the body of the ROP.<sup>14</sup> NERC acknowledges that this may be viewed as an inconsistency in presentation between the body of the ROP (*i.e.*, Sections 100 through 1600), on the one hand, and Appendix 4C (and certain other Appendices) on the other hand, in that defined terms are generally not capitalized in the body of the ROP but are capitalized in Appendix 4C and other Appendices. In developing the proposed amendments, NERC considered addressing this inconsistency in presentation. However, because defined terms generally are not capitalized in Sections 100-1600 of the ROP, eliminating this inconsistency would have necessitated numerous additional amendments to Sections 100-1600 of the ROP, *i.e.*, to capitalize all defined terms in the body of the ROP. NERC believed that introducing these significant additional amendments to this filing, for essentially non-substantive purposes, would unduly complicate this set of proposed amendments and was not warranted at

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<sup>13</sup> See NERC Petition at p. 111; amended Appendix 4C, § 5.2.

<sup>14</sup> ISO Comments at p. 10.

this time.<sup>15</sup> NERC can address the capitalization of defined terms in Sections 100 – 1600 of the ROP in connection with a future filing for approval of amendments.

### **Conforming Changes**

Finally with respect to the definitions in amended Appendix 4C, the ISOs assert that the revised definition of Confirmed Violation requires conforming changes to ROP Sections 402.4, 1506.1 and Appendix 4C Section 8.0 relating to public disclosure of both Confirmed Violations and settlements reached with respect to Alleged Violations.<sup>16</sup> They assert that it is not clear in these sections that a settlement will be posted when the related Notice of Penalty (“NOP”) is issued and that the identity of the settling registered entity will be disclosed.

No changes are required to these provisions of the ROP and Appendix 4C as presented in the NERC Petition. Section 402.4 of the ROP and Section 8.0 of Appendix 4C relate to Notices of Confirmed Violations only. A Notice of Confirmed Violation can include a settlement in which an entity has admitted to the violation. Public posting and filing requirements related to settlement agreements generally are separately addressed in ROP Sections 401.11 and 1506.1, and in Section 5.6 of Appendix 4C. Section 401.11.3 of the ROP and Section 5.6 of Appendix 4C explicitly provide that Confirmed Violations and settlement agreements (or a summary of the settlement), as well as the identity of the settling registered entity, are publicly disclosed in the NOP when it is filed with the Commission by NERC.<sup>17</sup>

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<sup>15</sup> However, the proposed amendments do include amendments to Attachment 2, Hearing Procedures, to the CMEP (Appendix 4C) to more consistently capitalize defined terms, and not capitalize terms that are not defined terms. *See* NERC Petition at p. 120.

<sup>16</sup> ISO Comments at pp. 11-13.

<sup>17</sup> The one circumstance in which a settlement agreement or the identity of the violator would not be publicly disclosed is where such public disclosure would reveal critical energy infrastructure information or other confidential information. *See* Section 401.11.3 of the ROP.



## **2. ROP Sections 401 and 403**

### **Section 401.11.3**

The ISOs assert that amended ROP Section 401.11.3, stating that NOPs will contain “sufficient facts to enable owners, operators and users of the bulk power system to evaluate whether they have engaged in or are engaging in similar activities,” “sets an unduly high expectation as to the utility of the Notices of Penalty.”<sup>18</sup> However, this provision is included in currently effective Section 408.6.3, with the only change being to revise “assist” to “enable.” The ISOs state that “assist” is a more appropriate term. NERC does not believe that the amendment reflects an unduly high expectation, but rather an objective to strive for excellence. The word change was made in recognition of the fact that registered entities are (or should be), in the first instance, undertaking self-assessments of their compliance activities. NERC supports rigorous self-evaluations by registered entities and is working to provide sufficient facts to “enable” registered entities to recognize, from the information provided in Notices of Penalties and settlement agreements, that they may be engaged in the same noncompliances. NOPs are publicly disclosed, in part, both to share lessons learned with the industry to avoid recurrence of the same noncompliances, and to provide a deterrent from engaging in the same or similar activities underlying a given violation.<sup>19</sup>

### **Section 401.12**

The ISOs assert that amended ROP Section 401.12 should state a specific time period, *e.g.* every 12 months, for when NERC CMEP staff will review and analyze reports of violations to identify trends, chronic violators and other pertinent reliability issues; and should also state

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<sup>18</sup> ISO Comments at p. 14.

<sup>19</sup> Although the ISOs state that a NOP “may contain a relatively high-level description of the facts, or a high-level description of the relationship between those facts and the alleged violation” (ISO Comments at p. 14), NERC submits that the descriptions of the facts and the noncompliance in its NOPs are typically quite detailed.

that a purpose of such reviews is to provide information to relevant NERC Committees.<sup>20</sup> NERC does not believe that such changes are required. At present, NERC CMEP staff is reviewing and analyzing information on an ongoing basis. Public presentations by NERC CMEP and Reliability Assessments staff are made at each of the quarterly NERC Board of Trustees and Member Representatives Committee meetings, with significant numbers of stakeholders present. Information on reliability trends is publicly posted on NERC's Web site.<sup>21</sup> With respect to violations, all NOPs are publicly posted on the Web site under the "Compliance" tab.<sup>22</sup> NERC has also begun posting to its Web site a series of Compliance Analysis Reports that focus on the most frequently-violated standards.<sup>23</sup> In addition, NERC CMEP staff regularly participate in Regional Entity compliance workshops where trends and other compliance issues are discussed with stakeholders. Further, NERC believes that specifying that analyses will be conducted and reports issued by the Regional Entities and NERC on a specific frequency would lead to the analyses being conducted and reports issued only on those "deadlines," and would result in a loss of flexibility to conduct analyses and issue reports more or less frequently, as circumstances warrant, than the specified periodicity.

### **Section 403.10**

The ISOs state that amended ROP Section 403.10, which strikes the phrase that information requests and submissions will be "in accordance with established procedures of NERC and the regional entity," should be rejected.<sup>24</sup> The ISOs contend that there should be

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<sup>20</sup> ISO Comments at p. 15.

<sup>21</sup> The Reliability and Assessments webpage is: <http://www.nerc.com/page.php?cid=4>. Compliance Violation Statistics are located at <http://www.nerc.com/page.php?cid=3|304>.

<sup>22</sup> NERC's Enforcement and Mitigation webpage (where NOPs are posted): <http://www.nerc.com/filez/enforcement/index.html>.

<sup>23</sup> See <http://www.nerc.com/page.php?cid=3|329>.

<sup>24</sup> ISO Comments at 15-16. The subject amendment is as follows: "All bulk power system owners, operators, and users within the regional entity responsible for complying with reliability standards shall submit timely and accurate

understandable criteria and procedures promulgated for information requests. ROP Section 403.10, among other sections, specifies that NERC and Regional Entities may request information and that bulk power system users, owners and operators are obligated to submit timely and accurate information when requested. This provision is in accordance with the Commission's regulations at 18 C.F.R. § 39.2(d), which recognize the need for NERC and Regional Entities to be able to request and obtain from users, owners, and operators of the bulk power system information to carry out the provisions of Section 215 of the Federal Power Act.<sup>25</sup>

NERC's ROP specify criteria and procedures for requesting and obtaining information in various contexts, and also specify procedures for maintaining the confidentiality of information provided, including critical infrastructure information. However, there will be different forms and types of requests for information, as well as circumstances under which information is needed, and it is not necessary or appropriate to identify each and every form in the rules. The rules make clear that NERC and the Regional Entities may request information. The overriding requirement applicable to all requests for information is that the information requested be necessary to implement Section 215 of the Federal Power Act. Specific requests for information will set forth the form and content required for submittal of information in response to requests from NERC and Regional Entities. Questions regarding any specific information request can be addressed to and resolved with the requesting entity based on the particular circumstances applicable at the time.

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information when requested by the regional entity or NERC, ~~in accordance with established procedures of NERC and the regional entity.~~"

<sup>25</sup> "Each user, owner or operator of the Bulk-Power System within the United States (other than Alaska or Hawaii) shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement section 215 of the Federal Power Act as determined by the Commission and set out in the Rules of the Electric Reliability Organization and each applicable Regional Entity." 18 C.F.R. § 39.2(d).

### 3. ROP Sections 807-808

FirstEnergy states that the amendments to ROP Sections 807-808 should be “revisited” for further revisions after NERC revises its processes for event analysis. No specific changes are proposed or identified.<sup>26</sup> NERC believes this comment is premature and does not warrant changes at this time. NERC acknowledges that future revisions to NERC’s processes for event analysis may necessitate or warrant further amendments to the ROP.

The ISOs state, with respect to the amendment to ROP Section 808, that NERC should provide more specific criteria and procedures as to how and what information would be requested.<sup>27</sup> Section 808 sets forth the basis upon which NERC and Regional Entities may request information in connection with the analysis of off-normal events, potential system vulnerabilities, and system performance. Again, such requests are authorized by the Commission’s regulations at 18 C.F.R. § 39.2(d). 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 such information requests in Section 808 could limit the flexibility of NERC and the Regional Entities to request the specific items of information needed in light of the particular circumstances of the event to be analyzed. However, 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.

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<sup>26</sup> *Motion to Intervene and Comments of FirstEnergy Companies* (“FirstEnergy Comments”) at p. 4.

<sup>27</sup> ISO Comments at pp. 10-11.

#### 4. CMEP Section 3.4.1

The ISOs state that the amended Section 3.4.1 of Appendix 4C, which includes proposed amendments authorizing NERC or the Regional Entity to exclude registered entity counsel or other representatives when testimony is being taken or interviews conducted in a Compliance Investigation, should be rejected, and instead should affirmatively permit counsel for the registered entity to be present in the interview.<sup>28</sup> FirstEnergy states that these amendments do not comport with procedural due process.<sup>29</sup> However, amended Section 3.4.1 is consistent with the Commission's determinations in PP 70-71 of its *April 19, 2007 Order*. In that 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:

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 . . . disagree . . . 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.<sup>51</sup> 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.<sup>11</sup> 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.

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<sup>28</sup> ISO Comments at pp. 13-14.

<sup>29</sup> FirstEnergy Comments at pp. 6-8.

In footnote 51, the Commission further explained:

<sup>51</sup> However, we 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.

FirstEnergy also states that these proposed amendments to Section 3.4.1 of Appendix 4C exceed NERC's authority, and that NERC and the Regional Entities do not have authority under the Federal Power Act or the Commission's regulations to compel sworn testimony.<sup>30</sup> However, as shown above, the amended provisions are in accordance with a Commission Order on this topic. Further, the source of NERC's and the Regional Entities' authority is the requirement in Section 215 and the Commission's regulations that NERC and Regional Entity rules, and amendments thereto, must be submitted to and approved by the Commission.<sup>31</sup> When the Commission approves a NERC or Regional Entity ROP or amendment, it becomes lawful.

#### **5. ROP Appendix 4B, Section 3.3**

FirstEnergy argues that amendments to Section 3.3 of Appendix 4B to the ROP, the *Sanction Guidelines*, unduly restrict settlement negotiation because, under the amendment, NERC or the Regional Entity "may decline to enter into or continue settlement negotiations after the possible violation (or alleged violation) becomes a Confirmed Violation."<sup>32</sup> According to FirstEnergy, even after a Confirmed Violation is found, settlement discussions should be allowed

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<sup>30</sup> FirstEnergy Comments at pp. 6-8.

<sup>31</sup> Federal Power Act, Section 215(f); 18 C.F.R. § 39.10. In addition, the Commission must approve the delegation agreements between NERC and the Regional Entities (Federal Power Act, Section 215(e)(4); 18 C.F.R. § 39.8), and the delegation agreements incorporate the NERC CMEP.

<sup>32</sup> FirstEnergy Comments at p. 5. Although not stated by FirstEnergy, the same assertion is applicable to amended Section 5.6 of Appendix 4C.

to continue with respect to penalties, sanctions and mitigation plans.<sup>33</sup> Additionally, FirstEnergy asserts that it should be clarified that if NERC remands a penalty determination to the Region, settlement discussions can be reopened.<sup>34</sup>

However, the proposed amendments are appropriate because, simply put, there must be a point of finality in the processing of violations. The ROP, including the CMEP in Appendix 4C, clearly lay out the due process steps by which a Possible Violation or Alleged Violation is finally resolved. A Confirmed Violation is, by definition, an Alleged Violation for which an entity has: (1) accepted the finding of the violation by a Regional Entity or NERC and will not seek an appeal, or (2) completed the hearing and appeals process within NERC, or (3) allowed the time for requesting a hearing or submitting an appeal to expire, or (4) admitted to the violation in a settlement agreement. (Amended Appendix 4C, § 1.1.9) As specified in Section 5.3 of amended Appendix 4C, the Notice of Alleged Violation will have included the proposed penalty or sanction determined by the Compliance Enforcement Authority to be applicable to the Alleged Violation. Therefore, at such time as an Alleged Violation becomes a Confirmed Violation, there is nothing further to negotiate with respect to penalties and sanctions.

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 (amended Appendix 4C, § 5.6). Practically speaking, the registered entity can request settlement negotiations upon receiving a Notice of Possible Violation, which occurs before the Regional Entity has even determined there is an Alleged Violation. Even if the registered entity does nothing until it receives a Notice of Alleged Violation, it then has 30 days to respond to the Notice of Alleged Violation and, after responding, 40 days to negotiate with the

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<sup>33</sup> FirstEnergy Comments at p. 5.

<sup>34</sup> FirstEnergy Comments at p. 6.

Regional Entity (amended Appendix 4C, § 5.4). Finally, again as a practical matter, settlement negotiations over a Possible Violation or Alleged Violation are necessarily going to include negotiations concerning penalties or sanctions and Mitigation Plans relating to the Possible Violation or Alleged Violation. 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.

With respect to Mitigation Plans, under Section 6.4 of amended Appendix 4C they are to be submitted within 30 days after the issuance of a Notice of Alleged Violation, if the registered entity is not contesting the Alleged Violation. However, regardless of when the registered entity submits its proposed Mitigation Plan, Sections 6.4 and 6.5 of amended Appendix 4C specify a process by which the Regional Entity and/or NERC reviews and accepts or rejects (in the latter case, with a statement of reasons) the Mitigation Plan, and the registered entity has the opportunity to resubmit a revised Mitigation Plan. In short, the CMEP allows for a process between the registered entity and the Compliance Enforcement Authority by which the final terms of the approved Mitigation Plan will be determined.

FirstEnergy also seeks clarification that, if NERC remands a penalty determination to the Regional Entity, settlement discussions can be reopened.<sup>35</sup> Again, no changes to the proposed rules are required. Former Section 5.4, now designated as Section 5.6 of amended Appendix 4C, 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. If a revised settlement cannot be reached, the enforcement process will continue to conclusion.

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<sup>35</sup> FirstEnergy Comments at p. 6.



## 6. ROP Section 1208

NPPD submitted two pleadings, a Motion to Intervene and Protest and a Motion for Clarification. In both pleadings, NPPD requests clarification that proposed new ROP Section 1208 will not apply to its “pending” request to “transfer” from Midwest Reliability Organization (“MRO”) to Southwest Power Pool Regional Entity (“SPP RE”), that NERC and the Regions will continue to process the request, and that it will not have to be “refiled” once Section 1208 goes into effect.<sup>36</sup>

As an initial matter, and in response to both pleadings, NERC has already advised NPPD that it does not intend to apply the pending ROP Section 1208 to NPPD’s request to be placed within SPP RE for compliance monitoring and enforcement purposes. Appended to NPPD’s Motion to Intervene and Protest, NPPD included the June 29, 2010 letter from NERC to MRO and SPP RE, with a copy to NPPD, which clearly states that NERC was moving forward on NPPD’s request and that the proposed rule changes were prospective only:

Work on the base delegation agreements and rule changes has been completed and filed with the Federal Energy Regulatory Commission (FERC) for approval. As you know, NERC included a new Rule 1208 in the Rules of Procedure to deal with requests of this nature on a going forward basis; however, because it may be many months before we receive FERC approval of the proposed rule changes, NERC has determined that it is appropriate to move forward with the pending requests for transfer at this time.<sup>37</sup>

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<sup>36</sup> NERC is well aware that NPPD seeks to be placed into SPP RE for compliance monitoring and enforcement purposes, and, as discussed herein, NERC has taken action to address the matter. However, apparently as evidence of its request, NPPD has attached to its filings its letter notifying MRO, pursuant to the applicable provisions of the MRO Bylaws, that NPPD is withdrawing from membership in MRO. Whether NPPD is or is not a member of MRO or SPP RE has nothing to do with which Regional Entity shall have delegated compliance monitoring and enforcement authority over NPPD (just as no registered entity is required to be a member of NERC). Rather, the issue is whether it is appropriate to amend the Delegation Agreements between NERC and MRO and between NERC and SPP RE so as to provide that SPP RE, rather than MRO, will be delegated compliance monitoring and enforcement authority over NPPD as a registered entity.

<sup>37</sup> Letter dated June 29, 2010 from NERC to MRO and SPP RE at pp. 1-2. As noted earlier in this Answer, under Section 215 of the Federal Power Act and the Commission’s regulations, a proposed amendment to NERC’s ROP cannot be effective unless and until it is approved by the Commission.

Toward this end, NERC requested MRO and SPP RE to submit a detailed written report within 45 days of the date of NERC's letter evaluating the proposed transfer and identified the issues MRO and SPP RE must address in the report. NERC also set forth the next steps for consideration by the NERC Board of Trustees, including the public posting, and the ultimate filing with the Commission.<sup>38</sup> Therefore, no action is necessary on NPPD's Motion for Clarification.

In response to the concerns NPPD expressed with respect to proposed Section 1208, NPPD expressed these same concerns in comments it submitted on the proposed ROP amendments when they were posted for stakeholder comment on the NERC Web site. NERC and the Regional Entities met and discussed NPPD's comments (and all the other stakeholder comments), but decided that only one revision to the posted Section 1208 was warranted based on NPPD's comments (specifically, an additional public notice and comment period was added to the procedure).

NPPD's criticisms of proposed Section 1208 include:

- There is no overall timeline or deadlines for consideration of a request to transfer to a different Regional Entity.<sup>39</sup>
- The criteria to be considered by the two Regional Entities are unduly focused on the impacts of the transfer on the Regional Entities, are slanted towards providing the status quo, and do not include “‘promot[ing] effective and efficient’ administration of the bulk power system.”<sup>40</sup>
- There is no opportunity to listen to or see the discussions among the two Regional Entities or otherwise know what they discuss.<sup>41</sup>
- Although two comment periods are provided, there is no opportunity for reply comments; further, the comment period prior to consideration by the NERC Board of Trustees could

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<sup>38</sup> *Id.* at pp. 1-2.

<sup>39</sup> *Motion to Intervene and Protest of the Nebraska Public Power District* (“NPPD Comments”) at p. 12.

<sup>40</sup> NPPD Comments at p. 5.

<sup>41</sup> NPPD Comments at p. 9.

conceivably be set to end the day before the Board of Trustees' decision, meaning the Board of Trustees could not meaningfully consider the comments received.<sup>42</sup>

- The registered entity requesting the transfer is only a passive party and is dependent on the Regional Entity to pursue the request.<sup>43</sup>
- A right is not provided for the requesting registered entity to appeal an adverse decision by the NERC Board of Trustees to the Commission.<sup>44</sup>

NPPD contends that proposed Section 1208 fails to articulate the statutory standard that a delegation agreement shall “‘promote effective and efficient administration’ of bulk-power system reliability.”<sup>45</sup> However, “effective and efficient administration” is an ultimate conclusion to be reached. The factors that must be considered as specified in proposed Section 1208 are the granular details that must be evaluated to determine if transferring delegated compliance monitoring and enforcement authority for a registered entity from one Regional Entity to another will support “effective and efficient administration of bulk power system reliability.”

ROP Section 1208 establishes a formal process for considering, evaluating, approving (or rejecting) and seeking appeal of a NERC Board decision disapproving a proposed transfer. The contention that the process is intended to preserve the status quo is unfounded. To the contrary, Section 1208 establishes a workable process for evaluating a request to be transferred to another Regional Entity for compliance monitoring and enforcement purposes. A registered entity does not have a right to choose the Regional Entity that will be its Compliance Enforcement Authority, or to define the priorities of a Regional Entity or NERC by virtue of a request to be transferred to a different Regional Entity. Rather, the determination to be made – for which proposed Section 1208 establishes an appropriate process – is whether the delegation agreements

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<sup>42</sup> NPPD Comments at p. 11.

<sup>43</sup> NPPD Comments at p. 9.

<sup>44</sup> NPPD Comments at p. 12.

<sup>45</sup> NPPD Comments at p. 5. This is one of the criteria that the Commission must find to be met in order to approve a delegation agreement. Section 215(e)(4) of the Federal Power Act.

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.

Amendments to the delegation agreements necessarily require consideration by the Regional Entities and NERC prior to any decision, as well as Commission approval. NPPD ignores the complexities involved. There are budget and resource impacts that must be addressed, ongoing compliance activities that must be considered, and amendments to delegation agreements that must be filed and approved, all of which takes time to evaluate and process, and all of which bear on “effective and efficient administration of bulk power system reliability.”

NERC and the Regional Entities are committed to timely processing of any such requests to be transferred, as evidenced by the actions to proceed with NPPD’s request separate and apart from the pending ROP amendments. Therefore, the Commission should decline to adopt the timeline that NPPD proposes or to develop an alternative timeline, and should continue to allow NERC and the Regional Entities to prioritize their workload.

In addition, contrary to NPPD’s comments, registered entities need not be involved in the discussions between the Regional Entities regarding whether a transfer will be approved or rejected. Contrary to NPPD’s position, under the process provided for in proposed Section 1208, a registered entity seeking to be transferred has several opportunities to provide information in support of its request. No changes are required.

Finally, NPPD is correct that proposed Section 1208 does not provide for a right of appeal by the registered entity to FERC if the request to be transferred is denied by NERC. However, Section 1208 is a NERC ROP and only pertains to the operations and procedures of NERC pursuant to its statutory authority. If the NERC Board decides that the delegation agreements of two Regional Entities should not be amended to transfer the delegated compliance

monitoring and enforcement authority over a particular registered entity from one Regional Entity to the other, the registered entity is free to challenge that decision at the Commission through whatever pleading is appropriate under the Commission's rules. The registered entity's filing would be to request that the Commission order the necessary amendments to NERC's delegation agreements with the two Regional Entities.

## **7. General**

Finally, the ISOs assert, without giving a list, that there are some ROP changes that may not be necessary at this time and would benefit from further development with the NERC membership.<sup>46</sup> NERC believes that each of the revisions embodied in the instant filing are supported and warrant approval.

### **III. CONCLUSION**

NERC respectfully requests that the Commission: (1) grant NERC's motion for leave to file this Answer; and (2) issue an order pursuant to 18 C.F.R. § 39.3(c)(2) approving the Pro Forma Delegation Agreements, Revised Delegation Agreements with the Eight Regional Entities, and Amendments to the NERC Rules of Procedure.

Respectfully submitted,

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<sup>46</sup> ISO Comments at 5.

**CERTIFICATE OF SERVICE**

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

Dated at Washington, D.C., this 26th day of July, 2010.

/s/ Rebecca J. Michael  
Rebecca J. Michael

*Assistant General Counsel for North  
American Electric Reliability Corporation*