

120 FERC ¶ 61,260
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

North American Electric Reliability Council, Docket No. RR06-1-008
North American Electric Reliability Corporation

Delegation Agreement Between the North American Docket No. RR07-1-001
Electric Reliability Corporation and Texas Regional
Entity, a division of ERCOT

Delegation Agreement Between the North Docket No. RR07-2-001
American Electric Reliability Corporation and
Midwest Reliability Organization

Delegation Agreement Between the North American Docket No. RR07-3-001
Electric Reliability Corporation and Northeast
Power Coordinating Council: Cross Border
Regional Entity, Inc.

Delegation Agreement Between the North American Docket No. RR07-4-001
Electric Reliability Corporation and ReliabilityFirst
Corporation

Delegation Agreement Between the North American Docket No. RR07-5-001
Electric Reliability Corporation and SERC Reliability
Corporation

Delegation Agreement Between the North American Docket No. RR07-6-001
Electric Reliability Corporation and Southwest Power
Pool, Inc.

Delegation Agreement Between the North American Docket No. RR07-7-001
Electric Reliability Corporation and Western
Electricity Coordinating Council

Delegation Agreement Between the North American Docket No. RR07-8-001

Electric Reliability Corporation and Florida
Reliability Coordinating Council

North American Electric Reliability Corporation

Docket No. RR06-3-003

ORDER ON REHEARING

(Issued September 21, 2007)

1. Southwest Power Pool, Inc. (SPP); the Western Electricity Coordinating Council (WECC); FirstEnergy Service Company (FirstEnergy); Alcoa, Inc. (Alcoa); and the Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC) seek rehearing and/or clarification of the April 19, 2007 order, which accepted eight Delegation Agreements between North American --Electric Reliability Corporation (NERC) and each of the Regional Entities.¹ For the reasons discussed below, we deny rehearing and grant, in part, and deny, in part, clarification. We also dismiss, as moot, CAC/EPUC's request for clarification.

Background

2. In the *April 19 Order*, the Commission took the final major step forward in the establishment of a new mandatory reliability regime for the nation's Bulk-Power System, consistent with the requirements of section 215 of the Federal Power Act (FPA),² our Final Rule implementing section 215,³ and our prior orders certifying NERC to serve as the Electric Reliability Organization (ERO) for the continental United States.⁴

¹ See *North American Electric Reliability Corporation*, 119 FERC ¶ 61,060 (2007) (*April 19 Order*).

² Pub. L. No. 109-58, 119 Stat. 594, 941-46 (2005), to be codified at 16 U.S.C. § 824o.

³ See *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 757-65 (2006), *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁴ See *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062 (2006) (*ERO Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on second compliance filing*, 118 FERC ¶ 61,030 (2007). See also *North American Electric Reliability Corporation*, 117 FERC ¶ 61,091 (2006) (*Business Plan and Budget Order*), *order on reh'g*, 119 FERC ¶ 61,059 (2007).

3. Consistent with these authorizations and requirements, the *April 19 Order* accepted NERC's revisions to its *pro forma* Delegation Agreement providing for the delegation of certain ERO duties and functions to NERC's designated Regional Entities.⁵ The *April 19 Order* also accepted each of NERC's eight proposed unexecuted Regional Entity Delegation Agreements, to become effective upon execution and re-filing.⁶ In addition, the *April 19 Order* accepted, as a part of the *pro forma* Delegation Agreement, and subject to certain proposed regional deviations applicable to several of the individual Regional Entity Delegation Agreements, a Uniform Compliance Monitoring and Enforcement Program (Uniform Compliance Program), as set forth at Appendix 4C to the NERC Rules of Procedure.

4. In accepting NERC's filings, the *April 19 Order* also identified areas of concern and, where necessary to provide greater uniformity and clarity, required modifications to the *pro forma* and individual Delegation Agreements, the exhibits to these agreements, and to the Uniform Compliance Program. The *April 19 Order* required that these modifications be submitted to the Commission within 180 days of the date of the Commission's order. Finally, the *April 19 Order* accepted NERC's proposed Regional Entity business plans for 2007 and clarified the guidelines that would be applied by the Commission in its review of the NERC/Regional Entity 2008 business plans and budgets.

Requests for Rehearing and Clarification

5. As noted above, rehearing and/or clarification of the *April 19 Order* is sought by SPP, WECC, FirstEnergy, Alcoa, and CAC/EPUC. These requests are briefly summarized below, followed by a fuller recitation of the petitioners' supporting arguments in the discussion section of this order that follows.

6. SPP: SPP seeks clarification regarding two issues related to the SPP Delegation Agreement. First, SPP seeks clarification that NERC is not authorized, or required, to approve SPP's budget and bylaws as they relate to SPP's regional transmission

⁵ NERC's eight Regional Entities are: (i) Texas Regional Entity (TRE), a Division of the Electric Reliability Council of Texas (ERCOT); (ii) Midwest Reliability Organization (MRO); (iii) Northwest Power Coordinating Council: Cross Border Regional Entity, Inc.; (iv) ReliabilityFirst Corporation; (v) SERC Reliability Corporation (SERC); (vi) SPP; (vii) WECC; and (viii) Florida Reliability Coordinating Council.

⁶ On June 5, 2007, the Commission accepted the eight executed Delegation Agreements. See *Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT, et al.*, 119 FERC ¶ 61,232 (2007).

organization (RTO) duties and functions, i.e., to non-Regional Entity matters.⁷ Second, SPP seeks clarification regarding the *April 19 Order*'s rejection of SPP's proposed \$6,000 membership fee.⁸ SPP requests clarification that the Commission's ruling does not preclude SPP from re-filing its proposed fee as an RTO-wide tariff requirement, under FPA section 205.

7. WECC: WECC asserts as error the *April 19 Order*'s directive that WECC's Uniform Compliance Program, at section 5.5, be amended to permit NERC to direct modification of a WECC enforcement decision, i.e., that WECC's proposed deviation to this provision, as accepted on an interim basis in the *April 19 Order*, be revised or deleted.⁹ WECC requests that the Commission, on rehearing, rescind this directive.

8. First Energy: FirstEnergy seeks clarification, or in the alternative rehearing, regarding the Commission's acceptance of certain provisions included in the Uniform Compliance Program and the NERC Rules of Procedure. Specifically, FirstEnergy asserts that: (i) modifications should be made to the Uniform Compliance Program at sections 5.2, 6.2, 6.6, and 8.0 and Attachment 2, section 3.0 (and a corollary provision in the NERC Rules of Procedure, at section 403.10.5) regarding general principles of agency and representation;¹⁰ (ii) a more detailed explanation of the term "reasonable

⁷ While the Commission, in the *April 19 Order*, did not address NERC's authority, or lack of authority, to review SPP's budget, the Commission did find that Exhibit E of the SPP Delegation Agreement was required to list SPP's non-statutory, i.e., non-Regional Entity-related, activities. *See April 19 Order*, 119 FERC ¶ 61,060 at P 428. The Commission also noted that SPP's bylaws are "Regional Entity Rules" under the Commission's regulations, which are subject to NERC approval and, if approved by NERC, Commission approval. *Id.* at P 404.

⁸ *Id.* at P 403.

⁹ *Id.* at P 159. WECC's Uniform Compliance Program, at section 5.5, currently provides: "On appeal, NERC shall either affirm or remand to the Regional Entity with its reasons for the remand."

¹⁰ In the *April 19 Order*, the Commission granted FirstEnergy's requested clarification that registered entities and other parties would be permitted to use general principles of agency and representation when acting on reliability matters, but did not require any language changes to the Uniform Compliance Program or the NERC Rules of Procedure. *See Id.* at P 198.

basis” should be provided at section 3.4.1, Step 9 of the Uniform Compliance Program;¹¹ (iii) the NERC Rules of Procedure, at section 407.3, are misleading and should be revised because they define a hearing as a “process for entities to contest a finding of noncompliance”;¹² (iv) section 5.4 of the Uniform Compliance Program should be revised to require NERC to post only confirmed violations on its website and protect against the disclosure of commercially sensitive material;¹³ and (v) a priority should be established where registered entities face conflicting obligations, with the highest priority given to any applicable Reliability Standard.¹⁴

9. Alcoa: Alcoa asserts as error the *April 19 Order*’s acceptance of the 2007 Regional Entity business plans.¹⁵ Alcoa further asserts, as error, the *April 19 Order*’s clarifications regarding the guidelines that will be applied to the NERC/Regional Entity 2008 budget and business plan submissions.¹⁶

10. CAC/EPUC: CAC/EPUC seeks clarification, or in the alternative requests rehearing, regarding an explanatory statement provided by WECC regarding its proposed deviations to the Uniform Compliance Program, at section 1.1.16, concerning the defined term, “regional compliance directory.”¹⁷ CAC/EPUC requests clarification that this provision does not permit WECC to use, or rely, on any supplemental registration criteria other than NERC criteria.

¹¹ In the *April 19 Order*, the Commission declined to require this clarification. *See Id.* at P 74.

¹² The *April 19 Order* did not address section 407.3 of the NERC Rules of Procedure.

¹³ In the *April 19 Order*, the Commission rejected FirstEnergy’s requests. *See Id.* at P 106, note 76.

¹⁴ In the *April 19 Order*, the Commission rejected FirstEnergy’s requests. *See Id.* at P 133.

¹⁵ *Id.* at P 597.

¹⁶ *Id.* at P 595.

¹⁷ In the *April 19 Order*, the Commission accepted WECC’s proposed deviations. *See Id.* at P 496.

Procedural Matters

11. Motions to intervene out-of-time were filed on May 21, 2007 by ERCOT and on June 11, 2007 by the American Public Power Association (APPA) and the National Rural Electric Cooperative Association (NRECA). ERCOT requests clarification, or in the alternative rehearing, that a reference to “the ERCOT bylaws” in the *April 19 Order*, at P 245, was not intended to make all ERCOT bylaws into “rules” subject to the Commission’s jurisdiction.¹⁸ APPA and NRECA challenge WECC’s “supplemental registration criteria,” as used by WECC to identify and register entities for NERC’s reliability compliance registry.¹⁹ An answer in opposition to APPA’s and NRECA’s motions was filed by WECC. An answer in support of APPA’s and NRECA’s motions was filed by the Southwest Transmission Dependent Utility Group.

12. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.²⁰ ERCOT, APPA and NRECA have not met this higher burden of justifying their late intervention. Accordingly, we deny their motions to intervene out-of-time. In addition, we will dismiss these entities’ requests for clarification and rehearing. Because these entities are not parties to this proceeding, they lack standing to seek clarification or rehearing of the *April 19 Order* under the FPA and the Commission’s regulations.²¹

Discussion

A. NERC’s Authority Over SPP RTO Matters

13. In the *April 19 Order*, the Commission noted that Exhibit E of the SPP Delegation Agreement failed to list SPP’s non-statutory activities, as required by the *ERO Certification Order*.²² Accordingly, the Commission directed NERC and SPP to do so in

¹⁸ SPP raises substantially the same issue as it relates to the SPP RTO.

¹⁹ This same issue is raised by CAC/EPUC.

²⁰ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

²¹ 16 U.S.C. § 8251(a) (2000); 18 C.F.R. § 385.713(b) (2007).

²² *April 19 Order*, 119 FERC ¶ 61,060 at P 428.

the form of a revised Exhibit E. In addition, the Commission clarified that the SPP bylaws are “rules,” under the Commission’s regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²³

14. SPP seeks clarification that the Commission’s Exhibit E requirement does not mean that NERC will be authorized, or required, to approve SPP’s RTO budget, including its budgetary allowances relating to its responsibilities for administering regional transmission services and a real-time market. SPP notes that, under Order No. 672, “[a]ny funding that is approved and provided by the ERO to a Regional Entity [will] be limited to a Responsible Entity’s costs related to the delegated functions.”²⁴ SPP adds that, under FPA section 215(b), an ERO’s authorities are limited to reliability matters, not other functions provided by an RTO.

15. We clarify as follows. The *April 19 Order* did not hold, or imply, that SPP’s identification of its non-statutory activities would be made for the purpose of giving NERC approval authority over these non-statutory matters. The Commission held, rather, that the identification of these activities is necessary only to “ensure that such activities do not compromise the Regional Entity’s oversight role or independence or present a conflict of interest with its oversight of transmission operators.”²⁵ In so holding, moreover, the Commission was simply restating the rationale on which it had relied in the *ERO Certification Order*.²⁶ Accordingly, we need not revisit this issue here.

16. SPP also seeks clarification regarding NERC’s authority to review SPP’s bylaws. Specifically, SPP requests clarification that only those portions of SPP’s bylaws relating to SPP’s Regional Entity’s responsibilities should be subject to NERC approval. SPP argues that, under FPA section 215, the ERO’s authorities are limited to the establishment and enforcement of Reliability Standards and do not include such non-reliability, RTO activities as the administration of a tariff. Accordingly, SPP seeks clarification that the portions of its bylaws that do not relate to NERC’s statutory responsibilities do not need to be submitted to NERC for its approval. Rather, SPP notes

²³ *Id.* at P 404, *citing* 18 C.F.R. §§ 39.1 and 39.10 (2007).

²⁴ *See* SPP request for clarification at 3, *citing* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 229.

²⁵ *April 19 Order*, 119 FERC ¶ 61,060 at P 428.

²⁶ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 580.

that any change to its existing bylaws are subject to the provisions of FPA section 206, given the fact that these bylaws were approved by the Commission as part of SPP's transition to a RTO.²⁷

17. The Commission grants clarification that only those provisions of the SPP bylaws that relate to the SPP Regional Entity functions require NERC approval. Such provisions constitute a Regional Entity Rule change pursuant to section 39.10 of the Commission's regulations.

18. However, SPP, as a "hybrid" organization, has not separated the provisions of its bylaws between its Regional Entity function and its RTO function. Section 9 of the SPP bylaws, titled "Regional Entity Function," delineates SPP's responsibilities as a Regional Entity, and would clearly require NERC approval. Further, SPP's delegation agreement identifies additional provisions of its bylaws that pertain to Regional Entity governance.²⁸ It is not clear whether additional SPP bylaw provisions relate to the Regional Entity function.

19. As stated above, SPP must submit to NERC for approval any revision to the SPP bylaws that relate to the SPP Regional Entity functions. In addition, any other proposed revision to the SPP bylaws that is filed with the Commission pursuant to sections 205 or 206 of the FPA must be served on NERC. As clarified above, NERC would not approve such a filing. However, this approach will provide NERC the opportunity to review such a proposed bylaw revision and determine whether it has any ramification to the Regional Entity function.

20. We therefore direct NERC to review subsequent revisions to the bylaws and to inform SPP and the Commission of any reliability-related issues that are raised by a proposed bylaw revision submitted pursuant to FPA sections 205 or 206, for the Commission's appropriate action.

²⁷ SPP notes that this clarification does not present an issue with regard to SPP's Regional Entity responsibilities, because the bylaw changes associated with these responsibilities were submitted by NERC in this proceeding.

²⁸ For example, Exhibit B to the SPP/NERC Delegation Agreement, which describes Regional Entity governance, references subsection 2.1, 3.16, 3.2, 3.5, 3.8-3.10, 4.2.3, 5.1, 6.1, 8.2 and 10.0 of the SPP bylaws.

B. SPP's Membership Fees

21. In the *April 19 Order*, the Commission rejected, as inconsistent with FPA section 215, SPP's proposal to assess its members a \$6,000 annual fee.²⁹ The Commission held that while Regional Entities may assess nominal membership fees, SPP's fees appear to exceed this limit. The Commission also held that funding of all statutory activities through NERC had been approved by the Commission, in the *Business Plan and Budget Order*, and that SPP, if it wished, could propose an appropriate fee in its annual budget filing.

22. SPP seeks clarification. SPP explains that its proposed fee would have applied to overall SPP membership, inclusive of SPP RTO membership. SPP further asserts that with, or without RTO membership status, any interested entity would be free to participate in SPP Regional Entity Reliability Standards development and other reliability matters. Accordingly, SPP seeks clarification that the Commission's rejection of this fee, in the context of NERC's SPP Regional Entity filing, does not preclude SPP from re-filing its proposal as an RTO membership fee under FPA section 205.

23. SPP does not challenge the substance of the Commission's prior determination on the \$6,000 Regional Entity membership fee. Without ruling on the merits of such a filing, we clarify that our earlier determination does not preclude SPP from filing a proposal to implement an RTO membership fee pursuant to section 205 of the FPA.

C. NERC's Review of WECC's Enforcement Decisions

24. In the *April 19 Order*, the Commission required NERC and WECC, in their 180-day filing, to modify WECC's deviation from the Uniform Compliance Program, at section 5.5.³⁰ The Commission found that WECC's deviation from NERC's provision would prevent NERC from carrying out its obligation to oversee Regional Entity compliance activities and to provide for consistency among the Regional Entities.

²⁹ *April 19 Order*, 119 FERC ¶ 61,060 at P 404.

³⁰ *Id.* at P 510. Section 5.5, as submitted in NERC's *pro forma* Uniform Compliance Program, provides, in relevant part, that "[t]he Registered Entity may appeal the hearing body's decision to NERC, as provided for in NERC Rules of Procedure, Sections 407.3 and 410." WECC's deviation, as stated *supra* at note 9, adds the following: "On appeal, NERC shall either affirm or remand to the Regional Entity with its reasons for the remand."

25. WECC seeks rehearing. First, WECC asserts that the *pro forma* provision, if not modified, will: (i) discourage settlements to the detriment of reliability; (ii) violate the rights of enforcement parties, particularly in the case of settlements; and (iii) invite circumvention of the WECC compliance hearing body process. WECC also notes, however, that it is currently in negotiations with NERC regarding this provision and may, in the near future, propose new compromise language addressing WECC's concerns. Accordingly, WECC, on rehearing, asks only that the Commission not finalize this aspect of the *April 19 Order*, pending the outcome of these negotiations.

26. We deny WECC's request for rehearing. We need not address, here, WECC's request for suspension of the *April 19 Order*, as it relates to section 5.5 of the WECC Uniform Compliance Program. In fact, NERC and WECC have already been granted the suspension that WECC requests. Specifically, the *April 19 Order* gave NERC and WECC 180 days from the date of that order to submit the modifications we required. With respect to these changes, moreover, the Commission stated that NERC and the Regional Entities may propose alternative language, provided that these revisions adequately address the Commission's underlying rationale or concern.³¹ WECC suggests that it and NERC may avail themselves of this opportunity. However, this proposal is not before us here and, as such, we cannot evaluate the relative merits of the existing provision *vis a vis* a revised proposal that has yet to be made.

D. Principles of Agency

27. In the *April 19 Order*, the Commission granted FirstEnergy's requested clarification that registered entities and other parties would be permitted to use general principles of agency and representation when acting on reliability issues.³²

28. FirstEnergy requests additional clarification. Specifically, FirstEnergy notes that while the Commission agreed with FirstEnergy, the Commission failed to direct NERC to

³¹ *Id.* at P 5.

³² *Id.* at P 198. The Commission held:

We agree with FirstEnergy that registered entities and other parties should be permitted to use general principles of agency and representation when acting on reliability issues pursuant to section 215. This determination is consistent with our practice for representatives of entities that appear before us, i.e., that all appearances be made and pleadings be executed by an entity's officer or other qualified representative. [cit. omitted].

make any clarifying changes to the Uniform Compliance Program or to the NERC Rules of Procedures.³³

29. NERC, if it wishes, may make the clarifications requested by FirstEnergy in its 180-day filing. However, we will not compel NERC to do so. Accordingly, we decline to grant the requested clarification sought by FirstEnergy. The Uniform Compliance Program uses the terms “officers” and “officer equivalents” when referring to those entities authorized to sign for, or appear, in an official capacity on behalf of registered entities. In the *April 19 Order*, we clarified that, in discharging their obligations under these provisions, registered entities and other parties would be permitted to use general principles of agency and representation. These statements provide the clarity that FirstEnergy seeks and no further revisions are necessary.

E. Investigations

30. In the *April 19 Order*, the Commission accepted section 3.4 of the Uniform Compliance Program regarding investigations of Reliability Standard violations. The Commission required that this provision be modified in NERC’s 180-day filing.³⁴ The Commission also rejected FirstEnergy’s request that revisions be made to the Uniform Compliance Program, at section 3.4.1, regarding the grounds for initiating an

³³ FirstEnergy requests that the NERC Rules of Procedure, at section 403.10.5, and the Uniform Compliance Program, at sections 5.2, 6.2, 6.6, and 8.0 and section 3.0 of Attachment 2, be amended to include this clarification. In addition, FirstEnergy states that in any other instance where the Commission agreed with commenters but failed to direct NERC to make a change to implement the recommended correction, the Commission should make clear that it directs NERC to take action to implement such changes. However, FirstEnergy fails to identify any such instances, other than the agency ruling noted above. Accordingly, our discussion and analysis, here, are limited to the Commission’s agency ruling.

³⁴ *April 19 Order*, 119 FERC ¶ 61,060 at P 65. Among other things, the Commission required that section 3.4 be clarified consistent with the understanding that NERC would not be required to explain its decisions to control an investigation to a Regional Entity’s satisfaction, and the Regional Entity would not be permitted to protest or appeal that determination. *Id.* at P 66.

enforcement proceeding. The Commission found that, while the compliance enforcement authority should have a reasonable basis to start an enforcement proceeding, including actual data or information, section 3.4.1, Step 9, is consistent with this understanding.³⁵

31. FirstEnergy requests clarifications regarding the preamble to section 3.4.³⁶ FirstEnergy asserts that section 3.4 is unduly broad and appears to grant the compliance enforcement authority unfettered discretion as to whether to initiate an investigation, inviting procedural unfairness and impinging upon legitimate due process interests. FirstEnergy argues that the Commission should require NERC to define when the compliance enforcement authority should commence an investigation. FirstEnergy requests that section 3.4 be revised to provide that investigations may begin only if the compliance enforcement authority is aware of facts or specific allegations, which, if true, would constitute a violation, as opposed to a mere suspicion of a violation.

32. FirstEnergy also renews its request that Step 9 of section 3.4.1 be revised to expressly define the term “reasonable basis.” Specifically, FirstEnergy asserts that, consistent with the clarification made by the *April 19 Order*, the term “reasonable basis” should be defined to mean that the ERO or Regional Entity, before initiating an enforcement action, must have “actual data or reliable information that suggests that a violation may have occurred.”

33. We decline to grant the clarifications requested by FirstEnergy. First, we decline to limit the language of the section 3.4 preamble with respect to the initiation of investigations. In fact, this preamble language appropriately gives NERC and the Regional Entities flexibility and discretion in initiating investigations. This discretion,

³⁵ *Id.* at P 74. Section 3.4.1, Step 9 states, in its entirety, as follows:

If the Compliance Enforcement Authority concludes that a reasonable basis exists for believing a violation has occurred, it shall send the registered Entity a notice containing the information set forth in section 5.1 [Notification to Registered Entity of Alleged Violation] and the process moves to step 3 (Notice of Alleged Violation) of the Compliance Program Process shown in Figure 3.0.

³⁶ The preamble to section 3.4 provides, in relevant part, that “[a] Compliance Violation Investigation may be initiated at any time by the Compliance Enforcement Authority in response to a system disturbance, Complaint, or possible violation of a Reliability Standard identified by any other means.”

moreover, is comparable to the discretion afforded by the Commission to its own investigative staff.³⁷ While FirstEnergy warns that this allowance may be subject to abuse, FirstEnergy's concerns are only speculative.

34. For the same reasons as stated above, we also decline to further define and limit the language of section 3.4.1, Step 9. FirstEnergy's suggested definition of "reasonable basis" could unduly hamstring the ERO's or a Regional Entity's ability to initiate an investigation in legitimate circumstances.

F. Hearing Procedures

35. In the *April 19 Order*, the Commission accepted attachment 2 to the Uniform Compliance Program, which consists of the hearing procedures applicable to the enforcement of Reliability Standards. The Commission also identified modifications to be addressed by NERC.³⁸

36. FirstEnergy, on rehearing, does not challenge these findings. However, FirstEnergy takes issue with the interplay between these procedures and the NERC Rules of Procedure. Specifically, FirstEnergy asserts that the NERC Rules of Procedure, at section 407.3, are misleading or inaccurate, because they define a hearing as a "process for entities to contest a finding of noncompliance." FirstEnergy suggests that this language is confusing because it suggests, or implies, that a hearing will be instituted only *after* a finding of noncompliance has been made, contrary to the investigation, enforcement and hearing procedures set forth in NERC's attachment 2 hearing procedures.

37. We decline to grant the clarification requested by FirstEnergy. We find that the asserted confusion claimed by FirstEnergy rests on an interpretation of section 407.3 that is itself strained and otherwise outweighed by the clear intent and specific language of the Uniform Compliance Program. In fact, under the Uniform Compliance Program, a registered entity, at an attachment 2 hearing, *is* entitled to "contest a finding of

³⁷ See 18 C.F.R. § 1b.6 (2007) ("The Commission or its staff may, in its discretion, initiate a preliminary investigation.")

³⁸ See *April 19 Order*, 119 FERC ¶ 61,060 at P 145.

noncompliance,” i.e., the preliminary finding giving rise to the hearing that, if not rebutted, would support a finding that a violation has occurred.³⁹ Thus, there is no basis to grant the clarification requested by FirstEnergy.

G. NERC’s Obligation to Post Settlements

38. In the *April 19 Order*, the Commission accepted section 5.4 of the Uniform Compliance Program, addressing the settlement of alleged violations.⁴⁰ The Commission also identified modifications to be addressed by NERC.⁴¹ In addition, the Commission rejected FirstEnergy’s requests that section 5.4 be revised to provide that NERC be allowed to post only confirmed violations. The Commission noted that this issue had

³⁹ See Uniform Compliance Program at section 1.1 (defining alleged violation as “[a] potential violation for which the Compliance Enforcement Authority has completed its accuracy and completeness review and has determined that evidence exists to indicate a Registered Entity has violated a Reliability Standard.”). See also *Id.* at section 5.1(ii) (stating that that a notice of an alleged violation must include the facts that the Compliance Enforcement Authority believes demonstrate or constitute the alleged violation).

⁴⁰ *April 19 Order*, 119 FERC ¶ 61,060 at P 104. Section 5.4 of the Uniform Compliance Program provides, in relevant part, as follows:

All settlement negotiations will be confidential until such time as the settlement is approved by NERC.... The Regional Entity shall report the terms of all settlements of compliance matters to NERC. NERC will review the settlement for the purpose of evaluating its consistency with other settlements entered into for similar violations or under other, similar circumstances. Based on this review, NERC will either approve the settlement or reject the settlement and notify the Regional Entity and the Registered Entity of changes to the settlement that would result in approval...NERC will (i) report the approved settlement of the violation to FERC or Applicable Governmental Authority, and (ii) publicly post the violation settled and the resulting penalty or sanction provided for in the settlement. The Compliance Enforcement Authority will issue a letter setting forth the final settlement terms including all penalties, sanctions and mitigation requirements provided for in the final settlement.

⁴¹ Specifically, NERC was directed to modify section 5.4 to state that settlement negotiations may occur at any time until a notice of penalty is filed with the Commission or an applicable governmental authority. *April 19 Order*, 119 FERC ¶ 61,060 at P 104.

already been addressed and resolved by the Commission in the *ERO Certification Order*, wherein the Commission had found that, subject to certain exceptions, an alleged violation would be treated as confidential only until a notice of penalty is filed with the Commission or resolved by an admission, settlement, or other negotiated disposition.⁴²

39. FirstEnergy, on rehearing, renews its objections to section 5.4. Specifically, FirstEnergy contends that the Commission should require that NERC only post confirmed violations on its website. According to FirstEnergy, NERC should not post alleged violations that have resulted in a settlement. FirstEnergy asserts that this policy will discourage settlements. FirstEnergy also argues that this policy may lead to unnecessary controversy, or confusion, if a third party concludes wrongly that a violation has, in fact, occurred. FirstEnergy argues that, in the case of a settlement, NERC should be permitted to post only a summary of the reliability issue and any advice concerning such reliability issues. FirstEnergy also asserts that NERC should be given the discretion to accept settlements containing non-disclosure provisions, similar to the treatment provided by the Commission's regulations.⁴³

40. We deny FirstEnergy's request for rehearing. First, we note that FirstEnergy does not allege any error in the Commission's earlier determination and, in fact, states that this is a matter for Commission discretion.⁴⁴ Moreover, FirstEnergy's argument is a collateral attack on the *ERO Certification Order*, which determined that an alleged violation would be treated as confidential until, *inter alia*, the matter is resolved by a settlement.⁴⁵ We also point out that NERC's procedures are consistent with the Commission's policy to make publicly available settlements of enforcement actions. FirstEnergy's claim that

⁴² *Id.* at P 106, note 74, *citing ERO Certification Order*, 116 FERC ¶ 61,062 at P 402 and 18 C.F.R. § 39.7(d)(4) (2007) (providing that NERC's authorization to post information about settlements is subject to a prohibition against public disclosure of a violation or alleged violation that relates to a cybersecurity incident or that would jeopardize bulk-power system reliability if publicly disclosed, unless the Commission otherwise directs). *See also* section 403.18 of the NERC Rules of Procedure ("NERC shall publicly post each violation (whether confirmed or not) that is settled, and the resulting penalty or sanction").

⁴³ *See* FirstEnergy request for clarification at 10, *citing* 18 C.F.R. § 385.606(j) (2007) (permitting parties to avail themselves of privileged treatment in settlement proceedings).

⁴⁴ *Id.* at 8.

⁴⁵ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 402.

NERC's disclosure policy will discourage settlements or confuse third parties is speculative. While NERC or a Regional Entity settlement should (with specific exceptions set forth in our regulations) be made public pursuant to NERC's Rules of Procedure, an entity may seek confidential treatment of specific information set forth in a settlement agreement pursuant to NERC's confidentiality rules, section 1500 of the NERC Rules of Procedure.

H. Conflicting Obligations

41. In the *April 19 Order*, the Commission addressed FirstEnergy's request that the Uniform Compliance Program be amended to establish a safe harbor from enforcement actions resulting from situations in which a registered entity's deviation from a Reliability Standard was either directed or caused by an apparently conflicting legal requirement. FirstEnergy also requested that in such instances, the registered entity should not be deemed or found to have violated the Reliability Standard or be subject to penalties. In the *April 19 Order*, the Commission also rejected FirstEnergy's proposal to establish a safe harbor from enforcement actions, findings of violations, and sanctions in a situation in which a registered entity's apparent violation of a Reliability Standard was directed or caused by an apparently conflicting legal requirement.⁴⁶

42. On rehearing, FirstEnergy requests that the Commission direct NERC to establish a priority mechanism to address the potential for these conflicting obligations, with the highest priority given to any applicable Reliability Standard. FirstEnergy suggests that such a priority mechanism is anticipated by several statutory provisions, including FPA section 215(d)(6). According to FirstEnergy, section 215(d)(6) requires that the rules promulgated by the ERO include fair processes for the identification and timely resolution of conflicts between a Reliability Standard and a tariff, rate schedule or

⁴⁶ The *April 19 Order* noted that, in Order No. 693 (at P 133, n.86), the Commission had determined that the ERO and Regional Entities will retain ongoing enforcement discretion as would any enforcement entity. The *April 19 Order* further noted that NERC and the Regional Entities should evaluate whether to issue a notice of alleged violation, find violations, and impose appropriate sanctions based on the facts presented, rather than erect blanket exemptions from potential enforcement actions in advance of considering individual cases. In addition, the Commission found that the Uniform Compliance Program will provide Regional Entities and NERC with sufficient tools to ascertain the relevant facts and to find, or decline to find, violations. Finally, the Commission noted that the NERC Sanction Guidelines also allow for the informed discretion necessary for the Regional Entities and the ERO to apply appropriate remedies and sanctions for violations. *Id.* at P 133.

agreement.⁴⁷ In addition, FirstEnergy asserts that the Commission is authorized and should act, under FPA section 215(e)(2), to grant relief from the application of penalties or sanctions to registered entities that may have relied on one obligation as opposed to a conflicting reliability obligation.⁴⁸

43. We deny FirstEnergy's rehearing request for all of the reasons relied upon by the Commission in the *April 19 Order*.⁴⁹ Moreover, contrary to FirstEnergy's assertion, section 215(d)(6) of the FPA requires the Commission, not the ERO, to develop in a final rule "fair processes" for the resolution of conflicts between a Reliability Standard and a tariff, rate schedule or agreement approved by the Commission. In fact, the Commission developed such processes in Order No. 672 and section 39.6 of our regulations.⁵⁰ Accordingly, FirstEnergy's request for rehearing on this issue is denied.

I. The 2007 Regional Entity Business Plans

44. In the *Business Plan and Budget Order*, the Commission stated that it would "reserve judgment" on the proposed Regional Entity business plans until the Regional Entity delegation agreements are filed.⁵¹ Further, the Commission agreed with Alcoa that differences between Regional Entity business plans should be minimized, and any that remain should be justified.

⁴⁷ See FirstEnergy request for rehearing at 10-11.

⁴⁸ FPA section 215(e)(2) authorizes the Commission to "order, affirm, set aside, reinstate, or modify [a] penalty [imposed by NERC], and, if appropriate, remand to [NERC] for further proceedings." Section 215(e)(2) also requires the Commission to "implement expedited procedures for such hearings."

⁴⁹ *April 19 Order*, 119 FERC ¶ 61,060 at P 133.

⁵⁰ 18 C.F.R. § 39.6 (2007). Consistent with the statute, section 39.6(c) of the Commission's regulations provides that a Transmission Organization must continue to comply with the Commission approved tariff, rate schedule or agreement until the Commission finds that a conflict exists, the Commission orders a change to such provisions, and the ordered change becomes effective.

⁵¹ 117 FERC ¶ 61,091 at P 69.

45. In the *April 19 Order*, the Commission accepted the Regional Entity 2007 business plans.⁵² The Commission found that these business plans are generally consistent with (and reflect) the statutory functions previously accepted by the Commission and made a part of the *pro forma* Delegation Agreement at Exhibit E, section 1. The Commission also found that these business plans had been further supported and clarified by the submissions made in connection with the individual Regional Entity Delegation Agreements, i.e., by the Regional Entities' bylaws, the Regional Entity standards development manuals, the individual Exhibit E recitations regarding the Regional Entities' authorized activities, and by the additional requirements NERC and the Regional Entities were directed to address in NERC's 180-day filing. The Commission also dismissed Alcoa's objections to these business plans, noting that Alcoa's concerns (as initially raised by Alcoa in Docket No. RR06-3-000 – the NERC/Regional Entity 2007 budget and business plan proceeding) had been addressed by the exhibits and appendices submitted by NERC as part of its Delegation Agreements filings.⁵³

46. Alcoa, on rehearing, renews its objections to the Regional Entity 2007 business plans. First, Alcoa renews its concern that there were significant disparities among the regions regarding their respective budgets.⁵⁴ Alcoa also renews its request that the Commission determine whether there are meaningful differences in the functions to be performed by each Regional Entity that would justify these budget disparities.

47. The Commission denies Alcoa's request for rehearing. As discussed above, NERC provided additional information regarding the jurisdictional activities of the

⁵² *April 19 Order*, 119 FERC ¶ 61,060 at P 597. These business plans were initially submitted by NERC in Docket No. RR06-3-000, along with the Regional Entity 2007 budgets. The 2007 budgets were accepted by the Commission. *See North American Electric Reliability Corporation*, 117 FERC ¶ 61,091 (2006). However, the Commission deferred ruling on the Regional Entity 2007 business plans, pending NERC's submission of the Regional Entity delegation agreements.

⁵³ However, the Commission also recognized that greater consistency among the Regional Entity budgets and business plans and better transparency will be required in the future to ensure that funding will be limited to statutory functions and will reflect an appropriate, cost-effective way of administering the Regional Entities' statutory functions. The Commission found that the forum for raising these issues will be the annual budget filings.

⁵⁴ Alcoa notes that the MRO user charge (\$0.000025 per kWh) is greater than the SERC user charge (\$0.000011 per kWh).

Regional Entities in its delegation agreement filing. The Commission in the *April 19 Order* was satisfied with this information and accepted the regional business plans, which it deferred when acting on NERC's 2007 budget filing. While Alcoa renews its general concerns, it does not identify specific discrepancies among the Regional Entity business plans or explain why any such specific differences are problematic.

48. While Alcoa points out that the MRO's user charge per kWh is greater than SERC's, such comparisons are not indicative that the cost of one program is necessarily more reasonable than the other. Without Alcoa providing a sufficient level of detail regarding its concerns, the Commission denies Alcoa's request for rehearing on the general concern that the information offered by NERC in the delegation agreement filing was insufficient.

49. Further, NERC's 2007 budget and business plan was developed during a time of transition from voluntary to mandatory reliability oversight. The Commission, in reviewing NERC's 2007 budget and business plan, identified certain informational requirements that it had not articulated previously. Thus, the Commission directed NERC to provide specific information in its 2008 budget filing, including the identification and justification of differences among Regional Entity budgets and business plans, when NERC submits the budgets and business plans for 2008. While Alcoa acknowledges but minimizes the significance of this requirement, the Commission's approach is reasonable in light of the period of transition and the identification of specific informational requirements identified by the Commission in the course of the 2007 review process.⁵⁵

J. Supplemental Registration Criteria

50. In the *April 19 Order*, the Commission accepted WECC's proposed deviations to the *pro forma* Uniform Compliance Program, including, at section 1.1.16, WECC's

⁵⁵ Moreover, while the Commission, in the *Business Plan and Budget Order*, agreed with Alcoa that the differences between Regional Entity business plans should be minimized and otherwise justified, the information provided by NERC in the delegation agreements showed an adequate degree of consistency among the Regional Entities regarding the activities that they consider jurisdictional, under the 2007 transitional circumstances. Thus, NERC's filings provided information to satisfy our previously articulated concern.

proposed deviations to the defined term, “regional compliance directory.”⁵⁶ WECC’s proposed deviations, in relevant part (and as shown in italics, below), defined WECC’s regional compliance registry as a list created “pursuant to section 500 of the NERC Rules of Procedure *and the NERC Statement of Registration Criteria. . .*” WECC explained in the transmittal material accompanying NERC’s submission of the WECC Delegation Agreement, that this reference to NERC’s registration’s criteria represents *another* source of registration criteria.

51. CAC/EPUC seeks clarification regarding the meaning of section 1.1.16, in light of WECC’s explanatory information, as noted above. It is concerned that WECC, in referring to the NERC criteria as “another source,” implies that WECC is employing additional criteria. CAC/EPUC object to any interpretation of section 1.1.16 that would permit WECC to use, or rely on, any supplemental registration criteria other than NERC’s criteria.⁵⁷

52. We will dismiss, as moot, CAC/EPUC’s request for clarification regarding the meaning and intent of section 1.1.16 of WECC’s Uniform Compliance Program. In Order No. 693-A, we addressed CAC/EPUC’s argument in finding that WECC’s supplemental registration criteria were not appropriate.⁵⁸ The Commission stated:

With regard to the fact that certain Regional Entities have created supplemental criteria to determine which entities should be on the registry, we agree with California Cogeneration that this is not appropriate. Order No. 693 accepted NERC’s compliance registration process “to provide as much certainty as possible

⁵⁶ See *April 19 Order*, 119 FERC ¶ 61,060 at P 496. Under the *pro forma* language, the term, regional compliance registry, is defined, in its entirety, as follows:

A list, pursuant to section 500 of the NERC Rules of Procedure of the owners, operators or users of the bulk power system or the entities registered as their designees for the purpose of compliance within a Regional Entity’s geographic footprint that perform one or more functions in support of reliability of the bulk power system. The Registry is used to determine the Reliability Standards applicable to the Registered Entity.

⁵⁷ CAC/EPUC notes that, in fact, WECC has posted, on its website, “supplemental registration criteria.” CAC/EPUC argues that this supplemental criterion differs from the NERC criteria and should therefore not be permitted.

⁵⁸ See *Mandatory Reliability Standards for the Bulk Power System*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

regarding the applicability and responsibility of specific entities under the approved standards.” NERC’s Statement of Compliance Registry does not reference supplemental compliance registries created by Regional Entities. While both the Commission and the ERO have made it clear that an entity that falls below the minimum registry criteria may be included on the compliance registry on a facility-by-facility basis, nonetheless NERC’s compliance registry places the burden on the Regional Entity to reasonably demonstrate that the organization is a user, owner or operator of the Bulk-Power System. This language contemplates a case-by-case registration of entities outside the NERC criteria, provided that a reasonable demonstration of the need to register the entity is made by the Regional Entity.⁵⁹

53. This determination in Order No. 693-A addresses the CAC/EPUC concerns raised on rehearing in the current proceeding.

The Commission orders:

(A) Rehearing of the *April 19 Order* is hereby denied, as discussed in the body of this order.

(B) Clarification of the *April 19 Order* is hereby granted, in part, and denied, in part, as discussed in the body of this order, except as provided in ordering paragraph C, below.

(C) CAC/EPUC’s requests for clarification are hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.

⁵⁹ *Id.* at P 38 (footnotes omitted).