

122 FERC ¶ 61,142  
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.

Mandatory Reliability Standards for  
the Bulk-Power System  
North American Electric Reliability Corporation

Docket Nos. RM06-16-000  
RR08-1-000<sup>1</sup>

ORDER CONDITIONALLY APPROVING AMENDED RULES OF PROCEDURE

(Issued February 21, 2008)

1. On October 12, 2007, the North American Electric Reliability Corporation (NERC) filed an amendment to its Rules of Procedure. The amendment proposes a new section 1600, which would establish a process for NERC or a Regional Entity to issue requests for data or information. In this order we conditionally approve section 1600 of NERC's Rules of Procedure and direct NERC to make a compliance filing within 90 days of issuance of this order.

**I. Background**

2. On July 20, 2006, the Commission issued an order<sup>2</sup> certifying NERC as the Electric Reliability Organization (ERO) for the United States pursuant to section 215 of the Federal Power Act (FPA).<sup>3</sup> In the *Certification Order*, the Commission found that NERC generally satisfied the criteria to become the ERO responsible for developing and

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<sup>1</sup> NERC filed this request in Docket Nos. RM06-16-000 and RR08-1-000. We find, however, that it was not appropriate to file this request in Docket No. RM06-16-000. NERC should have filed in Docket No. RR08-1-000 only. Nevertheless, any future filings relating to Docket No. RR08-1-000 should be filed in both dockets.

<sup>2</sup> *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006).

<sup>3</sup> 16 U.S.C. § 824o (Supp. V 2005).

enforcing mandatory Reliability Standards for the United States under Order No. 672.<sup>4</sup> The Commission also approved NERC's proposed Rules of Procedure.<sup>5</sup>

3. As the ERO, NERC must submit any proposed rule or rule change to the Commission for its approval.<sup>6</sup> The filing must be accompanied by an explanation of the basis and purpose for the rule or rule change, together with a description of the proceedings conducted by the ERO to develop the proposal. Additionally, if necessary, the Commission may propose a change to a rule upon its own motion or upon a complaint. The rule or rule change will become effective upon a finding by the Commission, after notice and opportunity for public comment, that the rule or rule change is just, reasonable, not unduly discriminatory, is in the public interest and satisfies the Commission's regulations governing the development of ERO rules. NERC's rules must be consistent with the criteria for certification of an ERO set forth in the Commission's regulations.<sup>7</sup> Accordingly, NERC's rules must assure NERC's independence from users, owners and operators of the Bulk-Power System while assuring balanced decisionmaking.<sup>8</sup>

## II. Proposed Section 1600 of NERC's Rules of Procedure

4. NERC states that proposed section 1600, which encompasses proposed sections 1601 through 1605, establishes a process for NERC or a Regional Entity to issue requests for data or information that are necessary for either organization to fulfill its obligations under section 215 of the FPA. NERC states that the basis for this amendment is Order No. 672,<sup>9</sup> which adopted section 39.2(d) of the Commission's regulations.<sup>10</sup> NERC further states that section 39.2(d) authorizes both the ERO and the Regional Entities to

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<sup>4</sup> *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

<sup>5</sup> *Id.* P 672.

<sup>6</sup> 16 U.S.C. § 824o (Supp. V 2005); *see also* 18 C.F.R. § 39.10 (2007).

<sup>7</sup> *Id.* § 39.3.

<sup>8</sup> *Id.* § 39.3(b)(2).

<sup>9</sup> Order No. 672 at P 114 (“...to fulfill the obligations under this Final Rule, the ERO or a regional entity will need access to certain data from users, owners and operators of the Bulk-Power System.”).

<sup>10</sup> 18 C.F.R. § 39.2(d)(2007).

request data and information as necessary to implement section 215 of the FPA, and obligates users, owners and operators of the Bulk-Power System to respond to such requests.

5. NERC states that it conducted the proceedings to develop this proposal in accordance with section 1400 of its Rules of Procedure. Accordingly, NERC states that it posted the proposed section 1600 for a 45-day comment period and received 16 comments in response, which have been posted on its website. NERC further states that it modified the proposed provisions prior to submission to the board of trustees to take into account many of the comments received. Finally, NERC states that its board considered and approved proposed section 1600 at its meeting on August 1, 2007.

6. Proposed section 1601 of the Rules of Procedure defines the scope of a NERC or Regional Entity request for data or information as any data or information necessary to meet their obligations under section 215 of the FPA, as authorized by section 39.2(d) of the Commission's regulations. However, the provisions of section 1600 would not apply to the requirements contained in any Reliability Standard to provide data or information, nor would they apply to data or information requested in connection with a compliance or enforcement action under section 215 of the FPA, section 400 of NERC's Rules of Procedure, or any other procedures adopted under those authorities.

7. Under proposed section 1602, NERC would post a proposed request for data or information or a proposed modification to a previously authorized request for a 45-day public comment period. Each posted request would need to contain a description of the data or information requested, how it will be used, and how the availability of the data or information is necessary for NERC to meet its obligations under applicable laws and agreements. NERC would also be required to: describe how the data or information will be collected and validated; describe the entities that will be required to respond to the request; set a schedule or due date for responding to the request; describe any restrictions on disseminating the responsive data or information (e.g., "confidential" or "critical energy infrastructure information" (CEII)); and provide an estimate of the relative burden imposed by the request on the reporting entities to accommodate the request.

8. At the close of the comment period, NERC would consider the comments and make any appropriate modifications to the request. NERC's board would then have the authority to authorize NERC to issue, modify or remand the request for further approval. Upon issuance of the request, parties would have 30 days to appeal the Board's decision to issue the request. Under proposed section 1603, only users, owners and operators of the Bulk-Power System that are registered in the NERC compliance registry would be obligated to respond to an authorized request for data or information.

9. Under proposed section 1604, a Regional Entity would be able to ask NERC to authorize a request on its behalf either as a separate request or as part of a proposed NERC request for data or information. The Regional Entity could develop its own

procedures for making a request as long as they include at least the same procedural elements as are included in NERC's section 1600.

10. Proposed section 1605 addresses the protection of confidential information and CEII submitted in response to a request. Under section 1605, if the request includes a statement that the requested data or information be held confidential or treated as CEII, that data or information, once received, would be protected by the applicable provisions of section 1500 of NERC's Rules of Procedure without any further action by the submitting entity.<sup>11</sup> A submitting entity may designate any response as confidential or CEII and NERC or the Regional Entity would treat that response similarly. NERC or the Regional Entity may invoke additional protective measures for handling particular requests, as may be necessary under the circumstances.

### **III. Notice of the Filing and Responsive Pleadings**

11. Notice of NERC's proposed amendment was published in the *Federal Register*, 72 Fed. Reg. 60,010 (2007), with interventions and protests due on or before November 15, 2007. Timely motions to intervene were filed by the American Public Power Association, the Electric Reliability Council of Texas, Inc., PJM Interconnection, LLC, the Midwest Reliability Organization, and ReliabilityFirst Corporation. Bonneville Power Administration (Bonneville) also filed a timely motion to intervene and comments. FirstEnergy Service Company (FirstEnergy) filed a motion to intervene out-of-time.

12. Bonneville states that it is concerned that its ability to protect information under the Freedom of Information Act (FOIA)<sup>12</sup> could be affected by NERC's proposed section 1600. Bonneville points out that as a federal agency it is subject to FOIA and that under FOIA, release of information to an external party generally waives any privileges against disclosure with respect to subsequent requests to the federal agency for that same information. If disclosure of such information to NERC and any applicable Regional Entities did constitute a waiver under FOIA, Bonneville contends that waiver would frustrate the purpose of the confidentiality provision of proposed section 1600. Bonneville also suggests that external reviewers of critical federal security information may need to obtain federal security clearances before federal entities can allow such review. Bonneville states that it is willing to work with the Commission and NERC to

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<sup>11</sup> Section 1500 of NERC's Rules of Procedure generally defines confidential information and related terms, governs how NERC and Regional Entities will treat confidential information, including information that would jeopardize Bulk-Power System reliability, and describes how and under what circumstances others may gain access to such information, including an appeal process to challenge a denial of access to information.

<sup>12</sup> 5 U.S.C. § 552 (2000).

find a way to meet NERC's needs for data and information while also protecting the confidential nature of sensitive federal information.

#### **IV. Discussion**

##### **A. Procedural Matters**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

14. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2007), the Commission will grant FirstEnergy's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

##### **B. Commission Determination**

15. The Commission conditionally approves NERC's proposed section 1600. We find that NERC has articulated an appropriate scope for its requests for data or information. We also find that NERC has developed fair and enforceable procedures governing requests for and the provision of data or information. There remain, however, areas for improvement.

16. We direct NERC to clarify what it intends to do if it requires certain data or information more quickly than its proposed rules currently allow. Under section 1602, NERC must wait 45 days until its board of trustees can decide whether or not to issue, modify or remand a request for further approval. Once issued, parties have another 30 days to appeal the board's decisions to issue the request. Although we recognize the importance of this collaborative process, we also recognize that there could be situations where NERC would require information more quickly than this schedule permits. We therefore direct NERC to clarify how it will gather time-sensitive data or information, and, to the extent necessary, to amend its Rules of Procedure to provide a mechanism to gather time-sensitive data or information.

17. We support NERC's decision to allow Regional Entities to establish their own procedures for requesting data or information required to meet their own obligations under section 215 of the FPA, as long as any such procedures include at least the same procedural elements as are included in section 1600 of NERC's Rules of Procedure. We also find it appropriate to require Regional Entities to submit such procedures for requesting data or information to both NERC and the Commission for their approval.<sup>13</sup> We therefore direct NERC to amend proposed section 1604 accordingly.

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<sup>13</sup> 18 C.F.R. § 39.10 (2007).

18. With respect to proposed section 1605, we find that NERC has appropriately balanced its need for full and candid disclosure of data and information with the responding parties' needs to maintain the confidentiality of certain data and information. In response to Bonneville, however, we agree that a governmental entity subject to FOIA should not be required to submit sensitive information that could be deemed a waiver of a FOIA exemption that is otherwise available.<sup>14</sup> Accordingly, we direct NERC to work with Bonneville and other federal agencies listed on NERC's compliance registry to develop procedures that would allow the review of the requested information without risking waiver of FOIA protection. NERC should submit a compliance filing within 90 days of the date of this order detailing procedures to allow the review of federal agency data under section 1600. The Commission recognizes, however, that developing such procedures may take longer than 90 days. If necessary, NERC may instead file a status report 90 days from the date of this order detailing its progress in developing such procedures.

19. The Commission notes that failure to comply with a NERC data request could constitute a violation of section 39.2(d) of the Commission's regulations, which in relevant part requires each user, owner or operator of the Bulk-Power System to provide the Commission, NERC and the applicable Regional Entity with such information as is necessary to implement section 215 of the FPA, as determined by the Commission and set out in NERC's rules and the applicable Regional Entity's rules. NERC is required to inform the Commission if it determines that one of its rules has been violated or cannot be practically complied with.<sup>15</sup> Consistent with the requirements of section 39.2(d) of the Commission's regulations and given that the Commission may be called upon to exercise its enforcement authority, the Commission believes that it is important for it to receive notification of any requests for data or information issued by NERC or the Regional Entities, prior to the proposed request for data or information being posted for public comment. Therefore, NERC is directed to notify the Commission of, and to provide, any proposed request for data or information at least 21 days prior to its posting for public comment.<sup>16</sup> This notification of proposed requests is for informational purposes. We remind the ERO and the Regional Entities, however, that it is the Commission which has

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<sup>14</sup> 5 U.S.C. § 552b (2000).

<sup>15</sup> See NERC Rules of Procedure § 100. If appropriate, NERC should make any request for the Commission to enforce a data request through a non-public submission to the Commission's enforcement staff. The Commission also can exercise its enforcement authority without a request from NERC.

<sup>16</sup> NERC may submit proposed requests for data or information with less than 21 days prior notice in time-sensitive circumstances.

ultimate authority for determining the pertinence, scope and relevance of any ERO or Regional Entity request.<sup>17</sup>

The Commission orders:

(A) Section 1600 of NERC's Rules of Procedure is hereby conditionally approved.

(B) NERC is hereby directed to make a compliance filing within 90 days of the date of this order, as discussed in the body of this order. To the extent NERC is unable to make a compliance filing within 90 days, NERC shall supplement its compliance report with a status report detailing the progress it has made in developing such procedures.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>17</sup> In this regard, the notification of proposed requests ensures the Commission will have an opportunity to review such requests and to take action as may be appropriate.