

130 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability Corporation

Docket No. RR09-6-000

ORDER DIRECTING NERC TO PROPOSE MODIFICATION OF ELECTRIC
RELIABILITY ORGANIZATION RULES OF PROCEDURE

(Issued March 18, 2010)

1. In this order, pursuant to section 215(f) of the Federal Power Act (FPA),¹ the Commission directs the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), to propose modifications to its Rules of Procedure that pertain to the development of Reliability Standards.² With respect to the details of the modifications, we give NERC discretion to propose specific modifications that address the concerns identified herein, and we will issue a final order after receiving public comment on NERC's specific proposed modifications.

2. We take this action because of a growing concern that the current voting process in the ERO rules of procedure can be used to prevent compliance with Commission directives to address particular reliability matters. We recognize that the statutory paradigm in section 215 of the FPA, by which the ERO is responsible for developing Reliability Standards through a stakeholder process that represents a balance of interests, differs significantly from the rest of the FPA statutory framework. However, we do not

¹ 16 U.S.C. § 824o(f) (2006). Section 215(f) of the FPA provides that the Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule change "shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just and reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of [section 215(c)]."

² See NERC Rules of Procedure, Section 300 (Reliability Standards Development), and Appendix 3A (Reliability Standards Development Procedure). These two provisions of NERC's Rules of Procedure are referred to, collectively, as the "Standards Development Process" throughout this order.

interpret section 215 to permit a process by which voting stakeholders or stakeholder committees in effect can prevent the ERO from adequately responding to Commission directives to address specific reliability matters, nor do we believe that Congress intended this paradigm. While we do not anticipate that the current voting process and other process rules will be used in this way as a matter of course, a particular event has raised concerns sufficient to cause us to direct NERC to propose modifications to the process.

3. Specifically, NERC should develop a proposed modification to its Rules of Procedure to address a conflict between NERC's Standards Development Process and its obligation as the ERO to comply with a Commission directive pursuant to section 215(d)(5) of the FPA.³ Section 215(d)(5) authorizes the Commission to direct the ERO to submit to the Commission a proposed new or modified Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Standard appropriate to carry out section 215. Under NERC's Standards Development Process, however, each new or modified Reliability Standard must be approved by two-thirds of the stakeholder ballot body before it can be presented to the NERC board of trustees. Consequently, if just more than one third of a ballot pool votes against a Reliability Standard drafted to comply with a Commission directive, the Standard will be rejected, not presented to the NERC board of trustees for a vote, and not submitted to the Commission for review – even in circumstances where the Standard would have complied with the Commission's directive. Thus, under current ERO rules, the ballot body can delay or prevent NERC's compliance with its obligation under section 215(d) of the FPA. As discussed in more detail below, this occurred with respect to a Commission order directing the ERO to modify FAC-008-1, a Reliability Standard governing Bulk-Power System facility ratings.

4. We further note that before a new or modified draft Reliability Standard reaches the stakeholder ballot body, it is drafted by a team of industry volunteers that may or may not agree with the Commission's directive. Under the current process, a Standards drafting team populated by industry volunteers can develop a new or modified draft Reliability Standard that is not responsive to a Commission directive to draft a new or modified Standard, and the ballot body can approve the non-responsive Standard. If this occurs, it would leave the NERC board of trustees with a Hobson's choice of either rejecting the draft Reliability Standard or approving a Standard not responsive to a Commission directive for submission to the Commission.

5. To resolve the conflict between the Standards Development Process and the ERO's statutory obligation to comply with Commission directives to develop or modify a particular Reliability Standard, we direct the ERO, within 90 days of the date of this

³ 16 U.S.C. § 824o(d)(5) (2006).

order, to submit to the Commission a filing containing specific proposed modifications to the NERC Standards Development Process. These proposed modifications shall be designed to ensure that NERC's Rules of Procedure allow it to comply with Commission directives to submit new or modified Reliability Standards. The Commission will notice NERC's filing for public comment and issue a subsequent order on proposed modifications to NERC's rules. As discussed herein, we also direct the ERO, within 90 days after our subsequent order, to fully comply with our previous directive to develop modifications to Reliability Standard FAC-008-1.

I. Background

A. Section 215 and Mandatory Reliability Standards

6. Section 215 of the FPA requires a Commission-certified ERO to develop mandatory and enforceable Reliability Standards, subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.⁴ Following a selection process, the Commission selected and certified NERC as the ERO.⁵ Consequently, NERC, as the certified ERO, develops and submits for Commission review and approval Reliability Standards that apply to users, owners and operators of the Bulk-Power System, as set forth in each Reliability Standard.⁶

7. NERC's application for certification as the ERO included Rules of Procedure, which address Reliability Standards development, compliance and enforcement, and other matters for which the ERO is responsible. In the order certifying NERC as the ERO, the Commission approved NERC's Rules of Procedure, and directed certain revisions in a compliance filing.⁷ NERC's Rules of Procedure include Section 300 (Reliability Standards Development) and Appendix 3A (Reliability Standards Development Procedure). Together, these provisions set forth the ERO process for development and ERO approval of mandatory Reliability Standards.

⁴ 16 U.S.C. § 824o(e).

⁵ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh'g & compliance*, 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc. v. FERC*, No. 06-1426, 2009 U.S. App. LEXIS 9905 (D.C. Cir. May 8, 2009).

⁶ 16 U.S.C. § 824o(d)(1).

⁷ ERO Certification Order, 117 FERC ¶ 61,126 at P 250-252.

B. NERC's Standards Development Process

8. The first step in NERC's Standards Development Process is the initiation of a Standard Authorization Request. The Standard Authorization Request describes the new or modified Reliability Standard, defines its purpose and scope, and offers reasons for its justification. After the Standard Authorization Request is posted for public comment, the Standards Committee votes on whether to authorize a draft Reliability Standard. If the Committee authorizes a draft Reliability Standard, it appoints a team that drafts the Standard, submits it for comment and any necessary field tests, analyzes and responds to comments and test results, and makes any necessary revisions.

9. Following these steps, the ballot body must approve the draft Reliability Standard by a two-thirds vote on a sector weighted basis before it is submitted to the NERC board of trustees for approval.⁸ When members of the ballot body consider the draft Reliability Standard, they can vote: (1) Affirmative, (2) Affirmative, with comment, (3) Negative with reasons, (4) Negative without reasons, or (5) Abstain.

10. The result of a vote is contingent on the two-thirds majority and whether any member of the ballot body votes "negative with reasons." For example, if the ballot body approves a new or modified Reliability Standard by a two-thirds vote, and there are no negative votes with reasons, the proposal is submitted to the NERC board of trustees. If adopted by the NERC board of trustees, the draft Reliability Standard is submitted to the Commission.

11. However, if any member of the ballot body votes negative with reasons, there must be a second vote, referred to as a "recirculation ballot."⁹ This is the case even if on the first ballot two-thirds of the ballot body voted in favor of the draft Reliability Standard. The Standards drafting team provides responses to comments accompanying a negative ballot, after which the recirculation ballot occurs. If the draft Reliability Standard fails in the recirculation ballot, it is rejected and the development process is ended. Any further work then requires a new Standard Authorization Request, which requires the process to begin from the first step described above.

⁸ NERC Rules of Procedure, App. 3A (Reliability Standard Development Procedure), version 6.1, at 22.

⁹ In the recirculation ballot, each member of the ballot body is free to change its vote. In fact, votes are counted by exception only; that is, unless a member of the ballot body indicates a revision to its original vote its vote remains the same as in the first ballot.

II. Potential Conflict between Section 215(d)(5) and NERC's Standards Development Process

A. Generally

12. Pursuant to section 215(d)(5) of the FPA, the Commission may direct the ERO to submit to the Commission a new or modified Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Standard appropriate to carry out section 215. As the ERO, NERC must be able to comply with a Commission directive pursuant to section 215(d)(5) of the FPA. However, NERC's current Standards Development Process does not provide reasonable assurance that NERC is capable of complying with such directives. In particular, when a NERC Standards drafting team develops a new or modified Reliability Standard in response to a Commission directive pursuant to section 215(d)(5) of the FPA, the Standards Development Procedure provides ballot body members with the opportunity to ballot down the new or revised Reliability Standard. Thus, the ballot body may effectively veto a Commission directive by refusing to approve a new or modified Reliability Standard intended to comply with the Commission's directive. This situation occurred in December 2008, with respect to NERC's attempt to modify Reliability Standard FAC-008-1, which is a Standard addressing the methodology for determining the capacity ratings of Bulk-Power System facilities.

B. Reliability Standard FAC-008-1

13. Reliability Standard FAC-008-1 requires each transmission owner and generator owner to develop a methodology for determining the ratings of its Bulk-Power System facilities and also requires that the methodology incorporate specific data and conditions identified in the Standard. In Order No. 693,¹⁰ the Commission approved FAC-008-1. In addition, pursuant to section 215(d)(5) of the FPA, the Commission directed NERC to develop and submit three specific modifications. One of these modifications was the addition of a requirement that, "for each facility, [each transmission owner and generator owner] identify the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting."¹¹ In other words, when a reliability coordinator, transmission operator, transmission planner, or planning coordinator requests specific types of system information about a limited set of transmission facilities

¹⁰ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

¹¹ *Id.* P 755-758; 771.

that are critical for reliability, including information about what equipment causes system limitations and how much the thermal rating would increase if the most limiting equipment no longer limited the facilities' capability, then the transmission owner must provide that information. Access to such information enhances reliability by enabling neighboring systems to accurately study the effects of other facilities on their own systems and determine the critical elements for increasing facility ratings, provides operators specific information about the limiting elements and therefore allows them to assess the risks associated with circuit loadings, and provides transmission operators information about which component within a transmission element is limiting so they have more information to guide their decisions about how to provide for Reliable Operation of the Bulk-Power System.

14. Several commenters objected to the Commission's proposal to require transmission and generator owners to identify the resulting increase in rating if the limiting component was no longer limiting, arguing that it "promotes commercial use of the grid . . . and relates more to transmission access [than to reliability]." ¹² In Order No. 693, the Commission rejected this argument and explained that the modification addresses a reliability objective:

When the transmission operators know which component within the transmission element is limiting they have more information to inform their decisions about how to provide for the Reliable Operation of the Bulk-Power System. Our . . . modification does not require any entity to invest in equipment to increase ratings of any facility; it simply requires the next limiting component [sic] of each facility to be identified in order to understand what components are causing the limits that are to be used in reliability mitigation assessments. The identification of the first limiting component is already an inherent requirement in the existing rating process. ¹³

No entity sought rehearing of this directive regarding FAC-008-1.

15. In January 2007, NERC initiated the process of complying with the Commission's directive by approving a Standard Authorization Request to develop revisions to FAC-008-1. An industry drafting team developed FAC-008-2, which addressed the three modifications directed by the Commission in Order No. 693. Requirement R7 of the revised Reliability Standard addressed the Commission's directive that the ERO develop a modification that requires transmission and generator owners to identify, for critical facilities, the resulting increase in rating if the limiting component was no longer

¹² *Id.* P 757.

¹³ *Id.*

limiting; that is, for certain transmission interconnections, transmission and generator owners must determine how much more transfer capability would be available if the weakest element was improved so that it no longer would limit the rest of the interconnection facilities.

16. In November 2008, the ballot body approved FAC-008-2 with a 70.01 percent affirmative (weighted segment) vote in the initial ballot. Although this percentage exceeded the two-thirds majority of the weighted segment votes required for passage, because negative votes with comments were received, NERC's Standards Development Process required a recirculation ballot. Some of the comments that accompanied the negative votes pertained to Requirement R7 of the draft Reliability Standard. These comments argued that Requirement R7 did not address a reliability concern, but rather a business concern better addressed in the context of a tariff. The NERC drafting team responded to these comments by stating that:

if FERC issues a directive and the time for a rehearing has passed, the drafting team is to comply with the directive provided the directive is not detrimental to reliability, regardless of the opinion of the drafting team or the industry as to its perceived reliability benefit. In the case of FERC Order 693, NERC did not ask for rehearing during the 30-day period....¹⁴

17. In December 2008, NERC held the recirculation ballot. FAC-008-2 was voted down, receiving only a 57.37 percent affirmative vote, less than the two-thirds affirmative votes necessary for approval. Pursuant to NERC's rules, the project ended after the failed recirculation ballot.

18. On January 15, 2009, NERC's Standards Committee approved the posting of a new Standard Authorization Request for FAC-008-2, which included the draft Reliability Standard without Requirement R7. The draft Standard Authorization Request directed the drafting team to "consider" applicable Commission directives.¹⁵ It is unclear how or when NERC will address the Commission directive addressed by Requirement R7.

¹⁴ Reliability Standard development record for FAC-008-2, available on the NERC website at http://www.nerc.com/docs/standards/sar/Project2006-09_C_of_C_Initial_Ballot_FAC-008_2008Dec08.pdf

¹⁵ An initial ballot window for proposed Reliability Standard FAC-008-2 and an associated implementation plan closed on January 22, 2010. Since at least one negative ballot included a comment, these results are not final. A second (or recirculation) ballot must be conducted.

III. Discussion

A. Concerns Raised By FAC-008-2 Development Process

19. The Commission is concerned about the use of the balloting procedures within the NERC Standards Development Process to delay or block NERC's ability to respond to a Commission directive intended to protect reliability of the Bulk-Power System. The NERC development record in FAC-008-2 indicates that NERC staff and the Standards drafting team understood the need to comply with the directives of a final Commission order and had taken diligent steps towards compliance.¹⁶ Yet, these efforts were effectively halted by a group of stakeholders that were able to "ballot down" FAC-008-2. As noted by the FAC-008-2 Standards development team, the concerns raised by stakeholders regarding Requirement R7 were precisely the concerns raised by commenters and rejected by the Commission in Order No. 693. These stakeholders and all other stakeholders were provided ample opportunity to comment on the Commission's proposed directive, yet no entity sought rehearing of the directive, and it became a final Commission directive that must be implemented by the ERO.

20. The ERO has not yet complied with the Order No. 693 directives to develop certain modifications to Reliability Standard FAC-008-2. Since the new Standard Authorization Request for FAC-008-2 does not include Requirement R7 (the requirement to share information about increased ratings if the limiting component no longer limited the facilities' capability), it is uncertain when or how the ERO will comply. Thus, the balloting down of FAC-008-2 has significantly delayed, if not blocked, NERC's ability to respond to the Commission's directive.

21. In *North American Electric Reliability Corp.*,¹⁷ the Commission affirmed that, as the ERO, NERC has responsibility for the content of Reliability Standards as well as for appropriately managing the Standards Development Process. The Commission does not believe it is in the public interest or consistent with the intent of section 215 to allow continuation of a process that does not allow the ERO to meet its statutory obligation to comply with Commission directives and provide for Reliable Operation of the Bulk-Power System.

¹⁶ As the Commission never had the opportunity to review it, we do not intend our discussion to imply that the version of FAC-008-2 that was balloted down would have complied with the Commission's directive in Order No. 693. Likewise, we do not intend to prejudge the results of NERC's current effort to comply with the Commission's directive.

¹⁷ *North American Electric Reliability Corp.*, 126 FERC ¶ 61,021, at P 10-12 (2009).

22. As mentioned above, before a new or modified draft Reliability Standard reaches the stakeholder ballot body, it is drafted by a team of industry volunteers that may or may not agree with the Commission's directive. The Commission is concerned that, just as the balloting procedures within NERC's Standards Development Process can be used to delay or block NERC's ability to respond to a Commission directive, the Standards drafting process can block the drafting of a Reliability Standard that complies with a Commission directive. Similarly, the Standards drafting team can draft a new or modified Reliability Standard that purposefully fails to respond to a Commission directive. If the ballot body approved a non-responsive Reliability Standard, the NERC board of trustees would then be faced with the choice of either approving or rejecting the non-responsive draft Reliability Standard. In either case, the "balloting up" of a non-responsive draft Reliability Standard will delay or block NERC's ability to comply with the Commission's directive.

23. Such misuse of the NERC Standards Development Process would thwart the fundamental goal of Congress in enacting section 215 to protect reliability of the Bulk-Power System. When the Commission directs that the ERO develop a new or modified Reliability Standard to address a specific concern pursuant to section 215(d)(5) of the FPA, the Commission provides due process, including notice and opportunity for comment and opportunity to seek rehearing. Users, owners and operators of the Bulk-Power System should raise their concerns with a proposed Commission directive in the appropriate Commission proceeding. However, once a Commission directive is final, the participants in NERC's Standards Development Process do not have the discretion to simply ignore the directive or develop provisions to a new or revised Reliability Standard that clearly contradicts the plain understanding of the Commission directive. As the Commission explained in Order No. 693, when the Commission offers a specific approach to address a concern, the ERO has flexibility to develop "an equivalent alternative approach provided that the ERO demonstrates that the alternative will address the Commission's underlying concern or goal as efficiently and effectively as the Commission's proposal."¹⁸ The ERO, however, does not have discretion not to comply with the Commission's directive. Neither a Standards development team nor a ballot body should have the ability to thwart the ERO's good faith efforts to comply.

B. Relevant Statutory and Regulatory Provisions

24. A number of statutory and regulatory provisions provide authority for Commission action when the ERO fails to comply with a Commission directive. Section 215(e)(5) of the Federal Power Act provides that:

¹⁸ Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 186.

the Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.¹⁹

In Order No. 672, the Commission implemented this part of the FPA by stating that it would “take appropriate action . . . if the ERO or a Regional Entity fails to comply with a Commission order requiring that a Reliability Standard be developed or modified as necessary to maintain reliability.”²⁰

25. Section 215(f) of the Federal Power Act authorizes the Commission to propose a change to the ERO’s rules that will take effect upon a finding by the Commission that it is just, reasonable, not unduly discriminatory or preferential, in the public interest, and satisfies the requirements of section 215(c).²¹

C. Modification to NERC Rules of Procedure

26. As discussed above, the Commission stated in Order No. 672 that it would take appropriate action if the ERO fails to comply with a Commission order requiring that a Reliability Standard be developed or modified as necessary to maintain reliability. The Commission in Order No. 672 also indicated that it would determine appropriate Commission action regarding the ERO on a case-by-case basis.²² In this case, we believe that it is appropriate in the first instance to require that the ERO develop a prospective remedy to ensure future compliance. Thus, we direct the ERO to propose a modification to its Rules of Procedure and the Standards Development Process to ensure that the ERO can comply with a Commission directive to develop a new or modified Reliability Standard pursuant to section 215(d)(5) of the FPA. However, we will leave it to the discretion of the ERO to submit detailed proposed rule changes on which the public may

¹⁹ 16 U.S.C. § 824o(e)(5). Section 39.9 of the Commission’s regulations, 18 C.F.R. § 39.9 (2008), includes language similar to section 215(e)(5), and also identifies possible compliance actions against the ERO such as imposition of civil penalties, suspension or decertification of the ERO, and suspension or rescission of approval of a delegation agreement.

²⁰ *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 at P 761, 765, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

²¹ 16 U.S.C. § 824o(f).

²² Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 762.

comment. The Commission will notice the proposed changes and will issue an order on proposed modifications after consideration of the comments. NERC is directed to submit detailed proposed rule changes within 90 days of this order.

27. The ERO's proposed modifications to the Standards Development Process must address our concern, discussed above, to assure that Standards drafting teams comply with Commission directives by developing new or revised Reliability Standards that satisfy applicable Commission directives.

28. Further, pursuant to section 215(f) of the FPA, any revision to the ERO's Rules of Procedure must "satisf[y] the requirements of subsection (c)," which includes providing for reasonable notice and opportunity for comment, due process, openness, and balance of interest in developing Reliability Standards.²³ We believe that this provision provides sufficient flexibility for the ERO to develop modifications to its Rules of Procedure that ensure the ERO's ability to comply with Commission directives pursuant to section 215(d)(5) while satisfying the requirements of section 215(c).

29. Moreover, consistent with the Commission's regulations,²⁴ we direct the ERO, within 90 days of our subsequent order on proposed modifications to the ERO's rules, to comply with the Commission's directive in Order No. 693 to modify Reliability Standard FAC-008-1.²⁵ As explained in greater detail in Order No. 693, the required modifications include (1) document underlying assumptions and methods used to determine normal and emergency facility ratings; (2) develop facility ratings consistent with industry standards developed through an open, transparent and validated process; and (3) for each facility, identify the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting.²⁶

²³ See section 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D) (2006).

²⁴ 18 C.F.R. § 39.5(g) (2009) ("The Commission, when remanding a Reliability Standard to the [ERO] or ordering the [ERO] to submit to the Commission a proposed Reliability Standard or proposed modification to a Reliability Standard that addresses a specific matter may order a deadline by which the [ERO] must submit a proposed or modified Reliability Standard.").

²⁵ Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 771.

²⁶ *Id.* P 755-762.

The Commission orders:

(A) NERC is hereby directed to file proposed modifications to the NERC Rules of Procedure, within 90 days of the date of this order, as discussed in the body of this order.

(B) NERC is hereby directed to submit to the Commission, within 90 days of the issuance of a Commission order on proposed modifications to NERC's rules, modifications to Reliability Standard FAC-008-1 that comply with the Commission's directive in Order No. 693, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.