134 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

North American Electric Reliability Corporation Docket No. RR09-6-003

ORDER ON COMPLIANCE FILING

(Issued March 17, 2011)

1. On March 18, 2010,[1] the Commission issued an order directing, in part, that the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), revise its Rules of Procedure governing the development of Reliability Standards.[2] Specifically, the Commission directed NERC to propose revisions that would address the conflict between NERC's existing Standards Development Process and its obligation as the ERO to comply with Commission directives under section 215(d)(5) of the Federal Power Act (FPA)[3] to submit a new or modified Reliability Standard.[4] On December 23, 2010, NERC submitted a Compliance Filing in response to the Commission's March 18 Order (Compliance Filing), following denial of requests for rehearing[5] and the grant of several extensions of time.[6] In its

[1] *North American Electric Reliability Corp.*, 130 FERC ¶ 61,203 (2010) (March 18 Order).

[2] *See* NERC Rules of Procedure, Section 300 (Reliability Standards Development). NERC's development process for Reliability Standards is governed by both Section 300 and Appendix 3A (Standard Processes Manual) of NERC's Rules of Procedure (collectively, the Standards Development Process).

[3] 16 U.S.C. § 824o(d)(5) (2006).

[4] March 18 Order, 130 FERC ¶ 61,203 at Ordering Para. (A). In addition, the Commission ordered NERC to fully comply with a previous Commission directive to develop modifications to Reliability Standard FAC-008-1, which governs Bulk-Power System facility ratings.

[5] *North American Electric Reliability Corp.*, 132 FERC ¶ 61,218 (2010) (September 16 Order).

Compliance Filing, NERC seeks (1) approval of a number of proposed amendments to its Standards Development Process, and (2) a finding that these proposed amendments, along with the other actions described in the Compliance Filing, satisfy the Commission's directives in the March 18 Order.

2. As explained in more detail below, we approve NERC's revised Section 300 of its Rules of Procedure. In addition, we find that in adopting revised Section 300 and taking the other actions described, NERC has complied with Ordering Paragraph (A) in the Commission's March 18 Order. In doing so, we find that the proposed revisions make a number of improvements to the Standards Development Process to address the Commission's previously-stated concerns that: (1) a stakeholder voting block of just over one third can effectively veto a new Reliability Standard or Reliability Standard modification developed in response to a Commission directive, and (2) the Reliability Standards drafting process can otherwise fail to create a new or modification to a Reliability Standard adequately responsive to a Commission directive.

I. Background

A. NERC's Standards Development Process

3. 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.[7] NERC's development of Reliability Standards is governed by its Commission-approved Standards Development Process.

4. 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, NERC's Standards Committee votes on whether to authorize a draft Reliability Standard. If the Committee authorizes a draft Reliability Standard, it appoints a team that: (i) drafts the Reliability Standard, (ii) submits it for comment and any necessary field tests, (iii) analyzes and responds to comments and test results, and (iv) makes any necessary revisions to the draft Reliability Standard.

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[6] *See North American Electric Reliability Corp*., 131 FERC ¶ 61,237 (2010) and *Notice of Extension of Time*, Docket No. RR09-6-000 (Aug. 19, 2010); *Notice of Extension o f Time*, Docket No. RR09-6-000 (Nov. 10, 2010).

[7] *See* 16 U.S.C. § 824o(d)(1) (2006).

5. 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 (Board) for approval. The result of a ballot vote is contingent on the two-thirds majority and whether any member of the ballot body votes "negative with reasons."[8] 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. If adopted by the NERC Board, the draft Reliability Standard is submitted to the Commission as a "proposed Reliability Standard."

6. However, if any member of the ballot body votes negative with reasons, there must be a second vote, referred to as a "recirculation ballot." In that case, the standards drafting team provides responses to comments accompanying a negative ballot, and may revise the draft Reliability Standard in response to objections raised, after which the recirculation ballot occurs. If attempts to meet objections and to revise the draft Standard ultimately fail (including after successive ballots), the Standards Committee has the authority to conclude the balloting process.[9] If the draft Reliability Standard is ultimately rejected in this manner, the development process is ended without the draft Reliability Standard ever reaching the Board of Trustees for consideration. To revive the subject of the rejected draft Reliability Standard, a new standard authorization request must be submitted, which requires the Standards Development Process to begin from the first step described above. NERC's Board currently has no recourse when the Standards Development Process fails to develop, or when the balloting body fails to approve, a Reliability Standard responsive to a Commission directive, other than to allow the process to begin again by submitting a new standard authorization request.

B. Statutory Framework and March 18 Order

7. The Commission has the authority, pursuant to FPA section 215(d)(5), to direct the ERO to submit a new or modified Reliability Standard to address a specific matter if the Commission considers such a new or modified standard appropriate to carry out FPA

[8] Each member of the ballot pool may vote in the affirmative, affirmative with comment, negative without comment, negative with comment, or abstain. If voting negative with comment, the member must provide reasons including specific wording or actions that would resolve the objection if possible. NERC Standard Processes Manual at 19.

[9] *Id.* at 18-19. Note that at the time the March 18 Order issued, NERC's Standards Development Process provided that a draft Reliability Standard would be rejected if it failed after one recirculation ballot.

section 215. As the Commission explained in its March 18 Order, a conflict exists between NERC's existing Standards Development Process and NERC's obligation as the ERO to comply with a Commission directive pursuant to section 215(d)(5) of the FPA. The Commission found that NERC's existing Standards Development Process did not provide "reasonable assurance" that NERC is capable of complying with such directives, and that the ballot body could instead effectively veto a Commission directive by refusing to approve a draft Reliability Standard intended to comply with a Commission directive.[10]

8. In the March 18 Order, the Commission explained that it had growing concerns about the use of the voting process to block compliance with Commission directives, and noted, as one example, the failure of NERC's Standards Development Process to develop a required modification to FAC-008-1.[11] The Commission noted two areas of concern: (1) that NERC's balloting procedures could be used to delay or block a draft Reliability Standard that is intended to respond to a Commission directive, and (2) that NERC's Standards Development Process could fail to produce a draft Reliability Standard that is adequately responsive to the Commission directive at issue on which the members could vote.[12]

9. While the Commission recognized in the March 18 Order that section 215 of the FPA balances the responsibilities for Reliability Standards between the ERO and the Commission, it rejected the notion that Congress intended that stakeholders could refuse to respond to a Commission directive to address specific reliability matters:

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[10] March 18 Order, 130 FERC ¶ 61,203 at P 12.

[11] FAC-008-1 set out requirements for determining the capacity rating of Bulk-Power System facilities. As FERC explained in the March 18 Order, the FAC-008 standards drafting team developed a revision to FAC-008 designed to address three separate Commission directives from Order No. 693, which initially received more than the 2/3 majority vote required for approval. However, because the proposed revision had received at least one set of comments with a negative vote, NERC's Standards Development Process required recirculation and reballoting of the proposed revision. The proposed revision to FAC-008 did not pass upon recirculation, based on objections to a Commission-directed provision. The entire Standards Development Process had to be started over, and a second version was ultimately developed and approved by the voting body which did *not* include the Commission-directed provision related to identification of certain limiting components.

[12] March 18 Order, 130 FERC ¶ 61,203 at P 22.

> [O]nce 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.[13]

10. Given these concerns, the Commission directed NERC to develop a proposed modification to its Standards Development Process to address the conflict between its Standards Development Process and its obligation to comply with a Commission directive under FPA section 215(d)(5).[14]

C. Order on Rehearing

11. NERC and a number of other parties sought rehearing of the Commission's March 18 Order, raising broad concerns that the March 18 Order would effect a fundamental change in the Commission's relationship with NERC and that its directive exceeded the Commission's authority, by requiring NERC to change its rules so that the Commission could dictate the specific content of Reliability Standards.[15] Parties argued that the required change in rules would violate the language and intent of section 215 of the FPA, would mark a departure from Commission precedent, and would undermine NERC's ability to function as an international ERO.

12. The Commission rejected these arguments and denied the requests for rehearing and clarification, explaining that the March 18 Order requires NERC to develop "an affirmative mechanism designed to ensure that NERC can comply with its obligations as the ERO to submit to the Commission new or modified Reliability Standards pursuant to a Commission directive under section 215(d)(5) of the FPA."[16] As the Commission

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[13] *Id.* P 23.

[14] *See id.* P 26-28, Ordering Para. (A). In addition, the Commission directed NERC to make a subsequent compliance filing modifying Reliability Standard FAC-008-1 as directed in Order No. 693. *Id.* P 29 and Ordering Para. (B).

[15] NERC also requested that the Commission reconsider and withdraw the directive to develop modifications to FAC-008-1, stay the directives in the March 18 Order, and convene a public conference to consider general issues pertaining to the Commission's prospective implementation of section 215 of the FPA and technical issues specific to FAC-008-1.

[16] September 16 Order, 132 FERC ¶ 61,218 at P 4.

explained, the required modifications were needed "to prevent the Standards Development Process from effectively negating a Commission directive," and were not intended to preclude the ERO "from exercising its freedom to respond to Commission directives with alternative approaches that address the Commission's underlying concern or goal in an equally effective and efficient manner."[17]

II. December 23 Compliance Filing

13. In response to Ordering Paragraph (A) of the March 18 Order, NERC submitted a Compliance Filing on December 23, 2010, describing several actions taken in response to the Commission's directive requiring a change in NERC's Standards Development Process. NERC first notes that the Commission has already approved a change in the NERC Standard Processes Manual, which change clarifies the responsibility of the Standards Committee and its authority over the standards drafting teams, including the authority to accept or reject the work of the team.[18] Second, NERC expanded the mandate of the Board level Technology Committee to become a Standards Oversight and Technology Committee, with responsibility for monitoring overall results and timeliness of Standards development work, including responding to directives related to Reliability Standards.[19]

14. Third, NERC proposes revisions to Section 300 of its Rules of Procedure, specifically: (1) to revise Section 309 and (2) to add new Section 321.[20] NERC states that these revisions to Section 300 of its Rules of Procedure provide an alternative means for developing or modifying a Reliability Standard in response to a Commission

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[17] *Id.*

[18] NERC Compliance Filing at 7; *see also North American Electric Reliability Corp.*, 132 FERC ¶ 61,200 (2010).

[19] *Id.* at 8.

[20] NERC notes that the proposed revisions to its Rules of Procedure were developed from three initial alternatives (Alternatives A, B and C). The three alternatives were posted for comment for a 45-day period, and NERC staff developed a fourth version based on the input received. This fourth alternative was presented, along with the three initial proposals, to the NERC Board. The NERC Board approved the fourth version, which is now before the Commission as part of the December 23 Compliance Filing. NERC attached to the Compliance Filing a spreadsheet summarizing the comments received on the three alternatives and the preferences of commenting parties.

directive, including the Board's development of a draft Reliability Standard, in the event that the regular development process fails to produce a responsive Reliability Standard.

15. NERC revised Section 300 of its Rules of Procedure as follows. A new sentence is added to Sections 309.2 and 309.3 (Remanded Reliability Standards and Directives to Develop Standards; Directives to Develop Standards under Extraordinary Circumstances), requiring use of the alternative standard development processes set forth in new Section 321 whenever the Board determines "that the standards process did not result in a standard that addresses a specific matter that is identified in a directive issued by an applicable ERO governmental authority."

16. New Section 321 sets out the "alternative standard development processes." Specifically, Section 321 sets out a number of actions the NERC Board may take if it determines that the regular Standards Development Process does not produce a draft Reliability Standard that is responsive to a Commission directive. Section 321 states that the Board has the authority to choose which one (or more) of the authorized alternative actions is appropriate, but that it must "to the extent feasible and consistent with its obligations and established deadlines, choose actions that seek to maximize stakeholder participation." The specific actions and authorities included in Section 321 are as follows:

- The Board may remand a draft Reliability Standard to the Standards Committee, with instructions, if it is presented with a draft Reliability Standard that fails to adequately address specific matters in a Commission directive. (Section 321.1)

- Upon a written finding by the Board that a ballot pool has failed to approve a draft Reliability Standard that adequately addresses a required directive, the Board can remand the draft Reliability Standard to the Standards Committee with instructions to convene a technical conference to discuss the directive, use the input from the technical conference to revise the draft Reliability Standard if deemed appropriate, and re-ballot the draft Reliability Standard under revised balloting procedures. (Section 321.2)

    - The re-ballot must be held within 45 days of remand to the Standards Committee. Votes cast against the draft Reliability Standard without written comments will be counted only for purposes of establishing a quorum, and not for determining whether the draft Reliability Standard otherwise meets the majority requirement. If affirmative votes achieve a two-thirds majority under this weighted segment approach, the draft Reliability Standard is deemed approved. (Sections 321.2.1, 321.2.1, 321.3)

    - If the draft Reliability Standard achieves a 60 percent majority under the weighted segment approach, the Board has the authority to consider the

> draft Reliability Standard for approval after soliciting comment. After considering all of the developmental record, the Board has the authority to approve the draft Reliability Standard and to direct that it be filed with the Commission (or other applicable ERO governmental authority) for recommended approval if it finds that the draft Reliability Standard is "just, reasonable, not unduly discriminatory or preferential, and in the public interest, considering (among other things) whether it is helpful to reliability, practical, technically sound, technically feasible, and cost-justified." If the Board cannot make such a finding, it has the authority to direct that the draft Reliability Standard be filed as a compliance filing with the governmental authority issuing the related directive, along with a recommendation that the draft Reliability Standard not be made effective. (Section 321.4)[21]

- If the Board finds that NERC's usual Standards Development Process has failed to develop or approve a draft Reliability Standard that adequately addresses a Commission directive, it has the authority to direct the Standards Committee to prepare a draft Reliability Standard that will comply with the directive, or to direct NERC management to draft such a Reliability Standard if the Standards Committee fails to do so. The draft Reliability Standard must be posted for public comment for a 45 day period. If the Board, after making any modifications it deems appropriate given the comments received, finds the draft Reliability Standard to be "just, reasonable, not unduly discriminatory or preferential, and in the public interest, considering (among other things) whether it is helpful to reliability, practical, technically sound, technically feasible, and cost-justified," it has the authority to approve the draft Reliability Standard and to ask that it be made effective by the Commission or other ERO governmental authority. If the Board cannot make such a finding, it has the authority to direct that the draft Reliability Standard be filed as a compliance filing with a recommendation that the Standard not be made effective. A Reliability Standard approved under these

[21] Note that Section 308.3 of NERC's Rules of Procedure does not provide for submission of a Reliability Standard to the relevant Canadian governmental authorities until the NERC Board has approved the Standard. Accordingly, if a Reliability Standard that the NERC Board did not approve were ultimately approved by the Commission after submission by the NERC Board as a draft Reliability Standard under Section 321.4.3.2 or 321.5.3, there is currently no provision for a corresponding review for adoption of that same Reliability Standard by Canadian governmental authorities.

procedures is not eligible for submission as an American National Standard. (Section 321.5)[22]

- NERC is required to file an annual status report with the Commission or other applicable ERO governmental authority on the status of and timetable for addressing each outstanding Commission directive. (Section 321.6)

17. NERC asserts that it has addressed the Commission's concerns that a ballot pool group of just over one third in size could block the Board's consideration of a draft Reliability Standard, by allowing the Board to approve a draft Reliability Standard that has received only a 60 percent majority vote under the new procedures.[23] NERC states that revised Section 321 of its Rules of Procedure includes specific criteria for the Board to consider when acting on such a proposed Standard, because it would be acting on a draft Reliability Standard with less than "the normal affirmative supermajority vote for adoption."[24] NERC further explains that these factors are based on general factors for consideration of a Reliability Standard as set out in Order No. 672, and that the Section 321 factors are intended to be similar to the factors that a stakeholder body would consider when voting on a draft Reliability Standard.[25]

18. NERC notes that in approving the changes to Section 300 of its Rules of Procedure, the Board expressed its expectation that the usual Standards Development Process would be sufficient to address Commission directives in most cases, and that any new authority granted to the Board would be used rarely.[26] NERC also suggests that the Commission can help avoid the need to resort to the alternative processes by exercising its FPA section 215(d)(5) powers on a limited basis, and that it use means other than FPA

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[22] NERC notes, based on discussions with American National Standards Institute (ANSI) staff, that a Reliability Standard adopted under paragraph 5 would not meet the ANSI Essential Requirements but that NERC should be able to maintain ANSI-accreditation for its usual Standards Development Process. NERC Compliance Filing at 17.

[23] *Id.* at 15.

[24] *Id.*

[25] *Id.* at 16 (requiring the Board to consider "whether [the Reliability Standard] is helpful to reliability, practical, technically sound, technically feasible, and cost-justified").

[26] *Id.* at 10.

section 215(d)(5) directives to address wording changes to a proposed Reliability Standard. For example, NERC notes that Commission staff has the opportunity to participate in the Reliability Standards drafting team process, where it can propose specific edits, or that the Commission can propose specific edits for consideration as part of the periodic review of a given Reliability Standard.[27]

III. Notice and Comments

19. Notice of NERC's December 23 Compliance Filing was published in the *Federal Register*, with comments, protests, or motions to intervene due on or before January 24, 2011.[28] Only two sets of comments were filed in response to NERC's December 23rd Compliance Filing, and of those, only those filed by the National Rural Electric Cooperative Association (NRECA) raise any objections to the filing.

20. The American Public Power Association, Edison Electric Institute, Electricity Consumers Resource Council, Electric Power Supply Association, Large Public Power Council and Transmission Access Policy Study Group (collectively, the Trade Associations) filed a joint set of comments in support of NERC's Compliance Filing. The Trade Associations agree with NERC that the Compliance Filing is responsive to the Commission's concerns as outlined in the March 18 Order, while still taking necessary steps to preserve a consensus-based Standards Development Process.[29] The Trade Associations assert that NERC's Compliance Filing addresses the Commission's concerns that (1) a proposed Reliability Standard developed to address a specific Commission directive can be defeated by greater than one-third of NERC's voting members; and (2) a new or modified Reliability Standard required pursuant to a Commission directive may never be developed at all.[30] With respect to Section 321 of NERC's Rules of Procedure, the Trade Associations support NERC's efforts to help

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[27] *Id.* at 10-12.

[28] 76 Fed. Reg. 1416 (2011). Subsequent notices were issued on January 11, 2011 and Jan. 12, 2011 following NERC's submission of errata filings.

[29] The Trade Associations note that they petitioned for review of the March 18 and September 16 Orders (jointly with NRECA), which appeal is being held in abeyance pending the outcome of the Compliance Filing process in this docket. Trade Associations at 4, n.7 (referencing D.C. Circuit No. 10-1387). The Trade Associations state that acceptance of the Compliance Filing "would go a long way" towards addressing the concerns that led to their request for review of the March 18 Order. *Id.* at 7.

[30] Trade Associations at 5-6.

preserve the stakeholder process by giving the Board authority to have NERC management develop a new or modification to a Reliability Standard in response to a Commission directive only as a last resort.[31] Finally, while the Trade Associations acknowledge that the Commission has the authority to require NERC to submit new or modified Reliability Standards under FPA section 215(d)(5), they ask that the Commission use that authority judiciously.

21. NRECA objects to only one aspect of the proposed modifications to NERC's Standards Development Process. [32] NRECA asserts that subsections 4.3.2 and 5.3 of proposed Section 321 of NERC's Rules of Procedure are inconsistent with section 215 of the FPA. Subsections 4.3.2. and 5.3 authorize the NERC Board to file with the Commission, as a compliance filing, a draft Reliability Standard that the Board does not approve or recommend be made a mandatory and enforceable Reliability Standard. NRECA asserts that FPA section 215(d)(1) authorizes the ERO to file with the Commission only those Reliability Standards "that it proposes to be made effective." Conversely, proposed new subsections 321.4.3.2 and 321.5.3 explicitly contemplate that the NERC Board may submit for Commission approval a Reliability Standard that the Board does not propose be made effective.[33]

22. NRECA argues that the Commission's potential approval of these "unsupported and unapproved" Reliability Standards conflicts with the statutory construct of FPA section 215, in which Congress empowered the ERO to develop Reliability Standards based on its technical expertise and required the Commission to give due weight to that technical expertise, and therefore leads to undesirable results.[34] NRECA suggests that in circumstances where the Standards Development Process has failed to the point where the Board cannot recommend approval of a new or modified Reliability Standard

[31] *Id.* at 6.

[32] NRECA characterizes the version of the modified Rules now before the Commission as "a modified version" of Alternative C of the three alternatives initially posted by NERC, and notes that it also opposed Alternative C when initially proposed by NERC. NRECA at 3.

[33] *Id.* at 4 (citing subsections 4.3.2 and 5.3 of Section 321 of NERC's Rules of Procedure).

[34] *Id.* at 5.

responsive to a Commission directive, NERC can do no more than make a compliance filing explaining why the Commission's required change is not appropriate.[35]

23. Regardless of whether the Commission accepts the revised Section 300 of the Rules of Procedure, NRECA agrees with NERC and the Trade Associations that the Commission should limit use of directives under FPA section 215(d)(5).[36]

IV. Discussion

24. We find that these proposed revisions to NERC's Rules of Procedure, coupled with its previous changes to its Standards Development Process, comply with the Commission's directive in the March 18 Order. The proposed revisions provide the NERC Board with multiple options to prevent the ballot body from delaying or preventing NERC's compliance with its obligation to comply with a Commission directive under section 215(d) of the FPA. Consequently, we agree with NERC that these revisions address the concerns the Commission expressed in the March 18 Order and we commend NERC for its efforts to comply with the Commission's directive. Accordingly, we approve revised Section 300 of NERC's Rules of Procedure as filed.

25. We reject NRECA's claim that FPA section 215(d)(1) precludes the ERO from filing a draft Reliability Standard for the Commission's approval if the ERO does not itself recommend that the draft Reliability Standard be adopted, where that standard is being submitted as a compliance filing in response to a Commission directive under FPA section 215(d)(5).[37] NRECA is concerned with the situation where NERC takes the

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[35] *Id.*

[36] *Id.* at 5-6.

[37] One of the two proposed new subsections of NERC's Standards Development Process to which NRECA objects states:

> If the Board of Trustees is unable to find that the proposed reliability standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest . . . then it has authority to treat the proposed reliability standard as a draft reliability standard and direct that the draft reliability standard and complete developmental record . . . be filed with the applicable ERO governmental authority issuing the directive as a compliance filing in response to the order giving rise to the regulatory directive, along with a

(continued…)

action set forth in new Sections 321.4.3.2 and 321.5.3 of NERC's Rules of Procedure, under which NERC files with the Commission a draft Reliability Standard that NERC does not recommend, as part of a compliance filing package in response to a Commission directive.[38] The language on which NRECA relies, in FPA section 215(d)(1), states as follows:

> The Electric Reliability Organization shall file each reliability standard or modification to a reliability standard that it proposes to be made effective under this section with the Commission.[39]

NRECA's argument fails because it tries to apply FPA section 215(d)(1) to a NERC action taken under FPA section 215(d)(5).

26. FPA section 215(d)(5) authorizes the Commission to: (i) require NERC to submit a proposed Reliability Standard or modification and (ii) to approve a Reliability Standard or modification submitted under a FPA section 215(d)(5) directive that is not supported by the ERO. FPA section 215(d)(5) states as follows.

> The Commission on its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the

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> recommendation that the standard not be made effective and an explanation of the basis for that recommendation.

Proposed Section 321.4.3.2. Proposed Section 321.5.3 includes almost identical language with respect to the Board's authority to file a draft Reliability Standard with the Commission as a compliance filing, with a recommendation that it not be approved.

[38] These subsections, 321.4.3.2 and 321.5.3, would be invoked only in instances where the Commission has issued a directive requiring submission by the ERO of a new Reliability Standard or modification to address a specific matter. If the Section 321 alternative processes fail to produce a Reliability Standard or modification that the Board can ultimately support, the proposed language gives the NERC Board the authority to submit the failed draft Reliability Standard in order to comply with an outstanding Commission directive under FPA section 215(d)(5).

[39] 16 U.S.C. § 824o(d)(1) (2006).

> Commission considers such a new or modified reliability standard appropriate to carry out this section.[40]

Nothing in FPA section 215(d)(1) limits the Commission's authority under FPA section 215(d)(5). Notably, FPA section 215(d)(5), unlike section 215(d)(1), does not include language requiring the ERO's support for a new or modification to a Reliability Standard developed in response to a Commission directive. It is incorrect to state, as NRECA does, that: "[n]owhere does the statute permit the filing of a standard or modification of a standard that the ERO does not itself propose to be made effective."[41] A Reliability Standard filed with the Commission in response to a section 215(d)(5) directive does not need to satisfy the FPA section 215(d)(1) requirement that the ERO file Reliability Standards that it proposes to be made effective. To interpret section 215(d)(5) otherwise -- i.e., to read the section 215(d)(1) requirements into 215(d)(5) -- would inappropriately diminish the Commission's authority to issue directives mandating the submission by the ERO of a new or modified Reliability Standard that addresses a specific matter identified by the Commission.

27. As the Commission has explained, while the ERO has discretion to determine exactly how it will respond to a given concern noted in a Commission directive, the ERO is legally obligated to submit a Reliability Standard in response to a directive. We continue to believe that the most reasonable reading of FPA section 215(d)(5) is that:

> [I]f the Commission has the authority to order the ERO to submit a Reliability Standard, then the ERO is legally obligated to submit it. . . . Once the Commission determines that a new or modified Reliability Standard is "appropriate to carry out [section 215 of the FPA]" and issues a final directive to that effect, the ERO is not free to substitute its judgment for the Commission's judgment by concluding through the Standards Development Process that the directive is technically unsound or unnecessary. The ERO is free to respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is at least as effective and efficient as the Commission's approach. Once the Commission has made a final determination that addressing the concern or goal identified

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[40] *Id.* § 824o(d)(5).

[41] NRECA at 4.

> by the Commission is technically justified, the ERO must comply with the Commission's directive.[42]

28. New Section 321 of NERC's Rules of Procedure permits NERC to submit to the Commission an "unapproved" draft Reliability Standard only when no other alternative has been successfully developed to comply with an outstanding FPA section 215(d)(5) directive.[43] By allowing NERC to make such a filing, the Commission will be afforded the benefit of the complete record of the Standard Development Process, including a record of the various drafts considered, the concerns raised by stakeholders, and specific factors that the NERC Board considered in recommending against adoption of the draft Reliability Standard. NRECA maintains that if NERC determines that a given Reliability Standard cannot be approved under NERC's proposed public interest rubric, the appropriate course would be for NERC to make a "compliance filing" that does not include any draft Reliability Standard but instead explains why a new or modified Reliability Standard is not appropriate or required to enhance Bulk-Power System reliability. The type of compliance filing that NRECA proposes would likely provide the Commission with a less complete record than the compliance filing contemplated by proposed subsections 4.3.2 and 5.3 of Section 321, and fails to provide the Commission with a draft Reliability Standard to consider. For the reasons stated above, we reject the notion that any such filing could be considered "compliant" with a Commission directive

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[42] September 16 Order, 132 FERC ¶ 61,218 at P 35 (citations and notes omitted).

[43] While we find here that the process contemplated by NERC's revised Standards Development Process is consistent with FPA section 215, whereby the Commission can consider and approve a draft Reliability Standard that the NERC Board has not officially approved, we note a potential inconsistency with the language in an existing Section of NERC's Standards Development Process. Specifically, proposed Section 308.2 of NERC's Rules of Procedure provides:

> Reliability standards or revisions to reliability standards approved by the ballot pool in accordance with the Standard Processes Manual shall be submitted for approval by the board. No reliability standard or revision to a reliability standard shall be effective unless approved by the board.

While this limitation on the effectiveness of a Reliability Standard appears to apply only to Reliability Standards that are approved through the ballot pool in accordance with NERC's usual (*i.e.*, non-Section 321) Standards Development Process, NERC should consider clarifying this language upon its next review or revision of Section 300 of its Rules of Procedure.

to submit a new or modified Reliability Standard under FPA section 215(d)(5). We affirm our prior determination that "section 215 of the FPA does not include a mechanism that allows the ERO to register disapproval and rejection of a Commission directive through the Standards Development Process."[44]

29. Next, we note that NERC's revisions to its Standards Development Process attempt to preserve a balance between the need to respond to Commission directives under FPA section 215(d)(5) and the ERO's obligation to provide for reasonable notice and opportunity for comment, due process, openness, and balance of interests in developing Reliability Standards under FPA section 215(c)(2)(D). While we acknowledge the need to balance these objectives under the FPA, and approve revised Section 300 as filed by NERC, we note the new alternative procedures in Section 321 give the Board a number of options and permissive authorities to take certain actions to ensure the development and submittal of a directed Reliability Standard, but are not mandatory. As we state above, NERC has the legal obligation to submit a new or modified Reliability Standard in response to a Commission directive. To that end, NERC must use whatever means are within its authority to meet that legal obligation, including the alternative procedures in Section 321, so that it can timely submit a new or modified Reliability Standard adequately addressing the reliability objective that is the subject of the Commission's directive.

30. Given NERC's obligations as the ERO under FPA section 215 and the options provided to the NERC Board under Section 321 of its Rules of Procedure, revised Section 300 sufficiently addresses our concerns regarding the Standards Development Process as raised in the March 18 Order.

31. Regarding NERC's and commenters' requests that we use our authority to issue directives under FPA section 215(d)(5) judiciously, we take seriously our responsibility to issue directives under section 215(d)(5) only when appropriate to carry out section 215. We note that the February 8, 2011 reliability conference explored how the Commission, NERC, and industry can work together to better identify, communicate, and prioritize our reliability objectives. We believe that progress has been made in these areas and we continue to look for opportunities for further dialogue, and particularly for increased communication between Commission staff and standards drafting teams throughout the standard development process.

[44] September 16 Order, 132 FERC ¶ 61,218 at P 37.

The Commission orders:

(A) Revised Section 300 of NERC's Rules of Procedure, governing its Standards Development Process, is hereby approved effective immediately.

(B) NERC's Compliance Filing is hereby accepted, and the actions described therein are determined to meet the Commission's directive in Ordering Paragraph (A) of the March 18 Order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.