

119 FERC 61,060
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Jon Wellinghoff.

North American Electric Reliability Council, Docket No. RR06-1-004
North American Electric Reliability Corporation

Delegation Agreement Between the North American Docket No. RR07-1-000
Electric Reliability Corporation and Texas Regional
Entity, a division of ERCOT

Delegation Agreement Between the North Docket No. RR07-2-000
American Electric Reliability Corporation and
Midwest Reliability Organization

Delegation Agreement Between the North American Docket No. RR07-3-000
Electric Reliability Corporation and Northeast
Power Coordinating Council: Cross Border
Regional Entity, Inc.

Delegation Agreement Between the North American Docket No. RR07-4-000
Electric Reliability Corporation and Reliability*First*
Corporation

Delegation Agreement Between the North American Docket No. RR07-5-000
Electric Reliability Corporation and SERC Reliability
Corporation

Delegation Agreement Between the North American Docket No. RR07-6-000
Electric Reliability Corporation and Southwest Power
Pool, Inc.

Delegation Agreement Between the North American Docket No. RR07-7-000
Electric Reliability Corporation and Western
Electricity Coordinating Council

Delegation Agreement Between the North American
Electric Reliability Corporation and Florida
Reliability Coordinating Council.

Docket No. RR07-8-000

North American Electric Reliability Corporation

Docket No. RR06-3-000

ORDER ACCEPTING ERO COMPLIANCE FILING,
ACCEPTING ERO/REGIONAL ENTITY DELEGATION AGREEMENTS,
AND ACCEPTING REGIONAL ENTITY 2007 BUSINESS PLANS

(Issued April 19, 2007)

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1. We address below two filings and the deferred portion of a third filing submitted by NERC Corporation (NERC).¹ First, on November 29, 2006, NERC submitted a compliance filing in response to the Commission's order certifying NERC as the Electric Reliability Organization (ERO) for the continental United States.² The compliance filing consists of a Uniform Compliance Monitoring and Enforcement Program (Uniform Compliance Program) and a revised *pro forma* Delegation Agreement providing for the delegation of certain ERO functions and duties to Regional Entities.

2. Also on November 29, 2006, NERC submitted for Commission review, pursuant to section 215 of the Federal Power Act (FPA),³ eight unexecuted Delegation Agreements between NERC and eight proposed Regional Entities.⁴

3. Finally, on August 23, 2006, as amended, NERC submitted for filing NERC's 2007 Business Plan and Budget; and a Regional Entity 2007 Business Plan and Budget for each of the eight Regional Entities. On October 24, 2006, the Commission conditionally accepted NERC's Business Plan and Budget and conditionally accepted, in part, the Regional Entity Budgets.⁵ However, the Commission reserved judgment on the

¹ NERC Corporation was established following the merger of the North American Electric Reliability Corporation and its affiliate, the North American Electric Reliability Council.

² 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) (*Certification Rehearing and Compliance Order*).

³ See Pub. L. No. 109-58, 119 Stat. 594, 941-46 (2005), to be codified at 16 U.S.C. § 824o.

⁴ The proposed Regional Entities are: Texas Regional Entity, a Division of the Electric Reliability Council of Texas (TRE); Midwest Reliability Organization (MRO); Northwest Power Coordinating Council: Cross Border Regional Entity, Inc. (NPCC); ReliabilityFirst Corporation (RFC); SERC Reliability Corporation (SERC); Southwest Power Pool, Inc. (SPP); Western Electricity Coordinating Council (WECC); and Florida Reliability Coordinating Council (FRCC). On December 21, 2006, NERC submitted supplementary documents relating to its proposed Delegation Agreement with FRCC.

⁵ See *North American Electric Reliability Corporation*, 117 FERC ¶ 61,091 at P 5 (2006) (*Business Plan and Budget Order*), *order on reh'g*, 119 FERC ¶ 61,059 (2007).

proposed Regional Entity Business Plans, pending NERC's submission of the Regional Entity Delegation Agreements.

4. In recent months, we have certified the ERO and established mandatory reliability standards. Today, we take the final major step forward in the transition to a strong reliability regime by providing for the enforcement of mandatory reliability standards. Specifically, we approve NERC's *pro forma* Delegation Agreement, including the Uniform Compliance Program, to be used by NERC and the Regional Entities to monitor, assess, and enforce compliance with NERC's reliability standards. We also approve each of the eight Regional Entity Delegation Agreements and attendant documents through which NERC has delegated responsibility to the Regional Entities to audit, investigate and otherwise ensure that users, owners and operators of the bulk-power system comply with NERC's mandatory reliability standards.⁶ Finally, we approve the Regional Entity 2007 Business Plans.

5. In doing so, we also identify areas of concern and, where necessary to provide greater uniformity and clarity, require modifications to the *pro forma* and individual Delegation Agreements. These modifications must be addressed by NERC and the Regional Entities in a filing to be made within 180 days from the date of this order. Both section 215 of the FPA and Order No. 672 provide that Regional Entities are subject to the Commission's jurisdiction and responsible for compliance with a Commission order affecting Regional Entities.⁷ Accordingly, we expect a complete set of responsive filings by the 180-day filing deadline. However, the required filing will not otherwise impede the implementation of the Delegation Agreements. Rather, we are approving these Delegation Agreements, without change, so that they will become effective, upon execution and re-filing, within 30 days of the date of this order. With respect to the modifications identified below and unless otherwise stated, NERC and the Regional

⁶ On March 16, 2007, the Commission approved 83 of the 107 standards initially filed by NERC. *See Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 118 FERC ¶ 61,218 (2007).

⁷ *See* 16 U.S.C. § 824o(b)(1) and (e)(5). *See also 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).

Entities may propose alternative modifications, provided that these revisions adequately address the Commission's underlying rationale or concern. However, each identified issue must be addressed. Concerns regarding the Commission's underlying rationale or concern may be raised in requests for rehearing of this order.

I. Background

6. In the Energy Policy Act of 2005 (EPAAct 2005), Congress authorized the Commission to certify an ERO for the purpose of establishing and enforcing reliability standards for the bulk-power system in the continental United States. The statute also allows the ERO to delegate enforcement authority to a Regional Entity, subject to Commission approval. The statute also directs the Commission to issue regulations implementing the requirements of FPA section 215, including: (i) the criteria that an applicant must satisfy to qualify as the ERO; and (ii) the criteria authorizing the ERO to delegate certain authority to a Regional Entity. The Commission addressed each of these requirements in Order No. 672.

7. On April 4, 2006, NERC submitted an application seeking authorization to serve as the ERO. NERC also submitted its proposed organizational documents and operating agreements, including a proposed *pro forma* Delegation Agreement. In July 2006, in the *ERO Certification Order*, the Commission certified NERC as the ERO. In addition, the Commission required NERC to address certain matters in one or more compliance filings, including: (i) providing additional information concerning its development of a uniform compliance monitoring and enforcement program; and (ii) making specified changes to the *pro forma* Delegation Agreement.⁸

8. As permitted by the *ERO Certification Order*, NERC responded to the Commission's directives in a series of compliance filings (including the instant compliance filing). First, on September 18, 2006, NERC submitted a compliance filing addressing NERC's governance structure.⁹ On October 18, 2006, NERC submitted a second compliance filing addressing non-governance ERO matters.¹⁰ In the instant filing, submitted in Docket No. RR06-1-004, NERC addresses its remaining compliance

⁸ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 3.

⁹ *Certification Rehearing and Compliance Order*, 117 FERC ¶ 61,126.

¹⁰ *See North American Electric Reliability Corporation*, 118 FERC ¶ 61,030 (2006) (*Second Compliance Filing Order*).

requirements: (i) its proposed Uniform Compliance Program; and (ii) its proposed revisions to the *pro forma* Delegation Agreement.

9. In the second filing at issue here, NERC requests authority, pursuant to FPA section 215(e)(4) and section 39.8 of the Commission's regulations,¹¹ to delegate certain of its functions to eight Regional Entities, i.e., TRE; MRO; NPCC; RFC; SERC; SPP; WECC; and FRCC.

10. Finally, with respect to the third filing addressed in this order, i.e., NERC's business plan and budget filing, the Commission, in the *Business Plan and Budget Order*, addressed certain of the issues presented, but deferred consideration of the Regional Entity 2007 business plans, pending submission of the NERC/Regional Entity Delegation Agreements. These deferred issues are now ripe for our consideration here.

II. Notices and Responsive Pleadings

11. Notice of NERC's compliance filing was published in the *Federal Register*, with interventions and protests due on or before January 10, 2007.¹² Notices of intervention and motions to intervene were timely filed by the entities noted in Attachment A to this order. Late interventions were filed by the New York Independent System Operator, Inc. (New York ISO), and East Texas Electric Cooperative, Northeast Texas Electric Cooperative, and Tex-La Electric Cooperative of Texas, Inc. Protests and comments were filed by numerous entities, as discussed below.

12. Notices of NERC's November 29, 2006 Delegations Agreements filing and FRCC's December 21, 2006 supplemental filing were published in the *Federal Register*, with interventions and protests due on or before January 10, 2007.¹³ Notices of intervention and motions to intervene were timely filed by the entities noted in Attachment B to this order. Late interventions were filed by the Electricity Consumers Resource Council, Southern California Edison Company, New York ISO, Western Farmers Electric Cooperative, and Florida Power & Light Company. Protests and comments were filed by numerous entities, as discussed below.

¹¹ 16 U.S.C. § 824o(e)(4); 18 C.F.R. § 39.8 (2006).

¹² 71 Fed. Reg. 74,501 (2006).

¹³ *Id.* at 74,501 and 78,419.

13. Notice of NERC's August 23, 2006 Business Plan and Budget filing was published in the *Federal Register*, with interventions and protests due on or before September 13, 2006.¹⁴ Notices of intervention and motions to intervene were filed by the same entities noted in Attachment A to the *Business Plan and Budget Order*.¹⁵

14. Answers to protests and/or answers to answers were filed regarding: (i) the proposed MRO Delegation Agreement, in Docket No. RR07-2-000 (by the WPS Companies, American Transmission Company LLC (ATC), PJM Interconnection, L.L.C. (PJM), and MRO); (ii) the proposed RFC Delegation Agreement, in Docket No. RR07-4-000 (by RFC); (iii) the proposed SPP Delegation Agreement, in Docket No. RR07-5-000 (by PJM and SERC), (iv) the proposed SPP Delegation Agreement, in Docket No. RR07-6-000 (by Xcel Energy Services, Inc. (Xcel) and SPP), and (v) NERC's business plan and budget filing, in Docket No. RR06-3-000 (by NERC, the New York ISO, and Alcoa, Inc. (Alcoa)).

III. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁶ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which these interventions were filed. In addition, given their interests, the early stage of this proceeding, and the absence of undue prejudice or delay, we will grant the unopposed late-filed interventions submitted by the entities noted above. Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a) (2006), prohibits an answer to a protest or an answer to an answer unless otherwise permitted by the decisional authority.

IV. NERC's Compliance Filing

16. We address, below, in sections IV(A) through IV(D) of this order, NERC's compliance filing. Section A addresses NERC's proposed revisions to Exhibit C of the *pro forma* Delegation Agreement, namely, NERC's proposed 34 Common Attributes governing the development of reliability standards. Section B of this order addresses NERC's proposed revisions to Exhibit D of the *pro forma* Delegation Agreement,

¹⁴ *Id.* at 52,785.

¹⁵ 117 FERC ¶ 61,091 at Attachment A.

¹⁶ 18 C.F.R. § 385.214 (2006).

addressing the enforcement of reliability standards, namely NERC's proposed Uniform Compliance Program. Section C addresses NERC's remaining compliance requirements as they relate to the *pro forma* Delegation Agreement. Finally, section D addresses miscellaneous comments and protests. All compliance matters addressed by NERC in its filing that are not addressed in the following discussion are hereby accepted.

A. Standards Development Procedures

17. The *ERO Certification Order* required NERC to include, in its *pro forma* delegation agreement, a uniform process for proposing reliability standards that mirrors NERC's own processes.¹⁷ As established under these *pro forma* rules, a Regional Entity's standards development procedures will be required to provide for reasonable notice and opportunity for public comment, due process, openness, and a balance of interests in developing reliability standards and otherwise exercising the duties of the ERO.¹⁸

1. NERC's Compliance Proposal

18. NERC, in its compliance filing, submits a revised Exhibit C to the *pro forma* Delegation Agreement, consisting of 34 "Common Attributes" to govern the development of reliability standards. NERC states that these Common Attributes establish a uniform framework that will ensure that any resulting reliability standard will be technically sound, capable of achieving a valuable reliability goal, and consistent with NERC's own rules.¹⁹ NERC also states that its proposed *pro forma*

¹⁷ See *ERO Certification Order*, 116 FERC ¶ 61,062 at P 520.

¹⁸ See 16 U.S.C. § 824o(e)(4).

¹⁹ See NERC Rules of Procedure at App. 3A (NERC Reliability Standards and Development Procedure).

Common Attributes will ensure that the standards development process is fair and open,²⁰ inclusive,²¹ transparent,²² and otherwise satisfies the requirements of Order No. 672.

19. NERC states that, with respect to voting procedures, uniformity may not be appropriate or necessary, given the flexibility permitted under FPA section 215 with respect to a Regional Entity's governance structure.²³ Accordingly, NERC proposes that the Regional Entities be allowed to structure voting on reliability standards by an open ballot body, by ballot pools similar to NERC's voting structure, or by a balanced committee of stakeholders.

20. However, the Common Attributes do address at least one level of the voting process, *i.e.*, the process as it will be structured at the registered ballot body level. Common Attribute 6 provides that "[e]ach member of the registered ballot body is eligible to vote on standards." It further provides that "[t]he registered ballot body comprises all entities or individuals that qualify for one of the stakeholder segments; are registered with [the Regional Entity] as potential ballot participants in the voting on standards; and are current with any designated fees." In addition, Common Attribute 19 provides, in the alternative, that either: (i) "[a]ll members of [the Regional Entity] are eligible to participate in voting on proposed new standards, standard revisions or standard deletions;" or (ii) "[e]ach standard action requires formation of a ballot pool of interested members of the registered ballot body."

²⁰ See Common Attributes 4, 22, 24 (requiring participation in the development of reliability standards to be open to all organizations and entities that are directly and materially affected by the Regional Entity's bulk-power system reliability).

²¹ See Common Attributes 6, 9, 17-18, and 23 (requiring, among other things, that the Regional Entity have a development process that will not be dominated by any two interest categories, with no single interest category able to defeat a matter).

²² See Common Attribute 26 (requiring that all actions material to the development of reliability standards be transparent).

²³ 16 U.S.C. § 824o(e)(4).

2. Responsive Pleadings

21. The Georgia System Operations Corporation (GSOC) argues that NERC's *pro forma* Common Attributes governing the development of reliability standards are, in certain respects, vague and require clarification. GSOC submits, for example, that the term "functional classes of entities," as used in Common Attribute 32,²⁴ and the term "proxies," as used in Common Attribute 33,²⁵ are vague and require clarification. GSOC also recommends that NERC make additional editorial revisions.²⁶

²⁴ Common Attribute 32 provides:

Clear identification of the functional classes of entities responsible for complying with the standard, noting any specific additions or exceptions. If not applicable to the entire [Regional Entity Name] area, then a clear identification of the portion of the Bulk-Power System to which the standard applies. Any limitation on the applicability of the standards based on electric facility requirements should be described.

²⁵ Common Attribute 33 provides:

Each requirement shall be addressed by one or more measures. Measures are used to assess performance and outcomes for the purpose of determining compliance with the requirements stated above. Each measure will identify to whom the measure applies and the expected level of performance or outcomes required demonstrating compliance. Each measure shall be tangible, practical, and as objective as is practical. It is important to realize that measures are proxies to assess required performance or outcomes. Achieving the measure should be a necessary and sufficient indicator that the requirement was met. Each measure shall clearly refer to the requirement(s) to which it applies.

²⁶ For example, GSOC proposes that in Common Attribute 7, the word "below" should be deleted. Common Attribute 7 provides that "[The Regional Entity] will coordinate with NERC such that . . . notice for vote identified in step 5 *below* are concurrently posted on both the [Regional Entity] and NERC websites" (emphasis added).

3. Commission Findings

22. We accept NERC's proposal to include, in Exhibit C of the *pro forma* Delegation Agreement, 34 Common Attributes that govern the development of reliability standards. These Common Attributes are generally consistent with NERC's procedures for the development of reliability standards that the Commission has approved in the *ERO Certification Order*.²⁷ We also find that these Common Attributes will serve as a useful benchmark in identifying the procedural elements necessary to ensure an open and fair process capable of producing reliability standards that are both technically sound and able to achieve a valuable reliability goal. We also agree that it will be appropriate, consistent with the flexibility afforded by FPA section 215, to consider, on a case-by-case basis (as we do below), the specific voting procedures applicable to this standards development process.

23. However, while we accept as reasonable NERC's Common Attributes as part of the *pro forma* Delegation Agreement and as an appropriate mechanism for NERC to evaluate a proposed reliability standards development process, we will look to the statute, *e.g.*, section 215(c) and (e), Order No. 672, and other Commission precedent to determine whether a proposed reliability standard is appropriate and whether the regional development process is acceptable. Thus, in reviewing Exhibit C in a given case (*e.g.*, in the context of the individual Delegation Agreements considered below in section V), we will consider the underlying documentation (*i.e.*, the bylaws or manuals approved by each proposed Regional Entity's board of directors), not only the narrative explanation accompanying each Common Attribute that appears in the individual Delegation Agreements. The scope of these Common Attributes will not limit the factors that we consider and our assessment of the requirements for a standards development process may be different from that provided by NERC's Common Attributes.

24. We disagree with GSOC that the Common Attributes are vague and require clarification. The term "functional classes of entities," as used in Common Attribute 32, is clearly referring to the types or categories of entities to which a reliability standard would apply.²⁸ Likewise, the purpose and function of the term "measures," as used in Common Attribute 33, has been clarified by NERC and discussed by the Commission in

²⁷ See NERC Rules of Procedure, App. 3A.

²⁸ See Order No. 693, 118 FERC ¶ 61,218 at P 94.

Order No. 693.²⁹ Finally, while we agree that NERC should consider the editorial and typographical revisions identified by GSOC, along with any other clarifications of this nature, we will not direct that any particular change be made.

B. Compliance Monitoring and Enforcement Procedures

25. The *ERO Certification Order* required NERC to submit uniform compliance monitoring and enforcement procedures to be used by Regional Entities in exercising their delegated authority. The Commission required that these procedures be consistent with the procedures applicable to NERC.³⁰ The Commission also required that these procedures satisfy additional requirements, as discussed below. NERC, in its compliance filing, submits a *pro forma* Uniform Compliance Program to be included as Appendix 4C to the NERC Rules of Procedure and, as incorporated by reference, to be made part of Exhibit D to the *pro forma* Delegation Agreement. Unless otherwise noted below, NERC's submittal is hereby accepted.

26. Generally, the Uniform Compliance Program will be utilized by NERC and the Regional Entities to monitor, assess, and enforce compliance with reliability standards within the United States. The document identifies and discusses eight monitoring processes, including compliance audits, self-certification, spot checking, investigations, self-reporting, periodic data submittals, exception reporting, and complaints. It includes procedures for enforcement actions, mitigation of violations and remedial action directives. It also discusses data retention and confidentiality matters. In addition, the Uniform Compliance Program obligates each Regional Entity to establish and maintain a hearing body to conduct and render hearings concerning disputes over findings of alleged violations, proposed penalties and mitigation plans.

1. Compliance Audits

27. The *ERO Certification Order* required NERC to establish, as part of its Uniform Compliance Program, compliance audit procedures, including guidelines that would:

²⁹ *Id.* at P 238.

³⁰ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 299.

(i) follow government auditing standards;³¹ and (ii) allow for participation of Commission Staff.³²

a. NERC's Compliance Proposal

28. NERC, in its compliance filing, states that its proposed Uniform Compliance Program, at section 3.1, describes the procedures each Regional Entity will be required to use in carrying out a compliance audit.³³ The procedures state that the guidelines for conducting compliance will be established for those reliability standards included in the audit and that such guidelines will be consistent with accepted auditing guidelines as approved by NERC and consistent with GAO Standards. NERC adds that because it must operate under the jurisdiction of Canadian governmental authorities and, eventually, Mexican governmental authorities, it will also consider standards established by these authorities in developing audit guidelines and training materials.

29. A section-by-section summary of NERC's proposed compliance audit process is provided below:

30. *Section 3.1.1 (Compliance Audit Process Steps)*: Section 3.1.1 provides that compliance audits will be conducted pursuant to NERC audit guides. Section 3.1.1 also specifies that the compliance enforcement authority (*i.e.*, the Regional Entity or NERC, in their respective roles), will distribute an annual audit plan to the compliance audit participants, *i.e.*, to both the Registered Entities scheduled to be audited as well as to the audit team members.³⁴ Section 3.1.1 provides that NERC and the Regional Entity are

³¹ See *Government Auditing Standards of the General Accounting Office* (GAO Standards), available at: www.gao.gov/govaud/ybhtml/toc.html.

³² *ERO Certification Order*, 116 FERC ¶ 61,062 at P 313 and P 318.

³³ A compliance audit is defined as a “systematic, objective review and examination of records and activities to determine whether a Registered Entity meets the requirements of applicable Reliability Standards.” See Uniform Compliance Program at section 1.1.5. The term registered entity means “an owner, operator, or user of the bulk power system or the entities registered as their designees for the purpose of compliance that is included in the NERC and Regional Compliance Registry.” *Id.* at section 1.1.18.

³⁴ An annual audit plan is defined as a “plan developed annually by the Compliance Enforcement Authority that includes the Reliability Standards and

(continued...)

required to provide the audit schedules to the Commission or other applicable governmental authorities. In addition, section 3.1.1 addresses the timing sequence relating to notice requirements, requests for data, audit review, and submissions of a final audit report to NERC.

31. *Section 3.1.2 (Compliance Enforcement Authority Annual Audit Plan and Schedule)*: Section 3.1.2 requires that the annual audit plan be submitted to NERC as well as to the Commission or other applicable governmental entities.

32. *Section 3.1.3. (Frequency of Compliance Audits)*: Section 3.1.3 provides that in addition to a scheduled audit, an unscheduled audit may be conducted “if reasonably determined to be necessary” to ensure compliance with a reliability standard.

33. *Section 3.1.4 (Scope of Compliance Audits)*: Section 3.1.4 provides that a compliance audit will generally include all reliability standards applicable to the registered entity for the current and previous three years.

34. *Section 3.1.5 (Conduct of Compliance Audits)*: Section 3.1.5 addresses the composition and duties of the audit team. At the discretion of NERC compliance staff, NERC may participate as either an observer or team member. The Commission and other regulatory bodies with regulatory authority for the registered entity may also participate on the audit team for any audit of a registered entity. No later than fifteen days prior to the start of on-site audit work, the audited entity may object, in writing, to the compliance enforcement authority regarding the appointment of any audit team member, other than NERC or Commission Staff, based on an asserted conflict of interest or on any other grounds that could interfere with the team member’s impartial performance of its duties.

35. *Section 3.1.6 (Compliance Audit Reports)*: Section 3.1.6 provides that a draft audit report, once it has been prepared, must be provided to the audited entity for comment. A final report will be submitted by the audit team to the compliance enforcement authority. The compliance enforcement authority, following its review of the final report, is required to submit the final report to NERC, which in turn submits it to the Commission and to other applicable governmental authorities. If the final audit report identifies an alleged violation, the audit report, or the part of it that is pertinent to any

Registered Entities to be audited, the schedule of Compliance Audits, and Compliance Audit Participant requirements for the calendar year.” *Id.* at section 1.1.2.

alleged violation, shall not be publicly released until the alleged violations have been addressed and finally determined.³⁵

b. Responsive Pleadings

36. American Municipal Power-Ohio, Inc. (AMP-Ohio), Xcel, Edison Electric Institute (EEI), GSOC, and the American Public Power Association (APPA) request clarifications and revisions regarding the requirements governing the preparation of audit reports under sections 3.1.1 and 3.1.6. AMP-Ohio asserts that the final report should be provided to the audited entity and NERC simultaneously and that the audited entity should be given the right to submit its objections to NERC. Xcel argues that the audited entity should be given the right to review and comment on the draft audit report before it is made final. GSOC argues that the statement, in footnote 1, that the compliance audit “normally completes within [60] days of the completion of the compliance audit” is circular and should be either revised or deleted. GSOC also asserts that to reduce potential confusion, time periods should consistently be stated as calendar days rather than sometimes referring to months which may vary in length (*e.g.*, section 3.1.1) or to undefined “business days” (*e.g.* section 3.1.6).

37. GSOC and Xcel request clarifications and revisions regarding the allowance for unscheduled audits under section 3.1.3. GSOC requests that the language authorizing the compliance enforcement authority to perform compliance audits “as required by the NERC Rules of Procedures *based on criteria established by NERC*” be revised to omit the italicized text, *i.e.*, to permit such an audit based solely on the requirements of the NERC Rules of Procedure. Xcel argues that section 3.1.3 should provide for as much advance notice to the audited entity as possible, including notice regarding the persons selected to conduct the audit.

38. Xcel, AMP-Ohio, EEI, Kansas City Power & Light (KCPL), and GSOC request clarifications and revisions regarding the composition and duties of the audit team as authorized under section 3.1.5. Xcel requests revisions stating that the Commission or other applicable governmental authorities participating in a compliance audit will be bound by the same confidentiality rules as will apply to the audit team. Similarly, EEI and KCPL argue that NERC and Commission Staff should be obligated to execute a confidentiality agreement. AMP-Ohio argues that Commission Staff participation on a compliance audit will, without adequate safeguards, raise fairness and due process

³⁵ Alleged violations are discussed in greater detail in section IV(B)(2), below.

concerns if the Commission is later required to judge the merits of the audit team report on appeal.

39. GSOC, Xcel and AMP-Ohio also seek greater specificity regarding the rights of an audited entity to object to the appointment of audit team members. GSOC specifically requests that an audited entity be given the right to appeal the compliance enforcement authority's determination regarding the make-up of the audit team. Xcel asks for section 3.1.5 to specify how an audited entity can object to members of the audit team in the event of an unscheduled audit. AMP-Ohio requests that an audited entity be permitted to object to audit team members appointed less than 15 days prior to the commencement of the audit.

40. GSOC requests that section 3.1.6 be revised to prohibit the release of information to the public on the basis of the compliance enforcement authority's finding alone.³⁶ EEI and Xcel argue that section 3.1.6 should be revised to prohibit an audit team from making penalty recommendations. Finally, GSOC argues that the audit report form authorized for use under section 3.1.6 be based on the applicable GAO form.

c. Commission Findings

41. We find that NERC's proposed compliance audit procedures satisfy the requirements of the *ERO Certification Order*. As discussed below, we also identify modifications to be addressed by NERC. As required by the *ERO Certification Order*, we find that NERC has included the necessary language in its audit procedures, at section 3.1.5, stating that no restrictions will be placed on the participation of Commission Staff in a compliance audit. We also find that NERC's compliance audit procedures are generally consistent with GAO procedures.³⁷ However, we direct NERC to review

³⁶ The relevant language provides that "in the event the audit report identifies Alleged Violations, the final audit report, or pertinent part thereof, shall not be released to the public until after such Alleged Violations have been addressed and finally determined *by the Compliance Enforcement Authority. . .*" (emphasis added). GSOC asserts that the italicized phrase should be deleted.

³⁷ Specifically, NERC's audit procedures are based on the following GAO procedures: ¶ 3.03 through ¶ 3.32 (independence); ¶ 3.33 through ¶ 3.38 (professional judgment); ¶ 3.39 through 3.42 (competence); ¶ 3.45 through ¶ 3.48 (continuing professional education); ¶ 3.49 through ¶ 3.56 (quality control and assurance), and additional provisions addressing reporting and field work procedures.

annually whether any changes to the GAO Standards have occurred and to address in its annual audit plan whether any changes in its audit procedures are appropriate.

42. With respect to section 3.1.1, we note that a compliance audit team will be authorized to conduct an audit subject to NERC “audit guides.” However, NERC has not filed these guides for our approval, nor is it clear whether these audit guides have as yet been developed by NERC. Accordingly, we direct NERC to submit the audit guides and to explain whether they should be incorporated into the Uniform Compliance Program.

43. We also agree with GSOC that the footnote to section 3.1.1 appears to be circular. Accordingly, NERC must consider a clarification.

44. We decline, as unnecessary, Xcel’s request that an audited entity be permitted to review an audit report before it is finalized. Section 3.1 allows for sufficient input, both in the audit team exit briefing and in the audited entity’s subsequent review of and opportunity to comment on the draft audit report. We also reject GSOC’s request regarding the use of consistent terms with respect to the time deadlines referenced in section 3.1. We find that these deadlines are clearly identified and are not otherwise confusing. Likewise, we find that the procedures and schedule for the release of an audit report are reasonable and provide for adequate due process and, therefore, we reject AMP-Ohio’s suggestion regarding the timing of the release of a final audit report to the audited entity.

45. Section 3.1.3 provides that in addition to a scheduled audit, an unscheduled audit may be conducted “if reasonably determined to be necessary” to ensure compliance with a reliability standard. However, we do not construe this provision as allowing an entity to challenge the decision to conduct such an audit, or as allowing the entity to prevent or fail to cooperate with such an audit. The decision to undertake such an audit should be within the discretion of NERC and the Regional Entities. Also, the Commission may direct NERC or a Regional Entity to undertake an audit at any time. Accordingly, we direct NERC to revise this provision. We also note that section 3.1.3 fails to provide that NERC and the Commission will receive notification of an unscheduled audit. Accordingly, we direct NERC to revise section 3.1.3 to include this requirement.

46. We reject GSOC’s argument regarding the conditions authorizing the compliance enforcement authority to perform a compliance audit under section 3.1.3. GSOC argues that the proposal to allow a compliance audit based on “criteria established by NERC” is vague, unsupported, and should, instead, be based solely on the alternative ground set forth in section 3.1.3, *i.e.*, on the NERC Rules of Procedures. However, GSOC has not provided any support for its position and we see no reason to limit NERC in the manner requested.

47. With respect to section 3.1.3, we agree with Xcel that an audited entity should be entitled to receive sufficient advance notice of an unscheduled audit in order to assess and, if it deems necessary, contest the composition of the audit team. On the other hand, too much advance notice would defeat the purpose of an “unscheduled” audit. Accordingly, NERC must have the discretion to consider the appropriate balance that will be required regarding these interests and to propose any revisions it may deem necessary.

48. We reject the arguments raised by Xcel, EEI, and KCPL that Commission Staff, when participating in a compliance audit, should be bound by the same confidentiality rules as all other compliance audit team members. FPA section 301(b) prohibits Commission Staff from publicly disclosing any information it receives during an audit unless the Commission or a court directs such disclosure.³⁸ We interpret this requirement to apply to Commission Staff participating in a compliance audit authorized under section 3.1.³⁹ To address AMP-Ohio’s concern that Commission Staff’s participation in a compliance audit will raise fairness and due process concerns in any subsequent appeal to the Commission, we clarify that Commission Staff participating in an audit will act consistent with the Commission’s policy regarding separation of functions.⁴⁰

49. We reject GSOC’s request that a separate appeals process be established to allow audited entities to contest determinations made by the compliance enforcement authority regarding the composition of the audit team. This additional appeal right is unnecessary and could unduly delay compliance audits. The audited entity, in this instance, will have the opportunity to raise any objections it may have to an audit team member’s participation in the audit at the outset of the process. This objection, moreover, must be considered and ruled on by the compliance enforcement authority at that time. Similarly, at the conclusion of the process, the final determination of the compliance enforcement authority may be appealed by the audited entity and may include due process challenges as they relate to the make-up of the audit team.

³⁸ 16 U.S.C. § 825(b) (2000).

³⁹ Because Commission Staff will be subject to this prohibition, the confidentiality rules that apply to other members of the compliance audit team, including the requirement that these entities execute a confidentiality agreement, need not apply to Commission Staff.

⁴⁰ See *Statement of Administrative Policy on Separation of Functions*, 101 FERC ¶ 61,340 (2002).

50. We agree with Xcel and AMP-Ohio that an audited entity should have the right to challenge the composition of the audit team in every circumstance, even where the audit team member has been appointed less than 15 days in advance of the audit. We direct NERC to revise this policy, as may be necessary.

51. We also agree with EEI that a revision is warranted, at section 3.1.6, prohibiting information regarding an alleged violation resulting from a compliance audit from being released to the public on the basis of the compliance enforcement authority's finding alone. Consistent with section 39.7(b)(4) of our regulations, an alleged violation may not be publicly disclosed until after NERC submits a notice of penalty to the Commission, or the alleged violation is resolved by an admission or a settlement. Accordingly, we direct NERC to make this revision.

52. We reject Xcel's and EEI's argument that a compliance audit team should be prohibited from making penalty recommendations. If the compliance audit team obtains information that it believes will lead a compliance enforcement authority to issue a notice of alleged violation, it could be useful for the audit team to recommend a penalty range consistent with the base penalty amount table in appendix A of the NERC Sanction Guidelines, if the team so decides.⁴¹ Such a recommendation would be limited to proposing the violation risk factor and violation severity level that would apply to a particular alleged violation.

53. Finally, we reject GSOC's argument regarding the necessary format for a compliance audit report. We leave it to NERC and the Regional Entities to determine the appropriate format for compliance audit reports.

2. Investigations

54. The *ERO Certification Order* required NERC to include, in its Uniform Compliance Program, procedures that would: (i) authorize NERC to assume, by way of a mandatory referral, the responsibility for an investigation, when appropriate; (ii) address

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⁴¹ We clarify, however, that any such recommendation should be accompanied by an explanation supporting the factual basis for the recommendation. We also clarify that notice of this recommendation must be provided to the audited entity at the time it is provided to the compliance enforcement authority.

how NERC and its Regional Entities will avoid multiple, overlapping investigations; and (iii) address all other procedures applicable to a NERC/Regional Entity investigation.⁴²

a. NERC's Compliance Proposal

55. NERC, in its compliance filing, states that sections 3.4 and 5 of the Uniform Compliance Program comply with the Commission's requirements regarding investigations. Section 3.4 provides 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.⁴³ Section 3.4 also provides that NERC, for good cause, may assume the leadership of a compliance violation investigation. Section 3.4 provides that while a compliance violation investigation will be confidential, a confirmed violation resulting from this investigation will be made public. Section 3.4.1 also outlines eleven process steps applicable to a compliance violation investigation:

- *Step 1:* The compliance enforcement authority will determine whether an investigation is warranted. A Regional Entity, when it is the compliance enforcement authority, will notify NERC and the applicable registered entity of the investigation and the reasons justifying it.
- *Step 2:* NERC will assign a staff member to the investigation and provide notice to the Commission or other applicable governmental authorities.
- *Step 3:* The compliance enforcement authority will request data and documentation and provide the registered entity with a list of the individuals who will comprise the investigation team. If the relevant reliability standard does not specify the advance notice period, the investigation team normally issues a request with no less than 20 days' advance notice.

⁴² *ERO Certification Order*, 116 FERC ¶ 61,062 at P 380-82.

⁴³ A compliance violation investigation is defined, at section 1.1.8 of the Uniform Compliance Program, as “[a] comprehensive investigation, which may include an on-site visit with interviews of the appropriate personnel, to determine if a violation of a Reliability Standard has occurred.”

- *Step 4:* The registered entity may object to any member of the investigation team on grounds of conflict of interest or the existence of circumstances that could interfere with the team member's impartial performance of his or her duties.
- *Step 5:* The compliance violation investigation may include on-site visits with interviews of the appropriate personnel and review of data.
- *Step 6:* The registered entity provides the required information to the compliance enforcement authority.
- *Step 7:* The compliance enforcement authority reviews information to determine compliance and requests additional information, if necessary.
- *Step 8:* The compliance enforcement authority completes the assessment of compliance with the reliability standard and/or approval of an applicable mitigation plan, writes and distributes the investigative report, and notifies the registered entity.
- *Step 9:* If the compliance enforcement authority concludes that a reasonable basis exists for believing that a violation has occurred, the procedures addressing alleged violations will be triggered.
- *Step 10:* The Regional Entity, if it is the compliance enforcement authority, will notify NERC of any alleged violations.
- *Step 11:* If the compliance enforcement authority determines that no violation has occurred, it will notify the registered entity and NERC that the investigation has been terminated. NERC, in turn, will notify the Commission or any other applicable governmental authority.

56. In addition to these procedures, section 5 requires the compliance enforcement authority to determine whether there have been violations of reliability standards by registered entities within the compliance enforcement authority's area of responsibility, and if so, the appropriate remedial actions, penalties, and sanctions as prescribed in the NERC Sanction Guidelines.⁴⁴ Section 5 requires NERC to review penalties and sanctions for the purpose of promoting consistency in their application. Section 5 also addresses notice requirements (sections 5.1 and 5.6); the rights of a registered entity to

⁴⁴ See NERC Rules of Procedure at App. 4B (NERC Sanction Guidelines).

respond (section 5.2); hearing procedures (attachment 2, section 5.3); settlement procedures (section 5.4); and appeals (section 5.5). Finally, section 5 applies in any matter in which a compliance enforcement authority alleges a violation of a reliability standard, whether the issuance of an alleged violation results from an investigation or any other process specified in section 3.0 of the Uniform Compliance Program.

b. Responsive Pleadings

57. FirstEnergy Service Company (FirstEnergy), Xcel, and Progress Energy, Inc. (Progress Energy) argue that section 3.4 fails to comply with the *ERO Certification Order* requirement that NERC avoid overlapping investigations.⁴⁵ Xcel and Progress Energy assert that section 3.4, in this regard, states only that compliance violation investigations will generally be led by the Regional Entity, while NERC may assume leadership of the investigation for good cause.

58. AMP-Ohio, APPA, Progress Energy, Xcel, and FirstEnergy request that section 3.4.1 be revised. AMP-Ohio suggests that NERC clarify step three because it includes redundant reference to objections to investigation team members rather than to time periods for responding to data requests. AMP-Ohio would delete the redundant language and include the following text after the first sentence: “[r]equests for data submittals will be issued by the Compliance Enforcement Authority to Registered Entities with at least the minimum advance notice period specified by the applicable Reliability Standard.”

59. APPA argues that step five, regarding on-site interviews, must be clarified and revised. Specifically, APPA argues that if a compliance enforcement authority conducts an on-site visit with interviews of the appropriate personnel, NERC’s proposed step five leaves unanswered: (i) whether the investigation team will allow management and legal counsel to the registered entity to be present; or (ii) whether these interviews will be tape-recorded or otherwise memorialized. APPA argues that the registered entity’s management should be represented and that a record is required.

60. Progress Energy, Xcel and APPA request that registered entities be given the right to review and comment on a draft investigative report before it is made final. Progress Energy alleges that this practice would be similar to procedures followed in the Commission’s own investigations, in which the Commission typically prepares a draft investigative report and allows parties to comment on the draft report before it becomes final. APPA notes that such a right would be consistent with section 3.1.6 of the Uniform

⁴⁵ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 380.

Compliance Program, which gives registered entities an opportunity to review and comment on a draft compliance audit report.⁴⁶

61. APPA argues that step eight should make clear that the registered entity will be served with a copy of the Compliance Enforcement Authority's investigative report.

62. FirstEnergy argues that step nine should state that a compliance enforcement authority's staff must have a reasonable basis to initiate an enforcement proceeding, such as actual data or information that suggest or reflect a violation of a reliability standard.

63. Xcel requests revision to section 5.1, regarding the notice requirements applicable to the issuance of a notice of alleged violation. Specifically, Xcel asserts that section 5.1 should prohibit a notice from including a proposed sanction or penalty prior to the receipt of any input from the registered entity.

64. Finally, AMP-Ohio argues that, under section 5.2, the compliance enforcement authority should proceed with the investigatory process rather than deeming a registered entity's failure to respond to a notice of an alleged violation to constitute an acceptance of the violation.

c. Commission Findings

65. We accept sections 3.4 and 5 of the Uniform Compliance Program. For the reasons discussed below, we find that NERC's procedures generally comply with the requirements of the *ERO Certification Order*. We also identify modifications to be addressed by NERC.

66. In the *ERO Certification Order*, the Commission required NERC to avoid the possibility of multiple, overlapping investigations. NERC, in response, at section 3.4, provides that it may assume the "leadership" of an investigation and that it will only do so for "good cause." However, NERC's proposal may be too restrictive under certain circumstances. Specifically, NERC should not be required to explain its decision to control an investigation to a Regional Entity's satisfaction, nor should the Regional Entity be entitled to protest or appeal that determination. Instead, NERC must retain discretion in deciding whether to assume control of investigations to assure consistency in investigative processes and to coordinate investigations into matters that may cross Regional Entity boundaries. In addition, NERC may assume leadership of the compliance violation investigation where the possible violation is: (i) related to Regional

⁴⁶ Section 3.1.6 is discussed *supra* at section IV(B)(1).

Entities or one of its affiliates, divisions, committees or subordinate structures; or (ii) where the Regional Entity determines that it cannot conduct the review.⁴⁷

Accordingly, we direct NERC to revise this aspect of section 3.4. We also remind NERC and the Regional Entities that the Commission retains the authority, at all times, to order the referral of any investigation directly to the Commission.⁴⁸

67. However, because NERC has otherwise complied with the *ERO Certification Order*, we reject the protests on this issue presented by FirstEnergy, Xcel, and Progress Energy. Specifically, we disagree that additional details are required regarding the interaction between NERC and the Regional Entities. NERC's proposed authorization, giving it the right to assume the leadership of an investigation, with the clarifications we provide in the previous paragraph, provides NERC with sufficient authority to determine how best to allocate investigative resources between it and the Regional Entities and among the Regional Entities. By definition, this leadership role gives NERC discretion to minimize, consolidate, or otherwise terminate an unneeded investigation.

68. Section 3.4.1, step 1, obligates the Regional Entity to provide, in its notice of investigation to a registered entity, its reasons for the investigation. However, this proposal is inconsistent with the Commission's holding in the *ERO Certification Order* that an entity under investigation need not be given, at the outset of the investigation, "a description of its scope and nature."⁴⁹ Accordingly, we direct NERC to amend step 1 to state that "[w]ithin two (2) business days of the decision to initiate a Compliance Violation Investigation, the Regional Entity: (i) notifies the registered entity of initiation of the investigation, its initial scope and the requirement to preserve all records and information relevant to the investigation and, where appropriate, the reasons for the investigation; and (ii) notifies NERC of the initiation of the investigation and the reasons for it." While the Regional Entity may, at its discretion, notify the registered entity of the reasons for its investigation, the investigation, as it unfolds, need not be limited to this scope.

⁴⁷ This reservation of authority is similar to section 3.8 of the Uniform Compliance Program, where a complaint provides the underlying basis for a compliance violation investigation. *See infra* section IV(B)(5).

⁴⁸ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 380.

⁴⁹ *Id.* at P 382. While this information may be appropriate to provide in some cases, in other cases, it may not be appropriate or necessary. However, in all cases, we agree that a Regional Entity must notify NERC of the reasons for the investigation.

69. We find that section 3.4.1, step 3 warrants clarification to make clear that objections to the composition of the investigation team may not include objections to the participation by NERC staff or Commission Staff. We also direct NERC to correct an apparent drafting error, at section 3.4.1, step 4, which states that an entity being investigated must provide its objections prior to the start of on-site “audit work.” As corrected, this requirement will relate to the investigative process, not the audit process.

70. We believe that NERC must provide in its investigative procedures for an entity to provide a response under oath to a request for documents or information or to provide testimony under oath, when appropriate in the discretion of the compliance enforcement authority. Because the Uniform Compliance Program provides for determinations of violations that could lead to substantial penalty assessments, Regional Entities and NERC must have available a mechanism to ensure that factual submissions and statements by witnesses bearing upon these determinations possess a high degree of veracity. We direct NERC to revise section 3.4 accordingly.

71. We reject AMP-Ohio’s request to correct an asserted drafting error in section 3.4.1, steps 3 and 4, *i.e.*, the asserted redundancy regarding objections raised to the selection of team members. We find no redundancy.⁵⁰ We also disagree with APPA that section 3.4 requires revision in order to expressly permit a registered entity’s management and counsel to be represented at investigative interviews and to provide that a record of these interviews be created.⁵¹ We leave it to the investigative team’s discretion to admit representatives of an entity’s management to an interview of an employee, contractor or consultant, in light of the particular circumstances of the interview. Counsel for an entity may attend an interview, if the person being interviewed

⁵⁰ Rather, we interpret step three to require that a registered entity’s time for responding to an investigative team’s data request will be the advance notice period specified in the reliability standard that relates to the request, unless the standard does not specify an advance notice period. This matter is not addressed by step 4, which addresses objections to the composition of the investigation team.

⁵¹ However, we believe that in some circumstances, the presence of management personnel of an entity could benefit an investigative interview. At that time, an entity’s management could explain its position on the subjects of the interview and provide additional information to the investigative team. Of course, an entity’s management could also provide this information in separate interviews. In contrast, when an employee being interviewed may provide information that is adverse to the entity’s management, the presence of management personnel could intimidate the employee.

states or agrees that the entity's counsel also represents him or her. Likewise, counsel representing the person being interviewed may attend the interview, whether or not the counsel also represents the entity.⁵² We also leave to the discretion of the investigative team whether a record of an interview should be made and if so, how the interview should be recorded.

72. We reject the arguments advanced by Progress Energy, Xcel, and APPA that a registered entity should be permitted to review and comment on draft investigative reports. Two premises underlie this argument: first, that draft investigative reports are analogous to draft audit reports (which are to be shared with a registered entity under section 3.1.6), and second, that the Commission Staff routinely shares draft investigative reports with entities that it has investigated. However, neither premise is correct because audits and investigations, under the Commission rules, are separate and distinct processes.⁵³

73. We reject APPA's request that a compliance enforcement authority be required to provide a registered entity with a copy of a final investigative report. If the report concludes that a violation has occurred, or is occurring, the registered entity will receive a notice of alleged violation, including the facts the compliance enforcement authority believes demonstrate or constitute the alleged violation.⁵⁴

74. We reject FirstEnergy's argument that clarifications are required, at section 3.4.1, regarding the grounds for initiating an enforcement proceeding. While we agree that the compliance enforcement authority should have a reasonable basis to start an enforcement proceeding, including actual data or information, section 3.4.1 is consistent with this

⁵² Our own investigative rules in Part 1b of our regulations are analogous. *See* 18 C.F.R. § 1b.16(b) (2006).

⁵³ *See Procedures for Disposition of Contested Audit Matters*, Order No. 675, FERC Stats. & Regs. ¶ 31,209 at P 42 (finding that investigations and audits are distinct processes, subject to separate rules and procedures).

⁵⁴ Of course, NERC's rules do not preclude a compliance enforcement authority from providing, to the registered entity, a summary of the investigative team's findings (*e.g.*, in the context of settlement discussions).

understanding.⁵⁵ However, this provision does not allow an entity to challenge the initiation of an investigation, or to prevent or fail to cooperate with such an investigation.

75. We deny the request by Xcel that a notice of alleged violation not include a proposed sanction or penalty unless the compliance enforcement authority has received input from the registered entity. We expect an investigative team to seek and receive information on matters that would pertain to a proposed penalty or sanction, as relevant in a particular investigation. Moreover, any such proposal would be of a preliminary nature and subject to additional procedures.⁵⁶

76. Finally, we reject AMP-Ohio's argument that if a registered entity fails to make a timely response to a notice of an alleged violation, that failure to respond, alone, should not be allowed to support a finding, by the compliance enforcement authority, that the underlying violation has occurred or is continuing. In fact, the 30-day response period provides sufficient opportunity for a registered entity to determine whether to contest a notice of alleged violation.

3. Mitigation Plans and Remedial Actions

77. The *ERO Certification Order* required NERC to include, in its Uniform Compliance Program, appropriate procedures applicable to the issuance of mitigation plans and remedial actions.⁵⁷

a. NERC's Compliance Proposal

78. NERC, in its compliance filing, states that sections 6 and 7 of the Uniform Compliance Program comply with the requirements of the *ERO Certification Order*. Section 6 addresses the submission of mitigation plans by a registered entity found to be

⁵⁵ Specifically, step 9 requires the compliance enforcement authority to conclude that a reasonable basis exists to initiate an enforcement proceeding and to send a registered entity a notice of alleged violation that includes the facts that support the issuance of the notice.

⁵⁶ In particular, section 5.2 of the Uniform Compliance Program provides a registered entity with a full opportunity to respond to a notice of alleged violation by contesting the alleged violation and any penalty or sanction it proposes, including the opportunity to provide any relevant information or documents.

⁵⁷ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 366 and P 369.

in violation of a reliability standard. A mitigation plan is defined, at section 1.1.12, as follows:

An action plan developed by a Registered Entity to (i) correct a violation of a Reliability Standard and (ii) prevent reoccurrence of the violation. A Mitigation Plan is required whenever a Registered Entity violates a Reliability Standard as determined by any means including Compliance Enforcement Authority decision, Settlement Agreement or otherwise.

79. In addition, section 7 of the Uniform Compliance Program sets forth the procedures applicable to remedial action directives. A remedial action directive is defined, at section 1.1.19, as “[a]n action (other than a penalty or sanction) required by a Compliance Enforcement Authority that (i) is to bring a Registered Entity into compliance with a Reliability Standard or to avoid a Reliability Standard violation, and (ii) is immediately necessary to protect the reliability of the bulk power system from an imminent threat.”

b. Responsive Pleadings

80. Xcel requests that section 6.2 be revised, as it relates to the implementation milestones applicable to a mitigation plan.⁵⁸ Xcel requests that NERC be required to provide flexibility in section 6.2 to establish implementation milestones for a mitigation plan that are more than three months apart, such as milestones for design and installation of certain equipment.

⁵⁸ Section 6.2 requires that a mitigation plan contain action plans to correct violations that have occurred and prevent their recurrence; describe the plan’s anticipated effect on reliability and include an action plan to mitigate any increased risk to reliability resulting from the plan’s implementation; include a timetable and completion date and, if the completion date is more than three months in the future, propose implementation milestones no more than three months apart. The compliance enforcement authority will issue a written statement accepting or rejecting the proposed mitigation plan within 30 days of receipt, unless this time period is extended; otherwise, the mitigation plan will be deemed accepted, pursuant to section 6.5. If the compliance enforcement authority rejects the proposed plan, it will require the registered entity to submit a revised plan. If the compliance enforcement authority rejects the revised plan, the registered entity may appeal that action.

81. APPA requests that section 6.3 be revised regarding the compliance enforcement authority's right to extend the completion deadline for a mitigation plan for good cause shown.⁵⁹ APPA requests that an additional example of "good cause" be included in section 6.3 covering the need of a registered entity to enroll its employees, on a staggered basis, in training courses.

82. ISO New England, Inc. (ISO New England) challenges the section 6.4 requirement that a mitigation plan be submitted by a registered entity that is served with a notice of an alleged violation, even when the registered entity chooses to dispute that notice.⁶⁰ ISO New England asserts that this requirement should be reserved for those violations that present a serious or imminent threat to reliability, because, in all other cases, the requirement to submit a mitigation plan could be unnecessarily onerous and expensive. Alternatively, ISO New England proposes that submission of a limited, or interim, mitigation plan in response to a notice of alleged violation be permitted, subject to the submission of a comprehensive plan if the alleged violation is upheld on appeal.

83. The Transmission Access Policy Study Group (TAPS) requests that, consistent with sections 6.2 and 6.4, section 5.1(v) should be revised to make clear that the registered entity has the option of submitting a mitigation plan after receiving its notice of an alleged violation, even if the entity wishes to contest the alleged violation.⁶¹ TAPS asserts that the minimum notice requirements set forth at section 5.1(v), by contrast, give

⁵⁹ Section 6.3 provides, in relevant part:

The Compliance Enforcement Authority will expect full compliance with the Reliability Standard to which the Mitigation Plan is applicable at the next report or assessment of the Registered Entity. At the Compliance Enforcement Authority's discretion, the completion deadline may be extended for good cause including: (i) short assessment periods (*i.e.*, event driven or monthly assessments), and (ii) construction requirements in the Mitigation Plan that extend beyond the next assessment period or other extenuating circumstances.

⁶⁰ Section 6.4 provides, in relevant part, that "[i]f the Registered Entity disputes the notice . . . the Registered Entity shall [nonetheless be required to] submit its Mitigation Plan within ten (10) business days following issuance of the written decision of the hearing body, unless the Registered Entity elects to appeal the hearing body's determination to NERC."

⁶¹ Section 5.1(v) addresses the contents of a notice of an alleged violation.

the erroneous impression that submission of a mitigation plan after receipt of a notice of alleged violation is only an option if the registered entity agrees to the alleged violation.

84. KCPL and EEI request clarification that any decision to implement a remedial action directive is within the purview of the registered entity that receives such a directive while an appeal relating to it remains pending. KCPL and EEI assert that a two business day period for a registered entity to notify a compliance enforcement authority that it will contest a remedial action directive, as required by section 7.0, is too short and could expire before a registered entity receives notice of such a directive. Therefore, they request that section 7.0 provide that a compliance enforcement authority provide actual notice to a registered entity of issuance of a remedial action directive (that is, the compliance enforcement authority actually speak to a representative of the entity), since such notice would be particularly appropriate given that a remedial action directive involves a matter deemed to be an imminent threat to reliability. Alternatively, EEI and KCPL suggest an extension for good cause of the deadline for an entity to notify the compliance enforcement authority of its intent to contest a remedial action directive, such as an entity's failure to receive actual notice of the directive.

85. Asserting that the list in section 7 of actions a compliance enforcement authority may take in a remedial action directive exceeds the steps necessary to ensure compliance with reliability standards and may go beyond or vary from requirements in particular standards, AMP-Ohio suggests that a compliance enforcement authority only issue remedial action directives that require compliance with approved standards or with an approved mitigation plan.

c. Commission Findings

86. We accept sections 6 and 7 of the Uniform Compliance Program. We also identify modifications to be addressed by NERC. The *ERO Certification Order* held that remedial actions would be required to: (i) achieve prospective compliance with reliability standards; and (ii) reduce the risk to bulk-power system reliability if actions that appear to be in violation of reliability standards are not corrected.⁶² Sections 6 and 7 of the Uniform Compliance Program generally satisfy these objectives.

87. However, we find that section 6.3 is unclear regarding the effect of a satisfactorily-completed mitigation plan on violations that occur during the plan's implementation period. Section 6.3 provides that, upon a registered entity's satisfactory

⁶² 116 FERC ¶ 61,062 at P 364-69.

and timely completion of an approved mitigation plan, the compliance enforcement authority will notify the entity that any findings of “violations of the applicable Reliability Standard” during the implementation period have been waived. In this instance, no penalties or sanctions will apply. By contrast, when a mitigation plan extends beyond the next reporting or assessment period for a violation it is to mitigate, the last sentence of the first paragraph of section 6.3 waives sanctions for “any violation,” without the modifier: “of the applicable Reliability Standard,” that occurs during the implementation period if the plan is satisfactorily completed.” We direct NERC to revise this sentence to refer to “any violation of the applicable Reliability Standard.”

88. We also find that sections 6.3 and 6.4 do not specifically address whether the rejection of an entity’s proposed mitigation plan places the entity in the position in which it would have been had it not submitted a mitigation plan. Because section 6.3 discusses waivers of penalties or sanctions in the context of an accepted mitigation plan, we conclude that rejection of an entity’s proposed mitigation plan should not immunize the entity from any penalties or sanctions for such violations. Accordingly, we require NERC to submit an appropriate clarification regarding this requirement.

89. We reject Xcel’s argument regarding the need for greater flexibility with respect to the implementation milestones included in a mitigation plan. Although, as Xcel asserts, design or installation of certain equipment, in a given case, could require an extension of these milestones, an entity, in this instance, will not be prohibited from proposing more than one implementation milestone for such a project. Section 6.3 also permits entities to request extensions of time for completion of milestones or a mitigation plan.

90. We reject APPA’s request to revise section 6.3 by listing, as an additional example of a “good cause” reason to extend a deadline for completion of a mitigation plan, a registered entity’s employees’ necessary training. The examples of “good cause” itemized at section 6.3 are illustrative in nature. As such, a compliance enforcement authority may at its discretion grant a good cause exemption as warranted by the circumstances.

91. We disagree with ISO New England that section 6.4 requires a registered entity to submit a mitigation plan in response to receipt of a notice of alleged violation if the registered entity disputes the notice. Section 6.4 specifically states that if an entity disputes an alleged violation, or a penalty or sanction proposed in the notice, the entity need not submit a mitigation plan until 10 business days after issuance of a written decision on the alleged violation by the applicable hearing body, or even later if the entity elects to appeal the hearing body’s decision to NERC. Nor do we read section 6 to prohibit ISO New England’s alternative proposal that an entity initially be permitted to submit an interim, or limited, mitigation plan, followed by the submission of a comprehensive plan, if the alleged violation at issue is upheld upon appeal. Section 6.2

states that a proposed mitigation plan should include “any other information deemed necessary or appropriate,” which could include the facts and arguments that an entity believes would support submission of an initial, interim or limited plan.⁶³ However, we caution that such a proposal may run a significant risk of rejection by the compliance enforcement authority and resulting preclusion of waiver of penalties or sanctions for subsequent violations, as we discussed above.

92. We agree with TAPS that it would be helpful for a notice of an alleged violation to inform the registered entity of its right to submit a mitigation plan, without thereby waiving its right to contest that notice. Accordingly, we direct NERC to make this clarification.

93. We find that NERC’s section 7 procedures, regarding the issuance of remedial action directives, warrant modification regarding the notice of these actions given to the registered entity.⁶⁴ As EEI and KCPL correctly point out, section 7 does not expressly require a compliance enforcement authority to provide actual notice to a registered entity of a remedial action directive prior to the expiration of the two-business day deadline for contesting the directive. Nor does NERC include a requirement that a remedial action

⁶³ We note that, in section 6, NERC encourages interested parties to consult regarding the level of data and information appropriate for addressing the process requirements for mitigation plans. If, as ISO New England suggests, a mitigation plan could be overly expensive and time-consuming for a particular registered entity to complete, the registered entity and the compliance enforcement authority could discuss these issues in this consultation process before the registered entity submits a proposed mitigation plan.

⁶⁴ We note that in the *ERO Certification Order*, the Commission required NERC to establish procedures for notifying an entity that it may be subject to remedial action, including information regarding each specific reliability standard that the entity appears to be violating or may violate in the near future, and the factual basis for the entity to undertake the remedial action. *See ERO Certification Order*, 116 FERC ¶ 61,062 at P 366. The Commission also stated that NERC should include in these procedures effective methods for providing timely notice of remedial action directives to affected entities, for the dual purpose of ensuring fairness to entities that receive remedial section directives and preventing instances in which needed corrective actions are not performed timely as a result of a communications failure. In particular, the Commission required NERC to provide for multiple avenues of notice, especially when immediate corrective action is needed, and for notifying the Commission of each remedial action. *Id.*

directive list, in that notice, the violations or possible violations giving rise to the directive, or include any discussion of the factual basis for the directive. Accordingly, we direct NERC to submit modifications to its section 7 procedures to address these concerns.

94. Section 7 also permits a registered entity to decide not to implement a remedial action directive while an appeal relating to this directive remains pending before the compliance enforcement authority.⁶⁵ However, NERC's hearing procedures, at attachment 2, section 10, permit the hearing body to rule, in a summary written decision, that the registered entity must comply with a remedial action directive, without discussion of that entity's rights under section 7. To avoid confusion regarding these related provisions, we direct NERC to make appropriate clarifications.

95. Finally, we reject, as a collateral attack of the *ERO Certification Order*, AMP-Ohio's request to limit the authority of the compliance enforcement authority to directives commanding compliance with approved reliability standards or directives satisfying the mitigation plan's approved requirements. In the *ERO Certification Order*, the Commission rejected arguments regarding such limitations.⁶⁶

4. Settlement Process

96. The *ERO Certification Order* required NERC to include, in its Uniform Compliance Program, appropriate procedures addressing settlements.⁶⁷

a. NERC's Compliance Proposal

97. NERC, in its compliance filing, states that its Uniform Compliance Program, at section 5.4, sets out the process to be followed with respect to settlements. First, negotiations must conform to the NERC Rules of Procedure.⁶⁸ NERC proposes that

⁶⁵ Failure to implement a remedial action directive could subject a registered entity to an action for injunctive relief by NERC, a Regional Entity or the Commission. *See ERO Certification Order*, 116 FERC ¶ 61,062 at P 367.

⁶⁶ *Id.* at P 358 and P 365 (finding that NERC's list of activities it could require in a remedial action directive, including items other than those AMP-Ohio urges as appropriate, are not excessive).

⁶⁷ *Id.* at P 299.

⁶⁸ *See* NERC Rules of Procedure at section 403.18.

negotiations may occur at any time from the issuance of a notice of alleged violation and sanction until a notice of penalty is filed with the Commission or other applicable governmental authority. Settlement terms will be treated as confidential until such time as the settlement is approved by NERC.

98. Section 5.4 also requires that the Regional Entity report terms of a settlement to NERC. After reviewing the settlement for consistency relative to other settlements involving similar violations or circumstances, NERC will either approve the settlement or reject it. If rejecting a settlement, NERC will then notify the Regional Entity and the registered entity of changes that would result in NERC's approval. Following NERC's approval of a settlement, NERC will report the settlement to the Commission or the applicable governmental authority. NERC will also publicly post a notice of the violation that has been settled and the resulting penalty or sanction.

b. Responsive Pleadings

99. FirstEnergy requests revision of section 5.4 as it relates to NERC's obligation to post settlements.⁶⁹ FirstEnergy argues that this requirement may conflict with the legitimate desire of the registered entity to enter into a settlement on a confidential basis without an admission that the violation has occurred. FirstEnergy adds that posting a violation and the resulting penalty or sanction may, under these circumstances, unfairly and inaccurately imply that a finding of a violation has, in fact, been made. Accordingly, FirstEnergy requests that section 5.4 be revised to state that NERC will only post confirmed violations and will not post alleged violations or settlements.

100. TAPS, by contrast, acknowledges NERC's obligation to post all settlements.⁷⁰ However, TAPS asserts that a settlement may be entered into without converting an alleged violation into a violation. As such, TAPS requests that NERC's posting obligation, as reflected in section 5.4, be revised to refer to settlements of both violations and alleged violations.

⁶⁹ Section 5.4 provides, in relevant part, that in the case of a settlement concerning an alleged violation, "NERC will: (i) report the approved settlement of the violation to [the Commission] or the Applicable Governmental Authority, and (ii) publicly post the violation settled and the resulting penalty or sanction provided for in the settlement."

⁷⁰ See TAPS comments at 5, *citing* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 598.

101. APPA requests revision of section 5.4 to permit parties to agree to a settlement at any phase during a proceeding.⁷¹ APPA notes that while Commission approval of a settlement may be necessary once a notice of penalty is filed, this requirement does not support a bar against settlement negotiations after that time.

102. Progress Energy argues that section 5.4 fails to comply with the requirements of the *ERO Certification Order*. Specifically, Progress Energy notes that in that order, the Commission directed NERC to include language, in its enforcement procedures, that would encourage settlements and resolutions of investigations that do not require formal adjudicatory procedures.⁷² Progress Energy asserts that section 5.4, by contrast, fails to mention a policy in favor of encouraging settlements and fails to establish sufficient procedures to encourage settlements. Progress Energy notes, for example, that section 5.4 does not strictly limit the rights of third parties or the Commission to challenge or overturn settlements.

103. Progress Energy further asserts that section 5.4, as drafted, may even discourage settlements. Progress Energy notes, for example, that section 5.4 gives NERC the right to review and reject settlements entered into by the Regional Entities, with no restrictions placed on NERC's ability to do so. Progress Energy argues that NERC's authorization to reject a settlement should be narrowly circumscribed.

c. Commission Findings

104. We accept section 5.4 of the Uniform Compliance Program. We also identify modifications to be addressed by NERC. We find that, in general, section 5.4 sets out procedures that will encourage settlements when appropriate, consistent with the requirements of the *ERO Certification Order*. However, the time period specified in section 5.4 during which settlement may be pursued warrants revision to include the period prior to the issuance of a notice of alleged violation. Accordingly, we direct NERC 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.

⁷¹ Section 5.4 provides, in relevant part, that “[s]ettlement negotiations may occur at any time from the issuance of a notice of Alleged Violation and sanction until a Notice of Penalty is filed with [the Commission] or Applicable Governmental Authority.”

⁷² *ERO Certification Order*, 116 FERC ¶ 61,062 at P 382.

105. To address TAPS' argument, we also direct NERC to modify section 5.4 regarding NERC's obligation to post confirmed violations, i.e., to clarify in section 5.4 that this posting obligation extends to both confirmed violations and settlements, whether or not the settlement includes an admission of a violation.⁷³ We also agree that NERC's postings should include a copy of the settlement or a description of its terms.

106. We reject APPA's argument that additional revisions are required to allow for settlement negotiations after NERC has submitted a notice of penalty to the Commission or other applicable governmental authority. Section 5.4 does not prohibit such negotiations.⁷⁴

107. We reject Progress Energy's argument that language should be added to section 5.4 making clear that NERC favors settlements. NERC's policy in this regard is sufficiently clear without further clarification. Finally, we reject Progress Energy's suggestion that we circumscribe NERC's ability to reject a settlement entered into by or before a Regional Entity. As we stated in the *ERO Certification Order*, to ensure consistency in settlements by regional entities, NERC must have discretion to reject settlements and associated penalties which may otherwise result in inconsistency.⁷⁵

⁷³ As such, we reject FirstEnergy's argument that section 5.4 should be revised to provide that NERC post only confirmed violations. In the *ERO Certification Order*, we stated that an alleged violation will be treated as confidential until a notice of penalty is filed with the Commission, or resolved by an admission, settlement, or other negotiated disposition. *See ERO Certification Order*, 116 FERC ¶ 61,062 at P 402. *See also* section 18 C.F.R. 39.7(b)(4) (2006) (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).

⁷⁴ A settlement submitted to the Commission, under these circumstances, would be subject to the Commission's rules and procedures, as applicable to the review of a notice of penalty.

⁷⁵ 116 FERC ¶ 61,062 at P 479.

5. Complaints

108. The *ERO Certification Order* required NERC to include, in its Uniform Compliance Program, appropriate complaint procedures.⁷⁶

a. NERC's Compliance Proposal

109. NERC, in its compliance filing, states that its Uniform Compliance Program, at section 3.8, sets out the process to be followed with respect to complaints. The process begins when the complainant notifies NERC or a Regional Entity by: (i) calling the NERC compliance hotline; (ii) submitting a NERC complaint reporting form; or (iii) relying on “other means.”⁷⁷

110. If, after receiving a complaint, the compliance enforcement authority determines that a compliance violation investigation is warranted, it will initiate an investigation, pursuant to the investigation process set forth in section 3.4.⁷⁸ If the compliance enforcement authority determines that an investigation is not warranted, it will notify the complainant, NERC, and the registered entity that no further action will be taken. An anonymous complainant who believes, or has information indicating, that a violation of a reliability standard has occurred can report the alleged violation and request that the complainant's identity not be disclosed.

111. NERC will be required to review any complaint that: (i) concerns Regional Entities; (ii) a Regional Entity determines it cannot review; (iii) specifically requests NERC review; or (iv) is anonymous, even if received by a Regional Entity. When receiving an anonymous complaint, a Regional Entity may, at its discretion, either direct the complainant to NERC or collect the relevant information and then forward it to NERC. Neither NERC nor a Regional Entity need act on a complaint if it is incomplete or does not include sufficient information.

b. Responsive Pleadings

112. Progress Energy and Xcel request that section 3.8 be revised to remove the right of a complainant to specify that its complaint be reviewed by NERC, rather than the

⁷⁶ *Id.* at P 299.

⁷⁷ *See* section 3.8.1, step one. The “other means” are not specified.

⁷⁸ Section 3.4 investigations are discussed *supra* at section IV(B)(2).

applicable Regional Entity, and to delete the provision giving NERC the exclusive authority to review anonymous complaints. Progress Energy asserts that this allowance could invite “forum shopping” by any complainant seeking to avoid review by the Regional Entity before whom its complaint arises. AMP-Ohio also foresees the possibility of abuse with respect to the section 3.8 anonymous complaint procedures, particularly if a complainant is intent on interfering with another entity’s business activities or is otherwise indifferent to those concerns.

113. AMP-Ohio asserts that despite the potential for abuse in the case of a frivolously-filed, or maliciously-filed complaint, it is prepared to accept NERC’s professed need for these procedures, provided that NERC and the Regional Entity involved possess authority to sanction a complainant for making a wholly unsubstantiated complaint. APPA recommends that a complainant who has filed a groundless complaint with the intent to harass the subject of the complaint be publicly admonished by NERC. Xcel too requests a mechanism to protect Registered Entities from multiple and unfounded complaints.

114. FirstEnergy agrees that NERC should receive and conduct initial reviews of all anonymous complaints, but believes that NERC should act on anonymous complaints only when a complainant demonstrates to NERC’s satisfaction that there is potential for bias or conflict of interest on the part of the Regional Entity. Otherwise, NERC should transmit the anonymous complaint to the Regional Entity for any further action.

115. Finally, AMP-Ohio requests that section 3.8 be revised to provide that, if a compliance enforcement authority determines that an investigation of a complaint is not warranted, the compliance enforcement authority must provide the complainant with a written explanation of the basis for this determination.

c. Commission Findings

116. We find that section 3.8 sets out procedures that will promote the fair and judicious processing of complaints, consistent with the requirements of the *ERO Certification Order*. Accordingly, we accept section 3.8 of the Uniform Compliance Program. We also identify modifications to be addressed by NERC. First, where NERC is required to review a complaint and conduct an investigation, due to its being “related to Regional Entities,” we construe the scope of that disqualification to include the Regional Entity and any of its affiliates, divisions, committees or subordinate structures.

117. In addition, the use of the term “Alleged Violation,” in section 3.8.2, in reference to the allegations made in an anonymous complainant is inconsistent with NERC’s

defined terms and must be revised. An “Alleged Violation,” as defined in the Uniform Compliance Program, has reference to a potential violation that has been investigated by the compliance enforcement authority, not an unreviewed complaint.⁷⁹ Accordingly, we direct NERC to amend the second sentence of the first paragraph of section 3.8 so that after the numeral “(1)” it states “that is related to a Regional Entity, or its affiliates, divisions, committees or subordinate structures” and substitute “possible violation” for “Alleged Violation” in the context of section 3.8.2.

118. We reject Progress Energy’s argument regarding the potential for forum shopping. While possible, in theory, it remains to be seen whether this alleged abuse will occur to the extent (or to the degree) that would warrant a rule change with respect to section 3.8. We also reject the arguments raised by AMP-Ohio, APPA, and Xcel regarding the projected filings of frivolous and/or malicious complaints and the asserted corresponding need for section 3.8 revisions allowing for sanctions. Again, it is speculative whether or to what extent this abuse may arise in practice.

119. We also reject FirstEnergy’s argument that section 3.8 should be revised to further limit NERC’s authority to review anonymous complaints, i.e., that NERC’s review should be triggered only where the complainant shows, to NERC’s satisfaction, that the Regional Entity has a potential for bias or conflict of interest. We do not believe that NERC can always evaluate a Regional Entity’s potential bias or conflict of interest without disclosing the nature of the complaint to the Regional Entity. This disclosure itself could engender the potential bias or conflict of interest that caused the anonymous complaint. Further, consistent with NERC’s oversight role over the Regional Entities and NERC’s obligation to assure consistency among the regions to which it has delegated duties and functions, it is appropriate that NERC address anonymous complaints.

120. Finally, we reject AMP-Ohio’s request that NERC or a Regional Entity provide to a complainant a written explanation of a determination not to investigate its allegations. We leave this decision to the discretion of the Regional Entities and NERC.

⁷⁹ The term alleged violation is defined at section 1.1.1 of the Uniform Compliance Program 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.”

6. Confidentiality

121. The *ERO Certification Order* required NERC to include, in its Uniform Compliance Program, additional details regarding the application and scope of its confidentiality requirements, including procedures for identifying and protecting from public disclosure information concerning violations, or alleged violations, relating to a cybersecurity incident, or other matters that would jeopardize bulk-power system reliability.⁸⁰

a. NERC's Compliance Proposal

122. NERC notes that, in the *Second Compliance Filing Order*, the Commission accepted NERC's proposed revisions to the NERC Rules of Procedure in partial compliance with the confidentiality rulings made by the Commission in the *ERO Certification Order*.⁸¹ NERC states that in the instant filing, it is submitting its remaining compliance changes with respect to these issues, including section 3.4 and 9.3 of the Uniform Compliance Program.

123. Section 9.3 requires that information or data generated or received pursuant to NERC's enforcement procedures, including through a hearing, will be treated in a confidential manner, subject to section 1500 of the NERC Rules of Procedure. Section 3.4 requires that investigations be confidential, but specifies that confirmed violations resulting from an investigation will be made public.

b. Responsive Pleadings

124. GSOC, Xcel, and Progress Energy argue that NERC's compliance filing fails to clarify the remedies available to an entity for breach of confidentiality or adequately explain the recourse available to entities threatened with a breach of confidentiality, as required by the *ERO Certification Order*.⁸²

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⁸⁰ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 650-51, P 659-60, and P 398.

⁸¹ *Second Compliance Filing Order*, 118 FERC ¶ 61,030 at P 163-213 (accepting NERC's proposed revisions, subject to conditions).

⁸² 116 FERC ¶ 61,062 at P 668.

c. Commission Findings

125. We accept sections 3.4 and 9.3 of the Uniform Compliance Program. We find that, in general, sections 3.4 and 9.3 set forth procedures that will protect confidentiality, consistent with the requirements of the *ERO Certification Order*. However, we also identify modifications to be addressed by NERC.

126. Section 3.4 (and a corollary provision in the NERC Rules of Procedure) state, respectively, that all investigations are confidential and that all compliance investigations are to be non-public.⁸³ While this statement of policy is generally accurate, clarification would also be useful regarding the authority of the Commission to determine that a particular NERC or Regional Entity investigation (or information obtained in it) should be publicly disclosed. Accordingly, we direct NERC to make this clarification.

127. We also agree with GSOC, Xcel, and Progress Energy that NERC's proposed confidentiality provisions do not expressly address how it will mitigate the inappropriate release of confidential information. However, in the *Second Compliance Filing Order*, we directed NERC to address this issue in that context of that proceeding.⁸⁴ Accordingly, we will not issue any findings on that issue here.

7. Penalties

128. The *ERO Certification Order* required NERC to address, with respect to the penalty provisions included in its Uniform Compliance Program, the extent to which a violator would be discouraged from viewing these penalties as simply an economic choice, or a cost of doing business that it might choose to incur in a given case.⁸⁵

a. NERC's Compliance Proposal

129. NERC states that the Commission, in the *Second Compliance Filing Order*, accepted NERC's proposed revisions to the NERC Sanction Guidelines in partial compliance with the penalty provision requirements of the *ERO Certification Order*.

⁸³ See NERC Rules of Procedure at section 403.13 ("All compliance investigations are to be non-public unless NERC or regional entity determines a need to conduct a public investigation.").

⁸⁴ *Second Compliance Filing Order*, 118 FERC ¶ 61,030 at P 213.

⁸⁵ 116 FERC ¶ 61,062 at P 446.

NERC states that, in the instant filing, it is submitting its remaining compliance changes with respect to these issues, consisting of proposed section 5.1(iv) of the Uniform Compliance Program. Section 5.1(iv) requires that a notice of an alleged violation contain certain information, including the proposed penalty or sanction, if any, determined by the compliance enforcement authority to be applicable to the alleged violation in accordance with the NERC Sanction Guidelines, including an explanation of the basis on which the particular penalty or sanction was determined to be applicable.

b. Responsive Pleadings

130. GSOC argues that section 5.1(iv) should specifically require a notice of alleged violation to include an explanation of how a proposed penalty addresses whether the violator saw its violation as an economic choice or a cost of doing business.

131. FirstEnergy requests that section 5.1(iv) be amended to establish a safe harbor from enforcement actions resulting from situations in which a registered entity “excursion” from a reliability standard was directed or caused by an apparently conflicting legal requirement. FirstEnergy also requests that in such instances, the registered entity should not be deemed or found to have violated the reliability standard or be subject to penalties.

c. Commission Findings

132. We accept section 5.1(iv) of the Uniform Compliance Program, without revision. GSOC’s recommendation that notices of an alleged violation should be required to state whether the alleged violator saw its violation as an economic choice is unnecessary. While the *ERO Certification Order* required that a Regional Entity or NERC justify a penalty determination, in part, on these grounds, a section 5.1(iv) notice may not be the appropriate forum for doing so. A notice of alleged violation, rather, is a notice that the compliance enforcement authority concludes that evidence exists that an entity violated one or more requirements of a reliability standard, not a determination of penalty. Such a notice, then, need not address this factor.

133. We also reject 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. In Order No. 693, we determined that the ERO and Regional Entities will retain ongoing enforcement discretion as would any enforcement

entity.⁸⁶ 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. NERC's 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. The NERC Sanction Guidelines, as we have modified them, allow for the informed discretion necessary for the Regional Entities and the ERO to apply appropriate remedies and sanctions for violations.

8. Hearing Procedures

134. The *ERO Certification Order* required NERC to include, in its Uniform Compliance Program, appropriate hearing procedures.⁸⁷

a. NERC's Compliance Proposal

135. NERC, in its compliance filing, submits, as attachment 2 to the Uniform Compliance Program, proposed hearing procedures. NERC's procedures address: (i) the designation of the hearing body in attachment 2, section 1;⁸⁸ (ii) recusal of hearing body members in attachment 2, section 2; (iii) authorized representatives, *i.e.*, persons permitted to represent the compliance enforcement authority and the registered entity before the hearing body in attachment 2, section 3; (iv) initiation of the hearing process in attachment 2, section 4; (v) the convening of an initial conference and the establishment of a procedural schedule in attachment 2, section 5; (vi) the conduct of the hearing, including the default use of a short-form procedure pursuant to attachment 2, section 6; (vii) the submission of post-hearing briefs in attachment 2, section 7; (viii) the maintenance of a hearing record in attachment 2, section 8; (ix) the written decision by the hearing body in attachment 2, section 9; and (x) the use of expedited hearings for disputes concerning remedial action directives in attachment 2, section 10.

⁸⁶ Order No. 693, 118 FERC ¶ 61,218 at P 225.

⁸⁷ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 476-78.

⁸⁸ To be clear, we cite to NERC's hearing procedures in this order by referencing both "attachment 2" and, when appropriate, the relevant section, as contained in attachment 2. All other references in this portion of this order to a section number alone are references to the main body of the Uniform Compliance Program.

136. NERC explains that, as required by the *ERO Certification Order*, it is proposing hearing procedures developed by the National Association of Securities Dealers (NASD). NERC states that the NASD procedures provide the fundamental requisites of due process, including notice, opportunity to respond, present evidence and confront adverse witnesses, the right to a hearing before an impartial tribunal, the requirement that a formal record be compiled and that a written decision be issued by the tribunal with stated reasons supporting any rulings. However, NERC notes that not all NASD hearing procedures are adaptable to Uniform Compliance Program hearings. NERC asserts that, in fact, NASD procedures are highly specialized and tailored to their specific subject matter in the securities industry.

b. Responsive Pleadings

137. AMP-Ohio, GSOC, Progress Energy, and Xcel argue that attachment 2 fails to address, with sufficient particularity, burden of proof, discovery (particularly discovery by registered entities against the compliance enforcement authority), and rights of third parties to intervene or have standing. GSOC adds that attachment 2 fails to specify the size of the hearing body or the law to be applied, the voting requirement applicable to the decision of the hearing body, the rules of procedure that will apply, or the rules of evidence that will apply.⁸⁹ Xcel asserts that NERC's attachment 2 hearing procedures should incorporate provisions of the NASD Rules of Procedure to address issues related to service of documents, filing of documents, computation and extensions of time, *ex parte* communications, rules of evidence, filing of motions, prehearing conferences and discovery.

138. AMP-Ohio and APPA request specific revisions to attachment 2, section 1, relating to authorized communications between parties and the hearing body.⁹⁰ AMP-

⁸⁹ With respect to rules of evidence, attachment 2, section 6, provides, in relevant part, that “[e]vidence not otherwise admissible under generally-recognized rules of evidence may be admitted if it is of a type commonly relied on by reasonably prudent persons in the conduct of their affairs.”

⁹⁰ Attachment 2, section 1 provides, in relevant part, that “[f]ollowing the convening of the hearing body, no representative of a party shall communicate in writing (including by e-mail) to any member of the hearing body regarding the matter to be heard without simultaneously providing a copy of the written communication to the other party, and no representative of a party shall communicate orally with any member of the hearing body regarding the matter to be heard without a representative of the other party being present in person or by telephone.”

Ohio requests that communications with any member of the hearing body, other than through formal submittals made simultaneously to all parties, be prohibited. AMP-Ohio maintains that it is procedurally irregular, as well as inconsistent with Commission-conducted adjudications, to allow a party to freely submit all manner of materials to the hearing body as long as the other party receives a copy. AMP-Ohio also argues that in the event of a prohibited communication with a member of the hearing body, either party should be permitted to seek recusal of that member. APPA also objects to the conditions under which the hearing body will be authorized to communicate with (and rely upon) a technical adviser.⁹¹ APPA requests that as a condition to the hearing body's use of such an advisor, disclosure be made by the hearing body regarding the identity and professional affiliations of that person, with any interested party thereafter permitted to object, either on the basis of conflict of interest or any other, similar ground.

139. APPA requests clarification with respect to attachment 2, section 6, as it relates to witness testimony. Specifically, APPA requests clarification that the registered entity will have the right to cross-examine witnesses presented against it by the compliance enforcement authority.⁹² Similarly, AMP-Ohio asks that attachment 2, section 5 or section 6 be amended to specify that parties: (i) are entitled to conduct discovery into the bases for any materials, positions, evidence or testimony in the hearing or otherwise placed into the evidentiary record; (ii) have the right to cross-examine witnesses offered by other parties; and (iii) may file reply briefs after initial post-hearing briefs. AMP-Ohio next requests that attachment 2, section 6 provide that the hearing body exclude material only in response to a motion by a party, rather than *sua sponte*. AMP-Ohio also requests that attachment 2, section 6 be revised to state that any written testimony must be served sufficiently in advance of the commencement of the hearing.

140. APPA expresses its concern with the lack of procedural protections as set out in the short-form hearing procedures of attachment 2, section 6.1, particularly the allowance of *ex parte* contacts between a party and members of the hearing body. APPA requests that section 5.1 of the Uniform Compliance Program require a notice of alleged

⁹¹ Attachment 2, section 1 provides, in relevant part, that “[n]othing prevents the hearing body from communicating with a person who has not previously been involved in the matter that is the subject of the hearing and is designated to act as a technical advisor to the hearing body for the hearing.”

⁹² Attachment 2, section 6.0 makes reference to the submission of prepared direct testimony, but does not expressly address the right of any party to cross-examine witnesses.

violation to state explicitly that: (i) there is a choice of long-form or short-form hearing procedures for contesting alleged violations; and (ii) assuming the compliance enforcement authority does not seek the long procedures of attachment 2, section 6, registered entities only have 10 days from the date they file responses to the compliance enforcement authority to decide whether to use the long-form procedure or short-form procedure.

141. AMP-Ohio believes that the long-form procedure of attachment 2, section 6.0 should be the default hearing process, rather than the short-form, attachment 2, section 6.1 procedures, and that all parties must knowingly and expressly waive their right to attachment 2, section 6.0 procedures for the short-form procedure to apply. EEI asks that NERC and Regional Entities ensure that no bias occurs against entities that choose the full hearing format as opposed to the short-form procedure.

142. AMP-Ohio and Xcel request clarification regarding the attachment 2, section 6.2 allowance for summary rulings.⁹³ AMP-Ohio argues that a summary ruling should only be permitted if a party seeking this ruling has filed a motion fully supporting its request. AMP-Ohio asserts that, in doing so, the moving party should bear the burden of proof. Xcel notes that in addition to this allowance, attachment 2, section 6.2 should be revised to expressly acknowledge the right of a registered entity to file a motion for summary judgment.

143. AMP-Ohio also urges that attachment 2, section 8 should be changed to allow post-hearing pleadings other than post-hearing briefs to be entered into the official record of a compliance hearing.

⁹³ Attachment 2, section 6.2 provides:

If it appears to the hearing body, based on a review of the Notice of Alleged Violation and Response, that there are no genuine issues of material fact, it may request the parties to identify in writing such issues. Unless the parties' responses, supported by sworn affidavits, demonstrate that there are genuine issues of material fact, the hearing body may proceed without any evidentiary hearing and render its decision based on the written filings and any oral presentation.

144. Finally, APPA requests revision of attachment 2, section 9, as it relates to the service of the hearing body's written decision.⁹⁴ APPA argues that, in addition to serving its written decision, the hearing body should also be required to inform the registered entity of its rights to appeal.

c. Commission Findings

145. We accept NERC's attachment 2 hearing procedures. In general, these hearing procedures satisfy the requirements of the *ERO Certification Order* by providing an appropriate forum to resolve disputes regarding the enforcement of reliability standards, including appropriate appellate procedures. However, we also identify modifications to be addressed by NERC.

146. First, we note that NERC's attachment 2 hearing procedures do not expressly address or describe certain essential components of the administrative hearing process. As AMP-Ohio, GSOC, Progress Energy, and Xcel point out, for example, attachment 2 does not expressly address the allocation of the burden of persuasion for a finding of violation. Nor does attachment 2 expressly describe the standard of proof that will apply to determinations by the hearing bodies on these matters. Accordingly, we direct NERC to address these matters. NERC's hearing procedures, for example, must provide expressly that the compliance enforcement authority will have the burden of persuasion on the merits of an attachment 2 hearing. NERC must also expressly guarantee that the standard of proof in its adjudications will be the preponderance of the evidence.⁹⁵

147. We also agree with AMP-Ohio, GSOC, Progress Energy, and Xcel that NERC should modify attachment 2 to address a potential disparity in the availability of discovery. Specifically, attachment 2, section 3 gives the compliance enforcement authority's staff, compliance audit teams, and investigation teams wide-ranging tools to obtain information from registered entities pertaining to their compliance with reliability standards before deciding whether to issue a notice of alleged violation. However, attachment 2, while not precluding this right, establishes no specific authority for the

⁹⁴ Attachment 2, section 9 provides, in relevant part, that “[c]opies of the written decision shall be served electronically and by certified mail on the Registered Entity and on the Compliance Enforcement Authority’s designated representative.”

⁹⁵ This is the standard of proof the Commission employs for imposition of remedies and sanctions. *See, e.g., Nantahala Power and Light Co.*, 19 FERC ¶ 61,152 at 61,276, n. 9 (1982), *citing Steadman v. SEC*, 450 U.S. 91 (1981).

registered entity to seek discovery from the compliance enforcement authority. Accordingly, we direct NERC to modify its attachment 2 procedures to address this concern.

148. Attachment 2, section 1 provides that the hearing body may rule on all procedural and discovery matters. However, without specific, codified rules to be applied in these cases, there could be the potential for arbitrary, inconsistent rulings. Moreover, these rulings may lead to disparate procedures among the Regional Entities and thus promote a lack of uniformity. Accordingly, we direct NERC to address this concern.

149. We also note that attachment 2, section 5 provides for consultations with respect to discovery that, if unsuccessful, would be resolved by a determination made by the NERC compliance program officer.⁹⁶ However, while this process may be successful, in some cases, it may not be adequate in others, in the absence of guidelines, *i.e.*, specific rules on discovery. In addition, it may not be appropriate for these matters to be considered by the NERC compliance program officer after a hearing body has convened. Rather, at that time, it would be preferable to assign this role to the hearing body. Accordingly, we direct NERC to address these issues.

150. We reject Progress Energy's and Xcel's arguments regarding the need for procedures addressing the participation of third parties in an attachment 2 hearing. We find that, generally, third parties should not be permitted to intervene. In most cases, the contributions from third parties regarding the development of the record would likely be minimal, given the fact that the record will have been compiled largely during the investigative process. Second, attachment 2 hearings will generally be non-public. As such, participation by third parties could make it more difficult for the hearing to remain non-public. There are, however, exceptions to this general rule that should be recognized. For instance, more than one registered entity may receive a notice of alleged violation for the same event or transaction, and it may be necessary, under these circumstances, to examine the actions of both entities in a single hearing. Circumstances may also occur when it would be appropriate and in the public interest to hold public hearings or permit third parties to intervene. In Order No. 672, the Commission stated

⁹⁶ Attachment 2, section 5 states that “[t]he hearing body shall set a date for an initial conference within thirty (30) days after the date the hearing body is convened.” Attachment 2, section 5 further provides that “[a]t the initial conference, the hearing body shall establish specific procedures for the hearing including: (i) any procedures for exchange of additional documents, (ii) any written testimony; (iii) the hearing date(s), and (iv) dates for any briefs.”

that it must authorize, in advance, interventions in proceedings in which a Regional Entity or NERC determines whether to impose a penalty. We will consider such matters on a case-by-case basis. If we permit interventions in such cases, we will address at that time any particular procedures relating to intervenors that would be appropriate.

151. We agree with GSOC that NERC's attachment 2 hearing procedures should also provide additional details regarding the composition and duties of the compliance enforcement authority hearing body. These details would be helpful in assuring that adjudications reached by these hearing bodies will comport with basic due process and will not be subject to inconsistency. For example, these procedures should address whether the entire hearing body, or only a subset of it, must vote, if not recused.⁹⁷ Further, to ensure that different practices do not arise on this point, all questions in a hearing shall be decided by a majority of the votes cast by a quorum of the hearing body. Accordingly, we direct NERC to address these matters.

152. We reject GSOC's argument that attachment 2, section 6 should be required to set forth additional requirements regarding the admissibility of evidence in an attachment 2 hearing. We note that attachment 2, section 6 essentially restates the Commission's own rule on admissibility of evidence and for that reason is acceptable.⁹⁸

153. We reject Xcel's argument that attachment 2 should be required to adopt additional provisions, as applied by the NASD Rules of Procedures. While we have determined, above, that certain changes are necessary to meet general due process concerns, we do not agree that the NASD template is appropriate in every instance.

154. We reject AMP-Ohio's argument that attachment 2, section 1 should prohibit all communications between a party to a hearing and the hearing body other than through formal submittals. Our rule on *ex parte* communications permits communication when, in the case of a written communication, both the hearing body and other party receive the written communication simultaneously, or in the case of oral communication, both parties have the same opportunity to hear and participate.⁹⁹

⁹⁷ See section 403.19 of the NERC Rules of Procedure.

⁹⁸ See 18 C.F.R. § 385.509(a) (2006).

⁹⁹ *Id.* at § 385.2201(c)(4).

155. However, we agree with AMP-Ohio that in the case of a prohibited *ex parte* communication between a party and a member of the hearing body or upon a specific showing of potential bias, another party to the hearing should be permitted to request recusal of the hearing body member. Accordingly, we direct NERC to adopt this requirement. However, not all prohibited *ex parte* communications need result in recusal, such as prohibited communications that are *de minimis* or inadvertent.

156. We also agree with APPA that if a hearing body uses a technical advisor, as attachment 2, section 1 permits, the hearing body should be required to disclose the identity and professional affiliations of the advisor, and parties to the hearing may raise objections to the advisor's participation. Accordingly, we direct NERC to adopt this requirement.

157. We also agree with APPA that a party should have the right to cross-examine another party's witnesses at a hearing governed by attachment 2. Accordingly, we direct NERC to make this modification.

158. We also require NERC to adopt AMP-Ohio's suggestion that the hearing body permit reply briefs after post-hearing initial briefs and exclude material from the record only in response to a motion by a party. In addition, we agree with AMP-Ohio that written testimony sponsored by a party should be served on other parties sufficiently in advance of the hearing. However, the hearing body, at its discretion, should set the date for service of written testimony.

159. We agree with APPA's argument that, consistent with the requirements of due process, attachment 2, section 6.1 should prohibit *ex parte* communications during a short-form procedure. Accordingly, we direct NERC to modify this provision. We are also concerned that attachment 2, section 6.1 authorizes a hearing body to forego testimony under oath or transcription of testimony and related proceedings. NERC does not explain, in that circumstance, how the hearing body could assure truthful testimony or preserve a meaningful record that would support any determination as to the existence of a violation or any sanction for a violation. Accordingly, we direct NERC to either further explain or delete this provision.

160. We also agree with APPA that a notice of alleged violation should clearly set forth a registered entity's options with respect to the long and short-form procedures. Accordingly, we direct NERC to address this matter.

161. We disagree with AMP-Ohio that the long-form procedure authorized under attachment 2, section 6.0 should apply by default. Under NERC's proposal, the long-form procedure will be utilized if either party timely asks for it. We find this opportunity to use the long-form procedure sufficient.

162. We reject EEI's argument that attachment 2, sections 6.1 and 6.2 should be revised to include adequate protections against any bias that may be applied by the hearing body in the event a registered entity elects the long-form procedure. EEI has not demonstrated that any such bias will occur, or that a registered entity will not have adequate recourse to remedy this bias by way of an appeal to the Commission.

163. We reject AMP-Ohio's argument that the hearing body should be prohibited from issuing a summary disposition, on its own motion. Subject to the opportunity for each party to object and support its objections with facts and argument, this procedure accords adequate due process to the registered entity. However, we agree with Xcel that a party should have the right to move for summary disposition.

164. We agree with AMP-Ohio that, under attachment 2, section 8, post-hearing pleadings other than briefs should be entered into the hearing body's official record. However, absent good cause shown, such pleadings must not seek to introduce additional evidence into the record after the hearing has ended. Accordingly, we direct NERC to make this modification.

165. Finally, we agree with APPA that attachment 2, section 9 should provide that, when serving its written decision, the hearing body will inform a registered entity of its appeal rights. Accordingly, we direct NERC to modify this aspect of its attachment 2 hearing procedures.

9. Appeals and ERO Review of Penalties

166. The *ERO Certification Order* required NERC to revise its Uniform Compliance Program, to: (i) clarify NERC's intention to review penalties imposed by a Regional Entity (*i.e.*, whether it intended to review each such penalty, or do so only in the case of an appeal); (ii) provide for an appeal of NERC determinations; (iii) consider the appropriateness of an expedited appeal process for remedial action directives; and (iv) permit requests for reconsideration of a mitigation plan when an entity is issued a real-time remedial action directive.¹⁰⁰

¹⁰⁰ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 366, P 369 and P 492-93. Mitigation plans are addressed in the Uniform Compliance Program at section 6. *See supra* section IV(B)(3).

a. NERC's Compliance Proposal

167. NERC, in its compliance filing, states that when a registered entity does not contest a determination of a violation or an imposition of a penalty, NERC will not be required, *per se*, to review the penalty imposed by the Regional Entity. Instead, NERC will file a notice of penalty with the Commission, as provided in section 5.6 of the Uniform Compliance Program. However, NERC states that under the *pro forma* Delegation Agreement, it will be required to participate, with its Regional Entities, in an exchange of information on practices, experiences and lessons learned in the implementation of their compliance enforcement programs.¹⁰¹ NERC states that it intends to utilize this authority and other mechanisms to review all penalties issued pursuant to the NERC Sanction Guidelines for the purpose of determining whether these penalties have been imposed on a consistent basis. Section 5 also provides that NERC will work to achieve consistency in the application of the NERC Sanction Guidelines by Regional Entities by direct oversight and review of penalties and sanctions.

168. With respect to the requirement that NERC provide for appeals of its own determinations, NERC clarifies that its compliance and certification committee will hear all matters brought before it for hearing where NERC (rather than a Regional Entity) is acting as the compliance enforcement authority. NERC further notes that in its second compliance filing, it submitted revisions allowing the opportunity to appeal to the compliance and certification committee any actions that NERC may take when it is acting as the compliance enforcement authority.¹⁰²

169. NERC states that it has allowed for expeditious appeals of remedial action directives through its hearing procedures, at attachment 2, section 10, which set forth an expedited hearing process for an entity to challenge a remedial action directive.¹⁰³ With respect to the Commission's requirement regarding the allowance for appeal rights

¹⁰¹ See *pro forma* base Delegation Agreement at section 6(j): "NERC shall conduct a review with the Regional Entities that provides for the exchange of information on practices, experiences, and lessons learned in the implementation of compliance enforcement programs."

¹⁰² *Second Compliance Filing Order*, 118 FERC ¶ 61,030 at P 6 (accepting NERC's proposed revisions to sections 404.1 and 409 of the NERC Rules of Procedures).

¹⁰³ NERC's attachment 2 hearing procedures are discussed *supra* in section IV(B)(8).

relating to a mitigation plan, NERC states that section 6.5 describes the procedures under which a mitigation plan is accepted or rejected by the compliance enforcement authority.¹⁰⁴ NERC states that section 6.5 also includes a provision under which the registered entity may seek a hearing on a rejected mitigation plan.

b. Responsive Pleadings

170. Xcel requests that NERC identify the “other mechanisms” it intends to rely upon to achieve consistency in penalty determinations. Xcel also asks for an explanation of the statement in section 5 that NERC will work to achieve consistency among Regional Entities by direct oversight and review of penalties and sanctions.

171. GSOC argues that NERC should not categorically state that it will not review a penalty if the penalized entity does not appeal, but should leave open this possibility. For example, GSOC suggests that such review may be appropriate if an uncontested penalty, unbeknownst to the penalized entity, is grossly disproportionate to others being levied. GSOC submits that this situation may occur in the early days of enforcement before many penalties have been made public.

c. Commission Findings

172. We accept the appellate review procedures included by NERC in the Uniform Compliance Program. We also identify modifications to be addressed by NERC. First, we agree with Xcel that it would be helpful for NERC to identify each of the mechanisms it will use to achieve consistency in penalty determinations other than those it has already specified.¹⁰⁵ Accordingly, we direct NERC to address these matters.

173. We also agree with GSOC that NERC should be authorized to change a penalty determination on its own motion if a registered entity decides not to appeal. This revision

¹⁰⁴ NERC’s section 6 procedures relating to mitigation plans are discussed *supra* at section IV(B)(3).

¹⁰⁵ We observe, for example, that section 402.1.2 of the NERC Rules of Procedure provides for NERC to conduct an annual evaluation of the goals, tools and procedures of each Regional Entity’s compliance program, and that section 402.2.2 states that NERC shall periodically conduct forums with Regional Entity compliance managers. Further, section 403.20 of the NERC Rules of Procedure sets forth a process under which NERC will approve annual implementation plans for the Regional Entity compliance programs.

would be warranted, for example, in cases where inconsistency among penalty determinations may otherwise result. This authority comports with the Commission's own reservation of authority to review a penalty after NERC files a notice of penalty. We do not expect NERC to exercise this authority on a frequent basis, given the right of the registered entity to seek an appeal raising these same issues. However, it may be appropriate to do so in certain cases.

174. Finally, we note that section 409.1 of the NERC Rules of Procedure does not make clear that NERC's appellate procedures apply to registered entities. Because this clarification would be useful, we direct NERC to make this modification.

10. Miscellaneous Comments and Protests Regarding NERC's Pro Forma Uniform Compliance Program and Related Matters

a. Fact and Circumstances Review

175. AMP-Ohio, EEI, and KCPL request that NERC provide more information with respect to the "fact and circumstances" reviews referenced at section 3 of the Uniform Compliance Program.¹⁰⁶ GSOC agrees that NERC's reference to this review is unclear and may be unnecessary in light of other available procedures.

176. We agree that the section 3 reference to a facts and circumstances review could be further clarified. We direct NERC to make this clarification.

b. Appeal of Decisions on Data Requests

177. GSOC argues that section 3 of the Uniform Compliance Program should be revised to allow for an appeal by a registered entity of a decision issued by the NERC compliance program officer regarding a compliance enforcement authority's request for data or information. Section 3 provides that the registered entity may request a written determination from the NERC compliance program officer if it believes that a compliance enforcement authority's request for data or information is unreasonable. GSOC argues that section 3 should be revised to provide for an appeal of that officer's

¹⁰⁶ Section 3 provides, in relevant part, that "[p]rior to any enforcement action or hearing, the Compliance Enforcement Authority may request a fact and circumstances review of an alleged violation."

decision, given the fact that the Uniform Compliance Program does not otherwise limit the scope, or frequency, of data requests.

178. We reject GSOC's request. A separate appeal procedure to challenge data requests could unduly prolong the compliance enforcement process based on an alleged burden that has not been demonstrated.

c. Applicable Governmental Authority

179. Xcel argues that a deviation proposed by WECC for inclusion in the WECC Delegation Agreement (specifically, in the WECC Uniform Compliance Program at section 1.1.3), should be adopted in the NERC *pro forma* Uniform Compliance Program.¹⁰⁷ WECC's proposed deviation would act as a limitation on the entities that could be defined as the applicable governmental authority by providing that those entities: (i) have the authority to enforce reliability standards against a registered entity (the *pro forma* standard); and, (ii) (as proposed by WECC) are parties to "enforcement arrangements with the Regional Entity."¹⁰⁸

180. We reject Xcel's request. WECC asserts that its change is appropriate because a Canadian governmental authority may require an enforcement arrangement with a Regional Entity. Because this circumstance would not, in general, apply to each Regional Entity, and no other cross-border Regional Entity has proposed a similar change or described the same requirement by Canadian authorities, WECC's proposed definition, as applied generically, has not been shown to be appropriate or necessary.

d. Confirmed Violations

181. AMP-Ohio recommends revising the definition of confirmed violation, at section 1.1.9 of the Uniform Compliance Program, to state that a confirmed violation means, among other things, an alleged violation for which an appeal, if filed, has "resulted in a determinative ruling adverse to the Registered Entity." GSOC requests a similar revision.

¹⁰⁷ Section 1.1.3 defines applicable governmental authority as "[a] governmental body other than the [Commission] with authority to enforce Reliability Standards against a Registered Entity."

¹⁰⁸ WECC's proposed change is discussed *infra* at section V(G)(5), where we approve this deviation for inclusion in the WECC Uniform Compliance Program.

182. We reject the proposed change as unnecessary. The rights and obligations of a registered entity, in the case of an alleged violation, are set forth with sufficient particularity in the Uniform Compliance Program.

e. Exception Reporting

183. GSOC argues that the term “Reliability Standard baseline norm,” as it appears at section 1.1.11, in the definition of “Exception Reporting,” is vague and should be replaced by the term “violations of a Reliability Standard,” as proposed by WECC as a deviation applicable to the WECC Delegation Agreement.¹⁰⁹

184. We agree that this definition should be clarified. Accordingly, we direct NERC to make this clarification.

f. Obligations to Mitigate

185. GSOC and Xcel request revision to the definition of mitigation plan, at section 1.1.12 of the Uniform Compliance Program. GSOC argues that mitigation plan should be defined, as a plan to “correct a past violation of a Reliability Standard to the extent possible,” not a plan to “correct a violation of a Reliability Standard.” GSOC argues that this revision is appropriate because correcting a past violation will not always be possible. Xcel asks that NERC amend this definition to state that a mitigation plan is “usually required,” rather than “required,” whenever a registered entity violates a reliability standard, as proposed by WECC as a deviation applicable to the WECC Delegation Agreement.

186. We reject the revisions GSOC and Xcel propose for the definition of mitigation plan. Even assuming, as GSOC submits, that a particular mitigation plan may not be able to correct a past violation fully, one purpose of a mitigation plan is such a correction. A compliance enforcement authority will consider whether proposed mitigation plans can fully correct violations in the context of its review of individual plans.

187. With respect to Xcel’s proposal, one objective of the Uniform Compliance Plan is to redress the effects of reliability standard violations and prevent future, similar violations. Submission of mitigation plans is vital to achieve this objective.

¹⁰⁹ Section 1.1.11 provides, in relevant part, that exception reporting means “[i]nformation provided to the Compliance Enforcement Authority by a Registered Entity indicating that exceptions to a Reliability Standard baseline norm have occurred....”

Accordingly, we disagree with Xcel that submission of a mitigation plan should not always be required for a violation.

g. Periodic Data Submittals

188. GSOC and APPA request revision to sections 1.1.15 and 3.6.1, which address periodic data submittals. GSOC argues that section 1.1.15, should be revised regarding the timeframe applicable to the submission of periodic data. GSOC asserts that while it is acceptable that these data be submitted on a time frame required by a reliability standard, it is not appropriate to add: “or [on an] *ad hoc* basis.” APPA suggests that, after receiving an assessment of compliance following a periodic data submittal, an entity should have an opportunity to submit comments to the compliance enforcement authority before it issues a notice of alleged violation.

189. We reject GSOC’s argument. The authority to determine the required timeframe applicable to the submission of periodic data is appropriately given to the compliance enforcement authority.

190. However, we agree with APPA that the Uniform Compliance Program should include, at section 3.6.1, the same opportunity for a registered entity to comment on a draft report about a periodic data submittal that it would receive for a draft compliance audit report. Accordingly, we direct NERC to make this change.

h. Regional Compliance Registries

191. AMP-Ohio, APPA, and TAPS seek clarification and revision to the NERC Rules of Procedure, regarding the regional compliance registry and the manner in which it is compiled, including the rights of an entity to appeal its registration.¹¹⁰ These commenters also note that “Regional Compliance Registry” is a defined term in the Uniform Compliance Program, at section 1.1.16.

192. We will not revisit, here, NERC’s rules for registering entities, which we approved in the *ERO Certification Order*. Nor is it necessary, as APPA, TAPS, and AMP-Ohio have requested, to restate in the Uniform Compliance Program any additional details already covered in section 500 of the NERC Rules of Procedure.

¹¹⁰ See NERC Rules of Procedure at section 500. The registry is used to determine the reliability standards applicable to a registered entity.

The ability of entities to challenge a decision that they should register is clearly explained in that section.

i. Spot Checking

193. APPA argues that the spot checking provisions addressed at section 3.3.1 should be revised to reference an opportunity for a registered entity to review and comment on a spot check report it receives from a compliance enforcement authority

194. We agree that the Uniform Compliance Program should include the opportunity APPA seeks for a registered entity to submit comments on reports it may receive on its compliance with reliability standards following a spot check. A registered entity should have the same opportunity to comment on a draft report about a spot check that it would receive for a draft compliance audit report. Accordingly, we direct NERC to make this modification to section 3.3.1.

j. Self-Certification and Self-Reports

195. Xcel states that the Uniform Compliance Program should explain the steps Registered Entities are to use to self-certify compliance pursuant to section 3.2 or self-report non-compliance pursuant to section 3.5 before the program takes effect.

196. We find that sections 3.2 and 3.5 provide sufficiently detailed discussions on procedures for self-certification and self-reporting and that the further explanation sought by Xcel is unnecessary.

k. Entity Representatives

197. FirstEnergy states that the Uniform Compliance Program and related appendices require “officers” or “officer equivalents” to sign for or appear in an official capacity on behalf of registered entities. FirstEnergy suggests that registered entities should be allowed to use general principles of agency and representation when acting under the NERC Rules of Procedure and the Uniform Compliance Program. According to FirstEnergy, this practice would permit entities to participate in or act on reliability matters through officers, employees or other company representatives such as law firms or technical firms.

198. 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 FPA 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.¹¹¹

I. Reporting to NERC

199. Section 8 of the Uniform Compliance Program obligates Regional Entities to report to NERC, on a confidential basis, any alleged violations of reliability standards, whether verified or still under investigation.¹¹²

200. These reporting requirements, however, require additional clarification and revision. First, the section 8 reporting obligation, as proposed, is limited to "Alleged Violations," which are defined, under the Uniform Compliance Program, as an end-product of a compliance process. Consequently, section 8 does not require a Regional Entity to disclose to NERC the *receipt* of any allegation of a violation, self-report, or other evidence of a violation. As such, section 8 is inconsistent with section 39.7(b) of our regulations, which requires that Regional Entities inform NERC of all alleged violations, a term that, in this context, we construe to include all allegations and evidence of violations that a Regional Entity receives or develops.

201. The Commission's intent in promulgating this regulation was not to limit a Regional Entity's reporting requirement to matters the Regional Entity believes may constitute violations.¹¹³ NERC cannot adequately exercise its oversight of Regional Entity compliance programs unless it receives information on all allegations of violations, and in particular, those for which Regional Entities have declined enforcement action. Nor are we in a position to monitor NERC and the Regional Entities in this regard unless NERC provides us with timely information on all allegations of violation. Accordingly, we direct NERC to revise section 8, consistent with these findings.

¹¹¹ See 18 C.F.R. §§ 385.2005(a)(3) and 385.2101 (2006).

¹¹² These reports are due within five business days, unless a violation has resulted in, or has the potential to result in, a reduced level of bulk power system reliability, in which case a Regional Entity is required to notify NERC within 48 hours. In turn, NERC is required to inform the Commission or any applicable governmental authority within two business days of receiving notice from a Regional Entity.

¹¹³ See Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 583.

202. In addition, we find that the deadline for submitting a section 8 report to NERC is unnecessarily slow and must be revised. Specifically, NERC does not explain, or justify, why a Regional Entity need not notify NERC of a potential violation that may possibly result in a reduced level of reliability for 48 hours. A Regional Entity should be capable of notifying NERC immediately and NERC, in turn, should be capable of notifying the Commission immediately after receiving a Regional Entity notice. Accordingly, we direct NERC to revise section 8 to address these concerns or, in the alternative, justify its proposed deadlines.

m. Record Retention Requirements

203. Section 9.2 of the Uniform Compliance Program establishes a record retention period for information and data generated or received in connection with a compliance matter.¹¹⁴

204. This policy, however, requires additional clarification and revision. First, because NERC defines applicable governmental authority, at section 1.1.3, to exclude the Commission, section 9.2 does not address how the record retention period will be integrated with any record retention requirement the Commission otherwise has established. We clarify that if particular records are covered by both the Uniform Compliance Program retention period and one or more Commission-established record retention periods, the longest retention period shall apply.

205. Second, NERC does not define the instances in which information or data “is material to the resolution of a controversy” for purposes of establishing when the record retention period commences. We clarify that information falls within this category whenever it is relevant to any of the specific compliance processes listed in section 3. Thus, a registered entity is under an obligation to retain records that relate to any of the specific section 3 compliance processes that commence with respect to that entity when the entity receives notice of its commencement. For example, if a compliance

¹¹⁴ The retention period is a minimum of five years, unless a different retention period is specified in a reliability standard or by an applicable governmental authority. Section 9.2 further provides that “[i]f the information or data is material to the resolution of a controversy, the retention period for such data shall not commence until after the controversy is resolved.”

enforcement authority notifies an entity of a spot check pursuant to section 3.3, the registered entity must retain all information relevant to the spot check.

n. Chronic Violators

206. FirstEnergy argues that the NERC Rules of Procedure, at section 408.5, should be revised. Section 408.5 provides that NERC staff will periodically review and analyze reports of violations to identify “trends, chronic violators, and other pertinent reliability issues.” FirstEnergy asserts that the term “chronic violator,” as used in this rule, should either be deleted or clarified to mean the same entity committing the same violation, not the same entity committing different violations. FirstEnergy also suggests that a subsidiary operating under a single holding company should not be considered to be the same violator as its affiliate, unless shown to have been acting in concert with, or under the control of, its affiliate.

207. We reject FirstEnergy’s proposed revision. Section 408.5, as proposed, obligates NERC to monitor general trends that may have a bearing on the effectiveness of its rules and the need for possible rule changes. NERC’s analysis, in this regard, should not be limited or otherwise hampered by restrictions that could prevent NERC from accurately assessing an important trend of any kind. Nor are we persuaded that NERC will be unable to make meaningful distinctions between types of violations and the entities that engage in them.

o. Revisions

208. EEI and FirstEnergy propose that processes be established to monitor and, if necessary, revise the Uniform Compliance Program following its implementation. EEI proposes that a collaborative process be established to review the Uniform Compliance Program after it has been in effect for six months, or a year, to identify and address any gaps or deficiencies that may become evident. EEI also recommends periodic reviews of the Uniform Compliance Program that could be coordinated with scheduled reviews of other reliability activities.

209. FirstEnergy submits that the Commission should convene a task force consisting of NERC and a limited circle of stakeholders to reach consensus concerning remaining issues that may need to be addressed in either the Uniform Compliance Program or the NERC Rules of Procedure. FirstEnergy submits that industry representatives could make staff available for this effort.

210. We concur with EEI that periodic reviews of the Uniform Compliance Program would be beneficial, especially after NERC, the Regional Entities, and bulk-power system owners, operators and users gain experience with it. At this point, however, it is

premature to establish a schedule or procedures for these reviews. Accordingly, we direct NERC to consider this issue with its members and submit a proposal.

211. While we agree with FirstEnergy that continued discussions between NERC and stakeholders about the Uniform Compliance Program could be productive, we decline its recommendation to convene a task force. We encourage discussions, which could occur within the framework of periodic reviews under NERC's purview, subject to the proviso that all interested stakeholders are permitted to participate. In this regard, we observe that the Uniform Compliance Program focuses on monitoring and information-gathering for the purpose of detecting violations and on procedural steps under which Regional Entities and NERC can determine violations, correct their effects through mitigation plans, and sanction violators to deter future violations. The program does not appear to incorporate any proactive practices to increase compliance prospectively. Accordingly, we direct NERC to consider proactive elements to be added to the Uniform Compliance Program or other NERC rules, to provide incentives for compliance or otherwise actively prevent violations.

C. NERC's Remaining Compliance Revisions to the *Pro Forma* Delegation Agreement

1. Definitions

212. NERC, in its compliance filing, has removed the defined terms "Regional Variance" and "Regional Reliability Standard" from section 1 of the *pro forma* base Delegation Agreement, in response to the Commission's requirement, in the *ERO Certification Order*, that NERC clarify the type and nature of reliability standards that may be developed by a Regional Entity.¹¹⁵ We accept NERC's proposal, including its continued use of the terms "Regional Reliability Standard" and "Regional Variances" in other sections of the *pro forma* Delegation Agreement.¹¹⁶ We note that, under FPA

¹¹⁵ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 277.

¹¹⁶ *See, e.g.*, section 2(a)(ii) ("[Regional Entity] has developed a standards development procedure, which provides the process that [Regional Entity] may use to develop Regional Reliability Standards and Regional Variances . . ."); section 5(a) ("[Regional Entity] shall be entitled to: (i) propose . . . Regional Variances, . . . (ii) develop Regional Reliability Standards and Regional Variances . . ."); section 5(b) ("NERC shall rebuttably presume that a proposal from a Regional Entity organized on an interconnection-wide basis for a . . . Regional Variance . . . is just and reasonable . . ."); and section 6(a) ("[Regional Entity] shall enforce . . . Regional Variances . . .").

section 215, there may be exceptions from continent-wide uniformity in a reliability standard. In Order No. 672, the Commission explained that “as a general matter, we will accept the following two types of regional differences, provided they are otherwise just, reasonable, not unduly discriminatory or preferential and in the public interest, as required under the statute: (i) a regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not; and (ii) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System.”¹¹⁷

2. Billing and Collection

213. The *ERO Certification Order* directed NERC to adopt appropriate safeguards in the *pro forma* base Delegation Agreement to ensure that, when a Regional Entity performs billing and collection functions on behalf of NERC: (i) the Regional Entities transfer the money to NERC in a timely manner, and (ii) the Regional Entities do not use their position as billing agent and collector to unduly influence NERC’s decisions.¹¹⁸ NERC, in its compliance filing, failed to comply with this requirement. Accordingly, we direct NERC to do so.

3. Confidentiality

214. Section 14 of the *pro forma* base Delegation Agreement, in addressing confidentiality, refers to the definition of confidential information as set forth in section 1500 of the NERC Rules of Procedure.

215. The Western Interconnection Regional Advisory Body (WIRAB) advises that section 1500 and section 14 unduly expand the definition of confidential information and undermine state and provincial efforts to promote transparency by denying them access to load forecast information. WIRAB requests that the Commission reject NERC’s confidentiality rules, finding them contrary to Order No. 672 and the *ERO Certification Order*. WIRAB contends that if NERC or a Regional Entity grants a request to restrict access to information deemed confidential, the determination must be publicly posted to promote openness in making determinations on confidentiality and to encourage consistency among Regional Entities and NERC in making these determinations.

¹¹⁷ See Order No. 672, FERC Stats & Regs ¶ 31,204 at P 291.

¹¹⁸ 116 FERC ¶ 61,062 at P 169.

216. We addressed WIRAB's general objections to section 1500 in the *Second Compliance Filing Order*.¹¹⁹ Because no party sought rehearing of this order, these determinations are now final. Accordingly, we believe that WIRAB's general objections to section 1500 are moot.

217. We agree with WIRAB's advice that the ERO or a Regional Entity should publicly post its determinations to deny a request to disclose publicly information that a submitter deems to be confidential. Otherwise, those who seek public disclosure of information, or its protection from such disclosure, will not be on notice of the standards that Regional Entities and the ERO use to make such determinations or be able to evaluate the consistency of these determinations. A Regional Entity or the ERO also must notify the requesting party whether its request to obtain access to confidential information a submitter asserts to be confidential is granted or denied. Likewise, we direct NERC and the Regional Entities to disclose publicly determinations that particular information is not confidential. Nevertheless, public notice of these determinations must not itself disclose information that NERC or a Regional Entity has determined to fall within one of the six categories of information defined as confidential in section 1501. Thus, in publicly disclosing determinations on confidentiality, NERC and the Regional Entities must expunge any references that would reveal confidential information.

218. We turn next to WIRAB's contention that NERC's adoption of section 1500 will decrease access to market information by preventing state agencies from obtaining access to load forecast information. WIRAB's stated major concern on this issue is that WECC has withheld from public release information it receives on load forecasts from load-serving entities. According to WIRAB, WECC aggregates this data into six sub-regions. WIRAB asserts that this aggregation masks potential adequacy problems within the sub-regions and hinders state and provincial governments' efforts, in the course of fulfilling their responsibility for adequacy of electric supply, to verify WECC reports on load forecasts and NERC adequacy assessments that use these WECC reports. WIRAB asserts that in December 2006, WECC approved the public release of all load forecasts in years four through ten of the forecast period and allowed broader access to load forecast data for years one through three. WIRAB expresses concern that NERC's issuance of Section 1500, which WECC has adopted in section 14 of its proposed base Delegation

¹¹⁹118 FERC ¶ 61,030 at P 180 and P 195. For example, while WIRAB asserts that the ERO and Regional Entities should use a "reasonableness" standard in making determinations of claims of confidentiality, we advised that NERC and the Regional Entities "should look with disfavor on frivolous, overly broad, or unreasonable claims of confidentiality." *Id.* at P 195.

Agreement with NERC, may reverse progress in the West regarding the availability of load forecast information.¹²⁰

219. At this time, we will not speculate on whether WECC may change its decision to increase the availability of load forecast information to state and provincial agencies, as WIRAB describes. We observe that WECC, which has moved to intervene and filed comments in Docket No. RR06-1-004 in general support of the Uniform Compliance Program and NERC's corresponding revisions of the NERC Rules of Procedure, has not stated in this proceeding that it would limit or rescind its prior decision as a result of section 1500. If WECC does not reverse or limit its decision on that ground, WIRAB's stated concern will be moot. If WECC were to decide that section 1500 requires it to find that the load forecast data fall within one or more of the six categories of confidential information defined in section 1501, WIRAB or its individual members may seek public disclosure of that information from WECC pursuant to section 1503, as we have directed NERC to amend it, and may appeal any adverse determination to NERC pursuant to section 1503.5. Thus, section 1500 does not foreclose WECC's public disclosure to WIRAB members of the load forecast information WECC collects.

220. Even if WECC were to determine that load forecast information sought by WIRAB's members is confidential and may not be publicly disclosed, section 1502 provides a potential avenue for WIRAB members to gain access to the information, albeit on a non-public basis. Section 1502.2 states that "[e]xcept as provided herein, a receiving entity shall keep in confidence and not copy, disclose, or distribute any confidential information or any part thereof without the permission of the submitting entity, except as otherwise legally required." This provision would permit WECC, as a "receiving entity," to provide to WIRAB members information that load-serving entities as "submitting entities" have provided to WECC, with the load-serving entities' permission.

221. Section 1502 permits WECC and other Regional Entities to share information deemed confidential by submitting entities. or determined to be confidential by a receiving entity, if submitting entities agree with a requester on appropriate conditions. In this regard, we liken agreements pursuant to section 1502 to agreements we have approved under which regional transmission organizations (RTOs) may provide

¹²⁰ In this respect, proposed section 14 of the WECC base Delegation Agreement is identical to section 14 of the *pro forma* base Delegation Agreement.

confidential information to state public utility commissions.¹²¹ Therefore, we disagree with WIRAB's contention that section 1500 will preclude WIRAB's members from receiving access via WECC to the load forecast information they seek.¹²²

**D. Miscellaneous Comments and Protests Regarding
The Pro Forma Delegation Agreement**

222. A number of intervenors propose revisions to the *pro forma* Delegation Agreement regarding provisions that were proposed by NERC in its certification filing and accepted by the Commission in the *ERO Certification Order*.¹²³ We reject each of these protests as a collateral attack of the *ERO Certification Order*.

223. Other intervenors raise issues that are beyond the scope of NERC's compliance filing.¹²⁴ We will not address these issues here.

¹²¹ *ISO New England, Inc.*, 106 FERC ¶ 61,280 (2004); *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,322 (2004).

¹²² WIRAB also states that its members desire access to information in WECC's extra high voltage data pool. WIRAB asserts that the California Independent System Operator Corporation (California ISO) stopped providing its data to a public website, claiming that it was market sensitive, and other entities started delaying release of their data. As discussed with respect to WECC's collection of load forecasts, we believe that section 1500 will not foreclose access by WIRAB's members to the extra high voltage data pool.

¹²³ Specifically: (i) Xcel and Progress Energy take issue with the offset mechanism set forth at section 8(k) and Exhibit E(4); (ii) Xcel requests revision to section 10, regarding the rights and obligations of the signatories in the event of termination due to a breach; (iii) Xcel requests revision to section 15 regarding what rights, if any, the Commission will have, *sua sponte*, to amend, modify, or revise a delegation agreement; (iv) AMP-Ohio requests revision to the dispute resolution procedures set forth at section 17; and (v) AMP-Ohio takes issue with the savings clause set forth at section 21.

¹²⁴ For example, the Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC) seek clarification that the reliability standards over which a Regional Entity will exercise its delegated authority will not apply to behind-the-meter load or qualifying facilities. CAC/EPUC asserts that these entities would not be capable of materially affecting the bulk-power system. For this
(continued...)

V. The NERC/Regional Entity Delegation Agreements

224. We address below each of the eight proposed NERC/Regional Entity Delegation Agreements, as submitted by NERC in Docket Nos. RR07-1-000, *et al.* FPA section 215 authorizes the Commission to approve the ERO's proposed delegation of functions if: (i) the Regional Entity is governed by an independent board, a balanced stakeholder board, or a combination of the two; (ii) the Regional Entity otherwise satisfies the criteria required for certification of the ERO; and (iii) the proposed agreement promotes effective and efficient management of the bulk-power system.¹²⁵ We apply these statutory criteria below to our consideration of the eight NERC-Regional Entity Delegation Agreements.

225. With regard to the rebuttable presumption that an interconnection-wide Regional Entity promotes effective and efficient administration of bulk-power system reliability, FPA section 215 defines the term "Interconnection" to mean "a geographic area in which the operation of bulk-power system components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain reliable operation of the facilities within their control."¹²⁶ As discussed below, ERCOT and WECC operate within interconnection-wide regions. The remaining six Regional Entities operate within portions of the Eastern Interconnection.

226. Each of the eight NERC/Regional Entity Delegation Agreements generally meets, or will meet, the requirements of FPA section 215 and Order No. 672. Accordingly, we accept these submittals, without change, to become effective, upon execution and re-filing, within 30 days of the date of this order. We also identify modifications to be

same reason, CAC/EPUC also asserts that these entities should be exempted from any payment obligations relating to NERC's funding or the standards development process. This issue is being addressed under a Notice of Proposed Rulemaking in Docket No. RM07-11-000.

¹²⁵ As discussed below, FPA Section 215 also requires a rebuttable presumption that a proposal for delegation to a Regional Entity organized on an interconnection-wide basis promotes effective and efficient administration of the bulk-power system reliability and should be approved. *See* 16 U.S.C. § 824o(e)(4). The Commission, in Order No. 672, stated that it would address what constitutes "effective and efficient administration" on a case-by-case basis. *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 671.

¹²⁶ 16 U.S.C. § 824o(a)(5).

addressed by NERC and the Regional Entities in a filing to be made within 180 days from the date of this order. These modifications, for the most part, are intended to provide greater uniformity and clarity and other improvements.

227. As discussed, below, with regard to individual Regional Entity delegation agreements, several Regional Entities will have an affiliated operational function. For example, the ERCOT and SPP Regional Entities will each have a separate division that, as an ISO or RTO, is an operator of the bulk-power system. The WECC and FRCC Regional Entities will also act as a reliability coordinator, with compliance responsibility pursuant to more than a dozen mandatory and enforceable reliability standards.

228. In a situation where a monetary penalty is assessed against the operational side of one of these organizations, it is inappropriate for the Regional Entity to receive the penalty money as an offset against its next-year budget. We are concerned that allowing the Regional Entity to retain the penalty money would merely result in an accounting transfer from one division of the umbrella organization to another. Reducing a monetary penalty to an accounting notation would diminish the effectiveness of the statutory penalties and would not serve as sufficient deterrent to ensure that the operational side of the organization is in compliance with all applicable reliability standards. This reasoning applies regardless of whether the investigation and hearing leading up to the penalty assessment are conducted by the Regional Entity or the ERO.

229. Accordingly, in the circumstances discussed above, we conclude that a monetary penalty assessed against the operational side of the organization should be received by the ERO and should be treated as a general offset of the next year's ERO budget for statutory activities.¹²⁷ This will remove the disincentives created by having the same organization pay and receive a monetary penalty. We recognize that this requirement is a change from the Order No. 672 policy that the entity conducting an investigation receive the penalty money as an offset against its next-year's budget for implementing FPA section 215.¹²⁸ However, that policy did not address the specific circumstance in which a penalty would be both paid and received by the same organization. Moreover, the

¹²⁷ NERC and the Regional Entities can effectuate this directive by either revising the *pro forma* Delegation Agreement or, alternatively, addressing in the Delegation Agreement of individual Regional Entities to which our concern applies.

¹²⁸ Order No. 672, FERC Stats. & Regs. ¶ 31,212 at P 627.

general policy set forth in Order No. 672 will continue to apply in a situation where a Regional Entity assesses a monetary penalty against a non-affiliated entity.¹²⁹

A. TRE Delegation Agreement (Docket No. RR07-1-000)

230. We accept the TRE Delegation Agreement. We also identify modifications to be made by NERC and TRE, consistent with the modification identified above, as applicable to the *pro forma* Delegation Agreement, and the additional modifications addressed below. TRE is a division of the Electric Reliability Council of Texas, Inc. (ERCOT); it was established for the purpose of carrying out its duties within the ERCOT region as a functionally separate entity. The ERCOT region is organized on an interconnection-wide basis and covers approximately 75 percent of the land mass of the State of Texas (a region that includes approximately 85 percent of the state's electricity load).¹³⁰ ERCOT functions as the independent system operator (ISO) for the ERCOT region. It is a membership-based, non-profit corporation subject to the jurisdiction of the Public Utility Commission of Texas (Texas Commission).¹³¹

231. We find that TRE qualifies for the FPA section 215 rebuttable presumption supporting a finding that the TRE Delegation Agreement will promote effective and efficient administration of the bulk-power system. Specifically, we find that the ERCOT region over which TRE will perform its delegated functions is organized on an interconnection-wide basis. We also find that TRE generally satisfies the FPA section 215 requirements for delegation of ERO authority. TRE will be governed by a combination independent and balanced stakeholder board (the ERCOT board) and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO.

¹²⁹ In addition, the requirement we establish here does not preclude the RTO from requesting that its penalty costs be recovered in its annual funding filing.

¹³⁰ It does not include the Panhandle, the El Paso area, and portions of East Texas.

¹³¹ ERCOT's members include retail customers, investor and municipal owned electric utilities, rural electric cooperatives, river authorities, independent generators, power marketers, and retail electric providers.

1. TRE Base Delegation Agreement

232. The TRE base Delegation Agreement adopts the *pro forma* base Delegation Agreement, subject to deviations. First, the TRE base Delegation Agreement contains additional language at section 6(c), addressing the confidentiality requirements applicable to an enforcement matter.¹³² Specifically, section 6(c) has been revised to add, in relevant part, that:

[A]ny hearing conducted by the [Texas Commission] concerning an alleged Violation in the ERCOT power region shall be conducted as a public hearing and any evidence or other submission concerning the hearing, except for information that is confidential or privileged under law, shall be publicly available. Following the hearing, the [Texas Commission] shall issue its recommendation on the appropriate resolution of the allegations in a written document that will be publicly available.

Second, section 6(c) has been revised to omit the phrase “filed with the Commission as a notice of penalty.”

233. NERC, in its transmittal letter, asserts that these changes are necessary to accommodate the role played by the Texas Commission relative to TRE’s proposed enforcement activities. NERC notes that as a governmental body, the Texas Commission must conduct its activities in public, except where the matter relates to a cybersecurity incident or would jeopardize the security of the bulk-power system if publicly disclosed.

234. We agree that the proposed deviations from the *pro forma* base Delegation Agreement outlined above are appropriate under the unique circumstances presented by

¹³² The *pro forma* provision provides:

Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the owner, operator, or user of the Bulk-Power System violated a Reliability Standard or by a settlement or other negotiated disposition. The disposition of each violation or alleged violation that relates to a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed shall be nonpublic unless the Commission directs otherwise.

the ERCOT region and the regulatory oversight to which it is subject (discussed below). Accordingly, we accept the TRE base Delegation Agreement.

2. **Exhibit A: TRE Regional Boundary**

235. The geographic region in which TRE will perform its duties and functions under the TRE Delegation Agreement is coterminous with the ERCOT region, which is organized on an interconnection-wide basis. Applying the rebuttable presumption set forth in the statute, we find that the TRE region, as described in Exhibit A, represents an appropriate size, scope and configuration.

3. **Exhibit B: TRE Governance Structure**

236. NERC, in its transmittal letter, asserts that TRE's governance structure satisfies the requirements of FPA section 215 because, among other things: (i) TRE will have a combination independent and balanced stakeholder board; and (ii) there will be a strong separation between TRE's oversight, monitoring, and compliance functions and ERCOT's ISO functions. NERC and TRE also represent that the TRE Delegation Agreement satisfies the Governance Criteria set forth in Exhibit B of the *pro forma* Delegation Agreement. TRE's governance structure is established under ERCOT's draft amended and restated bylaws (ERCOT bylaws), which are included in NERC's submittals as supplementary information.

a. **ERCOT Bylaws**

237. The ERCOT bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

238. *Composition and Election of the Board (Criterion 1)*: TRE represents that it will be governed by a combination independent and balanced stakeholder board. TRE asserts that its board will be balanced because, as discussed below, it will be comprised of representatives from seven segments, *i.e.*, six market segments plus consumer representatives and five independent directors. TRE refers to the following provisions of the ERCOT bylaws:

- *Section 4.2*: Section 4.2 provides that ERCOT's board will be comprised of 15 voting directors and one non-voting director representing seven stakeholder sectors. The board will be comprised by one director each representing the following seven industry segments: independent retail electric providers; independent generators; independent power marketers; investor owned utilities; municipal owned utilities; and cooperatives. In addition, the board will include three directors representing consumer interests; five unaffiliated directors, the

ERCOT CEO as an ex officio voting member, and the chairman of the Texas Commission, as an ex officio non-voting member.

- *Section 4.3:* Section 4.3 requires that the independent directors must be unaffiliated with any market participant, elected by the ERCOT membership, and approved by the Texas Commission.
- *Section 4.7:* Section 4.7 provides that a board quorum is comprised of one half of the directors and that board action requires a 67 percent affirmative majority of votes. Bylaw changes must be passed by a vote of at least four sectors. Each sector has one vote and a greater than two-thirds affirmative sector vote is required to cast the vote for a bylaw change.

239. *Rules Assuring Independence (Criterion 2):* TRE represents that it has established rules that assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its officers. TRE notes that while ERCOT is an ISO, and therefore a user, owner or operator of bulk-power system facilities, TRE has established a strong separation between TRE's Regional Entity functions and ERCOT's ISO functions. TRE refers to the following provisions of the ERCOT bylaws:

- *Section 6.1:* Section 6.1 provides that TRE will be functionally independent from ERCOT and will be responsible for proposing, developing, implementing and enforcing Reliability Standards. These standards must be approved by the ERCOT board prior to being submitted to NERC.
- *Section 6.2:* Section 6.2 provides that TRE will be responsible for creating and monitoring a separate budget, subject to approval by the ERCOT board. The TRE chief compliance officer (who will be hired by the ERCOT board) will conduct investigations into and will prosecute enforcement actions.
- *Section 6.3:* Section 6.3 provides that TRE will be managed directly by the ERCOT board to ensure independence from ERCOT's ISO functions. The general affairs of TRE will be overseen by TRE's chief compliance officer, subject to the supervision and direction of the ERCOT board. The chief compliance officer will be independent of any market participant.
- *Section 6.4:* Section 6.4 provides that TRE will be responsible for hiring, firing and compensating TRE's employees.

- *Section 6.5:* Section 6.5 provides that the ERCOT board will monitor TRE's performance, establish and review the chief compliance officer's compensation and provide annual or more frequent evaluations.
- *Section 7.2:* Section 7.2 provides that the ERCOT board will hire the chief compliance officer.

240. *Membership (Criterion 3):* TRE represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed Reliability Standards. TRE refers to the following provisions of the ERCOT bylaws:

- *Section 3.1:* Section 3 provides that members must qualify in one of the seven industry segments represented on the board. Within these industry segments, ERCOT members may be corporate members (who have voting rights), or either associate members or adjunct members (who do not have voting rights).
- *Section 3.2:* Only one member of a corporate family may serve as a corporate member. The non-voting associate group is comprised of affiliates from corporate families where another affiliate has been designated as its family's corporate member.
- *Section 3.4:* Section 3.4 provides that the annual fee for corporate members is \$2000 and for associate members and adjunct members is \$500. Residential and commercial consumer members pay \$100 per year for corporate membership and \$50 per year associate membership. There will be no charge for annual member service fees for associations that qualify for commercial consumer membership or for other associations or persons, upon good cause shown.

241. *Committees and Subordinate Organizational Structures (Criterion 4):* TRE represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure that no two industry sectors can control any action and no one industry sector can veto any action. TRE refers to the following provisions of the ERCOT bylaws:

- *Section 6.1:* Section 6.1 provides that TRE will form a Reliability Standards committee comprised of members from all ERCOT segments to propose, consider, and vote on Reliability Standards. The ERCOT board is required to approve these standards prior to their submittal to NERC.

- For a quorum on the reliability standards committee, a minimum of one vote in each of at least five of seven sectors is required. Each sector has one vote and each voting member has an equal fraction of the sector vote. Approval of a standard requires 4.67 affirmative votes.

242. *Openness and Balance of Interests (Criterion 5)*: TRE represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. TRE refers to the following provisions of the ERCOT bylaws:

- *Section 4.6*: Section 4.6(a) requires the ERCOT board to meet at least quarterly. Section 4.6(b) requires notice of any meeting of the board or any board subcommittee where at least one director is present be given to each director and made available electronically to the public. Section 4.6(e) requires board meetings to be open to the public, subject to certain limitations applicable to executive sessions.

b. Commission Findings

243. We find that the ERCOT bylaws and the representations made in Exhibit B of the TRE Delegation Agreement satisfy the governance requirements of FPA section 215 and the *pro forma* Exhibit B Governance Criteria. First, we find that TRE will be governed by a combination independent and balanced stakeholder board. The board will be sufficiently independent because it will be responsible for managing its own budget, hiring and managing its own staff and consultants, and investigating compliance with, and enforcement of, reliability standards in the ERCOT region. The Texas Commission, moreover, will conduct all hearings on complaints, allegations of violations, and non-compliance reports and will make recommendations as to the appropriate disposition of these matters.¹³³ The chairman of the Texas Commission will also occupy a seat on the ERCOT board. As such, we find that there will be a sufficient separation of functions between TRE and the ISO function of ERCOT.¹³⁴

¹³³ ERCOT bylaws at section 7.2.

¹³⁴ In our analysis of the SPP Delegation Agreement, below, we reach a different conclusion regarding the extent to which the SPP Regional Entity, as proposed, will operate independently of the SPP RTO. However, we find that the circumstances presented by the proposed TRE/ERCOT arrangement can be distinguished, particularly given the involvement of the Texas Commission in TRE's governance.

244. We also find that the ERCOT board will be sufficiently independent because it will be comprised of directors chosen from all industry segments, with no two sectors able to control a vote. No single sector will be able to veto a measure, given ERCOT's quorum and supermajority voting requirements. As such, ERCOT's board composition and voting protocols are designed to ensure that TRE will be governed by an appropriate balance of stakeholder interests.

245. Finally, we clarify that the ERCOT bylaws are "rules," under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹³⁵

4. Exhibit C: TRE Reliability Standards Development

246. Exhibit C to the TRE Delegation Agreement consists of narrative responses addressing each of NERC's 34 *pro forma* Common Attributes addressed above.¹³⁶ In addition, NERC and TRE reference a TRE draft manual, "The Texas Regional Entity Standards Development Process," dated October 19, 2006 (TRE Standards Development Manual).¹³⁷

247. NERC, in its transmittal letter, states that the TRE Standards Development Manual is consistent with the requirements set forth in its 34 *pro forma* Common Attributes. Specifically, NERC states that it has not identified any substantive differences between the TRE Standards Development Manual and NERC's 34 Common Attributes. NERC adds that it has worked closely with each of the Regional Entity candidates, including TRE, to attain a high level of consistency among the proposed Regional Entity standards development procedures. NERC further states that each reliability standard that will be proposed to NERC by TRE will be in the form of a NERC reliability standard and will contain all the same elements as a NERC reliability standard.

¹³⁵ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,212 at P 113 ("[T]he Rules of the ERO and Regional Entities are the bylaws, rules of procedure and other organizational rules and protocols of the ERO or a Regional Entity, respectively.").

¹³⁶ See *supra* section IV(A).

¹³⁷ The TRE Standards Development Manual is included in NERC's filing as supplemental information and is cross-referenced in the narrative responses addressing the 34 *pro forma* Common Attributes.

248. The TRE Standards Development Manual also addresses procedures for voting on the adoption of a proposed reliability standard.¹³⁸ Specifically, the TRE Standards Development Manual provides for the establishment of a reliability standards committee comprised of representatives from all market segments.¹³⁹ The reliability standards committee will receive, consider, and vote on requests for new or revised reliability standards. The reliability standards committee will also consider any requests for reliability standards from parties that are directly and materially affected by the operation of the ERCOT bulk-power system. However, the ERCOT board will have the final vote on proposed reliability standards.¹⁴⁰

249. We accept Exhibit C to the TRE Delegation Agreement. First, we agree that the voting procedures applicable to the standards formation process are consistent with the requirements of FPA section 215. We also find that the TRE Standards Development Manual is generally consistent with NERC's *pro forma* Common Attributes. We clarify, however, that the TRE Standards Development Manual embodies "rules," under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁴¹

¹³⁸ See TRE Standards Development Manual at app. A (addressing stakeholder representation).

¹³⁹ TRE's market segments are identified in section V(A)(3) of this order, above. Each segment will be given one vote, with each voting entity representative of that segment receiving an equal fraction of its segment vote, provided that the consumer segment will be divided into three sub-segments (residential, commercial, and industrial) receiving one-third of the consumer segment vote. Approval of a standard requires 4.67 affirmative votes. *Id.* at section II.

¹⁴⁰ *Id.* See also *pro forma* base Delegation Agreement at section 5(b): "Pursuant to section 215(d)(3) of the Act, NERC shall rebuttably presume that a proposal from a Regional Entity organized on an interconnection-wide basis for a [regional reliability standard] is just, reasonable, and not unduly discriminatory or preferential, and in the public interest."

¹⁴¹ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats & Regs ¶ 31,204 at P 113.

5. Exhibit D: TRE Compliance Monitoring and Enforcement

250. Exhibit D to the TRE Delegation Agreement adopts the *pro forma* Exhibit D (Uniform Compliance Program), subject to deviations. Specifically, the TRE Exhibit D deviates from the *pro forma* Uniform Compliance Program, at section 1.2, addressing: (i) use of the Texas Commission to serve as TRE's hearing body; (ii) reliance on public hearings, as required by the Texas Commission; (iii) reliance on the Texas Commission's staff of administrative law judges and other trained employees to establish the procedures and timelines that will be followed in TRE's hearings; and (iv) reliance on TRE's chief compliance officer, in lieu of the hearing body, to render a final decision, subject to an appeal to NERC. Exhibit B identifies the chief compliance officer as TRE's chief executive officer.

251. TRE, in support of these deviations, explains that using the existing procedures of the Texas Commission will be more efficient and cost effective than the attachment 2 hearing procedures outlined in the *pro forma* Uniform Compliance Program. In addition, TRE asserts that its proposed deviation from the *pro forma* confidentiality provisions is necessary because the Texas Commission is required under Texas law to conduct its deliberations in an open meeting. TRE observes that in Order No. 672, the Commission stated that if a Regional Entity wishes to conduct a public investigation or audit or to permit interventions when deciding whether to impose a penalty, the Regional Entity must receive advance authorization from the Commission.¹⁴² TRE requests this authorization from the Commission to allow the Texas Commission to conduct public hearings as TRE's hearing body. TRE also attaches to Exhibit D a version of attachment 2 to the Uniform Compliance Program that has been revised to accommodate the use of the Texas Commission as TRE's hearing body.

252. Additionally, the TRE hearing process will utilize the Texas Commission to provide a written recommendation, not a decision. The TRE chief compliance officer will be responsible for issuing the written decision accepting, rejecting or modifying the hearing body's recommendation. The chief compliance officer will also provide a written decision after the hearing body has made a recommendation in expedited hearings for disputes concerning remedial action directives.

253. We accept TRE's Exhibit D. We also require modifications to be addressed by NERC and TRE. TRE's Exhibit D will be required to adopt the modifications addressed

¹⁴² See Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 511.

above regarding our acceptance of the *pro forma* Uniform Compliance Program, including the modifications that apply to TRE's revised version of NERC's attachment 2 hearing procedures. We authorize the Texas Commission, in its capacity as TRE hearing body, to conduct public hearings and to issue written recommendations that are publicly available pursuant to the Texas Open Meetings Law. As represented by NERC and ERCOT, this provision is consistent with Texas state law. We note that no interveners comment on or protest the public hearing provision.

6. Exhibit E: TRE Funding

254. Exhibit E to the TRE Delegation Agreement adopts the *pro forma* Exhibit E, subject to deviations. Specifically, the TRE Exhibit E provides that: (i) either ERCOT or TRE, not NERC, be given the responsibility for submitting invoices;¹⁴³ (ii) NERC will be required to fund TRE's statutory costs on a quarterly basis, within two business days after receipt of the remittance;¹⁴⁴ and (iii) NERC will fund TRE's statutory costs based on TRE's approved annual budget.¹⁴⁵

255. We accept Exhibit E of the TRE Delegation Agreement. We also identify modifications to be addressed by NERC and TRE. In the *ERO Certification Order*, the Commission approved NERC's proposal to delegate billing and collection functions to Regional Entities.¹⁴⁶ However, the Commission required that appropriate safeguards be adopted in the delegation agreement to ensure that: (i) the Regional Entity will transfer the money it collects to NERC in a timely manner; and (ii) the Regional Entity will not use its position as a billing and collection agent to unduly influence NERC's decisions. The TRE Exhibit E does not address these required safeguards. Accordingly, we direct NERC and TRE to address this matter.

256. With respect to the proposed deviation requiring NERC to fund TRE's statutory reliability regulator-related costs on a quarterly basis, within two business days after receipt of the remittance, we are not persuaded on the record presented here that this

¹⁴³ TRE, however, will be required to notify NERC of non-payments.

¹⁴⁴ The *pro forma* provision contemplates "four equal quarterly payments."

¹⁴⁵ The *pro forma* provision specifies the eligible cost functions, but not the annual costs that will attach to these functions.

¹⁴⁶ 116 FERC ¶ 61,062 at P 166, P 169.

proposal is either necessary or appropriate. First, neither NERC nor TRE have explained TRE's proposal. In addition, it is unclear whether NERC's cumulative obligations under its delegation agreements, with respect to funding matters, would permit it to honor this additional commitment in a timely, cost-efficient manner. Finally, in the *ERO Certification Order*, the Commission expressed concern that a Regional Entity which was acting as the collection agent could unduly influence NERC's decisions. Accordingly, because NERC and TRE have not addressed this deviation, we direct NERC and TRE to do so.

257. Finally, the *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, i.e., non-FPA section 215, non-reliability regulator activities, then it must list them in Exhibit E.¹⁴⁷ The identification of non-statutory activities performed by a Regional Entity is necessary 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. The TRE Exhibit E fails to provide this information. Accordingly, we direct NERC and TRE to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities.

B. MRO Delegation Agreement (Docket No. RR07-2-000)

258. We accept the MRO Delegation Agreement. We also identify modifications to be addressed by NERC and MRO, including the modifications identified above, as applicable to the *pro forma* Delegation Agreement. MRO was formed in 2005 to succeed the MAPP Regional Reliability Council, which was responsible for carrying out reliability functions in a less than interconnection-wide region that spanned nine U.S. states and the Canadian provinces of Manitoba and Saskatchewan.¹⁴⁸ Almost half of the regional load and approximately two-thirds of the transmission within the MRO region is not part of any RTO. Public power entities represent approximately one-half of the load within the MRO region.

¹⁴⁷ *Id.* at P 580. By contrast, statutory costs, i.e., reliability regulator-related costs, include those costs associated with all activities performed pursuant to FPA section 215 and the Commission's reliability regulations. *See* Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 56 and P 65.

¹⁴⁸ The MAPP region includes portions of the following states: Illinois, Michigan, Minnesota, Wisconsin, Iowa, North Dakota, South Dakota, Nebraska, and Montana.

259. In addition to its application submitted here, MRO has also submitted a cross-border regional entity application to the applicable governmental authorities in Manitoba and Saskatchewan. MRO is comprised of municipal utilities, cooperatives, public power districts, investor-owned utilities, a federal power marketing agency, Canadian Crown Corporations, and independent power producers.

260. We find that MRO satisfies the FPA section 215 requirements for delegation of ERO authority. MRO will be governed by a balanced stakeholder board and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO. We also find that the MRO Delegation Agreement will promote effective and efficient administration of the bulk-power system.

1. MRO Base Delegation Agreement

261. The MRO base Delegation Agreement adopts the *pro forma* base Delegation Agreement, without deviation. Accordingly, we accept the MRO base Delegation Agreement.

2. Exhibit A: MRO Regional Boundary

262. The geographic region in which MRO will perform its duties and functions under the MRO Delegation Agreement is based on the load serving entities identified in Exhibit E. The region covers approximately one million square miles and has a population of over 20 million. NERC, in support of this proposed regional boundary, states that each of the six Regional Entities within the Eastern Interconnection, including MRO, have worked together to develop their respective Exhibit A proposals. This is especially important for a region that is less than interconnection-wide, where failure of one of the region's bulk-power system components may have an adverse impact on the neighboring regions' bulk-power systems. NERC asserts that these Regional Entities are satisfied that they have properly identified their boundaries so as to avoid both gaps and overlaps, i.e., in a way that will permit them to know which owners, operators and users of the bulk-power system are in which region.

263. We find that the MRO region, as described in Exhibit A, represents a sufficient size, scope and configuration. In the *pro forma* Exhibit A accepted by the Commission in the *ERO Certification Order*, the regional boundary is required to reflect coordination with neighboring Regional Entities, as appropriate, to ensure that all relevant areas are either included within the geographic boundary of a Regional Entity or specifically

identified as not being within a Regional Entity's geographic boundary.¹⁴⁹ NERC, as noted above, asserts that it has undertaken this review with MRO and MRO's neighboring Regional Entities and that each of these entities is satisfied that MRO's boundaries have been properly identified.

3. Exhibit B: MRO Governance Structure

264. NERC, in its transmittal letter, asserts that MRO's governance structure satisfies the requirements of FPA section 215 because, among other things: (i) MRO will have a balanced stakeholder board, in which no two sectors can determine or control the outcome of a decision; and (ii) MRO is not a user, owner, or operator of bulk-power system facilities. NERC and MRO also represent that the MRO Delegation Agreement satisfies the Governance Criteria set forth in Exhibit B of the *pro forma* Delegation Agreement. MRO's governance structure is established under its bylaws (MRO bylaws), which are included in NERC's submittals as supplementary information.

a. MRO Bylaws

265. The MRO bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

266. *Composition and Election of the Board (Criterion 1)*: MRO represents that it will be governed by a balanced stakeholder board because, as explained below, the board will be composed of representatives from nine sectors and because of the voting protocols applicable to board voting. MRO refers to the following provisions of the MRO bylaws:

- *Section 7.3*: Section 7.3 provides that the MRO Board consists of 19 directors, elected from nine industry sectors.¹⁵⁰ Directors are elected from a majority vote of

¹⁴⁹ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 534.

¹⁵⁰ Three directors elected by transmission system operators; two directors by generators and power marketers; five directors by investor owned utilities (including two by utilities with less than 3000 MW of end-use load and three by utilities with more than 3000 MW of end-use load); two directors by municipally-owned utilities; two directors by cooperatives; two directors by Canadian utilities; one director by federal power marketing agencies; one director by large end-use customers; and one director by small end-use customers.

each sector. Each director is given one vote with respect to decisions of the board.¹⁵¹

- *Section 7.8:* Section 7.8 provides that two-thirds of the directors are a quorum.
- *Section 7.9:* Section 7.9 provides that the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board.

267. *Rules Assuring Independence (Criterion 2):* MRO represents that it has established rules that assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its officers. MRO asserts, as noted above, that it is not a user, owner or operator of bulk-power facilities. MRO further asserts that its rules governing the selection of its board directors provide for fair stakeholder representation. MRO refers to the following provisions of the MRO bylaws:

- *Section 6.1:* Section 6.1 provides that each sector will elect directors to represent its sector on the board. The power to adopt, amend, or repeal the bylaws is vested in MRO's members, subject to the right of the board to approve such changes, upon a two-thirds vote.
- *Section 6.5:* Section 6.5 provides that a quorum for a sector is a majority of the sector votes entitled to vote at the meeting.

268. *Membership (Criterion 3):* MRO represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed reliability standards. MRO refers to the following provisions of the MRO bylaws:

- *Section 5.3:* Section 5.3 provides that membership in each sector is open to any entity within the MRO footprint that qualifies to become a member of an industry sector. Affiliates of members may become separate members, but no entity may hold more than one board seat. Only corporate members in good standing can vote and be directors.

¹⁵¹ *Id.* at section 7.2.

- Section 5.8 provides that the board will propose to NERC a budget for delegated functions pursuant to a delegation or other agreement. For those functions outside the scope of MRO's delegated functions, the board may fix the fees. Section 6.5.2 states that the members may change the dues structure as stated in section 5.8 by resolution with an affirmative vote of two-thirds of the sector votes cast.

269. *Committees and Subordinate Organizational Structures (Criterion 4)*: MRO represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action. MRO refers to the following provisions of the MRO bylaws:

- *Section 8.1*: Section 8.1 provides that the board will establish committees, subject to the direction and control of the board. The membership of organizational groups will be determined by experience, expertise and geographic diversity and to the extent practicable will include balanced representation of the sectors.

270. *Openness and Balance of Interests (Criterion 5)*: MRO represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. MRO refers to the following provisions of the MRO bylaws:

- *Section 6*: Section 6.1 provides that the members will hold an annual meeting to review the proposed budget and MRO operations. Section 6.2.1 provides that special meetings of the members may be called by six members of the board, by the president, or if at least ten percent of the members sign, date, and deliver to the president one or more written demands for a special meeting.
- *Section 7.7*: Section 7.7 provides that an annual meeting of the board will be held immediately following the annual meeting of the members. Regular meetings may be held at the discretion of the board, with notice given to members. With certain stated exceptions, all meetings of the board will be open to members and other interested persons.
- *Section 20.1*: Section 20.1 provides that the power to adopt, amend or repeal the MRO bylaws is vested in the members, subject to the right of the board, upon a two-thirds vote, to amend the bylaws as necessary or appropriate to comply with federal reliability legislation and/or the adoption of related requirements and procedures by NERC or any regulatory agency with jurisdiction.

b. Responsive Pleadings

271. The Midwest Independent Transmission System Operator, Inc. (Midwest ISO) takes issue with the MRO bylaw provision combining ISOs and RTOs with other transmission operators in representation on the board.¹⁵² The Midwest ISO argues that this provision fails to provide separate stakeholder representation for ISOs and RTOs, as required by the *ERO Certification Order*.¹⁵³ Specifically, the Midwest ISO points out that in the *ERO Certification Order*, the Commission required NERC to modify its governance structure to create a separate segment for ISOs and RTOs and to exempt ISOs and RTOs from a provision weighting the vote of segments with fewer than ten members. The Midwest ISO suggests that this ruling, which applied to NERC, should also apply to Regional Entities.

272. Answers to the Midwest ISO's protest were submitted by MRO, ATC, and WPS Resources Corporation (WPS Companies). MRO argues that the *ERO Certification Order* was specifically directed at NERC and the composition of NERC's registered ballot body, not a Regional Entity's board structure. ATC adds that any reliability standard developed by MRO will be voted on first, not by the MRO board, but by the sectors in MRO's registered ballot body, i.e., by a ballot body which has a specific sector allocated solely to RTOs and ISOs. WPS Companies agrees, pointing out that the Commission's guidance, in the *ERO Certification Order*, concerned only NERC's registered balloting body, not its board. WPS Companies and ATC argue that, even assuming that the *ERO Certification Order* does apply to the composition of the MRO board, the Midwest ISO's interests are adequately represented because, as board directors representing transmission system operators, the Midwest ISO and ATC will have similar concerns and interests relative to reliability matters.¹⁵⁴

¹⁵² See MRO bylaws at 7.3.

¹⁵³ Midwest ISO protest at 3, citing *ERO Certification Order*, 116 FERC ¶ 61,062 at P 90.

¹⁵⁴ WPS Companies notes that on the MRO Board, three seats are reserved for transmission system operators, with one seat each currently occupied by the Midwest ISO and ATC (the other seat is currently vacant).

c. Commission Findings

273. We find that the MRO bylaws and the representations made in Exhibit B of the MRO Delegation Agreement satisfy the governance requirements of FPA section 215 and the *pro forma* Exhibit B Governance Criteria. We also identify modifications to be addressed by NERC and MRO. We note that MRO is not a user, owner, or operator of bulk-power system facilities. Moreover, the MRO board will be comprised of directors chosen from all industry segments, with no two sectors able to control a vote. No single sector will be able to veto a measure, given MRO's quorum and voting protocols. As such, MRO's board composition and voting protocols are designed to ensure that MRO will be governed by an appropriate balance of stakeholder interests.

274. However, membership fees, which are set by the board on an annual basis, could upset this balance, particularly if set too high. Accordingly, in order to provide the Commission the opportunity to review them, any fees that MRO proposes to charge members must be identified in its annual budget and business plan.

275. Further, we clarify that the MRO bylaws are "rules," under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁵⁵

276. Finally, we reject the protest submitted by Midwest ISO regarding separate ISO and RTO representation in MRO governance matters. As MRO correctly points out in its answer, ISOs and RTOs will be adequately represented on board matters as members of the operator sector and will comprise a separate sector within the MRO stakeholder ballot body. As such, their interests will be adequately represented and balanced. Additionally, the Commission's ruling in the *ERO Certification Order* regarding NERC's ballot body does not apply to governance at the regional level where conditions for establishing balance are not the same. As such, MRO's proposal is not inconsistent with the *ERO Certification Order*.¹⁵⁶

4. Exhibit C: MRO Reliability Standards Development

277. Exhibit C to the MRO Delegation Agreement consists of narrative responses addressing each of NERC's 34 *pro forma* Common Attributes addressed above.¹⁵⁷ In

¹⁵⁵ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

¹⁵⁶ 116 FERC ¶ 61,062 at P 90.

¹⁵⁷ See *supra* section IV(A).

addition, NERC and MRO rely on an MRO draft manual, “The Midwest Reliability Organization Regional Reliability Standards Process Manual,” version 3.0 (MRO Standards Development Manual).¹⁵⁸ The MRO Standards Development Manual is included in NERC’s filing as supplemental information and is cross-referenced in the narrative responses addressing NERC’s 34 *pro forma* Common Attributes.

278. NERC, in its transmittal letter, states that the MRO Standards Development Manual is consistent with the requirements set forth in NERC’s 34 *pro forma* Common Attributes. Specifically, NERC states that it has not identified any substantive differences between the MRO Standards Development Manual and NERC’s 34 Common Attributes. NERC adds that it has worked closely with each of the Regional Entity candidates, including MRO, to attain a high level of consistency among the proposed Regional Entity standards development procedures. NERC further states that each reliability standard that will be proposed to NERC by MRO will have the same format as a NERC reliability standard, will contain the same elements as a NERC reliability standard, and will have been developed through a process meeting the common procedural elements.

279. The MRO Standards Development Manual also addresses voting procedures applicable to the adoption of a proposed reliability standard.¹⁵⁹ Specifically, the MRO Standards Development Manual provides for the establishment of a registered ballot body comprised of all organizations and entities that: (i) qualify for one of seven designated voting segments;¹⁶⁰ (ii) are registered with MRO as ballot participants in the voting on standards; and (iii) are current with any MRO designated fees associated with the Standards Development Process.¹⁶¹ The MRO Standards Development Manual states

¹⁵⁸ The MRO Standards Development Manual has not been approved by the MRO board.

¹⁵⁹ See MRO Standards Development Manual at app. C (registered ballot body registration procedures) and app. D. (balloting examples).

¹⁶⁰ The segments are: (i) transmission owners; (ii) RTOs, regional transmission group, ISOs, reliability organizations, and reliability coordinators; (iii) load-serving entities; (iv) electric generators; (v) electricity brokers, aggregators, and marketers; (vi) electricity end-users; and (vii) federal, state, and provincial regulatory or other government entities. *Id.* at app. C.

¹⁶¹ See MRO Standards Development Manual at app. C. (noting that at this time, there are no fees for registration).

that a quorum will be established if at least four segments have submitted a vote. A proposed reliability standard will be approved if at least two-thirds of the voting segments register an affirmative vote.

280. We accept Exhibit C to the MRO Delegation Agreement. First, we find that the voting procedures applicable to the standards formation process are consistent with the requirements of FPA section 215. We also agree that the MRO Standards Development Manual is generally consistent with NERC's *pro forma* Common Attributes. We clarify, however, that the MRO Standards Development Manual embodies "rules," under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁶²

5. Exhibit D: MRO Compliance Monitoring and Enforcement

281. Exhibit D to the MRO Delegation Agreement adopts the *pro forma* Exhibit D (Uniform Compliance Program), without deviation. Accordingly, we will accept MRO's Exhibit D.

6. Exhibit E: MRO Funding

282. Exhibit E to the MRO Delegation Agreement includes two alternative exhibits, both of which adopt the *pro forma* Exhibit E, subject to deviations. Exhibit E, version 7 is based on the *pro forma* Exhibit E, as it was accepted by the Commission in the *ERO Certification Order*.¹⁶³ Exhibit E, version 7.1 is based on NERC's compliance filing submission, subject to the following deviations: (i) deletion of "data gathering activities" as an activity to be funded through NERC; (ii) deletion of the modifier "this Exhibit E" from the section 3 requirement that NERC shall fund each Regional Entities' costs identified in four equal quarterly payments; (iii) the addition of a new section 4,

¹⁶² See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats & Regs ¶ 31,204 at P 113.

¹⁶³ Deviations from *pro forma* Exhibit E include the following changes to section 4 (addressing the application of penalties): (i) deletion of the provision clarifying "that the Regional Entity that initiates an investigation . . . shall receive any penalty monies that result . . . ;" and (ii) addition of the requirement that "no financial penalties will be commingled between the U.S. and Canada." In addition, MRO omits, as an activity to be funded through NERC, "necessary data gathering activities."

providing a definition of the term “Load Serving Entity” and a new section 5, providing a definition for the term “Net Energy for Load;” and (iv) the attachment, at Exhibit E version 7.2, of a list of MRO’s load serving entities.

283. We accept the MRO Exhibit E, version 7.1. We also identify modifications to be addressed by NERC and MRO. Exhibit E, version 7.1 is generally consistent with the *pro forma* Exhibit E and includes additional clarifications and definitions that we find appropriate. However, with respect to the deletion of data gathering activities as a statutory function, the *ERO Certification Order* found that in order for data collection activities to be considered a statutory activity, NERC would be required to designate them as such.¹⁶⁴ NERC did so in its compliance filing. However, the MRO Exhibit E fails to incorporate this revision or otherwise support a deviation. Accordingly, we direct NERC and MRO to conform the MRO Exhibit E to this provision of the *pro forma* Exhibit E.

284. Finally, the *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, i.e., non-FPA section 215, non-reliability regulator activities, then it must list them in Exhibit E. The identification of non-statutory activities performed by a Regional Entity is necessary 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. The MRO Exhibit E fails to provide this information. Accordingly, we direct NERC and MRO to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities.

C. NPCC Delegation Agreement (Docket No. RR07-3-000)

285. We accept the NPCC Delegation Agreement. We also identify modifications to be addressed by NERC and NPCC, including the modifications identified above, as applicable to the *pro forma* Delegation Agreement. NPCC states that it was originally established in 1966 as a voluntary, non-profit regional electric reliability organization, with members representing various regional industry segments. NPCC, however, has been restructured in anticipation of assuming its duties under both the NPCC Delegation Agreement and related agreements with the appropriate Canadian authorities. Specifically, the membership interests in NPCC’s predecessor have been transferred to NPCC’s affiliate, Northeast Power Coordinating Council, Inc. (NPCC Inc.). The NPCC

¹⁶⁴ 116 FERC ¶ 61,062 at P 582.

region is a less than interconnection-wide region that spans the six New England states, the State of New York, and Ontario, Quebec and the Maritime Provinces in Canada.

286. We find that NPCC satisfies the FPA section 215 requirements for delegation of ERO authority. NPCC will be governed by a combination independent and balanced stakeholder board and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO. We also find that the NPCC Delegation Agreement will promote effective and efficient administration of the bulk-power system.

1. NPCC Base Delegation Agreement

287. The NPCC base Delegation Agreement adopts the *pro forma* base Delegation Agreement, without deviation. Accordingly, we accept the NPCC base Delegation Agreement.

2. Exhibit A: NPCC Regional Boundary

288. The geographic region in which NPCC will perform its duties and functions under the NPCC Delegation Agreement will include, as noted above, New York State, the six New England states, and Ontario, Quebec, and the Maritime Provinces in Canada. The region covers approximately one million square miles. NERC, in support of this proposed regional boundary, states that the six Regional Entities within the Eastern Interconnection, including NPCC, have worked together to develop their respective Exhibit A proposals. This is especially important for a region that is less than interconnection-wide, where failure of one of the region's bulk-power system components may have an adverse impact on the neighboring regions' bulk-power systems. NERC asserts that these Regional Entities are satisfied that they have properly identified their boundaries so as to avoid both gaps and overlaps, and know which owners, operators and users of the bulk-power system located along the boundaries are in which regions.

289. We find that the NPCC region, as described in Exhibit A, represents a sufficient size, scope and configuration. In the *pro forma* Exhibit A accepted by the Commission in the *ERO Certification Order*, the regional boundary is required to reflect coordination with neighboring Regional Entities, as appropriate, to ensure that all relevant areas are either included within the geographic boundary of a Regional Entity or specifically identified as not being within that Regional Entity's geographic boundary.¹⁶⁵ NERC, as

¹⁶⁵ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 534.

noted above, asserts that it has undertaken this review with NPCC and NPCC's neighboring Regional Entities and that each of these entities is satisfied that NPCC's boundaries have been properly identified.

3. **Exhibit B: NPCC Governance Structure**

290. NERC, in its transmittal letter, asserts that NPCC's governance structure satisfies the requirements of FPA section 215 because, among other things: (i) NPCC will have a combination independent and balanced stakeholder board; and (ii) NPCC is not a user, owner, or operator of bulk-power system facilities. NERC and NPCC also represent that the NPCC Delegation Agreement satisfies the five Governance Criteria set forth in Exhibit B of the *pro forma* Delegation Agreement. NPCC's governance structure is established under its bylaws (NPCC bylaws), which are included in NERC's submittals as supplemental information.

a. **NPCC Bylaws**

291. The NPCC bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

292. *Composition and Election of the Board (Criterion 1)*: NPCC represents that it will be governed by a combination independent and balanced stakeholder board. NPCC asserts that its board will be balanced because, as explained below, it will be composed of directors representing eight voting sectors and because of the voting protocols applicable to board votes. NPCC refers to the following provisions of the NPCC bylaws:

- *Section VII*: Section VII(A) provides that the board consists of stakeholders balanced by sector and will consist of up to eight voting sectors.¹⁶⁶ Each sector will have a minimum of two directors and a maximum of six. As such, there will be between 16 and 48 directors. Directors are elected from a majority vote of the membership of their sector.

¹⁶⁶ The eight sectors are comprised of members representing: (i) transmission owners; (ii) reliability coordinators; (iii) transmission dependent utilities; (iv) generator owners; (v) marketers (including brokers and aggregators); (vi) customers; (vii) regulators; and (viii) sub-regional reliability councils and/or other regional interested entities.

- *Section VII(F)*: Section VII(F) provides that attendance by at least half of the directors in each of at least two-thirds of the sectors constitute a board quorum. A two-thirds affirmative majority of the weighted sector votes is required to approve an action, with each director casting one vote within the applicable sector. Bylaw changes may be approved by a vote of two-thirds of the members at a meeting where a quorum is present (*i.e.*, where there are more than one half of the members present from at least two-thirds of the represented sectors).

293. *Rules Assuring Independence (Criterion 2)*: NPCC represents that it has established rules that assure its independence from the users, owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its officers. NPCC asserts, as noted above, that it is not a user, owner or operator of bulk-power facilities. NPCC refers to the following provisions of the NPCC bylaws:

- *Section VI(G)*: Section VI(G) provides that at the first meeting of the members, the members from each of the eight voting sectors will vote to elect directors in their respective sector. A director will be elected by a vote of the majority of the members in the respective sector.

294. *Membership (Criterion 3)*: NPCC represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed reliability standards. NPCC refers to the following provisions of the NPCC bylaws:

- *Section IV*: Section IV(A) provides that membership is open to any person or entity, with membership in each sector open to those that have an interest in the Northeast bulk power grid.

295. *Committees and Subordinate Organizational Structures (Criterion 4)*: NPCC represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action. NPCC refers to the following provisions of the NPCC bylaws:

- *Section VII*: Section VII provides that NPCC will have such committees as the board deems appropriate. Quorum and voting rules applicable to the board will apply to voting on any such decision-making committees.
- *Section VIII*: Section VIII provides that at any meeting of the members, one-half of the members in each of at least two-thirds of the voting sectors will constitute a

quorum. An action will be approved if the sum of fractional affirmative votes from all sectors divided by the number of voting sectors is at least two-thirds.

296. *Openness and Balance of Interests (Criterion 5)*: NPCC represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. NPCC refers to the following provisions of the NPCC bylaws:

- *Section VIII*: Section VIII provides that meetings of the members will be open to the public, subject to confidentiality limitations.
- *Section IX*: Section IX(A)(1) provides that members will be entitled to attend all meetings of the general membership and, subject to confidentiality limitations, meetings held by NPCC's committees, task forces, and any other NPCC group. Members are also permitted to vote to amend the bylaws or to establish, modify, or eliminate reliability standards.

b. Commission Findings

297. We find that the NPCC bylaws and the representations made in Exhibit B of the NPCC Delegation Agreement satisfy the governance requirements of FPA section 215 and the *pro forma* Exhibit B Governance Criteria. First, we note that NPCC is not a user, owner, or operator of bulk-power system facilities. Moreover, the NPCC board will be comprised of directors chosen from all industry segments, with no two sectors able to control a vote. No single sector will be able to veto a measure, given NPCC's quorum and voting protocols. As such, NPCC's board composition and voting protocols are designed to ensure that NPCC will be governed by an appropriate balance of stakeholder interests.

298. We clarify, however, that the NPCC bylaws are "rules," under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁶⁷

4. Exhibit C: NPCC Reliability Standards Development

299. Exhibit C to the NPCC Delegation Agreement consists of narrative responses addressing each of NERC's 34 *pro forma* Common Attributes addressed above.¹⁶⁸ In

¹⁶⁷ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

addition, NERC and NPCC rely on an NPCC manual, “The Regional Reliability Standards Development Procedure,” as approved by the NPCC board on November 17, 2006 (NPCC Standards Development Manual). The NPCC Standards Development Manual is included in NERC’s filing as supplemental information and is cross-referenced in the narrative responses addressing NERC’s 34 *pro forma* Common Attributes.

300. NERC, in its transmittal letter, states that the NPCC Standards Development Manual is consistent with the requirements set forth in its 34 *pro forma* Common Attributes. Specifically, NERC states that it has not identified any substantive differences between the NPCC Standards Development Manual and NERC’s 34 Common Attributes. NERC adds that it has worked closely with each of the Regional Entity candidates, including NPCC, to attain a high level of consistency among the proposed Regional Entity standards development procedures. NERC further states that each reliability standard that will be proposed to the ERO by NPCC will contain all the same elements as a NERC reliability standard, and will have been developed through a process meeting the common procedural elements.

301. The NPCC Standards Development Manual also addresses voting procedures applicable to the adoption of a proposed reliability standard.¹⁶⁹ Specifically, the NPCC Standards Development Manual provides for the establishment of a Regional Standards Committee that will be charged with the management of the NPCC standards development process under a sector-based voting structure, as described in the NPCC bylaws.¹⁷⁰ The voting body will be comprised of all entities or individuals that qualify for one of the eight NPCC stakeholder sectors and that are registered with NPCC as potential ballot participants in the voting on standards. In order for a proposed reliability standard to be approved: (i) a quorum must be established by at least 50 percent of the NPCC members in at least two-thirds of the sectors; and (ii) a two-thirds majority of the total weighted sector votes cast must be affirmative.¹⁷¹

¹⁶⁸ See *supra* section IV(A).

¹⁶⁹ See NPCC Standards Development Manual at app. C (registered ballot body registration procedures) and app. D (balloting examples).

¹⁷⁰ See *supra* section IV(C)(3).

¹⁷¹ NPCC Standards Development Manual at section 4.

302. We accept Exhibit C to the NPCC Delegation Agreement. First, we find that the voting procedures applicable to the standards formation process are consistent with the requirements of FPA section 215. We also agree that the NPCC Standards Development Manual is generally consistent with NERC's *pro forma* Common Attributes. We clarify, however, that the NPCC Standards Development Manual embodies "rules," under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁷²

5. **Exhibit D: NPCC Compliance Monitoring and Enforcement**

303. Exhibit D to the NPCC Delegation Agreement adopts the *pro forma* Exhibit D (Uniform Compliance Program) without deviation, as it will apply within the United States. The NPCC Exhibit D also clarifies NPCC's enforcement activities as they relate to Canada. Specifically, section 1.2 of the NPCC Exhibit D provides that NPCC's "[c]ompliance monitoring and enforcement program will be implemented within the Canadian portion of [NPCC's] geographic area, consistent with individual Canadian Provincial Memoranda of Understanding and Canadian laws."¹⁷³

304. In addition, the NPCC Exhibit D clarifies NPCC's hearing procedures, relating to both the hearing body, i.e., the establishment of an NPCC compliance committee, and the operation and functions of NPCC compliance staff. The proposed clarification in section 2.0 of the NPCC Exhibit D relating to the NPCC compliance committee provides as follows:

[NPCC] shall establish and maintain a hearing body with authority to conduct and render decisions in compliance hearings in which a Registered Entity may contest a finding of alleged violation, proposed penalty or sanction, or a proposed mitigation plan. The NPCC CBRE Compliance Committee shall serve in the role as the hearing body. This committee will be appointed by the [NPCC] Board and will consist of either [NPCC] Board

¹⁷² See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats & Regs ¶ 31,204 at P 113.

¹⁷³ This statement appears in Exhibit D of the NPCC Delegation Agreement. NPCC does not propose in Exhibit D any specific deviations from the provisions of the Uniform Compliance Program.

members or representatives appointed by the [NPCC] Board. Quorum and voting rules applicable to the [NPCC] Board shall apply to the [NPCC] Compliance Committee.

305. The proposed clarification in section 3.0 of the NPCC Exhibit D relating to the operation and functions of the NPCC compliance staff provides as follows:

Implementation of the [Uniform Compliance Program] by NPCC requires that the [NPCC] independent Compliance Staff make the initial compliance determination for all compliance submittals. After consultation, as appropriate, with applicable technical committees, [NPCC] independent Compliance Staff then makes the final compliance determination before forwarding a report to the [NPCC] Compliance Committee. The [NPCC] independent Compliance Staff will be bound by the antitrust guidelines, code of conduct, conflict of interest, confidentiality and any other applicable policies as referenced in the [Uniform Compliance Program].

306. We accept NPCC's Exhibit D. We also identify modifications to be addressed by NERC and NPCC. First, NPCC's Exhibit D will be required to adopt the modifications addressed above regarding our acceptance of the *pro forma* Uniform Compliance Program.

307. We accept section 1.2 of NPCC's Exhibit D for the purpose of defining NPCC's compliance and enforcement program with respect to the Canadian portion of NPCC's geographical area. In this respect, section 1.2 is consistent with individual Canadian Provincial memoranda of understanding and Canadian laws. However, we direct that NPCC provide, consistent with any applicable Canadian or provincial law, any memorandum of understanding into which NPCC enters with any Canadian authority.

308. We accept section 2.0 of NPCC's Exhibit D, but require two clarifications. First, NPCC designates the NPCC CBRE compliance committee as NPCC's hearing body for compliance matters that, in the United States, will be subject to NPCC's attachment 2 hearing procedures. Attachment 2, section 1 provides, as relevant here, that a hearing body shall consist either of the compliance enforcement authority's board or a committee thereof, or "a balanced compliance panel, reporting directly to the compliance enforcement authority's board, whose membership is composed or selected in accordance with procedures established by the Compliance Enforcement Authority."

309. If the NPCC board selects all of its members as members of the compliance committee, or all of the compliance committee's members are board members, the designation of the compliance committee will be consistent with attachment 2, section 1. In particular, we construe a compliance committee composed of a subset of NPCC board

members to be a committee of the board. However, if the compliance committee includes representatives, rather than NPCC board members only, the compliance committee must: (i) be balanced; (ii) report directly to the NPCC board; and (iii) be composed or selected in accordance with procedures established by NPCC. NPCC does not provide any information on how a compliance committee that includes representatives would meet these three conditions. Accordingly, we direct NPCC to incorporate in section 2 of its Exhibit D a statement that the compliance committee will meet the requirements of attachment 2, section 1 or, alternatively, explain how a compliance committee with representative members will meet these requirements.

310. *The pro forma* attachment 2 hearing procedures include provisions, at section 10, under which a registered entity may contest issuance of a remedial action directive. NPCC's Exhibit D, however, does not specifically provide that the compliance committee will preside at hearings on remedial action directives. Accordingly, we direct NPCC to clarify whether the compliance committee or another entity will do so.

311. We accept NPCC's proposal in section 3 of its Exhibit D to designate its independent compliance staff as the staff responsible for initial determinations for all compliance submittals. We also identify modifications to be addressed by NERC and NPCC. First, because NPCC does not define the compliance submittals its staff will process initially, we direct NPCC to do so. In this regard, we observe that the *pro forma* Uniform Compliance Program provides for registered entities to make submissions to Regional Entities that include self reports, periodic data submittals, self-certifications, exception reporting and complaints.

312. Second, we direct NPCC to describe how it will conduct other compliance activities, such as compliance audits and investigations, that do not readily appear to constitute compliance submittals. Third, because it is not clear what "applicable technical committees" NPCC's compliance staff may consult in making its initial determinations and whether these committees, like compliance staff, would be bound by applicable policies referenced in the Uniform Compliance Program to ensure their impartiality and fairness, we direct NPCC to provide clarification on these points. We expect that, especially after an initial period in which reliability standards are in effect, NPCC compliance staff would not require consultation with technical committees on a regular basis for routine submittals and matters.

313. Finally, NPCC failed to provide details, at section 3, regarding the "final compliance determination" that the compliance staff will make before forwarding a report to the compliance committee. We agree that after issuing a notice of alleged violation, or terminating an investigation without issuing such a notice, compliance staff may forward its report on the matter to the compliance committee. However, only the compliance committee, serving as NPCC's hearing body, can make enforcement

determinations for NPCC. Accordingly, we direct NERC and NPCC to describe the compliance determinations that the NPCC compliance staff will make and how the compliance staff will report these determinations to the compliance committee.

6. **Exhibit E: NPCC Funding**

314. The NPCC Delegation Agreement adopts the *pro forma* Exhibit E, subject to deviations. Specifically, the NPCC Exhibit E: (i) inserts the modifier “or their designees” when referring to NPCC’s load-serving entities; (ii) omits the *pro forma* qualifier “dues, fees, and other” as it relates to the *pro forma* term “charges,” *i.e.*, in relation to the *pro forma* requirement that the “[Regional Entity] shall allocate its dues, fees, and other charges for its activities pursuant to the delegation agreement among all load-serving entities on the basis of net-energy-for load;” and (iii) inserts, in this same sentence, the modifier “within the U.S” after “activities.”

315. We accept Exhibit E of the NPCC Delegation Agreement. We also identify modifications to be addressed by NERC and NPCC. The deviations identified above are relatively minor or non-substantive and are acceptable. However, the *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, *i.e.*, non-FPA section 215, non-reliability regulator activities, then it must list them in Exhibit E. The identification of non-statutory activities performed by a Regional Entity is necessary 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. The NPCC Exhibit E fails to provide this information. Accordingly, we direct NERC and NPCC to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities.

D. **RFC Delegation Agreement (Docket No. RR07-4-000)**

316. We accept the RFC Delegation Agreement. We also identify modifications to be addressed by NERC and RFC, including the modifications addressed above, as applicable to the *pro forma* Delegation Agreement. RFC is a non-profit corporation formed in 2006 to replace three NERC regional reliability councils (the East Central Area Reliability Agreement; the Mid-America Interconnected Network, and the Mid Atlantic Area Council). RFC states that it was established for the purpose of assuming its duties and functions under the RFC Delegation Agreement. The RFC region is a less than

interconnection-wide region that covers all or portions of 14 states and the District of Columbia.¹⁷⁴

317. We find that RFC satisfies the FPA section 215 requirements for delegation of ERO authority. RFC will be governed by a combination independent and balanced stakeholder board and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO. We also find that the RFC Delegation Agreement will promote effective and efficient administration of the bulk-power system.

1. RFC Base Delegation Agreement

318. The RFC base Delegation Agreement adopts the *pro forma* base Delegation Agreement without deviation. Accordingly, we accept the RFC base Delegation Agreement.

319. We reject, as a collateral attack of the *ERO Certification Order*, AMP-Ohio's argument that the contract termination provisions addressed at section 16 give RFC an unwarranted veto over NERC's future amendments to its rules.¹⁷⁵ Section 16 of the RFC base Delegation Agreement adopts the *pro forma* provision, without deviation. Moreover, AMP-Ohio offers no justification for overturning our prior acceptance of this provision and the standard contract principle on which it is based.

2. Exhibit A: RFC Regional Boundary

320. The geographic region in which RFC will perform its duties and functions under the RFC Delegation Agreement will include, as noted above, all or portions of 13 states and the District of Columbia. In addition, transmission systems and generation within the metered boundaries of the load-serving entities that comprise the RFC region are also

¹⁷⁴ The RFC region includes all of New Jersey, Delaware, Pennsylvania, Maryland, the District of Columbia, West Virginia, Ohio, Indiana, lower Michigan and portions of upper Michigan, Wisconsin, Illinois, Kentucky, Tennessee, and Virginia.

¹⁷⁵ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 605. Section 16 obligates NERC to obtain RFC's consent regarding amendments to the NERC Rules that would conflict with RFC's rights, obligations, or programs under the RFC Delegation Agreement, but does not prohibit NERC from seeking approval of these amendments from the Commission. Instead, it gives RFC a 60-day option to terminate the agreement, which will become effective one year following written notice.

included within the RFC region, even if outside the respective service territories of RFC's load-serving entities. NERC and RFC further represent that the RFC region is electrically contiguous. NERC, in support of this proposed regional boundary, states that the six Regional Entities within the Eastern Interconnection, including RFC, have worked together to develop their respective Exhibit A proposals. This is especially important for a region that is less than interconnection-wide, where failure of one of the region's bulk-power system components may have an adverse impact on the neighboring regions' bulk-power systems.

321. We find that the RFC region, as described in Exhibit A, represents a sufficient size, scope and configuration. In the *pro forma* Exhibit A accepted by the Commission in the *ERO Certification Order*, the regional boundary is required to reflect coordination with neighboring Regional Entities, as appropriate, to ensure that all relevant areas are either included within the geographic boundary of a Regional Entity or specifically identified as not being within that Regional Entity's geographic boundary.¹⁷⁶ NERC, as noted above, asserts that it has undertaken this review with RFC and RFC's neighboring Regional Entities and that each of these entities is satisfied that RFC's boundaries have been properly identified.

3. Exhibit B: RFC Governance Structure

322. NERC, in its transmittal letter, asserts that RFC's governance structure satisfies the requirements of FPA section 215 because, among other things: (i) RFC will have a combination independent and balanced stakeholder board; and (ii) RFC is not a user, owner, or operator of bulk-power system facilities. NERC and RFC also represent that the RFC Delegation Agreement satisfies the Governance Criteria set forth in Exhibit B of the *pro forma* Delegation Agreement. RFC's governance structure is established under its draft amended and restated bylaws (RFC bylaws), which are included in NERC's submittals as supplementary information.

a. RFC Bylaws

323. The RFC bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

¹⁷⁶ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 534.

324. *Composition and Election of the Board (Criterion 1)*: RFC represents that it will be governed by a combination independent and balanced stakeholder board. RFC refers to the following provisions of the RFC bylaws:

- *Section 7.4*: Section 7.4 provides that the board will consist of 114 directors, eight of which will be elected by designated industry sectors.¹⁷⁷ The remaining three directors will be elected as “independent” directors on an at-large basis. With respect to the eight directors elected by sector, one director each will be elected from industry sectors representing RTOs, small load-serving entities, medium load-serving entities, and large load-serving entities. In addition, two directors each will be elected from industry sectors representing suppliers and transmission companies. Each sector will elect its director(s) by majority vote from among its membership. With respect to the three at-large directors, elections will be held by all sectors voting together as a single class.
- *Section 7.9*: Section 7.9 provides that a board quorum is a majority of directors. However, if there are three independent directors, board business requires an affirmative majority of director votes. Bylaw changes require a two-thirds vote of stakeholder sector members. Each regular member is entitled to one vote in the sector in which it belongs.

325. *Rules Assuring Independence (Criterion 2)*: RFC represents that it has established rules that assure its independence from the users, owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its offices. RFC also asserts, as noted above, that it is not a user, owner or operator of bulk-power system facilities. RFC adds that its board will be balanced because, as explained below, it is composed of directors representing six sectors and because of the voting protocols applicable to board votes.

326. *Membership (Criterion 3)*: RFC represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed reliability standards. RFC refers to the following provisions of the RFC bylaws:

¹⁷⁷ See also section 1.12 (defining industry sector to mean “a group of Bulk-Power System owners, operators or users in the Region with substantially similar interests as pertinent to the purposes and operations of the Corporation of the Bulk-Power System.”)

- *Section 5.2:* Section 5.2.1 provides that membership in a given sector is open to any entity that qualifies as a bulk-power system owner, operator or user. There are three classes of membership: regular members, associate members, and adjunct members. Regular members are permitted to vote and are subject to all rights and obligations attributable to being a member.¹⁷⁸ Associate members may not vote, but are otherwise subject to all rights and obligations attributable to being a member. Adjunct members may not vote but will otherwise have all rights (but not the obligations) of being a member.
- *Section 5.9:* Section 5.9 provides that fees are determined by the president, but may be waived by the board. Annual fees are to be charged to regular members, but are not otherwise specified. A deficiency assessment to recover the balance of RFC annual operating costs (non-statutory costs) may be collected from members.

327. *Committees and Subordinate Organizational Structures (Criterion 4):* RFC represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action.

328. *Openness and Balance of Interests (Criterion 5):* RFC represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. RFC refers to the following provisions of the RFC bylaws:

- *Section 6:* Sections 6.4.1 and 6.11 require that member meetings be noticed.
- *Section 7.8:* Section 7.8 requires that the board meet annually and at such other times as the board may deem appropriate.

¹⁷⁸ Regular members are defined in section 1.24 as either: (i) an entity that has no affiliates or “Related Parties” that are members or (ii) an entity designated to be a regular member by a related group of associate members. Affiliates are defined in section in section 1.3 as entities that, through one or more intermediaries, control, are controlled by, or are under common control with another entity as determined by the board. “Related Parties” are defined in section 1.26 as a cooperative that generates and transmits electricity, a joint municipal agency, or one of its members.

- *Section 7.15*: Section 7.15 requires that minutes of board meetings and committee meetings will be posted on RFC's website.

b. Responsive Pleadings

329. AMP-Ohio objects to the voting restrictions set forth in the RFC bylaws at section 1.24, *i.e.*, the voting restrictions applicable to members that are "Related Parties."¹⁷⁹ AMP-Ohio asserts that these provisions could operate to deny both AMP-Ohio, as a joint municipal agency, and its member systems from qualifying as an RFC regular member and thus deny them the opportunity to vote.

330. RFC, in its answer, disagrees with AMP-Ohio's interpretation of section 1.24. RFC argues that section 1.24 permits an entity to be designated as a regular member by any other members that are Related Parties. RFC asserts that if AMP-Ohio and one or more of its members join, one entity may be designated as the regular member by the others that join as associate members. RFC adds that among AMP-Ohio's 122 municipal members, those that are eligible to join RFC may each join as a regular member if AMP-Ohio does not join.

c. Commission Findings

331. We find that the RFC bylaws and the representations made in Exhibit B of the RFC Delegation Agreement satisfy the governance requirements of FPA section 215 and the *pro forma* Exhibit B Governance Criteria. We also identify modifications to be addressed by NERC and RFC. We note that RFC is not a user, owner, or operator of bulk-power system facilities. Moreover, the RFC board will be comprised of directors chosen from all industry segments, with no two sectors able to control a vote. No single sector will be able to veto a measure, given RFC's quorum and voting protocols. As such, RFC's board composition and voting protocols are designed to ensure that RFC will be governed by an appropriate balance of stakeholder interests.

332. However, membership fees, which are set by the board on an annual basis, could upset this balance, particularly if set too high. Accordingly, in order to provide the Commission the opportunity to review them, any fees that RFC proposes to charge members must be identified in its annual budget and business plan. In addition, we reject, as inconsistent with FPA section 215, RFC's proposal to assess all members for

¹⁷⁹ These restrictions are noted above under the sub-heading discussing RFC membership.

the costs of non-statutory activities. While the Commission has stated that a Regional Entity may engage in non-statutory activities, subject to certain limits, its primary function is to develop and enforce reliability standards. It would be improper to require interested stakeholders to fund other activities as a condition to their membership in RFC. RFC may collect funds through other means (such as user fees), or may charge special membership fees to those who either choose or are required to participate in non-FPA section 215 activities, however, it may not require contributions from those who do not.

333. Further, we clarify that the RFC bylaws are “rules,” under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁸⁰

334. Finally, we reject AMP-Ohio’s protest, regarding RFC Bylaw, section 1.24. While AMP-Ohio reads sub-section (i) of section 1.24 as a potential bar that would deny either it or its member systems from becoming an RFC voting member, RFC correctly points out in its answer that subsection (ii) expressly permits Related Parties to designate an entity with whom they are related to be a regular member.

4. Exhibit C: RFC Reliability Standards Development

335. Exhibit C to the RFC Delegation Agreement consists of narrative responses addressing each of NERC’s 34 *pro forma* Common Attributes addressed above.¹⁸¹ In addition, NERC and RFC rely on a draft RFC manual, “ReliabilityFirst Corporation Reliability Standards Development Procedure,” dated October 27, 2006 (RFC Standards Development Manual). The RFC Standards Development Manual is included in NERC’s filing as supplemental information and is cross-referenced in the narrative responses addressing NERC’s 34 *pro forma* Common Attributes.

336. NERC, in its transmittal letter, states that the RFC Standards Development Manual is consistent with the requirements set forth in its 34 *pro forma* Common Attributes. Specifically, NERC states that it has not identified any substantive differences between the RFC Standards Development Manual and NERC’s 34 Common Attributes. NERC adds that it has worked closely with each of the Regional Entity candidates, including RFC, to attain a high level of consistency among the proposed Regional Entity standards development procedures. NERC further states that each reliability standard that will be

¹⁸⁰ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

¹⁸¹ See *supra* section IV(A).

proposed to NERC by RFC will contain the same elements as a NERC reliability standard, and will have been developed through a process meeting the common procedural elements.

337. The RFC Standards Development Manual also addresses voting procedures applicable to the adoption of a proposed reliability standard. Specifically, the RFC Standards Development Manual provides for establishment of a standards committee to oversee the standards development process. If a draft standard receives a two-thirds vote, the standards committee will forward the standard to the RFC board, which may: (i) approve the draft standard action with only minor or no modification; (ii) remand the standard; or (iii) disapprove the standard. The board may also act on a standard that has not received a two-thirds vote. A standard that has been approved by the RFC board will be submitted to NERC for approval and filing with the Commission.

a. Responsive Pleadings

338. FirstEnergy takes issue with the definition of “materiality” set forth in the RFC Standards Development Manual as a condition governing the adoption of a reliability standard.¹⁸² FirstEnergy argues that this definition introduces a term that is not found in FPA section 215, or in Order No. 672, and that it is otherwise unnecessary.

b. Commission Findings

339. We accept Exhibit C to the RFC Delegation Agreement. We also identify modifications to be addressed by NERC and RFC. We find that the voting procedures applicable to the standards formation process are consistent with the requirements of FPA

¹⁸² The definition provides, in relevant part:

A [Regional Reliability] Standard shall generally have the following characteristics: [1] Material to Reliability – “A Standard shall be material” shall mean a policy or standard, including adequacy criteria to provide for the reliable regional and sub-regional planning and operation of the [Bulk-Power System], consistent with Good Utility Practice within the [RFC] geographical footprint. Generally, if the reliability of the [Bulk-Power System] could be compromised without a particular Standard or by a failure to adhere with that Standard, then the Standard is material to reliability.

See RFC Standards Development Manual at 3.

section 215. We also agree that the RFC Standards Development Manual is generally consistent with NERC's *pro forma* Common Attributes. We clarify, however, that the RFC Standards Development Manual embodies "rules," under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁸³

340. With regard to participation in reliability standards development, RFC's insistence on membership as a requirement for voting on reliability standards is inconsistent with our requirement in Order No. 672. In that order, the Commission directed that membership must not be a condition for participating in reliability standard development, or for voting on the approval of a reliability standard.¹⁸⁴ Instead, RFC requires membership for full participation and voting on reliability standards development. RFC, moreover, fails to offer any explanation or rationale that would support a deviation from this requirement. Accordingly, we direct RFC to make appropriate provisions in its Standards Development Manual and applicable bylaws to clarify that any interested stakeholder may participate and vote on reliability standard development.

341. We agree with FirstEnergy regarding RFC's dependence on materiality as a condition for adoption of a reliability standard. This term is inconsistent with previous Commission direction regarding appropriate factors for review and approval of a reliability standard. Therefore, RFC must eliminate from the RFC Standards Development Manual materiality as a characteristic required for a reliability standard.

5. **Exhibit D: RFC Compliance Monitoring and Enforcement**

342. Exhibit D to the RFC Delegation Agreement adopts the *pro forma* Exhibit D (Uniform Compliance Program), without deviation.

a. **Responsive Pleadings**

343. FirstEnergy notes that the RFC board compliance committee, a subcommittee of the RFC board, will be the hearing body for RFC enforcement matters, but that the RFC attachment 2 hearing procedures fail to make this point clear. FirstEnergy requests that attachment 2 be revised to include this information.

¹⁸³ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

¹⁸⁴ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 172.

344. FirstEnergy argues that the RFC Uniform Compliance Program should be amended to redress due process deficiencies, namely, the failure to: (i) specify factual predicates that should underlie initiation of an enforcement action; (ii) allocate the burden of proof in enforcement actions to the compliance enforcement authority enforcement staff; and (iii) provide that findings of violations must be made based on the preponderance of the evidence.

345. FirstEnergy also requests that the Commission clarify the extent to which a registered entity's compliance data, as compiled by the compliance enforcement authority, will be available to third parties. FirstEnergy also argues that NERC should act on anonymous complaints only when a complainant demonstrates to NERC's satisfaction that there is potential for bias or conflict of interest on the part of RFC. FirstEnergy argues that, otherwise, NERC should refer the anonymous complaint to RFC.

b. Commission Findings

346. We accept Exhibit D to the RFC Delegation Agreement. We also identify modifications to be addressed by NERC and RFC. With respect to the issues raised by FirstEnergy, we agree that NERC and RFC should amend the RFC attachment 2 hearing procedures to identify the hearing body. However, for the reasons discussed above with respect to section 5.1 of the *pro forma* Uniform Compliance Program, we reject FirstEnergy's contention that the counterpart provision in RFC's compliance program should identify the factual predicates for an enforcement action.

347. We also disagree that NERC should only inquire into an anonymous complaint regarding RFC if the complainant shows to NERC's satisfaction that RFC has a potential for bias or conflict of interest. As we discussed above, with respect to the *pro forma* Uniform Compliance Program, to fulfill NERC's role to oversee the Regional Entities and to assure consistency among them, NERC must address all anonymous complaints regarding Regional Entities.

348. With respect to FirstEnergy's concerns about whether data about a registered entity's compliance with reliability standards will be available to third parties after RFC reports it to NERC, or NERC reports it to the Commission, we observe that section 1500 of the NERC Rules of Procedure applies to information that a Regional Entity submits to NERC pursuant to the Uniform Compliance Program. When NERC provides the Commission with Uniform Compliance Program information from a Regional Entity, the provisions of section 39.7(b)(4) of the Commission's regulations address the extent to which the Commission will treat this information as non-public.

349. Finally, we have addressed, above, FirstEnergy's remaining arguments concerning the RFC compliance program in our discussion of the *pro forma* Uniform Compliance Program.

6. Exhibit E: RFC Funding

350. Exhibit E to the RFC Delegation Agreement adopts the *pro forma* Exhibit E, without deviation. However, the *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, i.e., non-FPA section 215, non-reliability regulator activities, then it must list them in Exhibit E. The identification of non-statutory activities performed by a Regional Entity is necessary 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. The RFC Exhibit E fails to provide this information. Accordingly, we direct NERC and RFC to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities.

E. SERC Delegation Agreement (Docket No. RR07-5-000)

351. We accept the SERC Delegation Agreement. We also identify modifications to be addressed by NERC and SERC, including the modifications identified above, as applicable to the *pro forma* Delegation Agreement. SERC was established in 1970 as a self-regulatory organization responsible for ensuring that the bulk-power system in its region is adequate, reliable, and secure. The SERC region is a less than interconnection-wide region that includes all or portions of sixteen states in the southeastern and central United States.¹⁸⁵ SERC's members are comprised of investor-owned utilities, municipal utilities, cooperatives, federal and state-operated systems, ISO-RTOs, merchant electricity generators, and marketers.

352. We find that SERC satisfies the FPA section 215 requirements for delegation of ERO authority. SERC will be governed by a balanced stakeholder board and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO. We also find that the SERC Delegation Agreement will promote effective and efficient administration of the bulk-power system.

¹⁸⁵ The SERC region covers all of Alabama, Georgia, Mississippi, North Carolina and South Carolina and portions of Arkansas, Illinois, Iowa, Missouri, Oklahoma, Texas, Kentucky, Tennessee, Virginia, Florida and Louisiana.

1. **SERC Base Delegation Agreement**

353. The SERC base Delegation Agreement adopts the *pro forma* base Delegation Agreement, without deviation. Accordingly, we accept the SERC base Delegation Agreement.

2. **Exhibit A: SERC Regional Boundary**

354. The geographic region in which SERC will perform its duties and functions under the SERC Delegation Agreement is determined by the service areas of its membership, consisting of investor-owned utilities, municipal, cooperative, state and federal systems, merchant electricity generators and power marketers. The region, as noted above, includes significant portions of the southeastern and central United States and covers an area of approximately 560,000 square miles. NERC, in support of this proposed regional boundary, states that the six Regional Entities within the Eastern Interconnection, including SERC, have worked together to develop their respective Exhibit A proposals. This is especially important for a region that is less than interconnection-wide, where failure of one of the region's bulk-power system components may have an adverse impact on the neighboring regions' bulk-power systems.

355. We find that the SERC region, as described in Exhibit A, represents an appropriate size, scope and configuration. In the *pro forma* Exhibit A accepted by the Commission in the *ERO Certification Order*, the regional boundary is required to reflect coordination with neighboring Regional Entities, as appropriate, to ensure that all relevant areas are either included within the geographic boundary of a Regional Entity or specifically identified as not being within that Regional Entity's geographic boundary.¹⁸⁶ NERC, as noted above, asserts that it has undertaken this review with SERC and SERC's neighboring Regional Entities and that each of these entities is satisfied that SERC's boundaries have been properly identified.

3. **Exhibit B: SERC Governance Structure**

356. NERC, in its transmittal letter, asserts that SERC's governance structure satisfies the requirements of FPA section 215 because, among other things, SERC will have: (i) a balanced stakeholder board; and (ii) SERC is not a user, owner, or operator of bulk-power system facilities. NERC and SERC also represent that the SERC Delegation Agreement satisfies the Governance Criteria set forth in Exhibit B of the *pro forma*

¹⁸⁶ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 534.

Delegation Agreement. SERC's governance structure is established under its amended and restated bylaws (SERC bylaws), which are included in NERC's submittals as supplemental information.¹⁸⁷

a. SERC Bylaws

357. The SERC bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

358. *Composition and Election of the Board (Criterion 1)*: SERC represents that it will be governed by a balanced stakeholder board. SERC asserts that its board will be balanced because, as explained below, it will be composed of representatives from seven sectors and because of the voting protocols applicable to board votes. SERC refers to the following provisions of the SERC bylaws:

- *Section 5.2*: Section 5.2 provides that the board is comprised of one director for each of SERC's members and an additional two customer representative directors.¹⁸⁸ Section 3.4 defines the term "customer representative" to mean "a person who represents an entity that receives service at retail and does not otherwise sell, purchase, or transmit power over the Bulk-Power System or own, operate or maintain, control or operate facilities or systems that are part of the Bulk-Power System." These customer representative directors will be elected, not by the customers themselves, but by the directors representing members.
- *Section 5.8*: Section 5.8 provides that directors will be divided into sectors for voting purposes. Board action (not including bylaw changes) requires the presence of a quorum (*i.e.*, two-thirds of the directors) and a vote representing a "Bicameral Simple Majority."¹⁸⁹ Bylaw changes require the presence of a quorum and a vote representing a "Bicameral Supermajority."¹⁹⁰

¹⁸⁷ The SERC bylaws were last amended July 1, 2006.

¹⁸⁸ Section 5.2 also provides that the board shall consist of no fewer than three, and no more than 100, directors.

¹⁸⁹ *Id.* at section 5.8(b):

"Bicameral Simple Majority" shall require the presence of a quorum and the (i) concurrence of directors whose combined Individual Votes are greater than fifty (50) percent of the total Individual Votes of all directors present at the
(continued...)

359. *Rules Assuring Independence (Criterion 2)*: SERC represents that it has established rules that assure its independence of the users, owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its officers. In support of that proposition, SERC states that it is not a user, owner, or operator of bulk-power system facilities.

360. *Membership (Criterion 3)*: SERC represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed reliability standards. SERC refers to the following provisions of the SERC bylaws:

- *Section 3.2*: Section 3.2 provides that membership is open to any entity that is: (i) a user, owner or operator of the bulk-power system, and (ii) subject to the jurisdiction of the Commission for the purpose of complying with reliability

meeting and entitled to vote on the issue (the “Individual Vote Test”), (ii) concurrence of directors whose combined Adjusted Weighted Votes are greater than fifty (50) percent of the total Adjusted Weighted Vote of all directors at the meeting and entitled to vote on the issue (the “Adjusted Weighted Vote Test”), and (iii) for at least one of the Individual Vote Test or the Adjusted Weighted Vote Test, on a individual Sector basis, the positive vote must outweigh the negative vote for at least three Sectors.

¹⁹⁰ *Id.* at section 5.8(c):

“Bicameral Supermajority” shall require the presence of a quorum and the concurrence of (i) directors whose combined Individual Votes equal or exceed two-thirds of the total Individual Votes of all directors present at the meeting and entitled to vote on the issue, provided that a quorum is present, and (ii) directors whose combined Adjusted Weighted Votes are greater than two-thirds of the total Adjusted Weighted Vote of all directors present at the meeting and entitled to vote on the issue.

- standards under FPA section 215. Members are assigned to one of seven sectors.¹⁹¹
- *Section 12.2*: Section 12.2 provides that fees are calculated and assessed annually by the board. These fees may also be authorized to recover costs not covered by NERC.

361. *Committees and Subordinate Organizational Structures (Criterion 4)*: SERC represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action. SERC refers to the following provisions of the SERC bylaws:

- *Section 6, 7 and 8*: SERC states that sections 6, 7, and 8 address, respectively, the composition and voting requirements of the executive committee, the board compliance committee, and the standing committees and *ad hoc* committees. SERC states that the decision-making process with respect to these committees satisfies Governance Criterion 4.

362. *Openness and Balance of Interests (Criterion 5)*: SERC represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. SERC refers to the following provisions of the SERC bylaws:

- *Section 5*: SERC states that sections 5.3, 5.4, and 5.5 address the dates of the annual and special meetings of the board and notice of such meetings. SERC further states that the date and location of the meetings of the board are published in advance on SERC's website.
- *Section 4.1*: SERC states that section 4.1 addresses the openness of meetings of standing committees and *ad hoc* committees, opportunities for public participation, and the availability of minutes.

¹⁹¹ The seven sectors are: (i) the investor-owned utility sector; (ii) the federal/state sector; (iii) the electric cooperative sector; (iv) the municipal utility sector; (v) the marketer sector; (vi) the merchant electricity generator sector; and (vii) the ISO/RTO and customer sector.

- *Section 5.10*: SERC states that section 5.10(a) addresses amendments to the SERC bylaws. Section 5.10(a) provides that “[e]xcept for amendments to these bylaws, which require approval by a Bicameral Supermajority, all other actions require approval by a Bicameral Simple Majority.”

b. Responsive Pleadings

363. The Midwest ISO takes issue with the SERC bylaws provision combining ISOs and RTOs into a single sector along with end-use customers for purposes of board representation.¹⁹² The Midwest ISO argues that this provision fails to provide separate stakeholder representation for ISOs and RTOs, as required by the *ERO Certification Order*.¹⁹³ PJM submitted an answer in support of the Midwest ISO’s protest. SERC submitted an answer in opposition.

c. Commission Findings

364. We find that the SERC bylaws and the representations made in Exhibit B of the SERC Delegation Agreement satisfy the governance requirements of FPA section 215 and the *pro forma* Exhibit B Governance Criteria. We also identify modifications to be addressed by NERC and SERC. We note that SERC is not a user, owner, or operator of bulk-power system facilities. Moreover, the SERC board will be comprised of directors chosen from all industry segments, with no two sectors able to control a vote. No single sector will be able to veto a measure, given SERC’s quorum and voting protocols. As such, SERC’s board composition and voting protocols are designed to ensure that SERC will be governed by an appropriate balance of stakeholder interests.

365. However, we reject, as inconsistent with FPA section 215, SERC’s proposal to assess all members for the costs of non-statutory activities, *i.e.*, non-FPA section 215, non-reliability regulator activities. While the Commission has stated that a Regional Entity may engage in non-statutory activities, subject to certain limits, its primary reliability regulator-related function is to develop and enforce reliability standards. It would be improper to require interested stakeholders to fund other activities as a condition to their membership in SERC. SERC may collect funds through other means

¹⁹² See SERC bylaws at 3.2.

¹⁹³ Midwest ISO protest at 3, *citing ERO Certification Order*, 116 FERC ¶ 61,062 at P 90. The Midwest ISO makes a similar argument, which we have rejected, as it relates to the MRO Delegation Agreement. See *supra* section V(B)(2).

(such as user fees), or may charge special membership fees to those who either choose or are required to participate in non-FPA section 215 activities, however, it may not require contributions from those who do not. Additionally, any membership fees, which are set by the board on an annual basis, could upset this balance, particularly if set too high. Accordingly, in order to provide the Commission the opportunity to review them, any fees that SERC proposes to charge members must be identified in its annual budget and business plan.

366. Further, we clarify that the SERC bylaws are “rules,” under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.¹⁹⁴

367. Finally, we reject the protest submitted by Midwest ISO regarding separate ISO and RTO representation in SERC governance matters. ISOs and RTOs will be adequately represented on board matters as a member of the ISO/RTO/customer sector and will comprise a separate sector within the SERC stakeholder ballot body. As such, their interests will be adequately represented and balanced. Additionally, the Commission’s ruling in the *ERO Certification Order* regarding NERC’s ballot body does not apply to governance at the regional level where conditions for establishing balance are not the same. As such, SERC’s proposal is not inconsistent with the *ERO Certification Order*.¹⁹⁵

4. Exhibit C: SERC Reliability Standards Development

368. Exhibit C to the SERC Delegation Agreement consists of narrative responses addressing each of NERC’s 34 *pro forma* Common Attributes addressed above.¹⁹⁶ In addition, NERC and SERC rely on a SERC manual, “SERC Regional Reliability Standard Development Procedure,” dated October 25, 2006 (SERC Standards Development Manual).¹⁹⁷ The SERC Standards Development Manual is included in NERC’s filing as supplemental information and is cross-referenced in the narrative responses addressing NERC’s 34 *pro forma* Common Attributes.

¹⁹⁴ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

¹⁹⁵ 116 FERC ¶ 61,062 at P 90.

¹⁹⁶ See *supra* section IV(A).

¹⁹⁷ The SERC Standards Development Manual has been approved by the SERC board.

369. NERC, in its transmittal letter, states that the SERC Standards Development Manual is consistent with the requirements set forth in its 34 *pro forma* Common Attributes. Specifically, NERC states that it has not identified any substantive differences between the SERC Standards Development Manual and its 34 Common Attributes. NERC adds that it has worked closely with each of the Regional Entity candidates, including SERC, to attain a high level of consistency among the proposed Regional Entity standards development procedures. NERC further states that each reliability standard that will be proposed to NERC by SERC will contain the same elements as a NERC reliability standard, and will have been developed through a process meeting the common procedural elements.

370. The SERC Standards Development Manual also addresses voting procedures applicable to the adoption of a proposed reliability standard. First, the SERC Standards Development Manual provides for the referral of proposed reliability standards to a standing committee.¹⁹⁸ If a reliability standard is approved by a standing committee, the SERC board will consider its adoption or rejection, as submitted but may not substantively modify the proposed standard. The standing committee may resubmit the standard with modifications.¹⁹⁹

371. We accept Exhibit C to the SERC Delegation Agreement. First, we find that the voting procedures applicable to the standards formation process are consistent with the requirements of FPA section 215. We also agree that the SERC Standards Development Manual is generally consistent with NERC's *pro forma* Common Attributes. We clarify, however, that the SERC Standards Development Manual embodies "rules," under our

¹⁹⁸ See SERC Standards Development Manual at section 3.11. The SERC standing committees will have the primary responsibility for the development, modification or withdrawal of reliability standards and will advise the SERC board on standards presented for adoption. The current standing committees are the engineering committee; the operating committee; and the critical infrastructure protection committee. *Id.* at section 2. The SERC bylaws, at section 8.1, address the duties and functions of these standing committees and provide for SERC member representation and voting rights.

¹⁹⁹ A standard that has been approved by the SERC board will be submitted to NERC for approval and filing with the Commission.

regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²⁰⁰

372. With regard to participation in reliability standards development, SERC's insistence on membership as a requirement for voting on reliability standards is inconsistent with our requirement in Order No. 672. In that order, the Commission directed that membership must not be a condition for participating in reliability standard development, or for voting on the approval of a reliability standard.²⁰¹ Instead, SERC requires membership for full participation and voting on reliability standards development. SERC, moreover, fails to offer any explanation or rationale that would support a deviation from this requirement. Accordingly, we direct SERC to make appropriate provisions in its Standards Development Manual and applicable bylaws to clarify that any interested stakeholder may participate and vote on reliability standard development.

5. Exhibit D: SERC Compliance Monitoring and Enforcement

373. Exhibit D to the SERC Delegation Agreement adopts the *pro forma* Exhibit D (Uniform Compliance Program), without deviation. Accordingly, we accept the SERC Exhibit D.

6. Exhibit E: SERC Funding

374. Exhibit E to the SERC Delegation Agreement adopts the *pro forma* Exhibit E, without deviation. However, the *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, i.e., non-FPA section 215, non-reliability regulator activities, then it must list them in Exhibit E. The identification of non-statutory activities performed by a Regional Entity is necessary 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. The SERC Exhibit E fails to provide this information. Accordingly, we direct NERC and SERC to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate

²⁰⁰ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats & Regs ¶ 31,204 at P 113.

²⁰¹ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 172.

how funding of these non-statutory activities will be kept separate from funding of statutory activities.

F. SPP Delegation Agreement (Docket No. RR07-6-000)

375. We accept the SPP Delegation Agreement. We also identify modifications to be addressed by NERC and SPP, including the modifications identified above, as applicable to the *pro forma* Delegation Agreement. SPP is an RTO and therefore a user, owner, or operator of bulk-power system facilities. The SPP RTO encompasses the service areas of its 47 members, who include investor-owned utilities, municipal, cooperative, state and federal systems, merchant electricity generators and power marketers. The SPP RTO region is a less than interconnection-wide region that covers an area of approximately 255,000 square miles in all or parts of eight states.²⁰²

376. We find that SPP satisfies the FPA section 215 requirements for delegation of ERO authority. SPP will be governed by an independent board and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO. We also find that the SPP Delegation Agreement will promote effective and efficient administration of the bulk-power system.

1. SPP Base Delegation Agreement

377. The SPP base Delegation Agreement adopts the *pro forma* base Delegation Agreement, without deviation. Accordingly, we accept the SPP base Delegation Agreement.

2. Exhibit A: SPP Regional Boundary

378. The geographic region in which SPP will perform its duties and functions under the SPP Delegation Agreement will include, as noted above, all or part of eight states. The region covers an area of approximately 255,000 square miles. NERC, in support of this proposed regional boundary, states that the six Regional Entities within the Eastern Interconnection, including SPP, have worked together to develop their respective Exhibit A proposals. This is especially important for a region that is less than interconnection-wide, where failure of one of the region's bulk-power system components may have an adverse impact on the neighboring regions' bulk-power systems.

²⁰² Arkansas, Kansas, Louisiana, New Mexico, Mississippi, Missouri, Oklahoma, and Texas.

379. We find that the SPP region, as described in Exhibit A, represents a sufficient size, scope and configuration. In the *pro forma* Exhibit A accepted by the Commission in the *ERO Certification Order*, the regional boundary is required to reflect coordination with neighboring Regional Entities, as appropriate, to ensure that all relevant areas are either included within the geographic boundary of a Regional Entity or specifically identified as not being within that Regional Entity's geographic boundary.²⁰³ NERC, as noted above, asserts that it has undertaken this review with SPP and SPP's neighboring Regional Entities and that each of these entities is satisfied that SPP's boundaries have been properly identified.

3. **Exhibit B: SPP Governance Structure**

380. NERC, in its transmittal letter, asserts that SPP's governance structure satisfies the requirements of FPA section 215 because, among other things: (i) SPP will have an independent board; and (ii) there will exist a strong separation of functions between SPP's compliance monitoring and enforcement activities and its operational activities. NERC and SPP also represent that the SPP Delegation Agreement satisfies the Governance Criteria set forth in Exhibit B of the *pro forma* Delegation Agreement. SPP's governance structure is established under its draft Regional Entity bylaws (SPP bylaws), which are included in NERC's submittals in the form of draft tariff revisions to the SPP open access transmission tariff (OATT).²⁰⁴

a. **SPP Bylaws**

381. The SPP bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

²⁰³ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 534.

²⁰⁴ The tariff sheets are labeled as Southwest Power Pool, Inc., Original Volume No. 4, Second Revised Sheet No. 41, *et seq.* SPP's currently-effective bylaws were filed in compliance with the Commission's order approving the establishment of the SPP RTO. *See Southwest Power Pool, Inc.*, 108 FERC ¶ 61,003 (2004) (*SPP RTO Order*) (accepting SPP's modifications to its bylaws, including: (i) installation of an independent SPP board; (ii) changes to the composition of SPP's members committee and corporate governance committee; and (iii) other bylaw changes to better reflect SPP's independence regarding, among other things, market monitoring).

382. *Composition and Election of the Board (Criterion 1)*: SPP represents that it will be governed by an independent board. SPP also asserts that the SPP Regional Entity will be governed by the SPP Regional Entity trustees. SPP refers to the following provisions of the SPP bylaws:

- *Section 9.7.2.1*: Section 9.7.2.1 provides that the SPP Regional Entity will be governed by the SPP Regional Entity trustees, consisting of three persons that must have relevant senior management expertise and experience in the reliable operation of the bulk-power system. They will also be required to be independent of the SPP board, any member, industry stakeholder, or SPP organizational group. An SPP Regional Entity trustee may not serve as a member of the board. The SPP Regional Entity trustees will be elected at the meeting of members. Each sector of the membership will vote separately with the result for that sector being a percent of the approving votes to the total number of members voting.
- *Section 4.2.3*: Section 4.2.3 provides that SPP's directors must be independent of members or customers of services provided by SPP.
- *Section 9.7.2.3*: Section 9.7.2.3 provides that SPP Regional Entity trustees must be independent of a member, a customer of services provided by SPP, or a Registered Entity in the SPP footprint.

383. *Rules Assuring Independence (Criterion 2)*: SPP represents that it has established rules that assure its independence of the users, owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its officers. SPP asserts that SPP bylaws establish a strong separation of functions. SPP also asserts that the SPP bylaws provide for fair stakeholder representation in the selection of its directors. SPP refers to the following provisions of the SPP bylaws:

- *Section 3.16*: Section 3.16 provides that monitoring of members and staff will be performed to ensure compliance with all requirements of membership. Certain SPP compliance monitoring functions, such as those related to reliability standards, will be performed in concert with NERC and will be overseen by the SPP Regional Entity trustees. Other monitoring functions will be provided by appropriate SPP staff under the oversight of the SPP oversight committee and the board. The SPP Regional Entity trustees will oversee SPP's Uniform Compliance Program.
- *Section 9.6*: Section 9.6 provides that all audits of SPP's compliance with NERC reliability standards will be performed by external third party auditors as coordinated and managed by the SPP Regional Entity trustees.

- *Section 9.7.1:* Section 9.7.1 provides that the SPP Regional Entity trustees will be required, among other things, to: (i) monitor all registered entities in SPP's footprint for reliability compliance; (ii) administer the Regional Entity staff; (iii) make decisions regarding the Regional Entity budget; (iv) track and review regional standards, as developed by the markets operations and policy committee, for submission to NERC; (v) complete a self-assessment annually to determine how effectively the SPP Regional Entity trustees are meeting their responsibilities; and (vi) provide an annual report to the board regarding the effectiveness of the Regional Entity functions and processes.
- *Section 9.7.3:* Section 9.7.3 addresses the election of the SPP Regional Entity trustees. Each sector represented in the members committee is permitted to vote separately as a sector, with the result for that sector being a percent of approving votes to the total number of members voting.

384. *Membership (Criterion 3):* SPP represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed reliability standards. SPP refers to the following provisions of the SPP bylaws:

- *Section 2.1:* Section 2.1 provides that membership in SPP is open to any electric utility, federal power marketing agency, transmission service provider, any entity engaged in the business of producing, selling, and/or purchasing electric energy for resale, and any entity eligible to take service under the SPP OATT.
- *Section 5.1:* Section 5.1 provides that the members committee will work with the board to manage and direct the general business of SPP. The members committee will provide input with the board to the SPP Regional Entity trustees on reliability standards recommended by the markets and operations policy committee.
- *Section 6.1:* Section 6.1 provides that each SPP member will appoint a representative to the markets and operations policy committee, whose duties will include recommendations regarding reliability standards.
- *Section 8.2:* Section 8.2 provides that annual membership fees of \$6,000 are assessed, subject to board approval.

385. *Committees and Subordinate Organizational Structures (Criterion 4):* SPP represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors

can control any action and no one industry sector can veto any action. SPP refers to the following provisions of the SPP bylaws:

- *Sections 5.1.1 and 6:* Sections 5.1.1 and 6 address the composition of SPP committees, including its members committee, the markets and operations policy committee, the strategic planning committee, the human resources committee, the oversight committee, the finance committee, and the corporate governance committee.
- *Section 3.8:* Section 3.8 provides that a quorum for a meeting of the markets and operations committee or the members committee will be those members present. The quorum for any other organizational group or task force will be one-half of the membership thereof, but not less than three members, provided that a lesser number may adjourn the meeting to a later time.
- *Section 3.9:* Section 3.9 provides that members will be assigned to one of two membership sectors for purposes of voting: the transmission owning members sector, or the transmission using members sector. With respect to actions taken by the markets and operations policy committee and members committee, each sector votes separately with the result for that sector being a percent of approving votes to the total number of members voting. The action is approved if the average of these two percentages is at least 66 percent. If no members are present within a sector, the single present sector-voting ratio will determine approval. A simple majority of participants present or represented by proxy and voting will be required for all other organizational group and task force action.
- *Section 3.10:* Section 3.10 permits members to appeal committee actions to the board prior to the meeting at which consideration of the action by the board is scheduled.
- *Section 9.5:* Section 9.5 provides that in the consideration of reliability standards, at the working group or task force level, participation and voting will be open to any interested party without regard to membership.

386. *Openness and Balance of Interests (Criterion 5):* SPP represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. SPP refers to the following provisions of the SPP bylaws:

- *Section 9.7:* Section 9.7 addresses notice requirements, openness of meetings, and opportunities for public participation.

- *Section 3.5*: Section 3.5 addresses openness requirements relating to SPP’s organizational groups.
- *Section 10*: Section 10 addresses the amendment of the SPP bylaws and procedural rules. It provides, in relevant part, that subject to certain limitations, the SPP bylaws may be amended by the board by an affirmative vote of at least five directors. SPP bylaws, sections 4.0, 5.0, 9.0, and 10.0, and the articles of incorporation may be amended by approval of the membership.

b. Responsive Pleadings

387. Protests were filed by Xcel and jointly by Lafayette Utilities System and Oklahoma Municipal Power Authority (Lafayette and OMPA). Xcel argues that SPP’s governance structure fails to achieve a sufficient separation between RTO and Regional Entity functions. First, Xcel asserts that the SPP bylaws fail to change the existing SPP committee structure and, consequently, assign significant responsibility regarding reliability standards development and authority over the SPP Regional Entity trustees to these existing committees. Xcel notes, for example, that SPP bylaw, section 6.1 gives the markets and operations policy committee authority to develop reliability standards and gives the members committee and board substantial authority over the standards development process.

388. Xcel adds that SPP bylaw, section 6.6 gives the corporate governance committee the authority to nominate SPP Regional Entity trustee candidates to fill vacancies, to develop criteria governing the overall composition of the SPP Regional Entity trustees and to coordinate the annual review and assessment of their effectiveness. Xcel also points out that SPP bylaw, section 9.7.9 gives the human resources committee the authority to recommend compensation for the SPP Regional Entity trustees. Xcel submits that because each of these committees reports directly to the SPP board, there is an inherent conflict of interest as between the SPP RTO and the SPP Regional Entity trustees.

389. On these same grounds, Xcel also takes issue with: (i) SPP bylaw, section 9.7.1(i), which requires the SPP Regional Entity trustees to provide an annual report to the board regarding the effectiveness of the SPP Regional Entity functions and processes; (ii) SPP bylaw section 9.7.6, which requires the SPP Regional Entity trustees to meet “coincident in time and location as the regularly scheduled [board] meetings” and to give notice of their meetings to the board; (iii) SPP bylaw, section 8.3, which provides that SPP will have the responsibility for defining the costs associated with the Regional Entity function within the scope of SPP’s overall budget; and (iv) SPP bylaw, section 9.3 which provides that the president (an SPP officer who must be a member of the board) shall

ensure that the director of compliance for the Regional Entity function has adequate resources.²⁰⁵

390. Xcel also takes issue with the duties and make-up of the SPP Regional Entity governing body, as established under section 9 of the SPP bylaws. First, Xcel asserts that there should be more than three SPP Regional Entity trustees because if one is unable to attend a meeting, there will be a risk that the voting could result in a tie. Xcel recommends that there be at least five SPP Regional Entity trustees. In addition, Xcel asserts that the qualifications to serve as a SPP Regional Entity trustee, as set forth at section 9.2.7.1, require no prior experience regarding enforcement of regulations and are otherwise vague. Xcel also asserts that the SPP Regional Entity trustees should not be required to meet at the same time and location as the SPP board.

391. Finally, Xcel argues that the SPP bylaws fail to satisfy the requirement that no one industry sector hold veto power over any action by the Regional Entity. Specifically, Xcel points out that SPP bylaw, section 3.5 provides that the leader of any organizational group can call a telephonic meeting with only one day's notice and that for the markets and operations policy committee, a quorum consists of only one member. Xcel adds that for other organizational groups, a balanced membership is not specifically required and that the attendance of only half of the members of these groups is sufficient to establish a quorum. Xcel concludes that absent stricter membership and quorum requirements, there is no assurance that one industry sector will not be able to veto an action.

392. Lafayette and OMPA object to SPP bylaw, section 1.21, as it relates to the term "Transmission Owning Member."²⁰⁶ Lafayette and OMPA assert that this definition affects the compensation Lafayette and OMPA are entitled to receive under the SPP OATT because, under the OATT, only Transmission Owning Members can recover their transmission revenue requirements.

²⁰⁵ Xcel makes a number of additional conflict-of-interest arguments relating to: (i) staffing; (ii) the acceptance of gifts; (iii) quorum requirements; and (iv) participation in the budget process.

²⁰⁶ "Transmission Owning Member" is defined, at section 1.21, as "[a] Member that has placed more than 500 miles of non-radial facilities operated at or above 60 kV under the independent administration of SPP for the provision of regional transmission service as set forth in the Membership Agreement."

393. On January 25, 2007, SPP filed an answer to Xcel's protest in which SPP urges the Commission to reject Xcel's separation-of-functions arguments. First, SPP argues that nothing in its organizational group and committee structure, or the involvement of that structure in the development of reliability standards, undermines the separation of functions, as required by Order No. 672. SPP asserts that this is so because the ultimate authority to approve and enforce proposed reliability standards will reside with the SPP Regional Entity trustees. SPP adds that while SPP RTO staff will be available to the SPP Regional Entity trustees for technical and administrative support, and the SPP RTO committees and working groups will contribute their expertise as part of an open and inclusive stakeholder-driven process, the final arbiters of any standards proposed for adoption will be the SPP Regional Entity trustees.

394. SPP also responds to Xcel's argument that the SPP bylaws fail to assure, as required by *pro forma* Governance Criterion 4, that no one industry sector can control an action. SPP argues that an action that will be taken by the SPP Regional Entity trustees is, by definition, an action that has been endorsed by that governing body. SPP adds that since the SPP Regional Entity trustees will have the final word on the development of reliability standards, their actions are not susceptible to *post hoc* veto by any industry sector, working group, or member committee.²⁰⁷

395. On February 6, 2007, Xcel filed an answer to SPP's answer, in which Xcel argues that SPP's answer fails to address Xcel's prior assertions regarding the SPP committee and/or board influence over: (i) SPP Regional Entity trustee selection; (ii) the SPP Regional Entity budget; (iii) reporting obligations to the SPP board; and (iv) the coordinated timing relating to SPP board and SPP Regional Entity trustee meetings. Xcel renews its claim that these deficiencies prevent adequate separation between the SPP RTO and the SPP Regional Entity.

c. Commission Findings

396. We find that the SPP bylaws and the representations made in Exhibit B of the SPP Delegation Agreement satisfy the requirements of FPA section 215 and the *pro forma* Exhibit B Governance Criteria. We also identify modifications to be addressed by NERC and SPP. SPP states that it is a user, owner or operator of the bulk-power system. SPP is

²⁰⁷ SPP further adds that while organizational groups will participate in the standards development process, the process will be open to any interested stakeholder in the SPP footprint, with voting rights extending to all such stakeholders, not just SPP members.

both an RTO and a reliability coordinator. In Order No. 672, the Commission found that serving as both a Regional Entity and as an RTO in a region creates an inherent conflict of interest because the entity, in this instance, would be responsible for enforcing its own compliance with NERC's reliability standards.²⁰⁸ While the Commission did not prohibit an entity from serving in both roles, the Commission emphasized that a heavy burden would be required demonstrating a strong separation of functions as between the ISO or RTO, on the one hand, and the Regional Entity, on the other.

397. SPP asserts that it meets this burden because the ultimate authority to approve and enforce proposed reliability standards will reside with the SPP Regional Entity trustees, who will operate with a sufficient degree of independence from the SPP RTO. Specifically, SPP asserts that the SPP Regional Entity trustees will be the final arbiter regarding each of the reliability functions and duties delegated to SPP. However, we agree with Xcel that the ability of the SPP Regional Entity trustees to act independently of the SPP RTO has not been sufficiently established in matters relating to their appointment, compensation, the preparation and control of budgets, the separation of personnel, the development of reliability standards and in other matters subject to the oversight and control of the SPP board.

398. For example, while the SPP bylaws provide that the Regional Entity trustees' duties will include "Regional Entity staff administration" and "Regional Entity budget decisions," the SPP board is given authority, under the SPP bylaws, that could be used to assert SPP RTO control over the SPP Regional Entity trustees. Specifically, section 8.3 gives the SPP board the authority to "define" the costs associated with the SPP Regional Entity. Section 6.6 gives the corporate governance committee (a committee that reports directly to the SPP board) authority to nominate SPP Regional Entity trustees and to develop criteria regarding the overall composition of the SPP Regional Entity trustees. In addition, section 9.7.9 gives the human resources committee (also controlled by the SPP board) the authority to recommend compensation for the SPP Regional Entity trustees. Accordingly, we direct SPP to modify these provisions to ensure that the independence of the SPP Regional Entity trustees in standards development and as otherwise discussed will not, in fact, be compromised directly, or indirectly, by the SPP board. In satisfying this requirement, we also invite SPP to consider the use of NERC to perform some or all of the functions identified herein, subject to NERC's approval.

399. We reject Xcel's request requiring SPP to appoint five (as opposed to three) Regional Entity trustees. We are not persuaded that the effective management of the SPP

²⁰⁸ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 698-700.

Regional Entity would depend on such a revision. We also disagree with Xcel that the qualifications to serve as an SPP Regional Entity trustee require no prior experience regarding the enforcement of regulations and are otherwise vague and require revision. The SPP bylaws, at section 9.7.2.1, provide that a SPP Regional Entity trustee must have relevant senior management expertise and experience in the reliable operation of the bulk-power system. We find these criteria to be sufficient and do not require further clarification.

400. We also reject Xcel's request that the SPP Regional Entity trustees and SPP board be prohibited from meeting at the same time and location. While we acknowledge, in theory, that coordinated meeting times could operate to weaken the separation of functions we require, we are satisfied that the revisions we have directed SPP to make, above, will adequately address this concern.

401. SPP represents that the SPP Regional Entity governance structure satisfies the requirements of Governance Criterion 4, *i.e.*, that the SPP Regional Entity will have established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action. However, it is unclear whether SPP's quorum and voting requirements will allow for this balance. Specifically, SPP Bylaw, section 3.8 provides that a quorum for a meeting of the markets and operations committee or the members committee will be those members present. Section 3.9, moreover, establishes only two voting sectors: the transmission owning members sector and the transmission using members sector.

402. While we acknowledge that these protocols may be sufficient to meet the minimum requirements of our standards, we intend to closely monitor the activities and workings of the SPP committees and subordinate structures and to provide additional guidance and directives, as may be necessary. We also expect the ERO to address the effectiveness of these provisions and identify any related concerns and recommendations in the ERO's first performance assessment, which must include an analysis of Regional Entity effectiveness.²⁰⁹

403. We also reject, as inconsistent with FPA section 215, SPP's proposal to assess all members a \$6,000 annual fee. While the Commission has stated that Regional Entities may assess nominal membership fees, SPP's fee appears to exceed this limit.²¹⁰ Further,

²⁰⁹ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 754.

²¹⁰ *Id.* at P 171.

funding of all statutory activities through NERC was approved in the *Business Plan and Budget Order*. SPP, if it wishes, may propose an appropriate fee in its annual budget filing.

404. Further, we clarify that the SPP bylaws are “rules,” under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²¹¹

405. Finally, we reject the Lafayette and OMPA request that we require SPP to revise the SPP bylaws for the purpose of allowing Lafayette and OMPA to recover transmission revenue requirement revenues under the SPP OATT. The bylaw and OATT change requested by Lafayette and OMPA is beyond the scope of this FPA section 215 proceeding.

4. Exhibit C: SPP Reliability Standards Development

406. Exhibit C to the SPP Delegation Agreement consists of narrative responses addressing each of NERC’s 34 *pro forma* Common Attributes addressed above.²¹² In addition, NERC and SPP rely on a SPP draft manual, “The Southwest Power Pool Regional Entity Standards Development Process Manual,” dated November 17, 2006 (SPP Standards Development Manual). The SPP Standards Development Manual is included in NERC’s filing as supplemental information and is cross-referenced in the narrative responses addressing NERC’s 34 *pro forma* Common Attributes.

407. NERC, in its transmittal letter, states that the SPP Standards Development Manual is generally consistent with the requirements set forth in its 34 *pro forma* Common Attributes. However, NERC points out three deviations. First, NERC takes issue with the definition given to the term “Regional Reliability Standard,” as it relates to the development and existence of SPP standards separate and apart from NERC standards.²¹³

²¹¹ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

²¹² See *supra* section IV(A).

²¹³ See SPP Standards Development Manual at section III(A), which provides in relevant part:

[SPP] may develop, through the process described in this manual, separate [standards] that go beyond, add detail to, or implement NERC Reliability Standards, or that cover matters not addressed in NERC continent-wide Reliability Standards. [SPP standards] may be developed and exist

(continued...)

Specifically, NERC characterizes the proposed authorization of separate standards as inconsistent with Order No. 672. NERC asserts that in order to become effective under FPA section 215, SPP's reliability standards must first be approved by NERC and the Commission and, when approved, will become part of the NERC reliability standards.

408. NERC also takes issue with one of the transparency provisions relating to the consideration and development of reliability standards, namely, the requirement that “[a]ny documentation of the deliberations . . . be made available according to normal ‘business rules and procedures’ of the [Standards Drafting Team] then in effect.”²¹⁴ NERC asserts that the reference to “business rules and procedures” is unclear and requires clarification. Finally, NERC notes that the elements and definitions set forth in the SPP Standards Development Manual do not fully conform to the NERC *pro forma* Regional Reliability Standards Development Procedure.²¹⁵

409. The SPP Standards Development Manual also addresses voting procedures applicable to the adoption of a proposed reliability standard. It provides that the standards development process will be managed by the SPP markets and operations policy committee, following the consideration of the standard at the stakeholder level.

separately from NERC continent-wide Reliability Standards, or may be proposed as NERC Reliability Standards. Standards that exist separately from NERC Reliability Standards shall be more stringent than a NERC continent-wide Reliability Standard, including a regional difference that addresses matters that the NERC continent-wide Reliability Standard does not, or shall be a regional difference necessitated by a physical difference in the Bulk-Power System.

See also section IV(C)(1), *supra*, where we address the *pro forma* definitions for “Regional Reliability Standard” and “Regional Difference.”

²¹⁴ *Id.* at section V(B).

²¹⁵ The procedure to which NERC refers was the draft protocol utilized by NERC for purposes of negotiating each of the eight reliability standards development manuals being considered in this order. NERC does not identify any of the asserted inconsistencies to which it alludes.

The stakeholder ballot body is comprised of five voting segments, each of which is given a 20 percent share.²¹⁶

410. The markets and operations policy committee will vote on the standard, pursuant to section 3.9 of the SPP bylaws. If the standard is approved, it will be referred to the SPP board for its review. The board may remand the standard for further consideration, or revision, or provide recommendations on the disposition of the standard to the SPP Regional Entity trustees. The SPP Regional Entity trustees can remand the standard, or approve the standard and submit it for NERC's consideration.

a. Responsive Pleadings

411. Xcel objects to the standards formation processes contained in the SPP Delegation Agreement on each of the three grounds asserted by NERC in its transmittal letter. In addition, Xcel renews its separation of functions arguments, as addressed above with respect to SPP's Exhibit B submittals. Specifically, in the context of SPP's Exhibit C submittals, Xcel argues that the SPP committees that will be authorized to develop reliability standards, including the markets and operations policy committee, will be controlled by the SPP board. Xcel also takes issue with the requirement, under article V of the SPP Standards Development Manual, that a record of the deliberations for any proposed standard be made in conformance with the "business rules and procedures" of the applicable markets operations policy committee. Xcel asserts that, in fact, there are numerous such committees and that, as such, a standardized procedure will be lacking.

412. Xcel also asserts that the mere posting of a proposed reliability standard on SPP's website, as contemplated by SPP in compliance with Common Attributes 6 and 7, will not provide adequate notice. Xcel requests that SPP be required, instead, to maintain an email distribution list with respect to these notice obligations. Xcel also argues that SPP has no firm deadline for the disposition of a proposed reliability standard, as required by Common Attribute 9.²¹⁷ In addition, Xcel asserts that SPP fails to explain how,

²¹⁶ A weighted, two-thirds affirmative vote will be required before the standard can be referred to the markets and operations policy committee.

²¹⁷ Common Attribute 9 provides that "[w]ithin [no greater than 60] days of receipt of a completed standard request, the [standards] committee shall determine the disposition of the standard request." The same argument and related objections are made by Xcel with respect to Exhibit C of the WECC Delegation Agreement, discussed below, at section V(G)(3).

consistent with Common Attribute 29, reliability standards will be developed to achieve their reliability objective without causing adverse impacts on competitive markets.²¹⁸ Finally, Xcel seeks clarification as to whether registration in a ballot body is required to vote on a reliability standard and whether a company or entity can vote in more than one segment if it qualifies for more than one segment and sends a different representative to each segment for which it qualifies.

413. SPP, in its answer, responds to Xcel's assertion that the SPP board will have the indirect authority and ability to control the development of reliability standards and otherwise influence the operation of the SPP Regional Entity. SPP argues, as it did above regarding its Exhibit B submittals, that its committee operations satisfies the required separation between RTO and Regional Entity functions because the ultimate authority to approve and enforce proposed reliability standards will reside with the SPP Regional Entity trustees.

414. SPP also responds to Xcel's concern that the SPP Standards Development Manual, at step seven, fails to satisfy the requirements of Governance Criterion 3.²¹⁹ SPP notes that step seven requires an affirmative vote of both the market and operations policy committee and the SPP board before a proposed standard can be approved, with non-members not permitted to vote. However, SPP notes that proposed standards are first presented for an industry vote with all interested stakeholders (members and non-members) permitted to participate. SPP asserts that, as such, the SPP bylaws satisfy the requirements of Governance Criterion 3. Finally, SPP responds to Xcel's argument that SPP should be prohibited from developing and implementing reliability standards independent of NERC's own standards. SPP asserts that under Order No. 672, a Regional Entity is not prohibited from enacting reliability standards intended to address issues specific to the SPP footprint.

²¹⁸ Common Attribute 29 provides, in relevant part, that “[w]hile Reliability Standards are intended to promote reliability, they must at the same time accommodate competitive electricity markets.”

²¹⁹ Governance Criterion 3 states:

If the Regional Entity has members, the Regional Entity has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed Regional Reliability Standards.

b. Commission Findings

415. We accept Exhibit C to the SPP Delegation Agreement. We also identify modifications to be addressed by NERC and SPP. We find that the voting procedures applicable to the standards formation process are generally consistent with the requirements of FPA section 215, subject to the conditions addressed above regarding SPP's governance structure. We also agree that the SPP Standards Development Manual is generally consistent with NERC's *pro forma* Common Attributes.

416. However, we agree with Xcel that additional clarification will be required regarding the respective roles that will be played in the standards development process by the SPP Regional Entity trustees and the SPP board. The SPP Regional Entity trustees must exercise the ultimate control over the standards development process, not the SPP board or the market operations policy committee. We understand that the SPP Regional Entity trustees will have the final vote to approve forwarding a reliability standard to NERC. Nevertheless, according to the proposed bylaws and SPP Standards Development Manual, the SPP board and market operations policy committee would control the standards development process, and could prevent a proposed standard from reaching the SPP Regional Entity trustees in the first place. Accordingly, we direct SPP to make these revisions.

417. We also agree with Xcel that, without elaboration, the reference made by the SPP Standards Development Manual to the "business rules and procedures" of the numerous committees to whom consideration of a standard may be referred, in a given case, is vague and lacks adequate transparency. Accordingly, we direct SPP to include in its manual the relevant rules and procedures these committees intend to utilize.

418. We grant Xcel's proposed clarification as to whether registration in a ballot body is required to vote on a reliability standard. While reasonable administration requirements may be imposed by SPP to facilitate the efficient operation of its ballot body, we reiterate here that any interested stakeholder may be represented and must be permitted to vote.²²⁰ In addition, we grant Xcel's proposed clarification as to whether a company or entity can vote in more than one segment if it qualifies for more than one segment and sends a different representative to each segment for which it qualifies. We clarify that we expect SPP to follow a one-entity/one-vote policy.

²²⁰ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 172.

419. Because the SPP Standards Development Manual has not been approved by the SPP board, we also direct NERC and SPP to submit a finalized, SPP-approved manual. We also clarify that the SPP Standards Development Manual embodies “rules,” under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²²¹

420. We reject NERC’s suggestion that there are inconsistencies in the elements and definitions that appear in the SPP Standards Development Manual and the draft manual utilized by NERC in its negotiations with SPP. NERC fails to specify the nature or context of these alleged inconsistencies and fails to offer any alternative proposed language. Accordingly, we will not require SPP to conform its manual to the provisions of this draft manual.

421. We agree with NERC’s concerns regarding the ability of SPP to adopt reliability standards that “exist separately from NERC continent-wide Reliability Standards.” We clarify that regional reliability standards or regional differences of this sort may be adopted only if they are first approved by NERC and subsequently approved by the Commission.²²²

422. We reject Xcel’s argument that the SPP Standards Development Manual should be revised to include a firm, date-certain deadline regarding the disposition of a proposed reliability standard. We are not persuaded that greater specificity on a generic basis is necessary. SPP’s market operations policy committee will meet at least three times per year, to consider requests for standards, and will be called by its chair for additional meetings, as necessary.

423. Finally, we reject Xcel’s argument that SPP’s Exhibit C representations fail to satisfy the requirements of Common Attribute 29. As noted above, Common Attribute 29 provides that while reliability standards are intended to promote reliability, they must at the same time accommodate competitive electricity markets. This statement of principle is satisfied, in the case of SPP, by the independent, balanced governance structure we approve above and will be further safeguarded by the facts and circumstances that will be considered, first, by NERC, and later by the Commission in the approval of any reliability standard.

²²¹ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

²²² See *supra* section IV(C)(1).

5. Exhibit D: SPP Compliance Monitoring and Enforcement

424. Exhibit D to the SPP Delegation Agreement proposes to adopt the *pro forma* Exhibit D (Uniform Compliance Program), without deviation. Accordingly, we accept the SPP Exhibit D.

6. Exhibit E: SPP Funding

425. Exhibit E to the SPP Delegation Agreement adopts the *pro forma* Exhibit E, subject to deviations. Specifically, the SPP Exhibit E: (i) requires SPP to allocate its dues, fees, and other charges for its activities among all balancing authorities within its geographic boundaries and their proportionate net energy for load; and (ii) omits “data gathering activities” as a statutory activity to be funded through NERC.

a. Responsive Pleadings

426. Xcel argues that reliance on balancing authorities as collection agents is unwarranted.²²³ Xcel also requests that Exhibit E, section 4, as accepted by the Commission in the *ERO Certification Order*, should be revised to make clear that any penalties collected by SPP will only be used to offset the budget for Regional Entity functions, not SPP’s general budget. Finally, Xcel objects to SPP’s proposal to allocate a full year of Regional Entity costs for 2007. Instead, Xcel requests that SPP defer its recovery of these costs pending the actual start-up date of the SPP Regional Entity.

427. In its answer, SPP states that it will withdraw its proposed deviation regarding the use of balancing authorities to allocate its costs. SPP states that, instead, it will follow the *pro forma* Exhibit E provision.

b. Commission Findings

428. We accept Exhibit E of the SPP Delegation Agreement. We also identify modifications to be addressed by NERC and SPP. First, we direct NERC and SPP to conform Exhibit E to the commitment made by SPP in its answer, i.e., to incorporate the cost assignment methodology reflected in the *pro forma* Exhibit E in place of the deviation reflected in the as-filed Exhibit E. With respect to SPP’s recovery of its

²²³ See also protests of American Electric Power Service Corporation (AEP), KCPL, and Oklahoma Gas & Electric Company (OGEC).

eligible costs, the *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, *i.e.*, non-FPA section 215, non-reliability regulator activities, then it must list them in Exhibit E.²²⁴ The identification of non-statutory activities performed by a Regional Entity is necessary 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. The SPP Exhibit E fails to provide this information. Accordingly, we direct NERC and SPP to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities.

429. The *ERO Certification Order* also found that in order for data collection to be considered a statutory activity, NERC would be required to designate it as such.²²⁵ NERC did so in its compliance filing. However, the SPP Exhibit E fails to incorporate this revision or otherwise support a deviation. Accordingly, we direct NERC and SPP to conform the SPP Exhibit E to this provision of the *pro forma* Exhibit E.

430. We reject, as a collateral attack of the *ERO Certification Order*, Xcel's protest regarding SPP's offset obligations under *pro forma* Exhibit E, section 4, to the extent that Xcel's protest contemplates a revision to this provision. Exhibit E, section 4 was proposed by NERC in its ERO certification filing and was accepted by the Commission in the *ERO Certification Order*. However, we clarify our reading of this provision to be generally consistent with Xcel's underlying concern. Any penalties collected by SPP, under the SPP Delegation Agreement, must be used to offset SPP's budget for statutory functions. Penalty revenues may not be used to offset non-statutory functions. Exhibit E, section 4 makes this obligation sufficiently clear by stating that the penalty is an offset for "budget requirements for U.S. related activities *under this agreement*" (emphasis added).

431. Finally, we will not require SPP to defer the recovery of its costs as requested by Xcel. To the extent that SPP is under contract with NERC to perform delegated functions, SPP should be reimbursed by NERC.

²²⁴ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 580. By contrast, statutory costs, *i.e.*, reliability regulator-related costs, include those costs associated with all activities performed pursuant to FPA section 215 and the Commission's reliability regulations. *See* Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 56 and P 65.

²²⁵ 116 FERC ¶ 61,062 at P 582.

G. WECC Delegation Agreement (Docket No. RR07-7-000)

432. We accept the WECC Delegation Agreement. We also identify modifications to be addressed by NERC and WECC, including the modifications identified above, as applicable to the *pro forma* Delegation Agreement. WECC states that it is a non-profit corporation formed in 2002 for the purpose of coordinating and promoting electric system reliability in the Western Interconnection. The WECC interconnection-wide region consists of all or portions of 14 states, the provinces of Alberta and British Columbia, and the northern portion of Baja California, Mexico.²²⁶ In addition to reliability, WECC is also engaged in activities designed to support efficient competitive markets, assure open and non-discriminatory transmission access among its members, provide a forum for resolving transmission access disputes, and providing an environment for coordinating the operating planning activities of its members.

433. We find that WECC will satisfy the FPA section 215 requirements for delegation of ERO authority. WECC will be governed by an independent and balanced stakeholder board and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO. We also find that WECC satisfies the FPA section 215 rebuttable presumption supporting a finding that the WECC Delegation Agreement will promote effective and efficient administration of the bulk-power system. Specifically, we find that the geographical region over which WECC will perform its delegated functions is organized on an interconnection-wide basis.

1. WECC Base Delegation Agreement

434. The WECC base Delegation Agreement adopts the *pro forma* base Delegation Agreement, subject to the following deviations:

435. *Section 2 (Representations)*: Section 2 includes four deviations. First, the *pro forma* base Delegation Agreement, at section 2(a)(i), states that the Regional Entity is governed by its bylaws, as attached at Exhibit B, and that “[n]o other such corporate governance documents are binding upon [the Regional Entity].” The WECC base Delegation Agreement, at section 2, omits the quoted text. Second, the *pro forma* base Delegation Agreement, at section 2(a)(i), notes 1-3, clarifies that the exhibits included in the NERC/Regional Entity delegation agreements will meet the requirements contained

²²⁶ The U.S. states represented by WECC are Arizona, California, Colorado, Idaho, Nevada, Oregon, Utah, Washington, and portions of Montana, Nebraska, New Mexico, South Dakota, Texas, and Wyoming.

in the exhibits to the *pro forma* Delegation Agreement. The WECC base Delegation Agreement omits these clarifications. Third, the *pro forma* base Delegation Agreement provides that “[a]s set forth in Exhibit C hereto, [the Regional Entity] has developed a standards development procedure, which provides the process that [the Regional Entity] may use to develop Regional Reliability Standards [and Regional Variances, if the Regional Entity is organized on an interconnection-wide basis]. . . .” The WECC base Delegation Agreement, at section 2(a)(ii), substitutes “shall” for “may.” It also deletes the reference to “Regional Variances.” Finally, the WECC base Delegation Agreement proposes to represent that attached to the agreement are “copies of all documents incorporated by reference that are not included elsewhere in this Agreement.”

436. *Section 5 (Reliability Standards)*: The *pro forma* base Delegation Agreement, at section 5(a), provides that if the Regional Entity is organized on an interconnection-wide basis, “[c]omments, in the case of a NERC review of a Regional Entity-proposed reliability standard] shall be limited to the factors identified in NERC Rule 313, section 3. . . .”²²⁷ The WECC base Delegation Agreement provides, instead, that comments “shall be limited to the factors identified in section 215(d) of the Act.”²²⁸

²²⁷ NERC Rule 313, section 3 provides:

Regional Criteria – Regional Entities may develop regional criteria that are necessary to implement, to augment, or to comply with Reliability Standards, but which are not Reliability Standards. Regional criteria may also address issues not within the scope of Reliability Standards, such as resource adequacy. Regional criteria may include specific acceptable operating or planning parameters, guides, agreements, protocols or other documents used to enhance the reliability of the regional bulk power system. These documents typically provide benefits by promoting more consistent implementation of the NERC Reliability Standards within the region. These documents are not NERC Reliability Standards, regional Reliability Standards, or regional variances, and therefore are not enforceable under authority delegated by NERC pursuant to delegation agreements and do not require NERC approval.

²²⁸ FPA section 215(d) states, in relevant part, that the ERO “shall rebuttably presume that a proposal from a Regional Entity organized on an interconnection-wide basis for a Reliability Standard or modification to a Reliability Standard to be applicable on an interconnection-wide basis is just, reasonable, and not unduly discriminatory or preferential, and in the public interest.”

437. *Section 6 (Enforcement)*: The WECC base Delegation Agreement, at section 6, omits, as redundant: (i) *pro forma* section 6(b), which requires the Regional Entity to make reports to NERC regarding violations and alleged violations; (ii) *pro forma* section 6(c), which specifies the circumstances under which a violation or alleged violation will be treated as non-public; (iii) *pro forma* section 6(d), which addresses the appeals of penalties; (iv) *pro forma* section 6(e), which addresses confidentiality; (v) *pro forma* section 6(f), which addresses enforcement audits; and (vi) *pro forma* section 6(g), which addresses the Regional Entity's conflict of interest policy. According to WECC, these omitted provisions are included in the Uniform Compliance Program. In addition, the WECC base Delegation Agreement adds a new section 6(b), addressing the conditions applicable to WECC's performance of non-statutory functions.²²⁹

438. *Section 8 (Funding)*: The WECC base Delegation Agreement omits, as redundant: (i) *pro forma* section 8(e), a provision stating that WECC is obligated to submit its annual budget for carrying out its Delegated Authority functions and related activities on Exhibit E, as well as all other Regional Entity activities and functions to NERC no later than June 1 of the prior year; (ii) *pro forma* section 8(f), which requires the Regional Entity's funding system to include reasonable reserve funding for unforeseen and extraordinary expenses and other contingencies, consistent with generally accepted accounting principles; and (iii) *pro forma* section 8(g), which clarifies that NERC shall review and approve the Regional Entity's budget for meeting its responsibilities under the delegation agreement.

a. Responsive Pleadings

439. Xcel asserts that, for the most part, the deviations in the WECC base Delegation Agreement have nothing to do with specific circumstances unique to the WECC region. Rather, Xcel claims that most, if not all of these proposed deviations are generic revisions that attempt to improve the *pro forma* base Delegation Agreement (*e.g.*, by removing alleged inconsistencies or allegedly increasing clarity or correcting errors). Xcel argues

²²⁹ New section 6(b) provides:

Where WECC performs functions not under this Agreement, the WECC shall maintain a segregation of responsibilities to ensure that no conflicts of interest that would cast doubt on the ability of WECC staff and any contractor of the WECC to act with total objectivity with regard to the overall interests of the compliance program and its applicability to those entities subject to Reliability Standards.

that if the Commission finds that the suggested changes are improvements and, as a result, approves them for the WECC Delegation Agreement, then the Commission should also make these changes to the *pro forma* base Delegation Agreement. In particular, Xcel supports the above-described revision to section 6(b).

440. However, Xcel objects to the deviations relating to sections 2(a)(i); section 2, footnotes 1-3; section 6(b)-(g), and section 8. Xcel asserts that deleting these provisions could have a substantive impact on WECC's obligations. Xcel also asserts that these provisions, even to the extent that they are redundant, are nonetheless helpful in clarifying WECC's obligations.

b. Commission Findings

441. We find WECC's deviations to be, as Xcel recognizes, generic attempts to improve the *pro forma* base Delegation Agreement. Further, these deviations do not raise any substantive concerns regarding the functions delegated by NERC to WECC. Nevertheless, we will not, as Xcel requests, require that corresponding changes be made to the *pro forma* base Delegation Agreement. NERC has not requested them and we will not direct that they be made simply for the sake of strict uniformity.

442. We also reject Xcel's argument that WECC's proposed elimination of provisions that are also addressed in the exhibits to the WECC Delegation Agreement (*i.e.*, the elimination of provisions included in the *pro forma* base Delegation Agreement at sections 2(a)(i); section 2, footnotes 1-3; section 6(b)-(g), and section 8) should be rejected. While Xcel suggests that these provisions, even if redundant, are nonetheless helpful in clarifying WECC's obligations, we are not persuaded that the restatement of these obligations is necessary.

2. Exhibit A: WECC Regional Boundary

443. The geographic region in which WECC will perform its duties and functions under the WECC Delegation Agreement is, as noted above, the Western Interconnection. The region covers an area of approximately 1.8 million square miles. We find that the WECC interconnection-wide region, as described in Exhibit A, represents an appropriate size, scope and configuration.

3. Exhibit B: WECC Governance Structure

444. NERC, in its transmittal letter, asserts that WECC's governance structure satisfies the requirements of FPA section 215 because, among other things: (i) WECC will have a combination independent and balanced stakeholder board; and (ii) WECC is not a user, owner, or operator of bulk-power system facilities. Exhibit B to the WECC Delegation

Agreement consists of the WECC bylaws, as last revised on April 21, 2006 (WECC bylaws). In addition, NERC and WECC, in a supplement to their filing, represent that the WECC Delegation Agreement satisfies the Governance Criteria set forth in Exhibit B of the *pro forma* Delegation Agreement.

a. WECC Bylaws

445. The WECC bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

446. *Composition and Election of the Board (Criterion 1)*: WECC represents that it will be governed by a combination independent and balanced stakeholder board. WECC asserts that its board will be balanced because, as explained below, it will have an equal number of representatives from each of WECC's six member classes as well as non-affiliated directors and a Mexican director. WECC refers to the following provisions of the WECC bylaws:

- *Section 6.2*: Section 6.2 provides that the board is made up of 32 directors. Twenty-four directors are elected by WECC's six member classes, i.e., sectors, with each sector entitled to elect four directors.²³⁰ Seven non-affiliated directors are elected by WECC's members as a whole.²³¹ One director may be elected from WECC's Mexican delegation. At board meetings, a quorum requires the presence of 17 directors, including three non-affiliated directors and one director from each of any four member classes. Board business calls for an affirmative majority of director votes when a quorum is present.

447. *Rules Assuring Independence (Criterion 2)*: WECC represents that it has established rules that assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its

²³⁰ The six sectors are: (i) transmission system owners controlling and operating less than 1000 miles of 115 kV lines; (ii) transmission system owners controlling and operating more than 1000 miles of 115 kV lines; (iii) electric line businesses that do not own, control or operate transmission or distribution lines; (iv) end users of electricity; (v) representatives of States or Provinces in the Western Interconnection; and (vi) Canadian members from the other five sectors.

²³¹ WECC bylaws at section 6.2. The eligibility requirements relating to a non-affiliated director are addressed at section 6.5.1.

officers. WECC asserts, as noted above, that it is not a user, owner or operator of the bulk-power system facilities. WECC further asserts that its board is selected pursuant to a fair stakeholder process.

448. *Membership (Criterion 3)*: WECC represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed regional reliability standards. WECC also notes that membership is not a condition for participating in the development of proposed reliability standards. WECC refers to the following provisions of the WECC bylaws:

- *Section 4*: Section 4 provides that membership in WECC is open to any candidate meeting the criteria for membership specified in WECC's six membership classes. In addition, each stakeholder sector may appoint a member to each standing or other committee.
- *Section 12.1*: Section 12.1 provides that an annual fee of \$5,000 is payable by members, non-inclusive of end user members, who pay \$1,500, and states, provinces, and Canadian members, who pay nothing. Fees may be waived by the board for good cause shown. A deficiency assessment to recover the balance of WECC operating costs (non-statutory costs) may be collected from members through each control area, ISO and RTO based upon net energy for load.

449. *Committees and Subordinate Organizational Structures (Criterion 4)*: WECC represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action. WECC refers to the following provisions of the WECC bylaws:

- *Section 7.7*: Section 7.7 addresses the composition of WECC's board nominating committee, which consists of one director from each of the six member classes and one non-affiliated director. Section 7.7 also authorizes the board to appoint other board committees.
- *Section 8*: Section 8 provides for three standing member committees (the planning committee, the operating committee, and market interface committee) and other committees as may be created by the board. Any WECC member may designate a representative to serve on any standing or other committee.
- *Section 8.5 and 5.2*: Sections 8.5 and 5.2 provide that committee voting is by three member classes: (i) transmission providers; (ii) transmission customers, and

(iii) states and provincial members of the committee with regulatory or policy ties but who do not otherwise participate significantly in the market. Each committee member has one vote and casts it on behalf of its designated member class. A majority of both transmission providers and transmission customers sectors is necessary to pass a measure. The state/provincial member sector vote is recorded but not counted for determining whether a measure passes.

450. *Openness and Balance of Interests (Criterion 5)*: WECC represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. WECC refers to the following provisions of the WECC bylaws:

- *Sections 5.7, 7.6 and 8.7*: Sections 5.7, 7.6, 8.7 and related provisions address notice requirements, openness, opportunity for public comment and due process in all WECC member meetings and board meetings.

b. Responsive Pleadings

451. The California ISO argues that WECC should provide ISOs and RTOs a separate class of membership and representation on both its board and committees.²³² The California ISO argues that without this representation, its vote on governance matters will be diluted, contrary to the requirements of FPA section 215.

c. Commission Findings

452. We find that the WECC bylaws and the representations made in Exhibit B of the WECC Delegation Agreement satisfy the governance requirements of FPA section 215 and the *pro forma* Exhibit B governance criteria. We also identify modifications to be addressed by NERC and WECC. The WECC board will be independent because it will be comprised of directors chosen from all industry segments, with no two sectors able to control a vote. No single sector will be able to veto a measure, given WECC's quorum and voting protocols. As such, WECC's board composition and voting protocols are designed to ensure that WECC will be independent of industry sectors and be governed by an appropriate balance of unaffiliated directors and stakeholder interests.

²³² A similar argument is addressed above regarding ISO and RTO participation in MRO and SERC governance matters. *See supra* sections V(B)(2) and (E)(2), respectively.

453. WECC, as a reliability coordinator, is a user, owner or operator of the bulk-power system. As such, WECC is obligated to demonstrate a strong separation between oversight and operational functions.²³³

454. To address this issue, WECC has explained, in Docket No. RR06-3-001, that NERC will serve as the audit team lead for compliance audits of the WECC reliability coordinators.²³⁴ WECC proposes that these audit teams consist of a NERC staff (or contractor) audit team lead and other independent audit team members from within WECC and elsewhere, as appropriate, to provide the necessary expertise for the audits. Commission Staff may also participate in these audits. The NERC audit team leader will be responsible for development of the final audit report. According to WECC, violations of mandatory reliability standards will be documented in the final audit report and transmitted to WECC's independent compliance staff for processing by WECC through the Uniform Compliance Program.

455. To enhance the independence of the compliance staff, WECC proposes to revise its compliance committee structure to ensure a separation between oversight and operations. WECC states that it will establish appropriate penalties, sanctions, mitigation plans and remedial action directives and will conduct any hearings on contested violations or penalties.

456. WECC's proposals represent a good first step and demonstrate a significant effort to meet the Commission's requirements. Nevertheless, we remain concerned that WECC's compliance staff is not sufficiently separated from its reliability coordinators. For example, both WECC's compliance staff and reliability coordinators are hired and have their performance reviewed by WECC management, and both have their work product reviewed by the same member committees and management personnel. The result is a lack of independence in compliance monitoring and enforcement for WECC operational functions. Accordingly, we direct NERC and WECC to remedy these deficiencies. If it chooses, and NERC agrees, WECC may engage NERC to oversee the compliance and enforcement functions as they relate to WECC's compliance with

²³³ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 698.

²³⁴ *See* WECC request for rehearing at 24 (explaining that WECC will not oversee its own compliance with reliability standards and that, instead, NERC will audit the WECC reliability coordinators in order to ensure that the reliability coordinators are in compliance with all applicable reliability standards).

reliability standards. This is just one possible way to help establish the strong separation that we require.

457. We also clarify that the WECC bylaws are “rules,” under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²³⁵

458. WECC proposes to assess an annual fee of \$5,000 payable by all members, non-inclusive of end-user members (who would be required to pay \$1,500 annually). The Commission has stated that Regional Entities may assess nominal membership fees but in this case WECC’s fees appear to exceed this limit. Further, funding of all statutory activities through NERC was approved in the *Business Plan and Budget Order*. WECC, if it chooses, may propose an appropriate fee in its annual budget filing. Additionally, we reject as inconsistent with FPA section 215, WECC’s proposal to assess members for the costs of non-statutory activities.

459. While the Commission has stated that a Regional Entity may engage in non-statutory activities, subject to certain limits, its primary function is to develop and enforce reliability standards. It would be improper to require interested stakeholders to fund other activities as a condition to their membership in WECC. WECC may collect funds through other means (such as user fees), or may charge special membership fees to those who either choose or are required to participate in non-FPA section 215 activities, however, it may not require contributions from those who do not.

460. Finally, we reject the protest submitted by the California ISO regarding separate ISO and RTO representation in WECC governance matters. ISOs and RTOs will be represented on board matters as members of the transmission system owner and operator sectors. As such, their interests will be adequately represented and balanced. Additionally, the Commission’s ruling in the *ERO Certification Order* regarding NERC’s ballot body does not apply to governance at the regional level where conditions for establishing balance are not the same. As such, WECC’s proposal is not inconsistent with the *ERO Certification Order*.²³⁶

²³⁵ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

²³⁶ 116 FERC ¶ 61,062 at P 90.

4. Exhibit C: WECC Reliability Standards Development

461. Exhibit C to the WECC Delegation Agreement consists of a WECC manual, “Process for Developing and Approving WECC Standards” (WECC Standards Development Manual).²³⁷ In addition, NERC and WECC rely on narrative responses addressing each of NERC’s 34 *pro forma* Common Attributes addressed above.²³⁸ The narrative responses are included in NERC’s submittal as supplemental information, with cross-references to the WECC Standards Development Manual.

462. The WECC Standards Development Manual also addresses voting procedures applicable to the adoption of a proposed reliability standard. Ultimately, the adoption of a new or revised reliability standard must be approved by the board. To be considered by the board, the standard must first be approved by the applicable standing committee, subject to a majority vote by WECC’s two voting sectors, *i.e.*, by the transmission providers sector and the transmission customers sector.²³⁹ The process may be initiated by a request from any individual or organization (utilizing the WECC standard request form). Appeals are available at various levels of the standards development process.

463. NERC, in its transmittal letter, states that the WECC Standards Development Manual generally meets the requirements of NERC’s 34 Common Attributes. However, NERC identifies certain deviations. First, NERC notes that the multiple stakeholder classes typical in other Regional Entities are, in WECC, combined and that, as such, it is unclear whether the WECC voting model satisfies the FPA section 215 requirement regarding the need for a balance of stakeholder interests.²⁴⁰

²³⁷ The WECC Standards Development Manual has been approved in principle by the WECC board.

²³⁸ *See supra* section IV(A).

²³⁹ *See* WECC bylaws at section 8.5 and 5.2. *See also* WECC Standards Development Manual at 7 (“Relevant voting information from all standing committees will be submitted to the board for its consideration in determining whether or not to approve the standard.”) The WECC standing committees are discussed above, as they relate to WECC’s Exhibit B submittals.

²⁴⁰ *See* 16 U.S.C. § 824o(c)(2)(D). Specifically, with only two classes of voting members (*i.e.*, transmission providers and transmission customers) it is unclear whether no two stakeholder sectors will be able to control a vote and whether no single sector will
(continued...)

464. Second, NERC points out that WECC has not incorporated its narrative responses to its 34 Common Attributes into Exhibit C. Third, NERC states that the WECC Standards Development Manual does not explicitly state how and when coordination between WECC and NERC will take place at key steps in the standards development process.²⁴¹ Fourth, NERC notes that the WECC Standards Development Manual fails to include a Standard Authorization Request Form (instead using a separate form). Finally, NERC states that the WECC Standards Development Manual fails to expressly state that each WECC regional standard will enable or support one or more of the NERC reliability principles and should be consistent with NERC's market interface principles.

465. On December 27, 2006, WECC filed comments addressing the concerns raised by NERC. In these comments, WECC argues that its committee voting procedures satisfy Commission requirements. WECC recognizes that its procedures may not meet the Commission's control and veto factors (that no two sectors should be able to control a decision and no one segment be able to veto) if literally applied. WECC, however, points out that the Commission provides latitude in determining whether there is balanced decision-making in any specific circumstance if "the ERO adequately explains why it cannot apply these principles."²⁴² WECC goes on to explain that its procedures "reflect the essence of the Commission's factors, because control is reasonably dispersed among groups with meaningfully different characteristics."

a. Responsive Pleadings

466. Xcel argues that the WECC Standards Development Manual fails to satisfy the requirements of Common Attributes 9, 11, 12, 19 and 34. First, Xcel argues that Common Attribute 9 is not met because there is no timeline specified for the standards

be able to defeat a matter. *See also* Governance Criterion 4 (requiring WECC to have established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action).

²⁴¹ NERC points out that noticing these steps through NERC is necessary to get input from all interested stakeholders on an inter-regional basis, as may be appropriate.

²⁴² Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 728.

committee to decide whether to accept, or reject, a standards request.²⁴³ Xcel argues that Common Attribute 11 is also not satisfied because there is no provision for posting a standard that has been approved for development on WECC's website.²⁴⁴

467. Xcel also takes issues with WECC's compliance with Common Attribute 12, which requires that composition of the drafting team be approved by the standards committee within 60 days of acceptance of a standard for development.²⁴⁵ Xcel asserts that WECC's procedure, contrary to this requirement, does not provide for approval of the composition of the standards drafting team by the members of the appropriate standing committee. Xcel asserts that while Common Attribute 34 specifies the elements that must be included within a measure, the WECC Standards Development Manual does not include all of these elements. Finally, Xcel argues that while Common Attribute 19 requires WECC to use a supermajority vote for approval of proposed reliability standards, WECC, instead, requires only a simple majority.

468. Xcel also proposes that the WECC Standards Development Manual be clarified in several respects. First, Xcel submits that the obligation of the WECC standards request routing committee to determine whether a standards request form that has been completed and submitted to WECC is "within WECC's scope" is vague and requires clarification.²⁴⁶ Xcel also asserts that the terms "mandatory requirements" and

²⁴³ Common Attribute 9 provides, in relevant part that: "[w]ithin [no greater than 60] days of receipt of a completed standard request, the [standards] committee shall determine the disposition of the standard request."

²⁴⁴ Common Attribute 11 provides that "[a]ny standard request that is accepted by the [standards] committee for development of a standard (or modification or deletion of an existing standard) shall be posted for public viewing on the [Regional Entity Name] website within [no greater than 30] days of acceptance by the committee."

²⁴⁵ Common Attribute 12 provides:

The standards process manager shall submit the proposed members of the drafting team to the [standards] committee. The [standards] committee shall approve the drafting team membership within 60 days of accepting a standard request for development, modifying the recommendations of the standards process manager as the committee deems appropriate, and assign development of the proposed standard to the drafting team.

²⁴⁶ See WECC Standards Development Manual at 3.

“measures” are introduced as part of WECC’s step 4 procedures, but require clarification. Similarly, Xcel asserts that the term “next meeting,” as used in step 7 also requires clarification, i.e., while the standing committee is required to vote on a standard at its “next meeting,” it is unclear when, if ever, that meeting will occur.

b. Commission Findings

469. We accept Exhibit C to the WECC Delegation Agreement. We also identify modifications to be addressed by NERC and WECC. We agree with NERC that the WECC Standards Development Manual is generally consistent with the requirements of FPA section 215 and NERC’s *pro forma* Common Attributes. However, with regard to participation in developing reliability standards and voting eligibility, WECC’s proposal of membership as a requirement for voting on reliability standards is inconsistent with our requirement that participation in the development of reliability standards and voting on reliability standards be open and not require membership.

470. The Commission has previously directed that membership must not be a condition for participating in reliability standard development, or for voting on the approval of a reliability standard.²⁴⁷ While, under WECC’s proposal, a requester of a new or revised reliability standard can be any person, or entity, the proposal does not otherwise extend participation or voting rights. Instead, WECC requires membership for full participation and voting on reliability standards development. WECC, moreover, has failed to offer any explanation or rationale that would support a deviation from this requirement. Accordingly, we direct WECC to make appropriate provisions in its Standards Development Manual and applicable bylaws to clarify that any interested stakeholder may participate and vote on reliability standard development.

471. We reject NERC’s argument that the WECC Standards Development Manual needs to explicitly state how and when coordination between WECC and NERC will take place at key steps in the standards development process. The WECC Standards Development Manual does not prohibit this coordination, nor does it prohibit NERC from disseminating the relevant information regarding WECC’s processes to any interested stakeholders.

472. We reject the requested editorial clarifications made by Xcel. These clarifications, while potentially helpful, have not been shown to be necessary or otherwise required.

²⁴⁷ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 172.

473. In addition, we clarify that the WECC Standards Development Manual embodies “rules,” under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²⁴⁸

474. NERC, in its transmittal letter, expresses concern that the multiple stakeholder classes typical in other Regional Entities are, in WECC, combined into two broad classes and that, as such, it is unclear whether the WECC voting model, at the committee and subordinate structure level, satisfies the FPA section 215 requirement regarding the need for a balance of stakeholder interests. However, we agree with WECC that its choice of transmission provider and transmission customer classes for committee voting can be considered fair and balanced under the circumstances presented here. In fact, both classes represent a sufficiently broad range of participants. In addition, both classes must approve a recommendation for it to pass and both classes have an equal ability to block a recommendation.

475. While we acknowledge NERC’s concern regarding the potential for interest groups within each class to control the vote of the class, in theory, we will not withhold approval on this basis alone given the overall acceptability of WECC’s governance structure, as discussed in connection with its Exhibit B submittals; and the transitional circumstances presented by WECC’s filing. We do not foreclose the possibility of revisiting this issue, if necessary, in the future. Further, we expect NERC to address the effectiveness of WECC’s stakeholder voting structure in the ERO performance assessment.²⁴⁹

476. For these same reasons, we also reject Xcel’s protest regarding WECC’s non-compliance with Common Attribute 19.²⁵⁰ Common Attribute 19 cannot be satisfied in this case because there will be only two voting classes. However, for the reasons stated above (and subject to those same conditions) we find that a deviation from Common Attribute 19 is acceptable.

²⁴⁸ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

²⁴⁹ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 754.

²⁵⁰ As noted above, Common Attribute 19 requires the use of a supermajority approval requirement for standards adopted at the committee level.

477. We reject Xcel's argument that the WECC Standards Development Manual should be revised to include firm, date-certain deadlines regarding the disposition of a proposed reliability standard and the composition of a drafting team. We are not persuaded that greater specificity on a generic basis is necessary. The WECC Standards Development Manual provides for review of a standards request and assignment to a standing committee within two weeks. The chair of the appropriate standing committee will then assign the request to a subgroup.

478. We also reject Xcel's argument that the elements of a "measure," as articulated in Common Attribute 34, should be restated in the WECC Standards Development Manual. These elements will be made a part of the WECC Delegation Agreement, regardless.

479. Finally, we reject Xcel's assertion that it is necessary to revise the WECC Common Attribute 11 to make it consistent with the *pro forma* Common Attribute 11 requirement that a standard that has been approved for development must be posted on WECC's website. In fact, the WECC Common Attribute 11 already states that "[n]otification of [all routing] assignments will be posted on the WECC website and sent to all parties that subscribe to the WECC standards e-mail list."

5. Exhibit D: WECC Compliance Monitoring and Enforcement

480. Exhibit D to the WECC Delegation Agreement adopts the *pro forma* Exhibit D (Uniform Compliance Program), subject to deviations. WECC explains that some deviations result from differences related to WECC's circumstances, while other deviations are intended to improve, or clarify, the *pro forma* Uniform Compliance Program.²⁵¹ We specifically discuss the following deviations:

481. *Section 1.1 (Definitions)*: Section 1 modifies the *pro forma* definitions for: (i) applicable governmental authority; (ii) exception reporting; (iii) mitigation plan; (iv) regional compliance directory; and (v) registered entity. Specifically, WECC narrows the definition of applicable governmental authority in section 1.1.3 to include only governmental bodies with authority to enforce reliability standards that have entered into enforcement arrangements with the Regional Entity. WECC explains that this change results from particular circumstances in WECC, because any application of delegation arrangements with a Canadian authority would require such an explicit

²⁵¹ The WECC Exhibit D also includes a number of minor changes in other provisions that do not affect the substantive meaning of those provisions.

understanding. For exception reporting, the WECC Exhibit D substitutes “violations of a Reliability Standard” for “exceptions to a Reliability Standard baseline norm.” WECC asserts that this change better reflects the definition. The WECC Exhibit D also changes the definition of mitigation plan to state that such a plan is “usually” required, rather than “required” when a registered entity violates a reliability standard. WECC justifies this change by asserting that a mitigation plan may not be required in limited circumstances, such as a one-time transmission line overload due to circumstances beyond the registered entity’s control. The WECC Exhibit D also defines regional compliance registry as a list created pursuant to section 500 of the NERC Rules of Procedure and the NERC statement of registration criteria of the owners, operators or users of the bulk-power system or the entities registered as their “delegates,” rather than “designees.” WECC explains that the reference to NERC’s statement of registration criteria in this definition represents another source of registration criteria. Finally, the definition of registered entity refers to “delegates” rather than “designees” of a bulk-power system owner, operator or user.

482. *Section 2.0:* Section 2 provides that WECC will update its compliance registry at least monthly, not when changes occur. WECC asserts that compliance with a requirement that it contemporaneously report updates would be burdensome.

483. *Section 3.0:* With respect to each of the six monitoring processes listed in section 3.0 that may directly lead to issuance of a notice of alleged violation, the WECC Exhibit D states that issuance of this notice occurs if the compliance enforcement authority “determines that an Alleged Violation has occurred.” In contrast, the Uniform Compliance Program provides that notice of alleged violation issues if the compliance enforcement authority “concludes that a reasonable basis exists for believing a violation has occurred.” WECC describes this change as an improvement over the Uniform Compliance Program because the revised provision uses alleged violation, a defined term, to avoid ambiguities.²⁵²

484. In section 3.1.5, the WECC Exhibit D provides that in addition to FERC, applicable governmental entities, rather than “other regulatory bodies with regulatory authority for the Registered Entity,” may participate on a compliance audit team. The WECC Exhibit D specifies in section 3.3 that as a result of a spot check, “[a] Compliance Audit may be initiated” rather than “[c]ompliance auditors may be assigned.” WECC

²⁵² This deviation occurs in sections 3.1.1, 3.2.1, 3.3.1, 3.4.1, 3.5.1 and 3.6.1 of the WECC Exhibit D.

states that the revised wording makes clear that auditors may be assigned in connection with a compliance audit.

485. WECC also proposes to change the heading of section 3.4 to refer to “compliance investigations” of reliability standard violations, rather than to “investigations.” WECC believes that this change distinguishes activities under section 3.4 from “disturbance investigations.”

486. *Section 5:* The WECC Exhibit D revises the Uniform Compliance Program’s reference in section 5.0 to NERC’s “direct oversight and review of penalties and sanctions” to achieve consistency in the application of the Sanction Guidelines to remove the reference to “direct oversight” because in WECC’s view, that phrase is ambiguous. The WECC Exhibit D deletes a provision from the Uniform Compliance Program that a party may request a written determination from the NERC compliance program officer if a party believes that a request for data or information in the section 5.0 process following issuance of a notice of alleged violation is unreasonable. WECC alleges that, if not deleted, this provision would impose unnecessary burdens and delays in the enforcement process and lead to ambiguous responsibilities. The WECC Exhibit D also deletes a sentence in section 5.1 that provides that a final notice of a violation, penalty and sanction will be processed and issued to the registered entity upon acceptance of an alleged violation and proposed penalty or sanction. Characterizing this provision as stating that a sanction will be processed and issued to a registered entity upon acceptance by FERC, WECC states that it has relocated the provision to section 5.6.

487. From section 5.4, which addresses settlements, WECC deletes the following sentence: “If a settlement cannot be reached, the compliance hearing process shall continue to conclusion.” WECC argues that this sentence could be construed to preclude another settlement before the hearing process concludes.

488. The WECC Exhibit D adds to section 5.5, which concerns the NERC appeal process, the following sentence: “On appeal, NERC shall either affirm or remand to the Regional Entity with its reasons for the remand.” WECC states that this addition makes clear that NERC either will affirm or remand with reasons, rather than modify the terms of the Regional Entity’s determination.

489. The WECC Exhibit D adds a sentence to section 5.6 that states that a penalty or sanction will be effective upon the expiration of the 30-day period following the filing of a notice of penalty with the Commission, or, if the Commission decides to review the penalty or sanction, upon final determination of the Commission. WECC states that this sentence is consistent with the Commission’s regulations and will avoid ambiguity by specifying when a penalty is effective.

490. *Section 6.0:* Section 6.0 removes a provision that allows a party that believes a request for data or information is unreasonable to request a written determination from the NERC compliance program officer. WECC also provides that a registered entity found in violation of a reliability standard that requires a mitigation plan will file a mitigation plan. WECC states that this revision parallels the revised definition of mitigation plan in section 1.1.12.

491. Section 6.2 omits a statement that additional violations could be determined for not completing work associated with accepted milestones in a mitigation plan that have been accepted, because: (i) WECC is not aware of any authority for this requirement; and (ii) the consequences to registered entities for failure to complete a mitigation plan by the required deadline should provide sufficient incentives to meet plan milestones. Section 6.3 of WECC's Exhibit D, correspondingly, omits a reference to a request for extension of a milestone.

492. *Attachment 2:* WECC states that, to avoid redundancy, the WECC attachment 2 hearing procedures, at section 6.0, delete references to the registered entity and the compliance enforcement authority in a statement that "[t]he party requesting transcription of the hearing, the Registered Entity or the Compliance Enforcement Authority," will arrange and pay for transcription. WECC also changes the requirement in section 6.0 of the *pro forma* attachment 2 that a party must serve copies of exhibits on the opposing party and the hearing body simultaneously at least 10 business days prior to the date of the hearing in which the exhibit is introduced. Instead, a party must serve copies of exhibits on the opposing party at least 10 business days in advance, and on the hearing body at least five business days in advance of either the date of the hearing in which the exhibit is introduced or when cross-examination takes place.

a. Responsive Pleadings

493. NERC asserts that WECC's deviations from the *pro forma* Uniform Compliance Program are insubstantial and should be approved.

494. Xcel recommends that the proposed deviations be applied to all Regional Entities, if approved by the Commission, because most, if not all, are generic revisions. Specifically, Xcel supports WECC's revisions to the definitions of applicable government authority, exception reporting and mitigation plan in section 1.0; monthly, rather than contemporaneous, updates to the regional compliance registry; WECC's proposal to change the standard for issuance of a notice of alleged violation in sections 3.1.1, 3.2.1, 3.3.1, 3.4.1, and 3.5.1; WECC's reference to compliance investigations in section 3.4; WECC's elimination of the reference to NERC's direct oversight of WECC's penalties in section 5.0; WECC's deletion in section 5.4 of the sentence that provides for a continuation of the compliance hearing process to conclusion if a settlement cannot be

reached; WECC's revisions to provisions relating to mitigation plans in section 6.1; and WECC's deletion of the provision in section 6.2 that states that additional violations could occur if a registered entity does not complete work associated with milestones in an accepted mitigation plan.

495. Xcel objects to the following proposed deviations: WECC's deletion of a party's right to challenge an unreasonable data request in section 5.0; WECC's proposed change in section 5.5 to eliminate NERC's ability to modify WECC's determination on appeal; and WECC's reference in section 5.6 to a thirty-day period for the Commission to review a WECC penalty or sanction before it becomes effective.

b. Commission Findings

496. We accept WECC's Exhibit D with the expectation that adoption of the Uniform Compliance Program will ensure more robust investigations and greater independence in the enforcement process. Below, we address WECC's deviations from the *pro forma* Uniform Compliance Program. To the extent we accept a deviation, we will not, as suggested by Xcel, require the same revisions to the delegation agreements of other Regional Entities.

497. With respect to definitions, we agree with Xcel and accept WECC's amendment to the definition of applicable governmental authority to reflect the existence of "enforcement arrangements" between WECC and Canadian authorities.

498. We accept WECC's proposed deviation regarding the definition of the term "mitigation plan," *i.e.*, the proposal that such a plan will not always be required in response to a violation. WECC should have the discretion to determine in particular instances whether to approve a registered entity's contention that mitigation of a violation is not necessary. For this same reason, we accept WECC's reference, at section 6.1, to the filing of a mitigation plan for a reliability standard violation "that requires a Mitigation Plan."

499. We agree with WECC's proposed amendment of the term "regional compliance registry" to include a reference to NERC's statement of registration criteria as another source of registration criteria for entities. In Order No. 693, we referred to NERC's statement of compliance registry criteria in accepting the compliance registry process as an appropriate approach for identifying entities responsible for compliance with

reliability standards.²⁵³ We also accept WECC's proposal that its definition of regional compliance registry should refer to "delegates" rather than "designees."

500. We held, above, that NERC must insert into the definition of exception reporting a reference to reports of violations of reliability standards. Therefore, we accept WECC's request to make the same change in the WECC Uniform Compliance Program.

501. We accept WECC's proposed deviation regarding updates to its compliance registry on a monthly basis (in lieu of the *pro forma* requirement that updates be made as they occur). WECC asserts that contemporaneous reporting of updates would be burdensome.

502. We accept WECC's proposed deviation permitting WECC to issue a notice of alleged violation if it "determines that an Alleged Violation has occurred." However, we emphasize that issuance of a notice of alleged violation does not represent a "determination" by the compliance enforcement authority. Rather, we expect staff of the compliance enforcement authority to issue such notices, which do not purport to constitute a determination of violation or any other finding by the authority itself.

503. We direct WECC to explain its proposed clarification that, other than staff from NERC or Commission Staff, only personnel from "authorized governmental entities" may participate on a compliance audit team. WECC appears to propose that only Canadian regulators be permitted to participate on these teams along with NERC and Commission Staff, because only Canadian regulators meet WECC's amended definition of authorized governmental entity. However, it is unclear whether WECC intends to narrow the group of individuals from governmental agencies who may participate in WECC's compliance audits, or to make a clarification to address a particular circumstance that applies only to WECC. Accordingly, we direct WECC to clarify this matter.

504. We accept WECC's proposed deviation regarding section 3.3. The *pro forma* provision states that as a result of a spot check, "compliance auditors" may be assigned. However, we agree that this provision fails to make clear that a Regional Entity may initiate a compliance audit as a result of a spot check.

²⁵³ Order No. 693, 118 FERC ¶ 61,218 at P 87, note 54, and P 95, note 59.

505. We accept WECC's proposal to modify the heading to section 3.4 from "Investigations of Reliability Standard Violations" to "Compliance Investigations of Reliability Standard Violations."

506. With respect to WECC's proposed deletion of the term "direct oversight," at section 5.0, regarding NERC's obligation to provide direct oversight over penalties and sanctions, we required NERC, above, to identify each of the mechanisms it will use to achieve consistency in penalty determinations, including "direct oversight." In this regard, we have directed NERC to explain the meaning of this phrase and the means by which it will exercise this oversight. We defer a decision on WECC's proposal until we receive NERC's response.

507. With respect to objections to data requests, we require WECC to modify WECC's proposal to delete references, at sections 5 and 6, to requests by parties for written determinations by a NERC compliance program officer if they believe that a data request following issuance of a notice of alleged violation, or with respect to a mitigation plan, is unreasonable. We agree with Xcel that determinations by NERC compliance staff following such requests could speed up, rather than delay, these processes and help ensure consistency across Regional Entities as to the proper scope of these requests.²⁵⁴

508. We accept WECC's proposal to remove *pro forma* language from section 5.1 addressing the issuance of a final notice of violation, penalty and sanction.²⁵⁵ However, we expect WECC to establish procedures for issuing a final notice of violation to a registered entity.

509. We accept WECC's proposed deletion of the *pro forma* language, at section 5.4, providing that if a settlement agreement cannot be reached, the hearing process for compliance matters "shall continue to conclusion."

²⁵⁴ As we found above, regarding NERC's *pro forma* attachment 2 hearing procedures, the hearing body, not a NERC compliance program officer, will determine issues relating to discovery requests in hearings relating to notices of alleged violations or other matters governed by attachment 2.

²⁵⁵ The *pro forma* language states that "[u]pon acceptance of the Alleged Violation and proposed penalty or sanction, the final notice of the violation, penalty, and sanction will then be processed and issued to the Registered Entity."

510. We require WECC to modify WECC's proposal to add language, at section 5.5, specifying that on appeal of a determination by WECC, NERC may either affirm WECC or remand the matter to WECC, but may not modify the terms of WECC's determination. This limitation would prevent NERC from carrying out its obligation to oversee Regional Entity compliance activities and to provide for consistency among the Regional Entities. NERC must be authorized to direct WECC to change its determinations.

511. We accept WECC's proposed addition, at section 5.6, clarifying when a penalty or sanction will become effective, *i.e.*, "upon the expiration of the thirty-day period following filing with the Commission of the notice of penalty or, if the Commission decides to review the penalty or sanction, upon final determination of the Commission." With this clarification, entities will not be required to consult FPA section 215(e)(2), or section 39.7(e) of our regulations, to obtain this information. However, we reject Xcel's related suggestion that we also permit a registered entity to submit a penalty payment into an escrow account pending an appeal of the penalty. The revision we approve states how to determine the effective date of a penalty. It does not delay the effective date.

512. We accept the proposal by WECC, supported by Xcel, to delete the following sentence in section 6.2 with respect to compliance with implementation milestones in mitigation plans: "Additional violations could be determined for not completing work associated with accepted milestones." WECC and Xcel correctly point out that an entity's failure to complete milestones included in a mitigation plan does not itself constitute an additional violation of a reliability standard. Nevertheless, as set forth elsewhere in section 6.3, adverse consequences could result if an entity does not complete, on a timely basis, all required actions in a mitigation plan, including implementation of milestones.

513. We require WECC to modify WECC's proposal to delete a reference in section 6.3 to a request for extension of an implementation milestone. Because registered entities reasonably may need extensions of milestones in certain circumstances, it is appropriate that section 6.3 refer specifically to a request for an extension of a milestone.

514. We accept WECC's proposed deletion of *pro forma* language, at attachment 2, section 6.0, identifying the party requesting a hearing transcript. This deviation eliminates extraneous language. We also accept WECC's proposed amendment to this

same provision regarding service of exhibits on an opposing party and the hearing body.²⁵⁶

515. Finally, WECC proposes numerous changes to correct typographical and grammatical errors. Many of these proposed changes are appropriate, but some inadvertently create additional errors. Accordingly, we direct WECC to review these submissions for typographical and other errors, make necessary corrections, and include all such corrections in the form of a revised Uniform Compliance Program.

6. Exhibit E: WECC Funding

516. Exhibit E of the WECC Delegation Agreement adopts the *pro forma* Exhibit E, subject to the following deviations:

517. *Section 1*: Section 1 clarifies WECC's intended application of the following *pro forma* statutory functions eligible for NERC funding: (i) compliance enforcement; (ii) reliability assessment and performance analysis; (iii) training and education; and (iv) situational awareness and infrastructure security.²⁵⁷ In addition, section 1 also details: (i) how and when WECC will submit its annual budget to NERC and what that submittal will include; (ii) NERC's obligation, in consultation with WECC, to develop "a reasonable and consistent system of accounts;" (and WECC's commitment to follow that prescribed methodology); (iii) WECC's commitment to provide "reasonable reserve funding for unforeseen and extraordinary expenses and other contingencies" and (iv) NERC's obligation to review and approve WECC's annual budget.

²⁵⁶ WECC's proposed deviation provides, in italicized text, "Copies of exhibits shall be served on the other party and the hearing body at least ten (10) business days *and at least five (5) business days, respectively*, prior to the date of the hearing in which the exhibit is introduced *or cross-examination takes place.*"

²⁵⁷ With respect to compliance enforcement, section 1 states that "[t]his category will encompass WECC's Compliance Enforcement Program, including activities under the WECC Reliability Management System." With respect to "reliability assessment and performance analysis," section 1 states that this function includes "WECC's Transmission Expansion Planning Program, and Loads and Resources Area." With respect to training and education, section 1 clarifies that this category includes WECC's training program. With respect to situational awareness and infrastructure security, section 1 provides that this function will include WECC's reliability coordinator functions.

518. *Section 2:* Section 2 clarifies that the fees and charges allocated under the WECC Delegation Agreement will be allocated, on the basis of net energy load, among all load serving entities (as provided by the *pro forma* Exhibit E provision) or among balancing authorities (*e.g.*, by the California ISO). Section 2 also states that WECC will develop a list of load serving entities responsible for paying these charges (as provided by the *pro forma* Exhibit E provision) or will develop a list of the applicable balancing authorities. As a deviation to the *pro forma* Exhibit E, section 2 also gives the listed load serving entities or balancing authorities two options for collection and payment of charges.²⁵⁸ The balancing authority would be required to inform WECC by June 1 of each year of its choice to undertake either option one or option two. Finally, section 2 requires WECC to submit to NERC updated listings of its load serving entities.

519. *Section 3:* Section 3 has been revised to state that once a week, until all funds are collected, WECC will electronically transfer to NERC any statutory funds received. In addition, these revisions commit NERC to electronically transfer WECC's and WIRAB's statutory portions back to WECC within 24 hours. Section 3 would also authorize WECC to charge interest on late payments, including payment related to statutory and, if applicable, non-statutory costs.

520. *Section 4:* Section 4 has been revised to permit WECC to levy monetary sanctions against organizations in the Western Interconnection.

a. Responsive Pleadings

521. Comments addressing the WECC Exhibit E cost allocation provisions were submitted by the California ISO, Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas and Electric Company (California IOUs), and CAC/EPUC.

522. The California ISO argues that the Commission has already addressed and rejected the suggestion that the role of ISOs and RTOs in the NERC/Regional Entity allocation

²⁵⁸ Option one states that the balancing authority will provide WECC with a list of all load serving entities located in its area, including the load serving entity's name, contact information, and net energy for load and that WECC will use this list to bill the load serving entities directly. Option two also requires the balancing authority to provide this list, but provides that WECC will bill the balancing authorities for all costs on an annual basis, leaving it to the balancing authority to equitably allocate WECC's costs and collect funds based on net energy for load.

and collection process should be addressed in a delegation agreement. Specifically, the California ISO asserts that in the *Business Plan and Budget Order*, the Commission expressly held that NERC's delegation agreements should address only the relationship between NERC and the Regional Entity, not between NERC and an ISO or RTO.²⁵⁹ The California ISO notes that the Commission went on to state that NERC may contract with an ISO or RTO for collection purposes, but that if it did so, it would be required to ensure that: (i) the collection contractor transfers the money to NERC in a timely manner; and (ii) the collection contractor states that it will not use its position as billing agent and collector to unduly influence NERC's decisions.

523. The California ISO states that, to date, it has not been provided an opportunity to elect either of the two allocation options provided for under the WECC Exhibit E allocation proposal. Nor has an agreement been executed regarding these obligations. Nonetheless, the California ISO points out that WECC appears to be proceeding as if this proposal were already in effect and as if the California ISO had agreed to undertake option two.²⁶⁰

524. The California ISO states, however, that it does not agree to serve as a collection agent for NERC and WECC, *i.e.*, that it is not willing to perform the collection functions contemplated for balancing authorities under proposed option two. The California ISO adds that, consistent with the general framework of option one, it is willing to work with WECC and all interested load serving entities to facilitate the direct invoicing of statutory costs to load serving entities. But currently, the California ISO notes that it is not in a position to provide WECC all of the information it has requested under option one.²⁶¹

525. The California ISO also requests that the Commission reject the WECC Exhibit E provision allowing WECC to charge interest on the late payment of costs associated with

²⁵⁹ California ISO comments at 18, *citing Business Plan and Budget Order*, 117 FERC ¶ 61,091 at P 135.

²⁶⁰ The California ISO notes that in December, it received separate invoices from WECC for both statutory and non-statutory costs with a January 14th due date.

²⁶¹ The California ISO notes, for example, that while it has information regarding net energy for load for all of WECC's members, it does not have this information for all load serving entities in the California ISO control area, including behind-the-meter load data for municipal entities. The California ISO adds that it does have a clear mechanism for obtaining this information.

WECC's non-statutory functions. The California ISO asserts that it is inappropriate for the WECC Delegation Agreement to authorize the recovery of non-statutory costs. The California ISO argues that because certain municipal utilities may need more than 30 days to obtain the necessary authorizations they will pay WECC, the Commission should establish a 90-day safe harbor for these entities. Finally, the California ISO asserts that Exhibit E should be revised to provide that balancing authorities or any other agent collecting WECC charges on behalf of WECC is not liable for any interest resulting from delays by individual load serving entities.

526. The California IOUs argue that while the cost allocation options set forth in WECC Exhibit E, section 2 appear reasonable, in principle, there are significant deficiencies that remain to be finalized. The California IOUs also note that the list of load serving entities on which the WECC Exhibit E relies has not been developed, to date. Specifically, the California IOUs point out that the list posted by WECC on its website does not reflect the inclusion of load serving entities who have elected to take retail service. As such, the California IOUs recommend that Exhibit E be revised to include an express obligation requiring all load serving entities to submit the information WECC will need to carry out its billing and collection functions.

527. In addition, the California IOUs argue that the WECC Exhibit E fails to determine how net energy for load will be determined and the means by which it will be updated. Accordingly, the California IOUs request that Exhibit E be revised to address these matters.

528. Finally, CAC/EPUC points out that, in making calculations of net energy load, balancing authorities in WECC currently do not include on-site load served by customer-owned generation. CAC/EPUC asserts that this practice should be continued.²⁶²

b. Commission Findings

529. We accept Exhibit E to the WECC Delegation Agreement. We also identify modifications to be addressed by NERC and WECC. We accept, in principle, that a Regional Entity may rely on a balancing authority, such as the California ISO, to provide a list of all load serving entities to which Exhibit E charges will be assessed. We also accept, in principle, that the Regional Entity may, with the necessary authorization, either

²⁶² We address, above, CAC/EPUC's related argument that the reliability standards over which a Regional Entity will exercise its delegation authority should not apply to behind-the-meter load or qualifying facilities.

bill load serving entities directly, as provided under the WECC Exhibit E option one proposal, or bill the designated balancing authority, as provided under option two, leaving it to the balancing authority to allocate costs and collect funds from the load serving entities. This is generally consistent with the *Business Plan and Budget Order*, wherein the Commission approved NERC's proposal permitting WECC to "invoice [load serving entities], or *designees* within its footprint."²⁶³ The "designee" under the WECC Exhibit E proposal, would be the California ISO (assuming it agrees to undertake this role). WECC and the California ISO will be required to formalize this arrangement as they see fit.

530. With respect to WECC's proposal to modify the WECC Exhibit E to allow for the assessment of interest on late payments, we find that WECC has failed to identify the interest rate that will apply and explain what it will do with the interest collected. In addition, we note that the California ISO has raised legitimate concerns regarding this provision. First, WECC's collection agents should not be held liable for any interest resulting from the payment delays of individual load serving entities given the fact that the ERO does not hold Regional Entities liable when they act as the collection agent. We also agree that the WECC Delegation Agreement is not the appropriate vehicle for addressing the rights and obligations relating to late payments for non-statutory functions. Accordingly, we direct NERC and WECC to address these matters.

531. In the *ERO Certification Order*, the Commission approved NERC's proposal to delegate billing and collection functions to Regional Entities.²⁶⁴ However, the Commission required that appropriate safeguards be adopted in the delegation agreement to ensure that the Regional Entity will transfer the money it collects to NERC in a timely manner and that the Regional Entity will not use its position as a billing and collection agent to unduly influence NERC's decisions. The WECC Exhibit E does not address these required safeguards. Accordingly, we direct NERC and WECC to do so. To the extent that a balancing authority agrees to act as the collection agent, these safeguards must be addressed in that context as well.

532. The *ERO Certification Order* required that a Regional Entity engaged in non-statutory activities, *i.e.*, non-FPA section 215, non-reliability regulator activities, would

²⁶³ *Business Plan and Budget Order*, 117 FERC ¶ 61,091 at P 135 (emphasis added).

²⁶⁴ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 166 and P 169.

be required to list these activities in Exhibit E.²⁶⁵ The identification of non-statutory activities performed by a Regional Entity is necessary to ensure that such activities do not compromise the Regional Entity's oversight role or independence or present a conflict of interest regarding its oversight of transmission operators. The WECC Exhibit E fails to provide this information. Accordingly, we direct NERC and WECC to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities.

533. With respect to the proposed deviation requiring NERC to electronically transfer WECC's and WIRAB's statutory costs within 24 hours, we are not persuaded that this proposal is either necessary or appropriate. In fact, WECC has an important role in ensuring NERC's financial security and requiring NERC to operate with this degree of turn-around may not be time or cost effective. Accordingly, because NERC and WECC have not addressed this deviation, we direct NERC and WECC to do so.

534. We reject the California IOUs request that Exhibit E be revised to include an express obligation requiring load serving entities to provide the information WECC will need in connection with its billing and collection functions. First, these entities will not be parties to this agreement. Moreover, under the Commission's regulations, these entities are already required to register with NERC and the Regional Entity for each region in which they use, own or operate bulk-power system facilities. Nonetheless, we take seriously the California IOUs report that WECC's list of load serving entities, as of December 2006, may be inaccurate or incomplete. Accordingly, we direct NERC and WECC to address the status of this issue.

535. We reject the California IOUs request to further define, in Exhibit E, the term "net energy for load." The Commission has already addressed its understanding of this term in the *ERO Certification Order*.²⁶⁶ In addition, the *pro forma* base Delegation

²⁶⁵ *Id.* at P 580. By contrast, statutory costs, *i.e.*, reliability regulator-related costs, include those costs associated with all activities performed pursuant to FPA section 215 and the Commission's reliability regulations. *See* Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 56 and P 65.

²⁶⁶ The Commission stated that net energy for load is equal to all generation located in a balancing authority area (less station use), plus energy received from other balancing authority areas, less energy delivered to balancing authority areas through interchange. *See ERO Certification Order*, 116 FERC ¶ 61,062 at P 135. The Commission further stated that net energy for load includes balancing authority area
(continued...)

Agreement adequately addresses other details relating to WECC's submittal of its annual budget and the information it will be required to include. Interested parties may raise issues relating to WECC's calculations of its net energy for load in these proceedings.

536. We also reject the California ISO's request that we direct WECC to establish a 90-day safe harbor provision for those entities (*e.g.*, municipals) that may require additional authorization in order to pay WECC charges. The California ISO has not demonstrated that its request is necessary. In fact, each entity will be on notice that it will be invoiced and can plan accordingly.

537. Finally, we need not address here CAC/EPUC's request that the term net energy for load exclude from its calculation behind-the-meter load and qualifying facilities. This argument has been addressed and rejected above.

H. FRCC Delegation Agreement (Docket No. RR07-8-000)

538. We accept the FRCC Delegation Agreement. We also identify modifications to be addressed by NERC and FRCC, including the modifications identified above, as applicable to the *pro forma* Delegation Agreement. FRCC states that it was established in 1996 as a self-regulatory, NERC reliability region, with responsibility for maintaining grid reliability in Peninsular Florida, east of the Apalachicola River. The FRCC region is a less than interconnection-wide region tied to the Eastern Interconnection on only one side. FRCC's members include investor-owned utilities, cooperative utilities, municipal utilities, a federal power agency, power marketers, and independent power producers.

539. We find that FRCC will satisfy the FPA section 215 requirements for delegation of ERO authority. FRCC will be governed by a balanced stakeholder board and will otherwise satisfy the criteria applicable to NERC's certification to serve as the ERO. We also find that the FRCC Delegation Agreement will promote effective and efficient administration of the bulk-power system.

1. FRCC Base Delegation Agreement

540. The FRCC base Delegation Agreement adopts the *pro forma* base Delegation Agreement, without deviation. Accordingly, we accept the FRCC base Delegation Agreement.

losses, but excludes energy required for storage at electric energy storage facilities, such as pumped storage. *Id.*

2. Exhibit A: FRCC Regional Boundary

541. The geographic region in which FRCC will perform its duties and functions under the FRCC Delegation Agreement is Peninsular Florida, east of the Apalachicola River, with the exception of a small section of Baker and Nassau counties in northeast Florida.²⁶⁷ The FRCC region interconnects with the SERC region via 10 transmission lines.²⁶⁸ NERC, in support of this proposed regional boundary, states that the six Regional Entities within the Eastern Interconnection, including FRCC, have worked together to develop their respective Exhibit A proposals. This is especially important for a region that is less than interconnection-wide, where failure of one of the region's bulk-power system components may have an adverse impact on the neighboring regions' bulk-power systems. NERC asserts that these Regional Entities are satisfied that they have properly identified their boundaries so as to avoid both gaps and overlaps, and know which owners, operators and users of the bulk-power system located along the boundaries are in which regions.

542. We find that the FRCC region, as described in Exhibit A, represents a sufficient size, scope and configuration. In the *pro forma* Exhibit A accepted by the Commission in the *ERO Certification Order*, the regional boundary identified in Exhibit A is required to reflect coordination with neighboring Regional Entities, as appropriate, to ensure that all relevant areas are either included within the geographic boundaries of a Regional Entity or specifically identified as not being within the geographic boundaries of any Regional Entity.²⁶⁹ We find that the FRCC Exhibit A representations satisfy this requirement.

3. Exhibit B: FRCC Governance Structure

543. NERC, in its transmittal letter, asserts that FRCC's governance structure satisfies the requirements of FPA section 215 because, among other things: (i) FRCC will have a balanced stakeholder board; and (ii) FRCC is not a user, owner, or operator of bulk-power system facilities. NERC and FRCC also represent that the FRCC Delegation Agreement satisfies the five Governance Criteria set forth in Exhibit B of the *pro forma* Delegation Agreement. FRCC's governance structure is established under its bylaws, as

²⁶⁷ Areas west of the Apalachicola River in Florida are within the SERC region.

²⁶⁸ The 10 lines consist of two 500 kV, four 230 kV and four 115 kV lines.

²⁶⁹ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 534.

last amended on March 2, 2006 (FRCC bylaws). The FRCC bylaws are included in NERC's submittals as supplemental information.

a. FRCC Bylaws

544. The FRCC bylaws and the *pro forma* Governance Criteria to which they relate, can be summarized as follows:

545. *Composition and Election of the Board (Criterion 1)*: FRCC represents that it will be governed by a balanced stakeholder board because the board will be comprised of directors representing five sectors and because of the voting protocols applicable to the board. FRCC refers to the following provisions of the FRCC bylaws:

- *Section 3.2*: Section 3.2 provides that the board will consist of 11 directors representing the FRCC CEO (an *ex officio* non-voting director) and five stakeholder sectors, namely: (i) suppliers; (ii) non-investor owned utility wholesalers; (iii) load serving entities consisting of municipal utilities and cooperatives); (iv) generating load serving entities; and (v) investor owned utilities.²⁷⁰
- *Section 3.2(e)*: Section 3.2(e) provides that an action by the board is subject to a weighted vote, by sector.
- *Section 3.5*: Section 3.5 provides that a board quorum requires the presence of directors holding 60 percent or more of the board's total vote share covering at least four sectors. Bylaw changes must be Board-approved and then passed by the affirmative fractional votes of three of the five sector votes wherein each sector can cast one sector vote which is divided into an affirmative and negative component, in direct proportion to the total votes cast by the voting members in that sector.
- *Section 3.6*: Section 3.6 provides that an action by the board requires approval of 60 percent or more of the total voting strength of the board.

²⁷⁰ Three directors each are elected by the suppliers sector and the investor owned utility sector; and two directors each are elected by the non-investor owned utility sector and load serving entity sector. FRCC's sector classifications are defined at section 1.2 of the FRCC bylaws.

546. *Rules Assuring Independence (Criterion 2)*: FRCC represents that it has established rules that assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its officers. FRCC refers to the following provisions of the FRCC bylaws:

- *Section 2.1*: Section 2.1 requires FRCC's voting members to meet at least annually. The delegates from each sector will elect, by majority vote, directors to the board.
- *Section 3.2*: Section 3.2 addresses the election of directors.

547. *Membership (Criterion 3)*: FRCC represents that it has established rules that assure that its membership is open, that it charges no more than a nominal membership fee and agrees to waive the fee for good cause shown, and that membership is not a condition for participating in the development of or voting on proposed reliability standards. FRCC refers to the following provisions of the FRCC bylaws:

- *Section 1.1*: Section 1.1 provides that membership is open to any entity that: (i) qualifies for eligibility in one or more of the stakeholder Sectors, identified above; and (ii) otherwise satisfies the eligibility requirements set forth in section 1.1 of the FRCC bylaws. There are three membership classes: voting members (*i.e.*, entities that satisfy the eligibility requirements of section 1.1); affiliate members (*i.e.*, entities that otherwise qualify as a voting member and that are affiliates of an entity that is a voting member); and adjunct members (*i.e.*, entities unable to qualify as either a voting member or an affiliate member).
- *Fees*: Annual budget balances not reimbursed by NERC are payable by voting members based upon a weighted allocation, with a minimum charge of \$20,000. The allocation is based on each member's system share of FRCC's net electric energy requirements, net summer generating capacity, and circuit miles of transmission lines. The annual membership fee for affiliates and adjunct members is \$5,000.

548. *Committees and Subordinate Organizational Structures (Criterion 4)*: FRCC represents that it has established rules that assure balance in its decision-making committees and subordinate organizational structures and assure no two industry sectors can control any action and no one industry sector can veto any action. FRCC refers to the following provisions of the FRCC bylaws:

- *Sections 1.8*: Section 1.8 provides that no entity may simultaneously hold more than one voting member status or have more than one voting representative on each of the standing committees, or more than one set on the board.

- *Article V*: Article V addresses the establishment of standing committees reporting to the board. Each voting member may appoint one representative to serve on the standing committees.²⁷¹
- *Section 5.7*: Section 5.7 provides, as a quorum requirement, representation at any meeting of the standing committee of 60 percent or more of the total voting strength of the standing committee, provided that at least three sectors are represented.
- *Section 5.8*: Section 5.8 addresses sector voting. Each voting representative present at a meeting is assigned a vote equal to the voting strength of their sector, divided by the number of voting representatives present in that sector. An investor-owned utility sector voting representative may have up to 1.167 votes. Action by the standing committee requires an affirmative vote equal to or greater than 60 percent.

549. *Openness and Balance of Interests (Criterion 5)*: FRCC represents that it has established rules that provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in exercising its duties. FRCC refers to the following provisions of the FRCC bylaws:

- *Section 3.4*: Section 3.4 addresses notice requirements.
- *Section 10.4*: Section 10.4 provides that any voting member or standing committee representative who has a minority opinion on any significant issue may present the minority opinion to the board in a manner prescribed by the board.
- *Section 8.1*: Section 8.1 provides that the chairman of the Florida Public Service Commission will be invited to attend all meetings of the board. The board will invite other observers as the board deems appropriate.

b. Commission Findings

550. We find that the FRCC bylaws and the representations made in Exhibit B of the FRCC Delegation Agreement satisfy the governance requirements of FPA section 215

²⁷¹ Under FRCC's rules of procedure for standing committees, standing committees will be the sponsor of all subordinate subcommittees, working groups, or task forces it may create.

and the *pro forma* Exhibit B Governance Criteria. We also identify modifications to be addressed by NERC and FRCC. The FRCC board will be comprised of directors chosen from all industry segments, with no two sectors able to control a vote. No single sector will be able to veto a measure, given FRCC's quorum and voting protocols. As such, FRCC's board composition and voting protocols are designed to ensure that FRCC will be governed by an appropriate balance of stakeholder interests.

551. However, while NERC states that FRCC is not a user, owner or operator of the bulk-power system, FRCC is a reliability coordinator. As such, FRCC is obligated to demonstrate a strong separation between oversight and operational functions.²⁷² However, in its current configuration, both FRCC's compliance staff and reliability coordinators are hired and have their performance reviewed by FRCC management, and both have their work product reviewed by the same member committees and management personnel. The result is a lack of independence in compliance monitoring and enforcement for FRCC operational functions. Accordingly, we direct NERC and FRCC to remedy these deficiencies. If it chooses, and NERC agrees, FRCC may engage NERC to oversee the compliance and enforcement functions as they relate to FRCC's compliance with the Reliability Standards. This is one possible way to establish the strong separation we require.

552. We also require FRCC to modify FRCC's proposal to assess all members for the costs of non-statutory activities. While the Commission has stated that a Regional Entity may engage in non-statutory activities, subject to certain limits, its primary function is to develop and enforce reliability standards. It would be improper to require interested stakeholders to fund other activities as a condition to their membership in FRCC. FRCC may collect funds through other means (such as user fees), or may charge special membership fees to those who either choose or are required to participate in non-FPA section 215 activities, however, it may not require contributions from those who do not. Additionally, we require FRCC to modify FRCC's proposal to assess affiliate and adjunct members a \$5,000 annual fee. While the Commission has stated that Regional Entities may assess nominal membership fees, FRCC's fee appears to exceed this limit.²⁷³ Further, funding of all statutory activities through NERC was approved in the *Business Plan and Budget Order*. FRCC, if it wishes, may propose an appropriate fee in its annual budget filing.

²⁷² *ERO Certification Order*, 116 FERC ¶ 61,062 at P 698

²⁷³ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 171.

553. Finally, we clarify that the FRCC bylaws are “rules,” under our regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²⁷⁴

4. Exhibit C: FRCC Reliability Standards Development

554. Exhibit C to the FRCC Delegation Agreement consists of narrative responses addressing each of NERC’s 34 *pro forma* Common Attributes addressed above.²⁷⁵ In addition, NERC and FRCC rely on FRCC’s procedures, as set forth in a manual, “The FRCC Regional Reliability Standard Development Process,” as last amended October 24, 2006 (FRCC Standards Development Manual). The FRCC Standards Development Manual is included in NERC’s filing as supplemental information and is cross-referenced in the narrative responses addressing NERC’s 34 Common Attributes.

555. NERC, in its transmittal letter, states that the FRCC Standards Development Manual generally meets the requirements of its 34 Common Attributes. However, NERC points out one “difference of interest” or deviation. Specifically, NERC notes that in order to vote on a reliability standard, FRCC membership would be required. NERC adds that FRCC membership is subject to a membership fee.

556. The FRCC Standards Development Manual also addresses voting procedures applicable to the adoption of proposed reliability standards. It provides that the planning committee and operating committee have the primary responsibility for the development of reliability standards, subject to board approval. These committees are comprised of five sectors for stakeholder representation and for voting. The board may adopt or reject a proposed standard. An approved standard will be submitted to NERC for approval.

557. We accept Exhibit C to the FRCC Delegation Agreement. First, we find that the voting procedures applicable to the standards formation process are consistent with the requirements of FPA section 215. We also agree that the FRCC Standards Development Manual is generally consistent with NERC’s *pro forma* Common Attributes. However, we clarify that the FRCC Standards Development Manual embodies “rules,” under our

²⁷⁴ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

²⁷⁵ See *supra* section IV(A).

regulations, which are subject to NERC approval and, if approved by NERC, Commission approval.²⁷⁶

558. We also find that the FRCC Standards Development Manual unnecessarily restricts those who can request that a standard be developed or modified, participate in reliability standards development, and vote on reliability standards. These functions are restricted to FRCC members and the voting function is confined to FRCC committees whose participants must be an FRCC member. FRCC members are restricted to owners, operators of the bulk-power system, and load serving entities. End-users, whether large or small, are not represented and persons or entities with an interest are also excluded. We therefore direct NERC and FRCC to modify these provisions such that, consistent with the requirements of Order No. 672, all interested stakeholders, including those who are not FRCC members, may participate and vote on reliability standards.²⁷⁷

5. **Exhibit D: FRCC Enforcement**

559. Exhibit D to the FRCC Delegation Agreement adopts the *pro forma* Uniform Compliance Program, subject to the following deviations:

560. *Section 1.0:* Section 1.1.4 defines the term “Business Days.” Section 1.1.20 defines “Reliability Standard.”

561. *Section 2.0:* Section 2.0 requires entities to notify the FRCC if there are changes to their registration status.

562. *Section 3.0:* Section 3.0 authorizes the FRCC compliance committee to review compliance staff determinations for concurrence in the final determination of an alleged violation and penalties and/or sanctions. FRCC explains that the compliance committee is a balanced stakeholder committee with technical expertise and experience to assist FRCC compliance staff. If the FRCC compliance committee does not concur with the staff determination, the final determination will be made directly by the FRCC board compliance committee. If the compliance staff does not contest the FRCC compliance committee’s decision within 30 days, the compliance staff is deemed to have accepted the FRCC compliance committee’s determination of violation, sanction and/or penalty.

²⁷⁶ See 18 C.F.R. §§ 39.1 and 39.10 (2006). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 113.

²⁷⁷ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 172.

563. *Section 5.0:* Section 5.2 requires the FRCC board compliance committee to appoint a panel (the compliance advisory panel) to work with the registered entity to resolve any conflicts within a 40-day period each time a registered entity contests an alleged violation. If the dispute is not resolved within 40 days, the registered entity may request a hearing. Section 5.2 also specifies that the compliance advisory panel will not have a decision-making function, but may serve as a mechanism for dispute resolution through non-adversarial means, prior to a formal hearing.

564. *Sections 9.1, 9.2 and 9.3:* Section 9.1 states that the FRCC records management policy shall provide for a routine and orderly process for retention and disposal of paper and electronic documents. In its discussion of records management, section 9.2 changes “Applicable Governmental Authority” to “Applicable Regulatory Authority.” Section 9.3.3 changes the title of the section from “Critical Energy Infrastructure Information” to “Critical Infrastructure Information.”

565. *Attachment 2, Section 1.0:* FRCC identifies its board compliance committee as the hearing body for the compliance program in section 2.0 and states in section 3.0 that no other decision-making body exists for FRCC. Two members from each of the five sectors of the FRCC board will volunteer annually to serve in a board compliance pool from which the chair of the FRCC board will select one member of each sector to serve on the committee for a particular hearing.

566. *Attachment 2, Section 2.0:* Attachment 2, section 2 provides that a registered entity may raise an objection within 15 days after the FRCC board compliance committee is convened (rather than “reasonably in advance of the start of the hearing,” as the *pro forma* attachment 2, section 2 specifies) to a committee member based on the employment of the FRCC board compliance committee member by another registered entity. At that time, the registered entity employed or employing the member will be sent a copy of the petition and supporting information. If the committee member concurs, the member will be recused. If the committee member disagrees, he or she shall provide to the FRCC board compliance committee and the FRCC representative a written explanation. The FRCC board compliance committee will then convene a special meeting and make a determination as to whether the potential for conflict of interest is sufficient to excuse the member. In addition, the FRCC board compliance committee member being asked to recuse himself or herself is allowed to provide information regarding why he or she believes that no conflict of interest exists. The FRCC board compliance committee will then make a determination and provide a written explanation of the decision.

567. *Attachment 2, Section 3.0:* Section 3.0 states that if either party elects to be represented by counsel, the party or the counsel shall notify the FRCC board compliance committee and supply contact and other relevant information. If FRCC chooses to be

represented by counsel, actions taken or filings by the FRCC designated representative may be made by such counsel and other counsel may send documents and notices to the FRCC's designated representative. The FRCC board compliance committee may make a determination as to whether additional time is required when a party initially elected to proceed without counsel but later retained counsel, or changed counsel during the hearing process.

568. *Attachment 2, Section 6.0:* Attachment 2, section 6 addresses the process to be used when transcripts are desired in a hearing and the procedure for motions to exclude evidence prior to the start of a hearing. A party may submit proposed transcript corrections to the FRCC board compliance committee who will then issue a written notice as to whether the corrections are accepted, in whole or in part. Prior to commencement of a hearing, the FRCC board compliance committee may establish a procedure for the submission of motions for the exclusion of evidence. Attachment 2, section 6.1 requires the FRCC board compliance committee to deliberate in a one-day session within 15 days of the hearing to render their decision under the expedited hearing process.

569. *Attachment 2, Section 10.0:* Attachment 2, section 10.0 states that the FRCC board will convene a board compliance committee task force consisting of three members from the board compliance committee pool who will conduct the hearing of the matter and issue a summary written decision.

a. Responsive Pleadings

570. Progress Energy argues that the proposed deviations are not required to address circumstances unique to the FRCC region. Progress Energy argues, however, that if accepted, these deviations should be incorporated into the *pro forma* Uniform Compliance Program.

b. Commission Findings

571. We address below whether to accept any FRCC deviations from the Uniform Compliance Program. We will not, as Progress Energy suggests, require that accepted revisions be made to the Delegation Agreements of other Regional Entities.

572. We accept as provisions specific to FRCC the addition to the FRCC Compliance Program of section 1.1.4, which defines the term "Business Days" as weekdays other than holidays, as set forth in FRCC's holiday schedule, and the addition of section 1.1.20, which defines "Reliability Standard" as a NERC reliability standard or FRCC reliability standard approved by the Commission.

573. We accept FRCC's proposed revision to section 2 to state that registered entities must notify FRCC of a change of registration status "within 30 days of the change," rather than "promptly." This revision provides a more specific time period for this notice.

574. We accept FRCC's proposed deviation, at section 3, requiring that the FRCC compliance committee review FRCC compliance staff decisions to issue notices of alleged violations and associated, proposed sanctions or penalties. We find this deviation justified in light of NERC's explanation that FRCC has historically relied on member volunteers, recent turnovers in FRCC compliance staff have occurred, and the review could be eliminated if unnecessary or burdensome. However, we may reevaluate this provision in the future, based on experience.

575. We clarify that this review process will apply only to the issuance of notices of alleged violation, not to any later determination with respect to such a notice or any proposed penalty or sanction included within it. Further, with respect to a notice of alleged violation proposed to be issued to a particular registered entity, no member of the FRCC compliance committee who is employed by, or has a financial or other interest in, the registered entity or any of its affiliates may participate in the review. All such reviews must be conducted confidentially.

576. Also, we direct FRCC to provide NERC with quarterly reports that set forth the number of FRCC compliance committee reviews and that, for each review: (i) provide the FRCC compliance staff's proposed notice of alleged violation; (ii) state whether the FRCC compliance committee concurred with the proposal and, if not, state the committee's objections to it; (iii) identify each member of the FRCC compliance committee who participated in the review; (iv) provide any revisions proposed by the FRCC compliance committee; and (v) state whether the FRCC compliance staff contested the revisions, and if so, provide the FRCC board compliance committee's decision. In turn, NERC must submit these quarterly reports to the Commission. We encourage FRCC to hire and train additional qualified compliance staff members.

577. We accept FRCC's proposal to amend section 5.2 to require the FRCC board compliance committee to appoint a compliance advisory panel to work with a registered entity to resolve any conflicts within the 40-day period after the registered entity contests an alleged violation. We concur with NERC that this procedure may encourage settlements of matters relating to alleged violations. However, as with the FRCC compliance committee's review process for notices of alleged violations, no person who is employed by, or has a financial or other interest in, the registered entity contesting the alleged violation, or any of its affiliates, may participate in the compliance advisory panel. Nor may any members of the compliance advisory panel serve on a hearing body that presides over any subsequent hearing in the matter. Further, the compliance advisory

panel process must be conducted confidentially. Finally, the FRCC compliance staff must participate in this process because its agreement is needed to achieve a settlement.

578. We require FRCC to modify FRCC's proposed deviations relating to its FRCC records management policy. Specifically, in section 9.1, we reject FRCC's proposal to permit "re-creation" of records required to implement the FRCC Uniform Compliance Program, rather than to require "maintenance" of these records. FRCC has not shown how it would "re-create" a record or that a "re-created" record would be identical to the original record. Nor has FRCC shown that it cannot maintain these records during the applicable record retention period.

579. We accept FRCC's proposal, at section 1.0 and exhibit A of attachment 2, to identify the FRCC board compliance committee as the hearing body for FRCC's Compliance Program. This designation is consistent with the *pro forma* Uniform Compliance Program, at attachment 2, section 1, which provides that a committee of a compliance enforcement authority's board may constitute such a hearing body. However, in exhibit A, FRCC does not clearly identify the number of votes required to carry the vote if a quorum of committee members, rather than the full number of members, conduct a particular hearing. Consistent with our earlier ruling on this matter, with respect to the *pro forma* Uniform Compliance Program, we require FRCC to specify that a majority of a quorum of committee members carries the vote.

580. In attachment 2, section 2, we accept FRCC's proposal to add additional detail to the Uniform Compliance Program's procedures for a registered entity to object to an FRCC board compliance committee member, as required to address the circumstances of FRCC's designation of this committee as the hearing body for attachment 2.

581. We accept FRCC's proposed amendment of attachment 2, section 3, which specifies greater details regarding representation by counsel. We also accept FRCC's proposal, at attachment 2, section 6, to provide specifically for submission of proposed transcript corrections to the hearing body under the long-form hearing procedure. This proposal will result in a more accurate record. We also accept FRCC's proposal that the FRCC board compliance committee deliberate in a one-day session within 15 days of a short-form hearing to render its decision, as a procedure to ensure more timely decisions.

582. We accept the FRCC's proposal, at attachment 2, section 10, to appoint a FRCC board compliance committee task force as the hearing body for expedited hearings. This task force will be comprised of three members of a hearing body that we have found to be acceptable in our discussion of FRCC's proposed attachment 2, section 1. However, we direct FRCC to explain the voting requirements with respect to the expedited hearing, consistent with our earlier determination as to the FRCC board compliance committee,

and the manner in which a FRCC board compliance committee task force will be appointed.

583. Finally, we observe that, in some circumstances, the deviations proposed by FRCC result in typographical or other errors. We direct FRCC to review these deviations, eliminate such errors, and submit a version of its Uniform Compliance Program that corrects them, along with a redline version that indicates changes FRCC made in this process.

6. Exhibit E: FRCC Funding

584. Exhibit E to the FRCC Delegation Agreement adopts the *pro forma* Exhibit E, subject to the following deviations:

585. *Section 1:* Section 1 modifies the *pro forma* section 1 by providing that FRCC “will identify costs, as part of its annual budget submittal,” in place of the *pro forma* phrase “shall include in its annual budget submission to NERC amounts for costs.”

586. *Section 2:* Section 2 modifies the *pro forma* section 2 by omitting the Regional Entity’s obligation to submit its list of load serving entities at the same time it submits its budget request. Section 2 adds a commitment that NERC seek approval from the applicable governmental authorities for all load serving entities to be compelled to pay all NERC and FRCC costs under their jurisdiction. In addition, section 2 states that the list of load serving entities which will be submitted annually by FRCC to NERC will include its load serving entities “associated” net energy for load in place of the *pro forma* term “proportionate” net energy for load.

587. *Section 3:* Section 3 obligates FRCC to support NERC’s collection of funds by providing the necessary information, adopts language defining NERC’s billing and collection processes, and deletes language stating that the costs to be funded are “identified in this Exhibit E.”

588. *Section 4:* Section 4 revises the phrase “Funds from financial penalties shall not be directly applied to any program maintained by the ‘investigating entity’” by deleting “investigating entity” and replacing it with FRCC.

589. We will accept the FRCC Delegation Agreement’s proposed revisions to the *pro forma* Exhibit E. We also identify modifications to be addressed by NERC and FRCC. The *ERO Certification Order* required that if a Regional Entity is engaged in non-statutory activities, i.e., non-FPA section 215, non-reliability regulator activities, then it must list them in Exhibit E. The identification of non-statutory activities performed by a Regional Entity is necessary 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. The FRCC Exhibit E fails to provide this information. Accordingly, we direct NERC and FRCC to do so in the form of a revised Exhibit E. Further, the revised Exhibit E should indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities.

590. Finally, we accept the proposed FRCC Exhibit E deviation regarding use of the designation "FRCC" in place of "investigating entity."

VI. Regional Entity Business Plans for 2007

591. For the reasons discussed below, we accept the Regional Entity 2007 Business Plans, as submitted in Docket No. RR06-3-000. We also provide guidance regarding the submission of these entities' 2008 Business Plans. In the *ERO Certification Order*, the Commission found that NERC's anticipated submission of its proposed annual budget and the annual budgets for each of its proposed Regional Entities, should provide additional detail regarding the funding that will be derived by NERC and the Regional Entities pursuant to FPA section 215 and whether this funding, as required by Order No. 672, will support statutory activities.²⁷⁸ Accordingly, the Commission deferred ruling on whether the activities identified by NERC in its ERO application satisfied these requirements.

592. Subsequently, in the *Business Plan and Budget Order*, the Commission addressed NERC's submission of its 2007 Business Plan and Budget and the 2007 Business Plans and Budgets for its prospective Regional Entities. The Commission accepted NERC's 2007 Business Plan and Budget, subject to conditions.²⁷⁹ The Commission also accepted the Regional Entity 2007 Budget, subject to condition.²⁸⁰ However, the Commission

²⁷⁸ *ERO Certification Order*, 116 FERC ¶ 61,062 at P 184.

²⁷⁹ Specifically, the Commission directed NERC to: (i) explain the organization and structure of its existing accounting and record keeping system; (ii) address whether its current accounting practices and procedures comply with generally accepted accounting principles; and (iii) include, in its 2008 business plan and budget, greater detail and justification for the criteria its uses to designate statutory activities. *Id.* at P 30.

²⁸⁰ Among other things, the Commission directed that in the proposed Regional Entity budgets for 2008, the activities for which funding will be sought be consistent, as based on NERC's designations, descriptions, and criteria applicable to statutory activities. *Id.* at P 39.

deferred ruling on the proposed Regional Entity 2007 Business Plans, pending its consideration of the Regional Entity delegation agreements. Based on our findings above regarding these agreements, we reach below the issues deferred by the Commission in the *Business Plan and Budget Order*.

A. NERC's Application in Docket No. RR06-3-000 and Related Submittals

593. NERC's application in Docket No. RR06-3-000, as it relates to the Regional Entity 2007 Business Plans, was summarized by the Commission in the *Business Plan and Budget Order*. By way of review, we note here that the business plans submitted for NERC's former reliability councils (i.e., for MRO, NPCC, RFC, SERC, FRCC, and WECC) generally follow the organizational structure of NERC's 2007 business plan. In addition, we noted that TRE's business plan allocates statutory functions as between TRE and ERCOT, while SPP allocates statutory functions as between the SPP Regional Entity trustees and the SPP RTO. The performance of these statutory functions is discussed in greater detail above as it relates to our conditional acceptance of these entities' bylaws, their standards development manuals, and their Exhibit E submissions.

B. Responsive Pleadings

594. Alcoa, in its comments submitted in response to NERC's compliance filing, in Docket No. RR06-1-004, renews many of the arguments it raised initially in Docket No. RR06-3-000. First, Alcoa asserts that the information made available to date makes it impossible to determine whether the 2007 business plans reflect a cost-effective way of administering the Regional Entity's statutory functions, or whether the significant budgetary differences as between these Regional Entities' budgets can be justified.

595. Alcoa further asserts that while the *Business Plan and Budget Order* deferred ruling on the Regional Entity business plans, the assumption underlying that deferral, *i.e.*, the assumption that additional facts would be revealed by the Delegation Agreements, has proven not to be the case. Specifically, Alcoa notes that in the Exhibit E submittals to each of the Delegation Agreements, the prescribed scope of activities to be funded through NERC does not attempt to explain or justify the significant differences among and between the Regional Entity budgets. Alcoa requests that NERC be directed to submit the information necessary to ensure that the disparities reflected in the Regional Entity business plans are properly explained before the Regional Entity budgets, business plans, and delegation agreements receive final approval.

C. Commission Findings

596. We accept the Regional Entity 2007 Business Plans. First, we find that these business plans are generally consistent with (and reflect) the statutory functions previously accepted by the Commission and made part of the *pro forma* Delegation Agreement at Exhibit E, section 1, namely, statutory functions related to: (i) reliability standard development; (ii) compliance enforcement; (iii) organization registration and certification; (iv) reliability readiness audit and improvement; (v) reliability assessment and performance analysis; (vi) training and education; and (vii) situational awareness and infrastructure. These business plans are also further clarified by our acceptance, above, of these entities' bylaws and standards development manuals.²⁸¹

597. These business plans, as supplemented by NERC's filings herein and the additional filing requirements established above, will generally satisfy the requirements of Order No. 672 and thus address Alcoa's concerns. However, we also agree that greater consistency among these entities' 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 Entity's statutory functions. The forum for raising these issues will be the annual budget filings.

598. Accordingly, when NERC and the Regional Entities submit their 2008 budget and business plans, those submittals must ensure that the differences among these budgets and business plans are minimized and that any differences are both identified and justified. To meet this objective, NERC will be required to coordinate with the Regional Entities for the purposes of providing better designations, descriptions, and criteria applicable to the NERC/Regional Entity statutory activities.

The Commission orders:

(A) NERC's compliance filing, in Docket No. RR06-1-004, including its proposed revisions to the *pro forma* Delegation Agreement and *pro forma* Uniform Compliance Program, are hereby accepted, as discussed in the body of this order. NERC is hereby directed to make a filing addressing the required modifications to NERC's

²⁸¹ We note in particular our requirement that the Exhibit E for each of these entities expressly enumerate both the statutory and non-statutory function that the entity will perform.

Uniform Compliance Program and *pro forma* Delegation Agreement within 180 days from the date of this order.

(B) The NERC/Regional Entity Delegation Agreements, as submitted in Docket Nos. RR07-1-000, *et al.*, are hereby accepted, without change, to become effective upon execution and re-filing within 30 days of the date of this order, as discussed in the body of this order. In addition, NERC and the Regional Entities are hereby directed to make a filing within 180 days of the date of this order, addressing modifications to their Delegation Agreements, as discussed in the body of this order.

(C) FRCC is hereby directed to provide NERC with quarterly reports setting forth the number of FRCC compliance committee reviews and related information, as discussed in the body of this order.

(D) NERC, in its first ERO performance assessment, is hereby directed to address: (i) the effectiveness of the SPP bylaws in ensuring an adequate separation of functions as between the SPP RTO and the SPP Regional Entity trustees; and (ii) the effectiveness of WECC's stakeholder voting structure as it relates to the standards development process.

(E) The 2007 Regional Entity Business Plans, as submitted in Docket No. RR06-3-000, are hereby accepted.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Philis J. Posey,
Deputy Secretary.

Attachment A

**Interventions, Protests and Comments
In Docket No. RR06-1-004
(NERC's Compliance Filing)**

Alcoa Inc.
American Municipal Power-Ohio, Inc.
American Public Power Association
Arkansas Electric Cooperative Corporation
Dominion Resources Services, Inc.
Duke Energy Corporation
East Texas Electric Cooperative, Northeast Texas
Electric Cooperative, and Tex-La Electric Cooperative
Of Texas, Inc.
Edison Electric Institute
Entergy Services Inc.
International Transmission Company and
Michigan Electric Transmission Company, LLC
FirstEnergy Service Company
Georgia Systems Operations Corporation
ISO New England Inc.
Kansas City Power & Light Company
Lafayette Utilities System and
Oklahoma Municipal Power Authority
Midwest Reliability Organization
New York Independent System Operator, Inc.
Northeast Coordinating Council: Bross-Border Regional
Entity, Inc.
Northern California Power Agency
PacifiCorp and MidAmerican Energy Company
Progress Energy, Inc.
RFC Corporation
SERC Reliability Corporation
Southwest Power Pool, Inc.
Transmission Access Policy Study Group
Transmission Agency of Northern California
Western Electricity Coordinating Council
Xcel Energy Services Inc.

Attachment B

**Interventions, Protests and Comments
In Docket No. RR07-1-000
(TRE Delegation Agreement)**

Alcoa Inc.
Electricity Consumers Resource Council
Exelon Corporation
Florida Reliability Coordinating Council
Golden Spread Electric Cooperative, Inc.
ISO New England Inc.
Midwest Reliability Organization
National Grid USA
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.
Pacific Gas and Electric Company
PacifiCorp and MidAmerican Energy Company
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company
Southwest Power Pool, Inc.

**Interventions, Protests and Comments
In Docket No. RR07-2-000
(MRO Delegation Agreement)**

Alcoa Inc.
American Transmission Company LLC
Dominion Resources Services, Inc.
Duke Energy Corporation
Electricity Consumers Resource Council
Exelon Corporation
Florida Reliability Coordinating Council
ISO New England Inc.
Midwest Independent Transmission System Operator, Inc.
Midwest Reliability Organization
National Grid USA
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.

Pacific Gas and Electric Company
PacifiCorp and MidAmerican Energy Company
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company
Southwest Power Pool, Inc.
Wisconsin Public Power Inc.
WPS Resources Corporation
Xcel Energy Services Inc.

**Interventions, Protests and Comments
In Docket No. RR07-3-000
(NPCC Delegation Agreement)**

Alcoa Inc.
Dominion Resources Services, Inc.
Duke Energy Corporation
Electricity Consumers Resource Council
Exelon Corporation
Florida Reliability Coordinating Council
ISO New England Inc.
Midwest Reliability Organization
National Grid USA
New York Independent System Operator, Inc.
New York Transmission Owners
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.
Northeast Utilities Companies
Pacific Gas & Electric Company
PacifiCorp and MidAmerican Energy Company
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company
Southwest Power Pool, Inc.

**Interventions, Protests and Comments
In Docket No. RR07-4-000
(RFC Delegation Agreement)**

Alcoa Inc.
Allegheny Power and Allegheny Energy Supply
Company, LLC
American Municipal Power-Ohio, Inc.
American Transmission Company LLC
Blue Ridge Power Agency
Dominion Resources Services, Inc.
Duke Energy Corporation
Electricity Consumers Resource Council
Exelon Corporation
FirstEnergy Service Company
Florida Reliability Coordinating Council
International Transmission Company and
Michigan Electric Transmission Company, LLC
ISO New England Inc.
Midwest Reliability Organization
National Grid USA
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.
Pacific Gas & Electric Company
PacifiCorp and MidAmerican Energy Company
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company
Southwest Power Pool, Inc.
Wisconsin Electric Power Company

**Interventions, Protests and Comments
In Docket No. RR07-5-000
(SERC Delegation Agreement)**

Alcoa Inc.
Ameren Services Company
Arkansas Electric Cooperative Corporation
Central Electric Power Cooperative, Inc.
Dominion Resources Services, Inc.
Duke Energy Corporation

Electricity Consumers Resource Council
Entergy Services Inc.
Exelon Corporation
Florida Reliability Coordinating Council
Georgia Systems Operations Corporation
Georgia Transmission Corporation
ISO New England Inc.
Midwest Independent Transmission System Operator, Inc.
Midwest Reliability Organization
National Grid USA
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.
Oglethorpe Power Corporation
Pacific Gas & Electric Company
PacifiCorp and MidAmerican Energy Company
Progress Energy, Inc.
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company
Southern Company Services, Inc.
Southwest Power Pool, Inc.

**Interventions, Protests and Comments
In Docket No. RR07-6-000
(SPP Delegation Agreement)**

Alcoa Inc.
American Electric Power Service Corporation
Duke Energy Corporation
East Texas Electric Cooperative, Northeast Texas
Electric Copperative, and Tex-La Electric Cooperative
of Texas, Inc.
Electricity Consumers Resource Council
Exelon Corporation
Florida Reliability Coordinating Council
Golden Spread Electric Cooperative, Inc.
ISO New England Inc.
Kansas City Power & Light Company
Lafayette Utilities System and
Oklahoma Municipal Power Authority
Midwest Reliability Organization

National Grid USA
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.
Oklahoma Gas & Electric Company
Pacific Gas & Electric Company
PacifiCorp and MidAmerican Energy Company
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company
Southwestern Power Administration
Southwest Power Pool, Inc.
Westar Energy, Inc. and Kansas Gas and Electric Company
Western Farmers Electric Cooperative
Xcel Energy Services Inc.

**Interventions, Protests and Comments
In Docket No. RR07-7-000
(WECC Delegation Agreement)**

Alcoa Inc.
California Independent System Operator Corporation
California Public Utilities Commission
Cogeneration Association of California and the
Energy Producers and Users Coalition
Electricity Consumers Resource Council
Florida Reliability Coordinating Council
ISO New England Inc.
Lafayette Utilities System and
Oklahoma Municipal Power Authority
Modesto Irrigation District
Midwest Reliability Organization
National Grid USA
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.
Northern California Power Agency
PacifiCorp and MidAmerican Energy Company
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company, Pacific Gas &
Electric Company, and San Diego Gas and Electric
Company

Southwest Power Pool, Inc.
Southwest Transmission Dependent Utility Group
Transmission Agency of Northern California
Western Electricity Coordinating Council
Western Interconnection Regional Advisory Body
Xcel Energy Services Inc.

**Interventions, Protests and Comments
In Docket No. RR07-8-000
(FRCC Delegation Agreement)**

Alcoa Inc.
Duke Energy Corporation
Electricity Consumers Resource Council
Florida Power & Light Company
Florida Reliability Coordinating Council
ISO New England Inc.
Midwest Reliability Organization
National Grid USA
Northeast Coordinating Council: Cross-Border Regional
Entity, Inc.
Pacific Gas & Electric Company
PacifiCorp and MidAmerican Energy Company
Progress Energy, Inc.
RFC Corporation
SERC Reliability Corporation
Southern California Edison Company
Southwest Power Pool, Inc.