REPORT OF THE SYSTEM RELIABILITY, PLANNING, & COMPLIANCE COMMITTEE

I. INTRODUCTION

The new EBA System Reliability, Planning, and Compliance Committee is pleased to submit this first committee report covering areas of NERC reliability and transmission system planning.[*] This report provides a summary of significant decisions, orders, and rules issued by the Federal Energy Regulatory Commission (FERC or Commission) or the North American Electric Reliability Corporation (NERC) from 2007 through 2009. The EBA Electricity Committee's 2007 report provides the background for the initial implementation orders issued by the FERC. In Order No. 672, the FERC certified NERC as the electric reliability organization (ERO) and approved procedures for the establishment, approval, and enforcement of electric reliability standards.[1] In Order No. 693, the FERC issued its first order approving as mandatory and enforceable the bulk of NERC's proposed reliability standards.[2] This report addresses subsequent rulings in the Order Nos. 672 and 693 proceedings as well as new developments in the ongoing efforts of the FERC and NERC to fully implement the Energy Policy Act of 2005 (EPAct 2005)[3] and enforce compliance with mandatory reliability standards. Finally, this report also addresses recent developments in the industry's regional transmission planning efforts that began with Order Nos. 888[4] and 2000.[5] Prior developments in this area were also covered in the EBA Electricity Committee's prior reports.

II. RELIABILITY GOVERNANCE AND STRUCTURE

A. FERC Order on Rehearing of ERO Certification Order

On April 19, 2007, the FERC issued an order granting clarification in part and denying rehearing of the Commission's July 20, 2006 Order certifying

* The System Reliability, Planning, and Compliance Committee wishes to acknowledge the support of the full Committee in producing this report, and in addition, to recognize specific Committee members who made particular contributions to this report. Those members are: Greg Butrus, Vanessa Colón, David Cook, Kristen Connolly McCullough, Walter Hall, Jennifer Hoffpauir, Suzanne McBride, Margaret McNaul, David McPhail, Gary Newell, Brandon N. Robinson, Daniel Simon, and Linda L. Walsh.

1. Order No. 672, *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, 114 F.E.R.C. ¶ 61,104, 71 Fed. Reg. 8,662 (Feb. 3, 2006), F.E.R.C. STATS. & REGS. ¶ 31,204 (2006); *order on reh'g*, Order No. 672-A, 114 F.E.R.C. ¶ 61,328, 71 Fed. Reg. 19,814 (June 8, 2006), F.E.R.C. STATS. & REGS. ¶ 31,212 (2006) [hereinafter, *Order No. 672*].

2. Order No. 693, *Mandatory Reliability Standards for the Bulk Power System*, 118 F.E.R.C. ¶ 61,218 (2007), F.E.R.C. STATS. & REGS. ¶ 61,218; *order on reh'g*¸Order No. 693-A, 120 F.E.R.C. ¶ 61,053 (2007).

3. Energy Policy Act of 2005, 16 U.S.C. § 824o (2005).

4. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS & REGS [Regs. Preambles 1991-1996] ¶ 31,036, at 31,790-31,791 (1996); *on reh'g*, Order No. 888-A, F.E.R.C. STATS & REGS [Regs. Preambles 1996-2000] ¶ 31,048 (1997); *on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997); *on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998); *aff'd in part, sub nom.*, Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000); *aff'd,* New York v. FERC, 535 U.S. 1 (2002) [hereinafter, *Order No. 888*].

5. Order No. 2000, *Regional Transmission Organizations*, 65 Fed. Reg. 808, 889 (Jan. 6, 2000), F.E.R.C. STATS. & REGS. [Regs. Preambles 1996-2000] ¶ 31,089, at 31,129; *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), F.E.R.C. STATS & REGS [Regs. Preambles 1996-2000] ¶ 31,092 (2000); *appeal dismissed for want of standing sub nom.* Pub. Util. Dist. No.1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001) [hereinafter, *Order No. 2000*].

NERC as the ERO.[6] The FERC granted NERC's request for clarification that a Commission-directed modification to a reliability standard must be developed pursuant to a process with "'reasonable notice and opportunity for comment, due process, openness and balance of interests', such as NERC's normal or expedited Reliability Standard development process."[7] In addition, the Commission upheld its prior determination that it can impose a deadline upon NERC for submitting to the Commission a proposed modification to a reliability standard.[8]

The FERC reaffirmed its determination that the NERC Compliance and Certification Committee (CCC) is the designated body responsible for monitoring NERC's compliance with the Rules of Procedure for the compliance enforcement program.[9] The FERC also clarified that NERC may use the ANSI-approved Reliability Standards Development Process (RSDP) to develop Violation Risk Factors (VRF), as long as the process produces timely results.[10] However, the Commission directed NERC to amend its Rules of Procedure to provide an alternate method for developing VRFs in the event the RSDP is not adequate to satisfy Commission-imposed deadlines.[11]

The FERC clarified that "there may be multiple violations of the same requirement that occur on the same day, and that each such violation would be subject to a maximum potential penalty of $1,000,000."[12] The FERC also agreed that there are requirements that are measured based on cumulative acts over time rather than discrete acts.[13] In that regard, the FERC directed NERC to specify in the future, within each applicable reliability standard, "the minimum period in which a violation could occur and how to determine when a violation arises, which may be other than once per applicable period."[14]

The FERC denied a request for rehearing of the Commission's acceptance of the provision within NERC's Sanction Guidelines providing that NERC will consider significantly increasing penalties for violations of reliability standards that occur as a result of an economic choice by the violator.[15] The Commission stated that "if a user, owner or operator of the Bulk-Power System refrains from taking actions that are necessary to comply with a requirement of a Reliability Standard in order to save money. . .the Commission endorses application of the expanded penalty provisions applicable to an economic choice decision."[16]

B. NERC Rules of Procedure for Requesting Data or Information

On February 21, 2008, the FERC issued an order conditionally approving a proposed new Section 1600 to the NERC Rules of Procedure establishing a process for NERC, or a Regional Entity, to issue requests for data or

6. *North Am. Elec. Reliability Corp.*, 119 F.E.R.C. ¶ 61,046 (2007) [hereinafter, *April 19 Order*].
7. *Id.* at P 15.
8. *Id.* at P 14.
9. *Id.* at P 25.
10. *Id.* at P 33.
11. *Id.*
12. *April 19 Order*, *supra* note 7, at P 39.
13. *Id.* at P 40.
14. *Id.* at P 41.
15. *Id.* at PP 49-51.
16. *Id.* at P 50.

information.[17] The FERC concluded that the proposed Section 1600 adequately defines the scope of information that may be requested by NERC or a Regional Entity as any information necessary to fulfill their obligations under Section 215 of the FPA.[18] Under the approved Section 1600, NERC is required to post each data request for a forty-five day comment period.[19] In the Order, the FERC directed NERC to clarify what it would do in situations where it needs information more quickly than the forty-five day comment period required by Section 1600.[20]

The FERC also directed NERC to amend the proposed Section 1604, which would allow Regional Entities to establish their own procedures for data requests.[21] The FERC directed NERC to amend the proposed Section 1604 to provide that any procedures adopted by Regional Entities include the same procedural elements as those found in Section 1600 of the NERC Rules of Procedure.[22] In addition, the FERC concluded that any Regional Entity procedures must be submitted to both NERC and the Commission for approval.[23]

The approved Section 1600 provides that any request for data or information that includes a statement that such data be held confidential will be afforded the confidential protections found in Section 1600 of the Rules of Procedure.[24] However, the FERC directed NERC to work with federal agencies listed on the Compliance Registry to ensure that these procedures allow review of requested information without risking waiver of FOIA protections.[25]

On March 24, 2008, Edison Electric Institute (EEI) filed a motion for clarification of the Commission's February 21 Order requesting that the FERC clarify how it intended to comply with the Paperwork Reduction Act of 1995 (PRA) if it directs NERC to request information from registered entities.[26] In its motion, EEI stated that it was not challenging "the Commission's or NERC's authority to request information, but instead to clarify for all parties what the applicable procedures will be before any such request is issued."[27] On September 18, 2008, the FERC issued an order denying EEI's request for clarification as premature, determining that the Commission's ability to direct NERC to collect information was speculative at the time and that it would be premature to address such future situations in this proceeding.[28] The FERC did note that it is "mindful of the requirements under the PRA . . . [and would] address its obligations under the PRA when and where appropriate."[29]

17. *Mandatory Reliability Standards for the Bulk-Power System, North Am. Elec. Reliability Corp.*, 122 F.E.R.C. ¶ 61,142 (2008) [hereinafter, *February 21 Order*].

18. *Id.* at P 15.

19. *Id.* at P 16.

20. *Id.*

21. *Id.* at P 17.

22. *February 21 Order*, *supra* note 18, at P 17

23. *Id.*

24. *Id.* at P 18.

25. *Id.*

26. Motion to Intervene Out-of-Time and Request for Clarification of the Edison Electric Institute, Docket No. RR08-1-000 (2008).

27. *Id.* at 2.

28. *Order Dismissing Request for Clarification*, 124 F.E.R.C. ¶ 61,243 (2008).

29. *Id.* at 5.

On May 16, 2008, NERC made a compliance filing with the FERC in accordance with the FERC's directives in the February 21, 2008 Order.[30] In the filing, NERC proposed, among other things, to add a new Section 1606 to the NERC Rules of Procedure that would provide an expedited process for requesting time-sensitive data or information.[31] On August 13, 2008, the FERC issued a letter order accepting NERC's compliance filing as satisfying the Commission's directives in the February 21 Order.[32]

C. FERC Order Granting Rehearing on Definition of CEII

On June 17, 2008, the FERC issued an order granting NERC's request for rehearing of its March 21, 2008 Order addressing NERC's proposed modifications to the pro forma Delegation Agreement and the eight Regional Entity delegation agreements.[33] In the March 21 Order, the FERC directed NERC to adopt in the NERC Hearing Procedures the definition of Critical Energy Infrastructure Information (CEII) proposed in the Reliability*First* Corporation (RFC) Delegation Agreement, because it is the same definition found in the FERC's regulations.[34] That definition provides that, among other things, CEII "is exempt from mandatory disclosure under the Freedom of Information Act [FOIA], 5 U.S.C. §552 (2000). . ."[35]

In the June 17 Order, the FERC concluded that NERC should not be required to adopt the FOIA exemption clause in the NERC Hearing Procedures and the NERC Rules of Procedures.[36] The FERC agreed that, while such an exemption is meaningful in the context of the FERC's own CEII determinations, it "provides neither a relevant nor a practical measure useful in the assessment of whether a request for CEII treatment should be granted."[37] In addition, the FERC directed RFC to revise the definition of CEII in its hearing procedures because to prevent "unnecessary confusion that may result in the attempted application of the FOIA exemption requirement in the context of an RFC hearing."[38]

D. FERC Order Approving Modifications to the NERC Bylaws

On October 7, 2008, the FERC issued a letter order approving NERC's proposed modifications to its bylaws. The NERC Bylaws were revised to: (i) provide for a ten day period following election to the NERC Board of Trustees for a newly-elected Trustee to eliminate or resolve any conflicts of interests which would otherwise preclude membership on the Board; (ii) modify the procedure for electing one or more additional Canadian representatives to the Members Representatives Committee (MRC) if sufficient Canadian

30. Compliance Filing of the North American Electric Reliability Corporation in Response to the Commission's February 21, 2008 Order, Docket No. RR08-1-000 (2008).

31. *Id.* at 4-7.

32. FERC Letter Order, Docket Nos. RM06-16-000 & RR08-1-002 (2008).

33. *North Am. Elec. Reliability Corp.*, 123 F.E.R.C. ¶ 61,276 (2008) [hereinafter, *June 17 Order*].

34. *Id.* at P 2.

35. *Id.* at P 3.

36. *Id.* at P 6.

37. *Id.* at P 7.

38. *Id.* at P 8.

representation does not result from the initial election of MRC members; (iii) revise the provision that identifies the original members of the NERC Board, for clarity; (iv) eliminate the term "regional reliability organization" from the bylaws; and (v) amend a reference to "reliability readiness audits" to "reliability readiness evaluations," consistent with a change in terminology for this program that NERC has already adopted elsewhere.

E. Alcoa, Inc. v. FERC

On May 8, 2009, the D.C. Circuit issued an opinion in which it denied Alcoa's appeal of the FERC's approval of the use of the "net energy for load" method by NERC for allocating its costs of service among electric customers.[39] In both Order No. 672 and the Certification Order, the FERC concluded that the "net energy for load" methodology was a "fair and reasonable method for allocating costs" to electric customers on the basis of energy consumption alone.[40] Alcoa appealed the FERC's approval of this method arguing that it departed from the FERC's traditional two-part rate structure, composed of a demand charge and an energy charge.[41] Alcoa also argued that

> [b]ecause a significant portion of the organization's costs will be demand related, and because net energy for load does not distribute these costs according to each customer's demand-related needs, customers with traditionally low demand charges will be forced to shoulder a greater share of the organization's costs than they would under the traditional two-part rate structure.[42]

The D.C. Circuit held that the FERC's conclusion that the "net energy for load" method is "fair and reasonable" was not arbitrary and capricious.[43] In addition, it concluded that while it is not clear that the FERC deviated from its prior practice, the FERC "adequately explained any departure from its traditional two-part transmission rate precedent."[44]

III. REGIONAL ENTITY DELEGATION AGREEMENTS/BUDGETS

During the second half of 2008 and the first half of 2009, NERC and the eight Regional Entities have continued to make filings amending and updating their respective Delegation Agreements as required by Commission orders.[45] In accordance with Commission regulations, NERC and the Regional Entities also

39. Alcoa v. FERC, 564 F.3d 1342, 1344 (D.C. Cir. 2009).

40. *Id.* at 1348 (quoting *Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization*, 116 F.E.R.C. ¶ 61,062, 61,318 (2006)).

41. 564 F.3d at 1347.

42. *Id.*

43. *Id.* at 1348.

44. *Id.*

45. NERC has delegated compliance monitoring and enforcement authority to eight Regional Entities, including the Florida Reliability Coordinating Council (FRCC), the Midwest Reliability Organization (MRO), the Northeast Power Coordinating Council (NPCC), Reliability*First* Corporation (RFC), SERC Reliability Corporation (SERC), the Southwest Power Pool Regional Entity (SPP), the Texas Regional Entity (TRE), and the Western Electricity Coordinating Council (WECC). During the second half of 2008 and the first half of 2009, NERC and the eight Regional Entities have continued to make filings amending and updating their respective Delegation Agreements as required by Commission orders.

submitted their 2009 Business Plans and Budgets and compliance filings related to their 2008 Budgets and Business Plans to the Commission during this time. Commission orders concerning Regional Entity Delegation Agreements and Business Plans and Budgets have emphasized the need to establish processes and procedures for effective and consistent performance of delegated compliance monitoring and enforcement activities by the Regional Entities.

A. Regional Entity Delegation Agreements

During the latter part of 2008 and the first six months of 2009, the Commission issued several significant orders addressing requests for rehearing of prior orders[46] on and compliance filings relating to the Delegation Agreements between NERC and the eight Regional Entities.

On June 17, 2008, the Commission issued an order[47] granting NERC's request for rehearing of the March 21, 2008 Order ruling that NERC adopt in its Rules of Procedure and Hearing Procedures a definition of CEII consistent with the definition included in the Commission's Regulations.[48] Specifically, the FERC ruled that NERC could modify the definition used in the NERC Rules of Procedure and Hearing Procedures to omit references to the Freedom of Information Act included in the definition of CEII in the Commission's Regulations. With this modification, the Commission explained that CEII would be determined, for purposes of NERC proceedings, on the basis of "whether the information at issue: (1) relates details about the production, generation, transportation, transmission, or distribution of energy; (2) could be useful to a person in planning an attack on critical infrastructure; and (3) does not simply give the general location of the critical infrastructure."[49]

In mid-July 2008, NERC submitted a filing in compliance with the March 21, 2008 Order, which consisted of a revised Amended and Restated *Pro Forma* Delegation Agreement, revisions to NERC's Compliance Monitoring and Enforcement Program, revised Amended and Restated Delegation Agreements with the eight Regional Entities, and revisions to the NERC Rules of Procedure.[50] The compliance filing addressed numerous Commission directives on an array of topics, including (but not limited to) the process applicable to the development of annual Business Plans and Budgets, the separation of Regional Entities' statutory and non-statutory functions, procedures governing NERC's release of information to the Commission and other international government authorities for investigations, NERC's authority to direct Regional Entities to revise penalty determinations and the circumstances in which such a directive permits a registered entity to request reopening of a compliance proceeding, and

46. *North Am. Elec. Reliability Corp.*, 119 F.E.R.C. ¶ 61,060 (2007); *order on reh'g*, 120 FERC ¶ 61,260 (2007); *North Am. Elec. Reliability Corp.*, 122 FERC ¶ 61,245 (2008) [hereinafter, *March 21, 2008 Order*].

47. *North Am. Elec. Reliability Corp.*, 123 F.E.R.C. ¶ 61,276 (2008) [hereinafter, *June 17, 2008 Rehearing Order*].

48. 18 C.F.R. § 388.113(c)(1) (2008).

49. *June 17, 2008 Rehearing Order*, *supra* note 48, at P 7.

50. Compliance Filing of the North American Electric Reliability Corporation in Response to March 21, 2008 Order, Docket No. RR06-1-012, *et al*. *See also* Supplemental Filings of North Am. Elec. Reliability Corp., Docket No. RR06-1-017, *et al.* (filed Aug. 28, 2008 and Sept. 15, 2008, respectively).

the production of documents during NERC and Regional Entity hearing processes.

The Commission issued an order on NERC's Compliance Filing on December 18, 2008.[51] The Commission accepted the revised Delegation Agreements, Compliance Monitoring and Enforcement Program, and Rules of Procedure subject to a further compliance filing. Among the significant modifications ordered by the Commission were directives to modify provisions of the Compliance Monitoring and Enforcement Program to address the international transfer of compliance-related information, the timing related to review of mitigation plans, discovery processes, and the disclosure of information to expert witnesses during hearing proceedings. The Commission also required further revisions to the Delegation Agreements between NERC and certain Regional Entities, including MRO, NPCC, SPP, WECC, and FRCC. Finally, the Commission requested information regarding the relative independence of the SPP Regional Entity in the areas of development and approval of regional reliability standards.

The Canadian Electricity Association (CEA) and SPP requested rehearing of the December 19, 2008 Order.[52] CEA contended that the Commission should have accepted its proposed revisions to the Compliance Monitoring and Enforcement Program relating to the exchange of compliance information with international governmental authorities. SPP argued that the Commission's directive to modify the SPP Delegation Agreement to establish separate accounts for the payment of statutory and non-statutory activities would be excessively complicated and administratively burdensome. The Commission rejected CEA's rehearing request but determined, based upon findings in a related proceeding, that SPP had established appropriate separation of its statutory and non-statutory functions and, therefore, reversed its prior directive requiring SPP to segregate its funding accounts.

NERC subsequently submitted a filing in compliance with the directives contained in the December 19, 2008 Order consisting of amended Rules of Procedure, a revised version of the Compliance Monitoring and Enforcement Program, and revised Delegation Agreements with certain Regional Entities.[53] The Commission accepted NERC's compliance filing, subject to a subsequent filing modifying further the notification processes and timelines for acceptance of mitigation plans, on June 1, 2009.[54] The FERC reserved its evaluation of the information submitted by NERC addressing the independence of the SPP Regional Entity with respect to development and approval of regional reliability standards for a future order.

51. *North Am. Elec. Reliability Corp.*, 125 F.E.R.C. ¶ 61,330 (2008); *errata notice*, 126 F.E.R.C. ¶ 61,008 (2009) [hereinafter, *December 19 Order*].

52. Request of the Canadian Electricity Ass'n for Clarification, or in the Alternative, Rehearing of the Commission's December 19, 2008 Order, Docket No. RR06-1-017 (2009); Request for Rehearing of S.W. Power Pool, Inc. Regarding the Commission's December 19, 2008 Order, Docket Nos. RR06-1-016, RR06-1-016, & RR07-6-004 (2009).

53. Compliance Filing of the North American Electric Reliability Corporation in Response to December 19, 2008 Order, Docket Nos. RR06-1-016, *et al.* (2009).

54. *North Am. Elec. Reliability Corp.*, 127 F.E.R.C. ¶ 61,209 (2009).

B. NERC Business Plan and Budget – 2008

During the second half of 2008 and early 2009, the Commission issued several orders relating to NERC's 2008 Business Plan and Budget which, together with those of the eight Regional Entities, was conditionally approved by the Commission in late 2007.[55] In the 2008 Budget Order, the Commission permitted NERC and the Regional Entities to collect its Budget requests of $22,780,492 and $59,402,602,[56] respectively, although the Commission's approval of the Regional Entities' proposed Budgets, with the exception of the Budget for Reliability*First* (which was simply approved), were conditioned upon future compliance filings to either correct or explain certain errors and inconsistencies. The Commission also raised concerns regarding the adequacy of the separation of functions between the SPP Regional Entity and SPP in its capacity as a Regional Entity and a Regional Transmission Organization. Finally, the Commission required NERC to file a "true-up" documenting its adherence to its 2007 Business Plan and Budget and, similarly, the Regional Entities' adherence to their respective Business Plans and Budgets for 2007.

NERC subsequently submitted its true-up and compliance filing. As to NERC's explanation of certain errors and inconsistencies and SPP's segregation of statutory and non-statutory activities, the FERC accepted NERC's compliance filing subject to a further compliance filing regarding the separation of functions within SPP.[57] As to the true-up of actual versus budgeted costs for both NERC and the Regional Entities for 2007, the Commission determined that, with several exceptions involving items included in the NPCC, FRCC, Reliability*First*, and WECC Budgets for which additional information was required, variances from initially budgeted costs were adequately justified.[58] The Commission issued guidance for future true-up filings, stating that significant variances should be explained with specificity, observing that cash reserves should not be used to fund projects outside the budget approval process, and explaining its expectation that Regional Entities' administrative costs would diminish in future years. NERC submitted a compliance filing relating to its and the Regional Entities' adherence to their 2008 Business Plans and Budgets submitted in April 2009.[59]

An additional order on NERC's subsequent compliance filing relating to the SPP Regional Entity's use of the NERC System of Accounts was issued in February 2009.[60] NERC and the Regional Entities' submitted a compliance filing in response to the order in April 2009.[61]

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55. *North Am. Elec. Reliability Corp.*, 121 F.E.R.C. ¶ 61,057 (2007) [hereinafter, *2008 Budget Order*].

56. The Regional Entities' 2008 Budgets consisted of the following amounts: FRCC – $6,707,726; MRO $5,822,795; NPCC – $8,176,962; Reliability*First* – $9,664,256; SERC – $7,991,021; SPP – $4,609,083; Texas RE – $3,296,066; and WECC – $27,940,402. WECC was subsequently granted a $4,954,654 increase in its 2008 Budget. *See North Am. Elec. Reliability Corp.*, 123 FERC ¶ 61,031 (2008).

57. *North Am. Elec. Reliability Corp.*, 122 F.E.R.C. ¶ 61,246 (2008).

58. *North Am. Elec. Reliability Corp.*, 123 F.E.R.C. ¶ 61,282 (2008).

59. Compliance Filing in Response to October 17, 2007 Order and Other Orders 2008 Actual Cost-to-Budget Comparisons for NERC and Regional Entities, Docket No. RR07-16-005 (2009).

60. *North Am. Elec. Reliability Corp*., 126 F.E.R.C. ¶ 61,123 (2009).

61. Compliance Filing in Response to February 19, 2009 Order Concerning SPP Regional Entity Use of NERC System of Accounts, Docket No. RR07-16-006 (2009).

C. NERC Business Plan and Budget – 2009

As required by Commission regulations, on August 22, 2008, NERC submitted to the Commission in Docket No. RR08-6-000 its 2009 Business Plan and Budget and the 2009 Business Plans and Budgets for each of the eight Regional Entities.[62] NERC stated that its 2009 Budget of $34,447,620 (reflecting an increase of $7,915,626 over the 2008 Budget) included funding requirements for its statutory responsibilities as the ERO in six program areas, including the Reliability Standards Program ($5,665,032), the Compliance Monitoring and Enforcement and Organization and Registration Program ($12,290,829), the Reliability Readiness Evaluation and Improvements Program ($485,429), the Training Education and Operator Certification Program ($2,593,173), the Reliability Assessment and Performance Analysis Program ($6,519,959), and the Situational Awareness and Infrastructure Security Program ($6,893,198). The Business Plan contained a description of NERC's work plans, goals, and objectives and of NERC's progress in implementing Commission directives contained in various orders relating to NERC's certification as the ERO. The Business Plans and Budgets for the Regional Entities[63] contained similar information.

The Commission issued an order conditionally approving the 2009 Budgets and Business Plans for NERC and the Regional Entities, but required NERC to provide supplemental information concerning whether the NERC Budget provided adequate funding for certain statutory activities.[64] NERC was ordered to submit a compliance filing justifying: (i) the adequacy of its staffing levels for reliability standards development and compliance monitoring and enforcement, (ii) its proposal to phase out its existing Reliability Readiness Evaluation and Improvement Program, and (iii) its process for ensuring that data provided by Regional Entities in connection with the Reliability Assessment and Performance Analysis Program is properly validated. The Commission directed NERC to explain whether its initial budget for reliability standards development and compliance monitoring and enforcement was adequate or whether a supplemental increase was necessary. The FERC also conditionally approved the Business Plans and Budgets submitted on behalf of the Regional Entities, subject to future compliance filings: (i) standardizing audit-related terminology; (ii) further supporting requested General and Administrative expenses for NPCC, Reliability*First*, TRE, SPP, and WECC; and (iii) providing additional information regarding certain Regional Entity specific budget provisions.

In response, NERC's December 15, 2008 compliance filing proposed an increase in the 2009 Budget of $1,558,606, provided additional support for NERC's request to phase out the Reliability Readiness Evaluation and Improvement Program, and described enhancements to its process for validating

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62. *North Am. Elec. Reliability Corp. 2009 Business Plan and Budget*, Docket Nos. RR08-6-000 *et al.* (2008), *available at* http://www.nerc.com/files/2009-Business-Plan-and-Budget-08222008.pdf.

63. The Regional Entities' 2009 Budgets are as follows: FRCC – $3,977,868; MRO – $6,405, 724; NPCC – $10,008,885; Reliability*First* – $11,434,201; SERC – $10,095,546; SPP – $6,481,036; TRE – $6,167,024; and WECC – $38,691,767. Motion of the North Am. Elec. Reliability Corp. to Submit Corrections to Its 2009 Business Plan and Budget Filing, Docket No. RR08-6-000 (2008).

64. *North Am. Elec. Reliability Corp.*, 125 F.E.R.C. ¶ 61,056 (2008); *order on clarif.*, 126 F.E.R.C. ¶ 61,021 (2009).

data provided by the Regional Entities to support NERC's Reliability Assessment and Performance Analysis Program.[65] On July 16, 2009, the FERC issued an order approving NERC's proposed increase to the 2009 budget and concluding that NERC had provided sufficient support for its proposal to terminate the Reliability Readiness Program.[66]

IV. RELIABILITY STANDARDS

A. Initial Review

Pursuant to the terms of Section 215 of the Federal Power Act, the Commission must make a determination that a proposed standard meets the statutory threshold "that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest"[67] before it can be approved. The Commission must give "due weight" to the "technical expertise" of the ERO or any Regional Entity organized on an interconnection-wide basis.[68] The proposed reliability standards must each be designed to achieve a specified reliability objective and must contain a technically sound means to achieve it.[69] The proposed standards, and the possible consequences for violations, should be clear and unambiguous regarding what is required and who is required to comply.[70] In order for there to be consistent enforcement applied in a non-preferential manner there "should be a clear criterion or measure of whether an entity is in compliance."[71]

According to the Commission, each proposed standard should be designed to be applicable throughout the interconnected North American bulk power system. As such, each standard

> should take into account geographic variations in grid characteristics, terrain, weather, and other such factors; it should also take into account regional variations in the organizational and corporate structures of transmission owners and operators, variations in generation fuel type and ownership patterns, and regional variations in market design if these affect the proposed Reliability Standard.[72]

NERC develops reliability standards in accordance with Section 300 of its Rules of Procedure (ROP), which was approved when the Commission certified NERC as the ERO. The NERC RSDP, which is incorporated into the ROP as Appendix 1 has been accredited by the ANSI Executive Standards Council, and, as a result, found to be an acceptable means of ensuring due process by the Commission.[73] Proposed reliability standards will be approved by the members

65. Compliance Filing in Response to October 16, 2008 Order on 2009 Business Plans and Budgets, Docket Nos. RR08-6-000, *et al.* (2008).

66. *North Am. Elec. Reliability Corp.*, 128 F.E.R.C. ¶ 61,025 (2009).

67. Fed. Power Act § 215(d)(2), 16 U.S.C. § 824*o*(d)(5) (2005).

68. *Id.*

69. *See also* Order 672, *supra* note 2, at P 324.

70. *Id.* at PP 325-326.

71. *Id.* at PP 327.

72. *Id.* at P 331.

73. *Id.* at P 269.

of the Regional Ballot Body (RBB) that join a ballot pool prior to submittal to the NERC Board and the Commission for approval, and any person or entity with a legitimate interest in the reliability of the bulk power system may join the RBB and a ballot pool.[74] The RBB has nine segments and an entity may join each segment of the RBB for which it qualifies, provided that the membership in each segment constitutes a separate membership represented by a different representative.[75]

On March 16, 2007, the Commission issued Order 693[76] approving the first set of mandatory and enforceable reliability standards in accordance with Section 215 of the FPA.[77] The Commission approved eighty-three of the 107 reliability standards, six of the eight proposed regional differences, and the Glossary of Terms Used in reliability standards submitted by NERC in its capacity as the ERO.[78] The Commission issued new regulations that require NERC, as the certified ERO, to maintain each approved reliability standard on its website for public inspection.[79] In Order 693, the Commission directed modifications to fifty-six of the eighty-three approved reliability standards.[80] The remaining twenty-four reliability standards were left pending at the Commission until additional information is submitted by NERC.[81] Most of the twenty-four standards were "fill-in-the-blank" standards that require specific regional criteria to be specified for proper implementation.[82] Until NERC has submitted further information and the Commission has approved the revised standards, compliance will continue on a voluntary basis, with the understanding that compliance is to be considered a matter of good utility practice.[83]

In Order 693, as proposed in the Notice of Proposed Rulemaking (NOPR), the Commission affirmed the four possible actions the Commission could take with regard to each proposed standard.[84] With respect to those standards to which the Commission directed modifications, the Commission directed NERC to submit an informational filing outlining a plan for addressing such modifications and a schedule for completing these modifications.[85] The Commission did not prescribe a set data retention period to apply to all reliability standards, but directed the ERO to review and update the data retention requirements in each reliability standard as it is reevaluated through its RSDP and submit the result for Commission approval.[86]

74. NERC, *Rules of Procedure*, June 16, 2009, at § 305, *available at* http://www.nerc.com/files/NERC_Rules_of_Procedure_EFFECTIVE_20090616.pdf.

75. *Id.* at §§ 305.2, 305.3.1, 305.5.

76. Order No. 693, Mandatory Reliability Standards for the Bulk-Power System, F.E.R.C. STATS & REGS. ¶ 31,242, 72 Fed. Reg. 16,416 (Apr. 4, 2007) (to be codified as 18 CFR § 40) [hereinafter, *Order 693*].

77. *Id.* at P 21.

78. *Id.* at P 1.

79. *Id.* at P 2.

80. *Id.* at P 1.

81. *Id.*

82. *Id.* at P 297.

83. *Id.*

84. *Id.* at P 184.

85. *Id.* at P 207.

86. *Id.* at P 263.

Although the Commission did not adopt a formal trial period, the Commission directed NERC and the Regional Entities to exercise enforcement discretion and focus their resources on the most serious violations through December 31, 2007.[87] The first reliability standards approved by the Commission became effective on June 18, 2007.[88] Since then, NERC has submitted multiple filings proposing new or revised reliability standards. In addition, NERC has sought Commission approval of formal interpretations of reliability standards.

On July 19, 2007, the Commission issued Order 693-A denying rehearing, providing clarifications and otherwise reaffirming Order 693.[89] In Order 693-A, the Commission asserted that the applicability section of a particular reliability standard is to be the ultimate determinant of applicability of each reliability standard, not the Functional Model. Accordingly, the Commission affirmed its decision not to require NERC to file revisions to the Functional Model.[90] The Commission clarified that it has not definitively defined the extent of the facilities covered by the statutory term "Bulk-Power System" and defers judgment regarding the scope with respect to the applicability of the reliability standards to a later proceeding.[91]

In Order 693-A, the Commission clarified that Order 693 did not intend to change existing contracts or agreements as to who is responsible for particular functions under a reliability standard.[92] For a situation in which two entities have a contract regarding which will perform functions under the Reliability Standards, the Commission pointed to procedures filed in Docket No. RM06-16-003 which allow an organization to accept compliance responsibility on behalf of its members.[93]

In Order 693-A, the Commission also clarified that Order 693 "intentionally declined to develop a threshold that would place limits on the ERO's and Regional Entities' exercise of enforcement discretion" and "did not require that there be actual harm to the Bulk-Power System for the ERO to assess a penalty during the transition period" (through December 31, 2007).[94]

Moreover, the Commission responded to a request for rehearing claiming the Commission improperly delegated the task of determining those responsible for compliance under applicable reliability standards to the ERO and Regional Entities in light of the Western Electricity Coordinating Council developing supplemental criteria that may result in the registration of entities not captured by the ERO criteria. The Commission responded: "With regard to the fact that certain Regional Entities have created supplemental criteria to determine which entities should be on the registry, we agree. . . that this is not appropriate."[95] The

87. *Id.* at P 221-222.

88. Mandatory Reliability Standards for the Bulk-Power System, Stay of Effective Date, 72 Fed. Reg. 31,452 (June 7, 2007).

89. Order No. 693-A, *Mandatory Reliability Standards for the Bulk-Power System*, 120 F.E.R.C. ¶ 61,053 (2007) [hereinafter, *Order 693-A*].

90. *Id.* at P 54.

91. *Id.* at P 17.

92. *Id.* at P 45.

93. *Id.*

94. *Id.* at P 63.

95. *Id.* at P 38.

Commission noted that such supplemental criteria cannot be used to determine which entities are captured in compliance registries because NERC's Statement of Compliance Registry Criteria makes no reference to supplemental compliance registries created by Regional Entities.[96]

B. CIP Standards

1. Approval of the Initial CIP Standards

Critical infrastructure protection (CIP) reliability standards are a separately recognized set of standards established by NERC designed to address cyber security. Development of these standards, and review and approval by the FERC, is required under Section 215 of the Federal Power Act.[97] Under the process established for reliability standard approval,[98] NERC filed each of these standards for Commission approval in 2006.[99]

NERC filed the first CIP reliability standard, CIP-001-1, with its filing of 107 proposed standards on April 4, 2006, as modified on August 28, 2006.[100] CIP-001-1 requires that entities have procedures for recognizing and for making operational personnel aware of sabotage events, and communicating information concerning sabotage events to the appropriate parties.[101] The FERC approved this first CIP reliability standard in its initial order on mandatory reliability standards issued March 16, 2007.[102]

NERC filed its second, more comprehensive, set of CIP reliability standards on August 28, 2006. These eight reliability standards cover the following topics:

(1) Reliability Standard CIP-002-1 requires entities to develop a risk-based assessment methodology for identifying critical assets and their associated critical cyber assets and to identify the appropriate assets.[103]

(2) Reliability Standard CIP-003-1 requires entities to develop and implement a cyber security policy, appoint a manager with overall authority for CIP compliance, and protect critical information.[104]

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96. *Id.* at PP 37-38.

97. 16 U.S.C. § 824o (d) (2005).

98. *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, F.E.R.C. STATS. & REGS. ¶ 31,204 (2006); *order on reh'g*, Order No. 672-A, F.E.R.C. STATS. & REGS. ¶ 31,212 (2006).

99. NERC filed CIP-001-1 in Docket No. RM05-30 on April 4, 2007. Petition of the North American Electric Reliability Council and North American Reliability Corporation for Approval of Reliability Standards, Docket No. RM06-16-000 (2007) [hereinafter, *NERC April Filing*]. NERC filed CIP-002-1 through CIP-009-1 in Docket No. RM06-22 on August 6, 2007. Petition of the North American Electric Reliability Council and North American Reliability Corporation for Approval of Proposed Reliability Standards, Docket No. RM06-22-000 (2007) [hereinafter, *NERC August Filing*].

100. *NERC April Filing*, *supra* note 100, at 33.

101. *Id.*; *see also* NERC, *Reliability Standard CIP-001-1* (June 7, 2007), *available at* http://www.nerc.com/files/CIP-001-1.pdf.

102. Order No. 693, *supra* note 77*;* Order No. 693-A, *supra* note 90.

103. Order No. 706, *Mandatory Reliability Standards for Critical Infrastructure Protection*, 122 F.E.R.C. ¶ 61,040, at 234 (2008), 73 Fed. Reg. 7368 (Feb. 7, 2008) [hereinafter, *Order No. 706*]; *order on reh'g*, Order No. 706-A, 123 F.E.R.C. ¶ 61,174 (2008) [hereinafter, *Order No. 706-A*]; *order on clarification*, Order No. 706-B, 126 F.E.R.C. ¶ 61,229 (2009) [hereinafter, *Order No. 706-B*].

104. *Order No. 706*, *supra* note 104, at P 342-43.

(3) Reliability Standard CIP-004-1 requires entities to develop and implement security awareness and training programs, conduct personnel risk assessments for certain employees, and restrict access to those employees who have been cleared for access.[105]

(4) Reliability Standard CIP-005-1 requires entities to create an electronic security perimeter around all critical cyber assets, limit and monitor access to assets within this perimeter, and conduct an annual cyber vulnerability assessment.[106]

(5) Reliability Standard CIP-006-1 requires entities to create a "six-wall" physical perimeter to protect the cyber assets within the electronic security perimeter and to control and monitor physical access to this perimeter.[107]

(6) Reliability Standard CIP-007-1 requires entities to implement certain specific cyber security measures such as security patch management procedures.[108]

(7) Reliability Standard CIP-008-1 requires entities to develop a Cyber Security Incident Response Plan.[109]

(8) Reliability Standard CIP-009-1 requires entities to create and test a Critical Cyber Asset Recovery Plan.[110]

Under the standards, each entity subject to compliance must first identify its assets that are critical to the reliable operation of the grid, and then identify the cyber assets critical to operating those critical assets.[111] Once critical cyber assets are identified, the CIP reliability standards require that applicable parties establish plans and controls to safeguard physical and electronic access to those assets, train personnel on security matters, report security incidents, and be prepared for recovery actions.[112] To aid with the implementation and necessity of security upgrades required in many cases for these reliability standards, NERC developed an implementation plan that provides for a three-year phase-in to achieve full compliance with all requirements.[113]

The FERC staff issued a white paper describing their preliminary assessment of these standards in December 2006.[114] This assessment was limited to a technical review, without making a final determination on whether the proposed CIP reliability standards met statutory and regulatory criteria.[115] The FERC staff invited comment from the industry on these standards in advance of the NOPR.[116] More than forty sets of comments were filed, including

105. *Id.* at P 413.

106. *Id.* at P 477.

107. *Id.* at P 548-49.

108. *Id.* at P 584.

109. *Id.* at P 653.

110. *Id.* at P 688.

111. *NERC August Filing*, *supra* note 100, at 24.

112. *Id.*

113. *Id.* at 25.

114. FERC, STAFF PRELIMINARY ASSESSMENT OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION'S PROPOSED MANDATORY RELIABILITY STANDARDS ON CRITICAL INFRASTRUCTURE PROTECTION (Dec. 11, 2006) [hereinafter, *FERC Staff Assessment*].

115. *Id.* at 1.

116. *Id.*

those of NERC which noted that, regardless of the modifications necessary to the standards, the FERC should approve the CIP reliability standards as soon as possible to address the serious issue of cyber security.[117] On July 20, 2007, the FERC issued its NOPR on these eight reliability standards, proposing to approve each, but to direct NERC to modify the eight CIP reliability standards to address specific concerns identified by the FERC, specifically those concerns raised in the FERC Staff Assessment.[118]

On January 18, 2008, in Docket No. RM06-22, the FERC issued Order No. 706, approving CIP-002-1 through CIP-009-1 and directing NERC to develop modifications to the CIP reliability standards to address specific concerns.[119] The FERC also approved NERC's proposed implementation plan and timetable.[120]

After receiving several requests for rehearing, the FERC on May 16, 2008 issued Order No. 706-A, denying rehearing but clarified certain aspects of its rule approving the eight CIP reliability standards, including the use of NERC guidance documents,[121] the use of the term "technical feasibility,"[122] various issues relating to the identification of cyber asset identification[123] and the revocation of access to critical cyber assets.[124]

2. Approval of the Violation Risk Factors for CIP Reliability Standards

On July 30, 2008, NERC submitted modifications to certain Violation Risk Factors (VRFs) and several proposed VRFs for reliability standards CIP-002-1 through CIP-009-1,[125] as required by Order No. 706.[126] NERC filed additional VRF changes on December 19, 2008.[127] The FERC approved twelve of the VRF changes on January 27, 2009,[128] but required NERC to elevate four VRFs from "low" to "medium" status because the FERC found these system protections provide significant protections and are not simply administrative, as a "low" assignment would reflect.[129] On February 2, 2009, in response to the December

117. Comments of the North American Electric Reliability Corporation on the Staff Preliminary Assessment for Eight Cyber Security Standards for the Bulk Power System, Docket No. RM06-22, at 2-3 (2007).

118. Notice of Proposed Rulemaking, Mandatory Reliability Standards for Critical Infrastructure Protection, 72 Fed. Reg. 43,970 (Aug. 6, 2007), F.E.R.C. STATS & REGS ¶ 32,602 (2007).

119. *Order No. 706*, *supra* note 104, at P 24.

120. *Id.* at P 86.

121. *Order No. 706-A*, *supra* note 104, at P 14-15.

122. *Id.* at P 23.

123. *Id.* at P 34-35, 50, 55.

124. *Id.* at P 60.

125. Supplemental Compliance Filing of the North American Electric Reliability Corporation in Response to Paragraphs 751 and 757 of Order No. 706: Mandatory Reliability Standards for Critical Infrastructure Protection Submission of Proposed Violation Risk Factors, Docket No. RM06-22-003 (2008).

126. *Order No. 706*, *supra* note 104, at 751, 757, 767.

127. Supplemental Compliance Filing of the North American Electric Reliability Corporation in Response to Paragraphs 751 and 757 of Order No. 706: Mandatory Reliability Standards for Critical Infrastructure Protection Submission of Thirty-One Proposed Violation Risk Factors, Docket No. RM06-22-005 (2008).

128. *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order on Compliance Filing, 126 F.E.R.C. ¶ 61,065 (2009).

129. *Id.* at P 13.

19 VRF filing, the FERC accepted additional revised VRFs pertaining to certain CIP reliability standards for approval.[130]

3. Regulatory Gap for Nuclear Facilities

On September 18, 2008, the FERC issued an order proposing to clarify that the facilities within a nuclear generating plant that are not regulated by the Nuclear Regulatory Commission (NRC) are subject to compliance with the eight mandatory CIP reliability standards that were approved in Order No. 706.[131] As approved in Order No. 706, CIP Reliability Standards CIP-002-1 through CIP-009-1 include an exemption for facilities regulated by the NRC.[132] The FERC explained in the Proposed Clarification Order that it understands that the NRC does not regulate all facilities within a nuclear plant, and proposes to close this "regulatory gap" to cover those facilities within a nuclear generation plant that are not regulated by the NRC.[133] This understanding arises from a joint meeting held between the two agencies on April 8, 2008.[134] During this meeting NRC staff explained that the NRC's regulations on cybersecurity would not apply to all systems within a nuclear generation plant.[135] Therefore, the FERC determined that there may be a regulatory gap concerning critical assets at these facilities, but notes that it does not intend for the facilities to be subject to dual regulation for cybersecurity.[136] The FERC sought comments on this clarification from the industry.[137]

After notice and comment, the FERC issued Order No. 706-B, clarifying the scope of the CIP regulatory standards approved in Order Nos. 706 and 706-A to include equipment not governed by NRC regulations.[138] Specifically, the FERC determined that "balance of plant" equipment within a nuclear power plant that is not regulated by the NRC is subject to compliance with the CIP reliability standards.[139] The FERC defined balance of plant as the NRC regulations do, specifically the remaining systems, components, and structures that comprise a complete nuclear power plant and are not included in the nuclear steam supply system.[140] The FERC also found that there was no risk of dual regulation and that operators should be able to create procedures to comply with both FERC and NERC requirements.[141] Though the FERC noted that a

130. North Am. Elec. Reliability Corp. Letter Order, Docket No. RM06-22-005 (2009).

131. Order on Proposed Clarification, *Mandatory Reliability Standards for Critical Infrastructure Protection*, 124 F.E.R.C. ¶ 61,247 (2008), 73 Fed. Reg. 55,459 (Sept. 25, 2008) [hereinafter, *Proposed Clarification Order*].

132. *Id.* at P 4; s*ee, e.g*., NERC, *Reliability Standard CIP-002-1*, May 2, 2006, at 1, *available at* http://www.nerc.com/files/CIP-002-1.pdf.

133. *Proposed Clarification Order*, *supra* note 132, at P 8.

134. Joint Meeting of the Nuclear Regulatory Commission and Federal Regulatory Commission, Docket No. AD06-6 (2008). In March 2009, the NRC issued a final rule that included cyber security-related regulations applicable to nuclear power plant licensees. Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (Mar. 27, 2009) (effective May 26, 2009; compliance required by March 31, 2010).

135. 124 F.E.R.C. ¶ 61,247, at P 5.

136. *Id.* at P 6, 8.

137. *Id.* at P 10.

138. *Order No. 706-B*, *supra* note 104, at P 7.

139. *Id.* at P 49.

140. *Id.* at P 15.

141. *Id.* at P 40.

memorandum of understanding or coordinated approach to cyber security oversight at nuclear power plants might help to avoid redundancies, it declined to resolve that issue in this proceeding.[142] This rule became effective on the date of publication in the Federal Register, April 7, 2009,[143] subject to an implementation schedule timetable to be determined by NERC.[144]

C. NERC/NAESB Coordination

On March 19, 2009, the FERC issued a NOPR proposing to approve five new Reliability Standards governing the calculation of available transfer capability (ATC).[145] NERC and the North American Energy Standards Board (NAESB) coordinated in the development of the Reliability Standards and related NAESB business practices to ensure consistency and coordination between the requirements, as well as to avoid duplicative compliance obligations.[146] The five ATC related Reliability Standards were developed in response to requirements in Order No. 890 and directives in Order No. 693.[147] These standards are intended to aid in the achievement of the Order No. 890 goals regarding the transparency, standardization, and consistency of ATC calculations by requiring such calculations to be consistent and transparent for all transmission customers.[148] The standards include an "umbrella" standard requiring entities to select or implement one of three ATC methodologies which are detailed in five related standards that provide the methodologies for the calculation of capacity benefit margin and transmission reliability margin.[149]

D. Regional Standards Development

A regional reliability standard is only applicable within a specific Regional Entity or group of Regional Entities.[150] The FERC has issued two Final Rules approving a total of nine regional reliability standards for the Western Electricity Coordinating Council (WECC), which apply to owners, operators, and users of the bulk power system in the Western Interconnection. On June 8, 2007, the FERC issued a Final Rule approving eight WECC regional reliability standards[151] and on May 21, 2009, the FERC issued a final rule approving one additional WECC regional reliability standard.[152] NERC has filed three further

142. *Id.* at P 55.

143. Mandatory Reliability Standards for Critical Infrastructure Protection, 74 Fed. Reg. 12,544 (Mar. 25, 2009).

144. *Order No. 706-B*, *supra* note 104, at P 56.

145. *Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System*, 126 F.E.R.C. ¶ 61,249 (2009).

146. *Id.* at P 18.

147. *Id.* at P 12-13.

148. *Id.* at P 14.

149. *Id.* at P 13.

150. NERC, *Rules of Procedure*, at 3, *available at* http://www.nerc.com/filez/regional_standards/regional_reliability_standards_under_development.html (last visited Sept. 11, 2009).

151. *North Am. Elec. Reliability Corp.*, 119 F.E.R.C. ¶ 61,260 (2007).

152. *North Am. Elec. Reliability Corp.*, 127 F.E.R.C. ¶ 61,176 (2009).

petitions for approval of WECC regional reliability standards.[153] Other regional reliability standards are currently under development in all Regional Entities.[154] The Texas Regional Entity (TRE) has one regional standard that has received NERC Board of Trustees approval.[155]

E. Violation Risk Factors and Violation Severity Levels

1. Violation Risk Factors

On May 18, 2007, the FERC approved over 700 Violation Risk Factors (VRFs) proposed by NERC.[156] NERC had developed the VRFs through its RSDP, apart from the development of the reliability standards themselves.[157] There are three categories of VRFs: "High", "Medium", and "Lower". "High" risk indicates requirements that, "if violated, could directly cause or contribute to Bulk-Power System instability, separation, or a cascading sequence of failures."[158] "Medium" risk requirements, if violated, could "directly affect the electrical state or the capability of the Bulk-Power System, or the ability to effectively monitor, control, or restore the Bulk-Power System."[159] "Lower" risk requirements are "administrative in nature," and, if violated, "would not be expected to affect the electrical state or capability of the Bulk-Power System."[160]

NERC was directed to modify twenty-eight of the proposed VRFs and to explain the rationale for assigning certain risk factor levels in seventy-four VRFs.[161] The FERC used five guidelines to evaluate each proposed VRF, and expressed concerns related to the fourth and fifth guidelines. The guidelines were: (1) consistency with conclusions of the Final Report on the August 2003 blackout; (2) consistency within a reliability standard; (3) consistency among reliability standards with similar requirements; (4) consistency with NERC's proposed definition of the VRF level; and (5) assignment of VRF levels to certain Standards that co-mingle a higher risk reliability objective and a lower risk reliability objective.[162] In an order issued on June 26, 2007, the FERC accepted twenty-two of the proposed VRFs corresponding to three reliability standards, including FAC-003-1 (Transmission Vegetation Management Program).[163]

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153. NERC petitions for approval of regional reliability standards in Docket Nos. RM09-14-000 (2009), RM09-15-000 (2009), and RM09-9-000 (2009).

154. NERC, *Regional Reliability Standards-Under Development*, http://www.nerc.com/filez/regional_standards/regional_reliability_standards_under_development.html (last visited Sept. 11, 2009).

155. *Id.*

156. *North Am. Elec. Reliability Corp.*, 119 F.E.R.C. ¶ 61,145, at P 2 (2007).

157. *Id.* at P 8.

158. *Id.* at P 9.

159. *Id.*

160. *Id.*

161. *Id.* at P 2.

162. *Id.* at P 16.

163. *North Am. Elec. Reliability Corp.*, 119 F.E.R.C. ¶ 61,321, at P 8 (2007).

2. Compliance Filing of VRFs

NERC provided explanations of seventy-four VRFs, and, on November 16, 2007, the FERC approved forty-three, and directed modifications of thirty-one VRFs.[164] The FERC reiterated that modification must be done in a timely manner, since "it is vital to have the Violation Risk Factors in place to ensure that the penalty-setting process is operative."[165] NERC agreed that thirteen VRFs needed modification; the FERC directed modification of an additional eighteen VRFs because it did not find NERC's justification persuasive.[166] The FERC increased many of these VRFs from "lower" risk to "medium" risk and explained its rationale for doing so. The FERC emphasized that the purpose of a VRF "is to accurately portray the risk a violation poses to the Bulk-Power System, not to mitigate perceived content issues within the [r]equirements."[167] Concerns about the requirements should be addressed through the RSDP.[168]

The thirty-one revised VRFs were submitted in a December 17, 2007 compliance filing, and approved in a letter order dated February 6, 2008. On April 1, 2008, NERC submitted ten revised VRFs for Facilities Design, Connections, and Maintenance reliability standards approved in Order No. 705. A letter order on May 29, 2008 approved the revised VRFs.

3. Violation Severity Levels

On June 19, 2008, the FERC approved Violation Severity Levels (VSLs) for the 83 mandatory reliability standards approved in Order No. 693.[169] VSLs will be used by NERC and the Regional Entities to determine the degree to which a reliability standard requirement was violated.[170] VSLs were developed using NERC's RSDP, which requires a two-thirds majority vote to receive industry approval.[171] All VSLs received the two-thirds vote, except the VSLs for the eight Emergency Preparedness and Operations (EOP) standards, which received only sixty percent of the vote.[172] These were submitted for use until NERC develops and obtains approval of modified VSLs for the EOP standards.[173] The FERC approved the EOP VSLs because, like the VRFs, they are not part of the reliability standards; VSLs "are appropriately treated as an appendix to NERC's Rules of Procedure," which do not require two-thirds approval.[174]

The FERC outlined four guidelines used to evaluate VSLs: (1) no inadvertent lowering of the current level of compliance; (2) uniformity and

164. *North Am. Elec. Reliability Corp.*, 121 F.E.R.C. ¶ 61,179, at P 11 (2007).

165. *Id.* at P 13.

166. *Id.* at P 14.

167. *Id.* at P 16.

168. *Id.*

169. *North Am. Elec. Reliability Corp.*, 123 F.E.R.C. ¶ 61,284, at P 13 (2008). NERC proposed an additional VSL for a proposed Reliability Standard, but FERC stayed a decision on that pending approval of the Reliability Standard. *Id.* at P 5.

170. *Id.* at P 15.

171. *Id.* at P 6.

172. *Id.*

173. *Id.*

174. *Id.* at P 50.

consistency in determining penalties among all reliability standards; (3) consistency with corresponding requirements; and (4) assessment for a single violation, rather than a cumulative number of violations.[175] Utilizing these guidelines, the FERC identified several concerns, including inconsistent VSLs for "binary" requirements,[176] ambiguous language in certain VSLs,[177] and VSLs that redefine requirements.[178] The FERC directed a review of the approved VSLs according to the guidelines provided in the order, and directed NERC to either validate the VSLs or to propose revisions.[179] The FERC required revisions for VSLs that both (a) have a "High" Violation Risk Factor, and (b) correspond to reliability standards that implement a recommendation of the U.S. – Canada Power System Outage Task Force that studied the 2003 Blackout.[180] NERC was directed to apply the same severity level for all VSLs for "binary" requirements or to justify the inconsistencies.[181] The FERC also directed the creation and analysis of historical performance data to determine whether VSLs allow for compliance lower than historical performance.[182] Finally, the concern was raised as to whether violation of a sub-requirement is also a violation of the requirement itself.[183] The FERC announced that this would be addressed on a case-by-case basis.[184]

V. RELIABILITY COMPLIANCE

A. Registration/Joint Registration

On July 19, 2007, the FERC issued an order approving NERC's filing that established procedures to allow an organization to accept compliance responsibility for its member organizations (*i.e.*, a Joint Registration Organization or JRO).[185] The FERC accepted procedures allowing a JRO to register on behalf of its members and the separate members to each register for particular reliability functions.[186] Further, where there is disagreement regarding which organization is responsible, or if there is agreement that a reliability function should have split responsibility, the procedures allow NERC to register both entities concurrently.[187] A concurrent registration allows NERC or a Regional Entity to hold either or both entities accountable in the event of a violation, as appropriate.[188] The FERC found that allowing joint registration would not diminish reliability by encouraging non-compliance, instead asserting that "allowing joint registration provides greater flexibility for organizations to

175. *North Am. Elec. Reliability Corp.*, 123 F.E.R.C. ¶ 61,284, at P 17 (2008).
176. These are requirements where compliance is defined only in terms of "pass" or "fail." *Id.* at P 24.
177. *Id.* at PP 28-30.
178. *Id.* at PP 32-34.
179. *Id.* at P 42.
180. *Id.* at P 38.
181. *Id.* at P 47.
182. *Id.* at PP 43, 56.
183. *Id.* at P 53.
184. *Id.* at P 54.
185. *Mandatory Reliability Standards for the Bulk-Power System*, 120 FERC ¶ 61,065, at P 1 (2007).
186. *Id.* at P 2.
187. *Id.*
188. *Id.*

achieve compliance with Reliability Standards, and will, therefore, likely facilitate compliance resulting in improved reliability."[189] The provisions governing the joint registration process are contained in Sections 501 and 507 of NERC's Rules of Procedure.[190]

B. Notices of Penalty

On July 3, 2008, the FERC issued a guidance order on what it considers to be the appropriate contents of Notice of Penalty filings submitted by NERC and Regional Entities. The Commission indicated that Notice of Penalty filings must contain enough information from which the FERC could "gauge the nature and seriousness of violations and the reasonableness of any penalty assessment."[191] The FERC was primarily concerned with issues regarding the completeness of the record and whether there was enough information submitted to support a determination that a violation involved a documentation issue.[192] The Commission also distinguished between self-reports and self-certifications finding that while self-reports can be a mitigating factor for penalty determinations, self-certifications should not.[193] The FERC also found that mitigation plans must be reviewed to ensure they include "optimal measures" to bring the entity into compliance.[194] The FERC further directed NERC and the Regional Entities to address multiple violations in further Notice of Penalty filings as they may be an indication that an entity lacks a compliance program or culture of compliance.[195] On January 9, 2009, the FERC issued an order accepting several Notices of Penalty, finding that NERC's Notices of Penalty submitted since the issuance of the Guidance Order were substantially in compliance with that order.[196]

As of June 1, 2009, NERC has filed sixty-four Notices of Penalty at the FERC since June 18, 2007, ten of which contained penalty amounts. There have been some substantial penalty amounts assessed, with the highest five civil penalty amounts for violations of reliability standards ranging from $50,000 to $250,000, but to date most Notices of Penalty (*i.e.* fifty-four) have been assigned zero penalty amounts.[197] Most of the zero penalty amounts have been assessed for violations of reliability standards that occurred during the transition period from June 18, 2007 through December 31, 2007, for which the FERC directed NERC and Regional Entities to focus on the more serious violations in their assessment of civil penalties.[198]

189. *Id.* at P 24.

190. NERC, *Rules of Procedure*, Dec. 19, 2008, at 41-42, 49, http://www.nerc.com/filez/regional_standards/regional_reliability_standards_under_development.html.

191. *Guidance on Filing Reliability Notices of Penalty*, 124 F.E.R.C. ¶ 61,015, at P 15 (2008).

192. *Id.* at PP 19, 27.

193. *Id.* at P 32.

194. *Id.* at P 35.

195. *Id.* at P 39.

196. *North Am. Elec. Reliability Corp.*, 126 F.E.R.C. ¶ 61,014 (2009).

197. NERC, *Enforcement Actions*, http://www.nerc.com/filez/enforcement/index.html (last visited Sept. 11, 2009).

198. *Id*; *see also*, Order No. 693, *Mandatory Reliability Standards for the Bulk Power System*, F.E.R.C. STATS. & REGS. ¶ 31,242, at PP 222-223 (2007); *order on reh'g*, *Order No. 693-A*, *supra* note 90 (directing

Most of the reliability standard violations have been of failures to maintain required documentation.[199] However, there have been three violations of the vegetation management reliability standard (*i.e.*, FAC-003) which have been assessed civil penalties of $180,000, $75,000, and $50,000.[200] The two largest civil penalties, $250,000 and $235,000, were assessed against entities that were alleged to have failed to timely submit certification of the completion of a mitigation plan for violations of several reliability standards.[201] Those failures were considered aggravating factors in the determination of the penalty amount.[202] Nine out of the ten Notices of Penalty which assessed monetary penalties were settlements.[203]

C. FERC Enforcement Policies

1. Revised Policy Statement

On May 15, 2008, the FERC issued a revised and expanded policy statement in response to requests for greater transparency and clarification of its enforcement policies. The FERC stated that audits are initiated without an allegation of wrongdoing.[204] Like the initiation of an audit, the final audit report is public, and includes audit methodology and the company's written response.[205] Whether to initiate an investigation involves a consideration of several factors, including: the nature and seriousness of the alleged violation; efforts to remedy it; the nature and extent of the harm and whether alleged violations were widespread or willful; the likelihood of recurrence; the importance to policy objectives of documenting and remedying the alleged violations; details in the allegation and whether staff can likely assemble a strong case; and the compliance history of the alleged wrongdoer.[206] Should an investigation be initiated, the subject of the investigation cannot communicate about it orally, in person or by telephone, with the Commissioners or their assistants, though written communications, or communications about other matters, are permissible.[207] Enforcement staff close investigations without further action if no violation occurred or the evidence is insufficient, or "no further action is otherwise called for based on a totality of the circumstances."[208]

"the ERO and Regional Entities to focus their resources on the most serious violations during an initial period through December 31, 2007").

199. NERC, *Enforcement Actions*, http://www.nerc.com/filez/enforcement/index.html (last visited Sept. 11, 2009).

200. *Id.; See also* NERC Notices of Penalty filed in Docket Nos. NP09-3-000, NP08-1-000, NP08-2-000, respectively. *Id*.

201. NERC, *Enforcement Actions*, http://www.nerc.com/filez/enforcement/index.html (last visited of Sept. 11, 2009); *See also* Notices of Penalty filed in Docket Nos. NP09-17-00 and NP09-2-00, respectively. *Id*.

202. *Id.*

203. *Id.*; S*ee also* NERC Notices of Penalty filed in Docket Nos. NP09-17-000, NP09-9-000, NP09-8-000, NP09-7-000, NP09-3-000, NP09-2-000, NP09-1-000, NP08-1-000, NP08-2-000. *Id*.

204. *Enforcement of Statutes, Regulations and Orders*, 123 F.E.R.C. ¶ 61,156, at P 14 (2008).

205. *Id.* at PP 15-18.

206. *Id.* at P 25.

207. *Id.* at P 27.

208. *Id.* at P 31.

If sanctions are warranted, the Commission determines the appropriate range of remedies for a settlement.[209] If a settlement is not reached, an order to show cause is issued, though no findings are made until after the company responds to the order.[210] The FERC possesses "broad discretion in fashioning the appropriate remedy," which "is carefully tailored to the facts and circumstances of each case."[211] Remedies commonly include one to three year compliance plans,[212] civil penalties, disgorgement of any unjust profits in addition to civil penalties,[213] and can include conditioning or suspending market-based or other authorities.[214] In assessing civil penalties, the Revised Policy Statement emphasized that, among the factors considered, "the most important in determining the amount of the penalty are the seriousness of the offense and the strength of the entity's commitment to compliance."[215] The FERC also considers several mitigating factors: whether the violation is found through self-reporting, whether there is any evidence of exemplary cooperation, and whether the violation occurred due to reliance on staff guidance.[216]

2. Policy Statement on Compliance

The FERC supplemented this policy statement on October 16, 2008 with a policy statement on compliance. The statement emphasized "the benefit to companies that take such compliance measures seriously and implement effective programs to assure compliance in their regulated activities."[217] A vigorous compliance program exhibits four factors: (1) the role of senior management in fostering a strong compliance ethic within a company; (2) systematic and effective preventive measures, including careful hiring, training, and accountability; (3) prompt detection, correction, and reporting of a violation; and (4) remediation efforts.[218] A penalty for a non-serious violation[219] may be reduced in the presence of these factors, or eliminated entirely if all four factors are met. Reducing a penalty is a case-specific decision, and, even if a penalty is reduced, other sanctions, such as disgorgement of unjust profits and prospective compliance monitoring, may still be imposed.[220]

3. Penalty Cost Recovery

The FERC issued an order on March 20, 2008 to provide guidance to RTOs and ISOs on recovery of reliability penalty costs. The FERC expressed concern that "RTOs and ISOs will not have the appropriate incentives to proactively comply with reliability standards if they have blanket authority to automatically

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209. *Id.* at P 34.

210. *Enforcement of Statutes, Regulations and Orders*, 123 F.E.R.C. ¶ 61,156, at P 36 (2008).

211. *Id.* at P 41.

212. *Id.* at P 44.

213. *Id.* at P 42.

214. *Id.* at P 49.

215. *Id.* at P 54.

216. *Id.* at PP 61-70.

217. *Compliance with Statutes, Regulations, and Orders*, 125 F.E.R.C. ¶ 61,058, at P 9 (2008).

218. *Id.* at PP 13-21.

219. A violation that is not serious is a "violation [that] does not involve significant harm, risk of significant harm, or damage to the integrity of the Commission's regulatory program." *Id.* at P 25.

220. *Id.* at P 27.

pass through monetary penalties to their customers."[221] The FERC announced that RTOs and ISOs cannot adopt tariffs to automatically recover reliability penalties.[222] However, RTOs and ISOs can request approval to spread penalty costs among their members and/or customers on a case-by-case basis. Any such proposals will be evaluated by the nature of the violation, factors contributing to the violation, and the integrity of the entity's compliance program.[223] The FERC rejected automatic direct assignment of reliability-related monetary penalty costs by RTOs or ISOs, but will allow Section 205 filings to directly assign the costs of a penalty to another entity.[224] In doing so, however, that other entity must have been put on notice of its potential liability during the investigative or hearing stage of the enforcement process.[225] RTOs and ISOs are therefore encouraged to include responsibility provisions in their contracts with members and customers, and to utilize the joint registration process.[226]

4. Review of Notices of Penalty

On April 17, 2008, the FERC issued a statement of administrative policy on processing Notices of Penalty. The statement provided timeframes for the review process, both when requested by the regulated entity or on its own motion. The Commission discussed the general criteria it will use to determine whether to review specific notices on its own motion. These criteria include: (1) the apparent relative seriousness of a violation listed in the notice, as evidenced by the combination of violation risk factor and violation severity level for the particular Standard requirements; (2) the potential risk posed to bulk power system reliability, as well as any actual harm, presented by the factual pattern relating to the violation; (3) the application of penalties in a reasonably consistent manner; and (4) the improvement in compliance and consequent increase in bulk power system reliability that the penalty would provide.[227]

These will be *de novo* reviews of the record to determine whether there is adequate evidence that the proposed penalty determination accords with the test in FPA Section 215(e)(6).[228] The statute requires that a penalty "shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of [the regulated entity] to remedy the violation in a timely manner."[229] The FERC observed that it "does not anticipate moving to review every notice of penalty that NERC files, or even most."[230]

The Commission also stated that it retains the ability to review on its own motion settlements imposing penalties to which a Regional Entity had agreed, after approval by NERC; this changes a policy first announced in Order No.

221. *Reliability Standard Compliance and Enforcement in Regions with Reg'l Transmission Orgs. or Indep. Sys. Operators*, 122 F.E.R.C. ¶ 61,247, at P 16 (2008).

222. *Id.*

223. *Id.*

224. *Id.* at P 23.

225. *Id.*

226. *Id.* at P 24.

227. *Statement of Admin. Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672*, 123 F.E.R.C. ¶ 61,046, at P 11 (2008).

228. *Id.* at P 9.

229. *Id.*

230. *Id.* at P 10.

672.[231] The FERC made an additional clarification of Order No. 672 on August 7, 2007. The FERC clarified that any orders issued pursuant to Order No. 672 only apply to that portion of the bulk power system located in the contiguous U.S.[232] Therefore, only mitigation plans prepared by entities subject to the FERC's jurisdiction are to be filed with the Commission.[233]

5. Guidance on Notices of Penalty

The FERC issued guidance to NERC regarding the content of future notices of penalty on July 3, 2008. Much of the guidance focused on NERC's need to ensure consistency with FERC regulations and NERC's own rules of procedure, as well as consistency across notices of penalty.[234] The FERC lauded a settlement which required the violator to analyze why the violation occurred, mitigate the violation, minimize possible future violations, "and otherwise protect the reliability of the Bulk-Power System."[235] Such detailed information, particularly about the nature and duration of each violation, "is crucial to development of adequately-documented records that support penalty determinations."[236] Future notices also must address whether the number and range of violations "evidence a failure of the registered entity to properly prioritize compliance."[237]

In determining penalties, the FERC distinguished between self-certifications, which are required and do not trigger penalty reductions, and voluntary self-reports, which can be a mitigating factor for penalty determinations.[238] The FERC also criticized the lack of analysis as to how the penalty factors were considered in determining each penalty.[239] Although the notices of penalty included mitigation plans, these plans did not detail how the entity will come into compliance in a timely manner, and the notices did not specify how completion of mitigation plans will be verified.[240] Finally, the Commission emphasized that its decision to not review the determinations on its own motion "should not be taken as any indication as to whether the Commission would impose comparable penalties . . . with respect to any violation" of the reliability standards.[241]

D. Sanction Guidelines

By letter order on January 15, 2008, the FERC approved NERC's November 13, 2007 compliance filing modifying Sections 3.21 and 4.0 of the Sanction Guidelines, located in Appendix 4B to the NERC Rules of

231. *Id.* at P 15.
232. *North Am. Elec. Reliability Corp.*, 120 F.E.R.C. ¶ 61,141, at P 3 (2007).
233. *Id.* at P 2.
234. *Guidance on Filing Reliability Notices of Penalty*, 124 F.E.R.C. ¶ 61,015, at P 18 (2008).
235. *Id.* at P 16.
236. *Id.* at P 22.
237. *Id.* at P 39.
238. *Id.* at P 32.
239. *Id.* at P 34.
240. *Id.* at PP 36-37.
241. *Id.* at P 15.

Procedure.[242] The modifications respond to the Commission's requirement that some reliability standards should have penalties calculated based on an alternative penalty frequency or duration, rather than assessment on a per day, per violation basis.[243]

VI. NERC's Reliability Assessment and Monitoring Functions

A. Reliability Assessment and Performance Analysis Program

Under Section 215(g) of the FPA and 18 C.F.R. §39.11, NERC is responsible for "conduct[ing] periodic assessments of the reliability and adequacy of the bulk-power system in North America."[244] NERC prepares three reliability assessment reports annually (long-term, summer, and winter reports) and additional reports as conditions warrant or as directed by its board. These reports analyze electricity demand, adequacy of supply, and adequacy of the transmission system. In 2008 and 2009, this program implements the Reliability Assessment Improvement Initiative and in 2009, it includes a reliability assessment to evaluate potential scenarios should legislation regulating greenhouse gases be enacted. The program also includes

> [a]nalyzing significant system events and other off-normal events occurring on the bulk power system; identifying the root causes of events that may be precursors of potentially more serious events impacting the reliable operation of the bulk power system; assessing past reliability performance for lessons learned; disseminating findings and lessons learned to the electric industry to improve reliability performance; and developing reliability performance benchmarks and monitoring performance against those benchmarks.[245]

The program further includes "maintaining and enhancing NERC's Blackout and Disturbance Response Procedure . . . maintaining the Generating Availability Data System (''GADS'') and . . . develop[ing] the Transmission Availability Data System ("TADS")."[246]

B. NERC Alerts

On September 20, 2007, the FERC issued an order requiring NERC to further clarify its Rules of Procedure pertaining to NERC's issuance of alerts.[247] In response, NERC submitted a compliance filing on October 19, 2007 that amended Section 810 of its Rules of Procedure – Information Exchange and Issuance of NERC Advisories, Recommendations and Essential Actions – to require that operating experience data be provided to NERC, which disseminates the results of its events analysis findings, lessons learned, and other analysis and information gathering to the industry. When NERC determines it is necessary to place the industry on formal notice of its findings, it will issue notifications in

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242. North Am. Elec. Reliability Corp. Letter Order, Docket No. RR06-1-013 (Jan. 15, 2008), *available at* http://www.nerc.com/files/Appendix4B_Sanctions_Guidelines_Effective_20080115.pdf.

243. *North Am. Elec. Reliability Corp.*, 121 F.E.R.C. ¶ 61,033, at PP 10-15 (2007).

244. 16 U.S.C. § 824o (2008); 18 C.F.R. § 39.11 (2009).

245. NERC, *Request of the North American Electric Reliability Corporation for Acceptance of its 2009 Business Plan and Budget* (August 22, 2008), http://www.nerc.com/files/RR08-6NERCMotFileCorrections.pdf.

246. *Id.* at 34-35(emphasis omitted).

247. *North Am. Elec. Reliability Corp.*, 120 F.E.R.C. ¶ 61,239 (2007).

the form of Advisories (Level 1), Recommendations (Level 2), or Essential Actions (Level 3) depending on the seriousness of the recommendation. The industry alerts program (embodied in Section 810 of the Rules of Procedure) does not give NERC authority to mandate that applicable industry members take specific action in response to the notifications. However, the entities to which Level 2 and Level 3 notifications apply are required to acknowledge receipt of such notifications, and provide reports of actions taken and timely updates on their progress towards resolving the issues identified in the notification. Prior to issuing any alerts, NERC must advise the FERC and other governmental authorities of its intent to issue alerts and must also report to them after receiving progress reports from industry members.[248] On February 6, 2008, the FERC approved NERC's compliance filing proposing these changes to Section 810.[249]

C. Reliability Readiness Evaluation and Improvements Program

NERC's Reliability Readiness Evaluation and Improvement Program[250] supports the development and enforcement of reliability standards, as well as the conduct of assessments of the bulk power system reliability. The program aims at assessing the readiness of reliability coordinators, balancing authorities, and transmission operators, identifying and promoting examples of excellence, and identifying opportunities for improvement. The program consists of the following steps: development of overall evaluation schedule; initiation of evaluation process for an entity; provision of criteria and documentation; identification of readiness evaluation team members; coordination of entity to be evaluated and neighboring entity questionnaires; publication of findings.

In its 2009 budget filing, NERC concluded that, with the advent of mandatory and enforceable reliability standards and the implementation of the formal NERC Compliance Monitoring and Enforcement Program, the Reliability Readiness Evaluation and Improvement Program should be discontinued.[251] The Commission disagreed, finding that reliability readiness evaluations are "an essential part of the [Electric Reliability Organization's] package of responsibilities under Section 215 of the [Federal Power Act]."[252] Nonetheless, "NERC continues to believe the decision to terminate this program is warranted

248. For example, on June 21, 2007, NERC's Electricity Sector Information Sharing and Analysis Center (ES-ISAC) issued an advisory regarding an Aurora (*i.e.* cyber-security) threat identifying short-, mid-, and long-term measures designed to mitigate the cyber vulnerability and asked the recipients to voluntarily implement the measures within specific time periods. NERC further requested information regarding compliance with its advisory. Hon. Joseph T. Kelliher, Chairman, FERC, Protecting the Electric Grid from Cyber Security Threats, Summary of Testimony Before the Subcommittee on Energy and Air, (September 11, 2008), *available at* http://www.FERC.gov/EventCalendar/Files/20080911110135-Kelliher%20Cyber%20Security-testimony.pdf.

249. *North Am. Elec. Reliability Corporation*, 122 F.E.R.C. ¶ 61,105 (2008).

250. NERC, *Reliability Readiness Evaluation and Improvement Program Procedure* (Jan. 18, 2007), http://www.nerc.com/files/Appendix7_ReliabilityReadinessEvaluationandImprovementProcedure.pdf.

251. NERC, Request of the North American Electric Reliability Corporation for Acceptance of its 2009 Business Plan and Budget (August 22, 2008), http://www.nerc.com/files/NERC-MRO2009SuppBudgetReq08062009.pdf.

252. *North Am. Elec. Reliability Corporation*, 125 F.E.R.C. ¶ 61,056, at P 32 (2008).

and appropriate."[253] On February 27, 2009, the FERC issued questions and requests for data to NERC regarding its justification for terminating the program[254] and NERC responded thereto on March 16, 2009.[255] On July 16, 2009, the FERC issued an order approving NERC's proposed increase to the 2009 budget and concluding that NERC had provided sufficient support for its proposal to terminate the Reliability Readiness Program.[256]

D. Adequate Level of Reliability

On January 18, 2007, the FERC issued an order[257] directing NERC to file a plan for defining the "adequate level of reliability," a concept that the FERC uses when judging the merits of NERC's Reliability Standards. The FERC required NERC to use a stakeholder process in developing the definition, to address whether the definition should be applicable to all reliability standards or tailored for each standard, to consider opportunities for developing applicable metrics, to propose a continuing improvement process.[258]

On May 5, 2008, NERC made an informational filing[259] that provided the following explanation of "adequate level of reliability":

> The Bulk-Power System ("System") will achieve an adequate level of reliability when it possesses following characteristics: (1) The System is controlled to stay within acceptable limits during normal conditions; (2) The System performs acceptably after credible Contingencies; (3) The System limits the impact and scope of instability and Cascading Outages when they occur; (4) The System's Facilities are protected from unacceptable damage by operating them within Facility Ratings; (5) The System's integrity can be restored promptly if it is lost; and (6) The System has the ability to supply the aggregate electric power and energy requirements of the electricity consumers at all times, taking into account scheduled and reasonably expected unscheduled outages of system components.[260]

NERC also explained the concepts behind each statement in the definition.

E. Confidentiality

NERC's Rules of Procedure protect the confidentiality of confidential business and market information, critical energy infrastructure information, personnel information, work papers, investigative files, and cybersecurity incident information.[261] In order to identify confidential information, an entity submitting information to NERC or a Regional Entity must mark it as

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253. Compliance Filing of the North American Electric Reliability Corporation in Response to October 16, 2008 Order on 2009 Business Plans and Budgets, Docket Nos. RR08-6, *et al.*, at 20 (2008), *available at* http://nerc.com/files.CompFiling-Resp-Oct16-BudgetOrder-12152008.pdf.

254. North Am. Elec. Reliability Corp. Letter Order, Docket Nos. RR08-6 (2008), *et al., available at* http://nerc.com/files/FinalFiled-TOP-004-2_VSLFiling-022709.pdf.

255. Response of North American Electric Reliability Corporation to the February 27, 2009 Data Request, Docket Nos. RR08-6, *et al.* (March 16, 2009).

256. *North Am. Elec. Reliability Corp.*, 128 F.E.R.C. ¶ 61,025 (2009).

257. *North Am. Elec. Reliability Corp.*, 118 F.E.R.C. ¶ 61,030 (2007).

258. *Id.* at P 16.

259. Definition of "Adequate Level of Reliability'', Docket No RR06-1 (2008), *available at* http:www.nerc.com/files/Adequate_Level_of_Reliability_Definition_05052008.pdf.

260. *Id.* at 1, 6.

261. NERC, Rules of Procedure § 1501(1) (2009).

"confidential".[262] Prior to disclosing confidential information, a receiving entity must notify the submitting entity and provide it with an opportunity to comment as to why the confidential information should not be disclosed and to seek a protective order.[263] The FERC may obtain, from NERC or a Regional Entity, reliability information under Section 215 of the Federal Power Act and other governmental authorities may do the same under similar authorizing legislation.[264] The disclosure of violations is not prohibited when the matter is filed with a governmental authority as a notice of penalty, when the violator admits to the violation, or when a settlement is reached regarding the violation.[265] NERC and the Regional Entities may "exchange confidential information related to evaluations, audits, and investigations in furtherance of the compliance and enforcement program, on condition they continue to maintain the confidentiality of such information."[266]

F. Training, Education, and Operator Certification Program

The Training, Education, and Operator Certification Program[267] includes the System Operator Certification Program (SOCP), the Continuing Education Program (CEP) for owners, operators and users of the bulk power system, and the Education Program for NERC and Regional Entity staff (Education Program).

The SOCP certifies operating personnel through examination and continuing education. It is administered by NERC professional and technical staff and overseen by NERC's Personnel Certification Governance Committee. The CEP accredits with the goal of improving the training programs of owners, operators and users of the bulk power system and of other continuing education providers. The program audits periodically continuing education providers and training activities to ensure that they satisfy relevant continuing education requirements.

The Education Program establishes training requirements for NERC and Regional Entity staff and maintains learning materials and activities. The program "provides educational activities and tools to industry stakeholders, participants and regulators."[268] "These activities are carried out by NERC professional and technical staff and contractors with the assistance of industry volunteers possessing appropriate technical knowledge and competencies."[269]

G. Enhancements to Reliability

In response to Order No. 672, NERC proposed reliability enhancement programs that it has either implemented or is in the process of implementing in

262. *Id.* at § 1502(1) (2009).

263. *Id.* at § 1503(3), 1503(6) (2009).

264. *Id.* at § 1505(1) (2009).

265. *Id.* at § 1506(1) (2009).

266. *Id.* at § 1506(2) (2009).

267. NERC, Request of the North American Electric Reliability Corporation for Acceptance of its 2009 Business Plan and Budget (August 22, 2008), at 32-33.

268. *Id.* at 32.

269. *Id.* at 33.

order to improve the reliability of the bulk power system,[270] including: enhancements to NERC seasonal and long-term assessments of reliability and adequacy in the NERC Reliability Assessment Program; enhancements to the NERC Events Analysis and Information Exchange Program; reliability Metrics and Benchmarking Program; Transmission Availability Data System; new features and enhancements to the NERC Readiness Evaluation and Improvement Program; Training, Education and Personnel Certification Program; Situation Awareness and Infrastructure Protection Program; response to the recommendations of the August 2003 Blackout Task Force; Operating and Planning Committees and Subgroups; NERC Board of Trustees Technology Committee; and Transmission Owners and Operators Forum. NERC also explained that it was not yet in a position to propose reliability enhancement programs that are comparable to the specific nuclear power programs discussed in Order No. 672.

Further, on July 21, 2008, NERC made a filing describing several reliability enhancement programs and activities initiated or expanded to improve the reliability of the bulk power system,[271] including: development of NERC's New Five-Year Strategic Plan; Critical Infrastructure Protection; Continued Efforts to Enhance the Reliability Metrics and Benchmarking Program; Reliability Assessment Improvement Program; Establishing New Reliability Databases for Availability Performance of Transmission Facilities and Demand Response Programs; Definition of Adequate Level of Reliability; Development of a Reliability Concepts Document; Development and Implementation of the NERC Alerts Program; and Improving Reliability Tools and Support Services. NERC further explained that it was still not in a position to propose reliability enhancement programs that are comparable to the nuclear power programs.

VII. COORDINATED, OPEN, AND TRANSPARENT REGIONAL TRANSMISSION PLANNING

Order No. 888,[272] which established the legal obligation supporting open access to the transmission grid, imposed obligations on transmission service providers to plan and develop their transmission systems to meet open access service requirements. However, it was not until Order 890,[273] issued in 2007, that the FERC required the adoption of specific transmission planning processes to support its mandated open transmission access. As it explained in Order 890,

270. Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards, 71 Fed. Reg. 8,862 (Feb. 21, 2006); Compliance Filing of The North American Electric Reliability Corporation in Response to Paragraph 468 of Order No. 672, Docket No. RM05-30-000 (July 20, 2007). Approved by letter order dated November 2, 2007 in Docket No. RR07-14-000.

271. Compliance Filing of the North American Electric Reliability Corporation in Response to FERC Order on Filing of Reliability Enhancement Programs, Docket No. RR07-14-000 (2008); accepted in *North Am. Elec. Reliability Corp.*, 125 F.E.R.C. ¶ 61,056 (2008).

272. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996) [hereinafter, *Order 888*]; *reh'g*, Order No. 888-A, 62 Fed. Reg.12,274 (Jan. 21, 1997); *reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997).

273. *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12,266 (Mar. 15, 2007); *reh'g*, 73 Fed. Reg. 2,984 (Jan. 16, 2008); *reh'g & clarif'n*, 73 Fed. Reg. 39,092 (July 8, 2008) [hereinafter, *Order 890*].

in Order 888, the FERC set forth "certain minimum requirements for transmission system planning," including that transmission providers be required to "plan and upgrade their transmission systems to provide comparable open access transmission service for their transmission customers."[274] But this general obligation lacked transparency or requirements for transmission customer input into the planning process, thus leaving monopoly transmission service providers with broad discretion in its implementation, discretion that the FERC concluded could permit discrimination in favor of a provider's affiliated generation. The FERC thus summarized the problem and the importance of its correction as follows:

> [T]he Final Rule [established by Order 890] will increase the ability of customers to access new generating resources and promote efficient utilization of transmission by requiring an open, transparent and coordinated transmission planning process. Transmission planning is a critical function under the pro forma OATT because it is the means by which customers consider and access new sources of energy and have an opportunity to explore the feasibility of non-transmission alternatives. Despite this, the existing pro forma OATT provides limited guidance regarding how transmission customers are treated in the planning process and provides them very little information on how transmission plans are developed. These deficiencies are serious, given the substantial need for new infrastructure in this Nation. We act today to remedy these deficiencies by requiring transmission providers to open their transmission planning process to customers, coordinate with customers regarding future system plans, and share necessary planning information with customers.[275]

In Order 890, the FERC defined nine transmission planning principles whose proper implementation through specific planning procedures and activities would, it concluded, eliminate opportunities for continued discrimination. It defined these principles as follows:

(i)Coordination: This principle requires that transmission providers must meet with all of their transmission customers and interconnected neighbors to develop a transmission plan, but without prescribing how often such meetings are to occur, except to note that "customers must be included at the early stages of the development of the transmission plan and not merely given an opportunity to comment on transmission plans that were developed in the first instance without their input," nor to prescribe substantive content, scope, and other features of such plans. However, the FERC clarified that stakeholders are not "co-equals" in the transmission planning process and specifically held that transmission providers are not required to construct transmission proposed by stakeholders. The FERC explained that this principle is intended to "eliminate the potential for undue discrimination in planning by opening appropriate lines of communication between transmission providers, their transmission-providing neighbors, affected state authorities, customers, and other stakeholders."[276]

(ii)Openness: This principle requires that "transmission planning meetings be open to all affected parties" except as it may be appropriate where limited subjects are addressed to limit participation to those interested in such subjects

274. *Id.* at PP 39-40, 418-420; Open Access Transmission Tariff §§ 13.5, 15.4, 28.2. Under these sections, the transmission provider is required to "conform to Good Utility Practice in determining the need for new facilities and in the design and construction of such facilities" to provide requested open access transmission service.

275. *Order 890*, *supra* note 274, at P 3.

276. *Id.* at PP 451-454.

and to protect proprietary and confidential data through appropriate confidentiality agreements and other means.[277]

(iii) Transparency: This principle requires that transmission providers be required "to disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans" including "the basic methodology, criteria, and processes they use to develop their transmission plans." The FERC explained that information disclosed should be sufficient to permit non-transmission provider stakeholders to "replicate the results of planning studies and thereby reduce the incidence of after-the-fact disputes regarding whether planning has been conducted in an unduly discriminatory fashion."[278]

(iv) Information Exchange: This principle requires that transmission customers be given the opportunity to "submit information on their projected loads and resources on a comparable basis . . . as used by transmission providers in planning for their native load." Transmission providers are to develop guidelines and a schedule for submitting this information.[279]

(v) Comparability: The FERC requires that each transmission provider "develop a transmission system plan that (1) meets the specific service requests of its transmission customers and (2) otherwise treats similarly-situated customers (*e.g.*, network and retail native load) comparably in transmission system planning." Comparability further requires that "where demand resources are capable of providing the functions assessed in a transmission planning process", "they should be permitted to participate in that process on a comparable basis."[280]

(vi) Dispute Resolution: The FERC requires that such a process be provided, noting that its purpose is to provide a means for parties to address substantive and procedural disputes respecting transmission planning without involving the FERC, but further noted that such disputes could be brought before it through an FPA Section 206 complaint.

(vii) Regional Participation: This principle requires that each transmission provider is required to coordinate with interconnected systems to: "(1) share system plans to ensure that they are simultaneously feasible and otherwise use consistent assumptions and data and (2) identify system enhancements that could relieve ['significant and recurring' transmission] congestion". The FERC noted approvingly that a number of regional planning efforts were already underway.[281]

(viii) Economic Planning Studies: Stating that "[p]lanning involves both reliability and economic considerations", the FERC directed that transmission providers are to conduct, at the request of customers or other stakeholders, a specified number of studies each year which examine the economic desirability of system "upgrades or other investments that could reduce congestion or integrate new resources and loads." Study costs are to be recovered as a

277. *Id.* at P 460.
278. *Id.* at P 471-79.
279. *Id.* at P 480, 486.
280. *Id.* at P 479-80, 494-95.
281. *Id.* at P 523-29.

ratepayer cost-of-service expense, and additional studies may be requested at the cost of the requestor.[282]

(ix)Cost Allocation of New Projects: Explaining that transmission providers and customers cannot be expected to support the construction of new transmission unless the entities responsible for costs are reasonably well identified and support the projects, the FERC added this principle to its initial NOPR proposal. It further noted that the new process would not alter existing, approved cost allocation mechanisms, but would apply only to projects not covered by those mechanisms. It also declined to provide specific guidance on what allocations should be adopted, but rather stated that fairness, acceptance by those affected and the provision of adequate incentives to project development should govern choice of allocation method.[283]

The FERC encouraged but did not require the use of: an independent third party coordinator to manage the required transmission planning process; an open season procedure to encourage development; joint ownership of major new projects; and the upfront establishment of specific methods for reimbursing costs to participate in the planning process.[284] In its Rehearing Orders (Orders 890-A & B), the FERC generally affirmed its original determinations, emphasizing that transmission planning is the "tariff obligation of the transmission provider" and that the need for openness, transparency, and customer participation exists at all levels of the planning process (*i.e*. regional, sub-regional and local).[285]

As described above, transmission providers were directed to make compliance filings with Order 890 compliant transmission planning process proposals in December 2007. Most providers employed Order 890's suggested new Attachment K to their OATT to state the rules and describe the terms of the new planning process. In orders issued from May to October 2008, the FERC reviewed these compliance filings to assure that the planning processes being established would comply with the requirements of Order 890.[286] Although generally concluding that transmission providers had largely satisfied its nine principles, the FERC typically required supplementation and/or clarification of the substance of the proposed planning process or its descriptive tariff language. The initial orders (May/June) reviewed the compliance filings of the

282. *Id.* at PP 529-51.

283. *Id.* at PP 557-61.

284. *Id.* at PP 567-68, 586, 593-94.

285. Order 890-A, at PP 153-264; Order No. 890-B. The FERC required that all transmission providers make a filing under Federal Power Act § 206 (16 U.S.C. § 824e (2005)) amending their existing OATT tariff to comply with the principles and new requirements described above or to Seek modifications of the required terms where they believed alternatives could be proposed which were "consistent with or superior to" those specified by Order 890. *Order 890*, *supra* note 274, at PP 135-142, 157-158, 435-443. A series of the FERC Staff Conferences were held throughout 2008 to examine and obtain comment upon "strawmen" prepared by transmission providers prior to the formal compliance filings.

286. *See e.g.*, *Midwest Independent Transmission System Operator, Inc.*, 123 F.E.R.C. ¶ 61,164 (2008), *reh'g* 127 F.E.R.C. ¶ 61,169 (2009) [hereinafter, *MISO*]. Employment of the suggested Attachment K is not required, and transmission providers may maintain descriptions of their planning processes in other similar tariff schedules or in their formative agreements (*i.e.* such as *PJM*'s Operating Agreement Schedule 6). *PJM Interconnection, L.L.C.*, 123 F.E.R.C. ¶ 61,163 (2008); *reh'g*, 127 F.E.R.C. ¶ 61,166 (2009) [hereinafter, *PJM*); *MISO* at 14-19, 42-43 (OATT Attachment FF) (2009). Transmission providers may also place technical details related to the transmission planning process in business or technical manuals so long as the manuals are available on their website.

RTO/ISOs.[287] Typical supplementation required to these proposals addressed compliance with principles seven and eight, *i.e.* providing regional participation and economic planning studies. For example, the FERC concluded as to several of the proposals that further description was required of how inter-regional and regional planning processes would operate, and particularly how stakeholders would be permitted to contribute meaningfully to the proposed regional planning. Also, the FERC typically required enhancement of tariff descriptions of stakeholder participation opportunities in local planning by RTO/ISO member transmission providers that would contribute to the final prepared RTO/ISO transmission plan.[288] In several Orders, the FERC reiterated that, although Order 890 requires that stakeholders be allowed a meaningful participation in transmission plan development, this does not mean that such plans are developed on a "co-equal basis". Rather, their development remains the responsibility of the transmission provider.[289]

Generally, the proposed (and accepted) RTO/ISO and non-RTO/ISO planning processes are "bottom-up" in nature, beginning with local utility planning, moving to the RTO or non-RTO regional level (where coordinated reliability and then economic planning occur), and then concluding with an inter-regional coordination process. The FERC accepted various additional features of the transmission provider-proposed processes, including the identification of stakeholder planning committees (for example, such as the PJM Transmission Planning or Expansion Advisory Committee) through which stakeholders would participate in the development of necessary planning assumptions, propose alternative system improvements, request economic planning studies and participate in other ways. Additionally, the FERC accepted the use of timelines for describing important milestones of plan development, the use of early stakeholder/transmission provider joint meetings to define analysis assumptions and the dissemination of computer and other models to replicate or expand on

287. *See e.g., PJM, supra* note 287; *MISO, supra* note 287; *ISO New England Inc.*, 123 F.E.R.C. ¶ 61,161 (2008), 127 F.E.R.C. ¶ 61,170 (2009) [hereinafter, *ISO-NE*]; *CA Indep. Sys. Operator Corp.*, 123 F.E.R.C. ¶ 61,283 (2008); *reh'g*, 127 F.E.R.C. ¶ 61,172 (2009) [hereinafter, *CAISO*]; *New York Indep. Sys. Operator, Inc.*, 125 F.E.R.C. ¶ 61,068 (2008); *reh'g*, 126 F.E.R.C. ¶ 61,320 (2009) [hereinafter, *NYISO*]; *S.W. Power Pool*, 124 F.E.R.C. ¶ 61,028 (2008); *reh'g*, 126 F.E.R.C. ¶ 61,244 (2009). *Midwest Indep. Transmission System Operator & Am. Transmission Co., L.L.C.*, 123 F.E.R.C. ¶ 61,165 (2008), 127 F.E.R.C. ¶ 61,169 (2009) (Then FERC largely accepted the joint compliance filing defining how transmission planning obligations under Order 890 would be divided where an independent transmission company operates within an RTO).

288. *PJM, supra* note 287, at PP 121-142; *MISO, supra* note 287, at PP 65-66, 87-138 (also rejecting a request that it mandate the regional scope of this planning obligation); *ISO-NE, supra* note 288, at PP 67-72, 90-91, 94-100 (noting with approval the role played by existing Joint Operating Agreements between RTOs); *CAISO, supra* note 288, at PP 185-193; *NYISO, supra* note 288, at PP 70, 77, 102-103 (noting with approval the Northeastern ISO/RTO Planning Coordination Protocol which provides for the development of a Northeastern Coordinated System Plan and NYISO's recently developed economic planning process, the Congestion Assessment and Resource Integration Study). The FERC rejected as to the PJM planning process arguments that it favored rate base over market solutions to new facility needs. *PJM, supra* note 287, at PP 96-99; *ISO-NE, supra* note 288, at PP 41-45 (role of regulated versus market based solutions in transmission plan discussed). Finally, in *PJM*, the FERC held that Order 890 transmission planning processes need not include stakeholder voting on plan adoption or components. *Id*.

289. *MISO, supra* note 287, at P 30; *ISO-NE, supra* note 288, at PP 22-23 (a stakeholder vote to adopt the Plan is not required).

the studies performed.[290] Certain Orders approved new cost-allocation methodologies.[291]

In some non-RTO/ISO transmission provider filings, certain unique features were also present. For example, Entergy Services, Inc. integrated the Order 890 planning requirements into its existing and previously FERC-approved Independent Coordinator of Transmission (ICT) Transmission Planning Protocol, pursuant to which its transmission planning process is overseen by the Southwest Power Pool (SPP) as its designated and independent ICT.[292] As proposed by Entergy, it would develop and propose a "Construction Plan" apart from other stakeholders while SPP would develop the "Base Plan" with stakeholder involvement as required by Order 890, but employing planning criteria provided by Entergy. Although accepting for the most part the division of functions proposed by Entergy between itself and the ICT (though emphasizing that Order 890 requirements must be complied with regardless of conflict with the earlier ICT Order), the FERC required that Entergy permit stakeholder involvement in its "Construction Plan" and planning criteria development (i.e. for use in Base Plan development) as such input is necessary for meaningful participation in the transmission planning process.[293]

Duke Energy Carolinas and Progress Energy Carolinas made a single compliance filing proposing a joint transmission planning process in which each would participate.[294] That joint process, which was first implemented in 2005 as the North Carolina Transmission Planning Collaborative Process with the backing of the State of North Carolina, employs a Transmission Advisory Group (similar to RTO/ISO proposals) which is led by an independent third-party (*i.e.* similar to the Entergy ICT proposal). The FERC approved this structure, but as with Entergy, required Duke and Progress to provide for additional stakeholder input.[295] Integration of existing regional planning groups, such as Columbia Grid, WestConnect, MAPP, Western Electricity Coordinating Council, and Florida Reliability Coordinating Council into the Order 890 planning process occurred throughout non-RTO/ISO areas.[296]

In addition, the majority of the Order No. 890 regional transmission processes in the Southeast combined to form an inter-regional transmission planning process, referred to as the Southeast Inter-Regional Participation Process (SIRPP), to perform stakeholder-requested, economic transmission

290. See generally sources cited in Note 288.

291. *CAISO, supra* note 288, at PP 185-193; *reh'g*, 127 F.E.R.C. ¶ 61,172 (2009) at 105- 118; *NYISO, supra* note 288, at PP 19-41, 48, 91-134.

292. *Entergy Services, Inc*., 124 F.E.R.C. ¶ 61,268 (2008); *reh'g*, 127 F.E.R.C. ¶ 61,272 (2009) [hereinafter, *Entergy*]; *Entergy Services, Inc.*, 110 F.E.R.C. ¶ 61,295 (2005).

293. *Entergy*, *supra* note 293, at PP 29-30, 45-48.

294. *Duke Energy Carolinas & Progress Energy Carolinas, Inc.*, 124 F.E.R.C. ¶ 61,267 (2008); *reh'g*, 127 F.E.R.C. ¶ 61,281 (2009) [hereinafter, *Duke*].

295. *Id.* at PP 13-18.

296. *U.S. Dep. of Energy – Bonneville Power Admin.*, 124 F.E.R.C. ¶ 61,054 (2008) [hereinafter, *Bonneville*]; *El Paso Elec. Co.*, 124 F.E.R.C. ¶ 61,051 (2008); *Mid-American Energy Co.*, 123 F.E.R.C. ¶ 61,160 (2008); *reh'g*, 127 F.E.R.C. ¶ 61,168 (2009).

planning studies that are inter-regional in nature.[297] The transmission owners and transmission providers sponsoring the SIRPP are: Power South, Dalton Utilities, Georgia Transmission Corporation, Duke Energy Carolinas, Entergy Companies, E.ON U.S., Municipal Electric Authority of Georgia, Progress Energy Carolinas, Santee Cooper, South Carolina Electric & Gas, South Mississippi Electric Power Association, Southern Companies, and Tennessee Valley Authority.

In other actions respecting non-RTO/ISO transmission planning proposals, the FERC denied various restrictions on who could be considered a stakeholder and thus participate in plan development because it found that these restrictions could be construed to prevent alternative energy project distributors from participating, and required greater specificity and guidance in tariff language as to how stakeholder participation in regional planning would be accomplished.[298]

Regional transmission planning in the six RTOs/ISOs and also in non-RTO/ISO regions began well before the FERC's issuance of Order 890, in some instances as far back as 1997, and provides for either a ten or fifteen year planning horizon. In all regional planning processes, planning is done to satisfy applicable NERC standards including compliance with NERC Categories A to C events (TPL-001 to 004) as well as additional regional and/or RTO/ISO specific requirements. Approved Order 890 planning processes are already in effect; however, the FERC has encouraged seeking further refinements and improvements to these planning processes. In that regard, it proposed that Commission Staff should periodically monitor and that the Commission itself, beginning in 2009, should convene regional technical conferences similar to those held in 2007 to determine the progress and benefits realized from the Order 890 process revisions. In a Press Release issued on May 21, 2009, the FERC reaffirmed its plans to host these conferences and provided a more specific statement of their purpose:[299]

The conferences will examine whether existing transmission planning processes adequately consider needs and solutions on a regional or interconnection-wide basis to ensure adequate and reliable supplies of electricity at just and reasonable rates. The FERC also will explore whether the existing transmission planning processes sufficiently meet such emerging transmission challenges as the development of interregional transmission facilities, the integration of large amounts of location-constrained generation and the interconnection of distributed energy resources. The conferences will determine

297. *See e.g.* Press Release, FERC, The FERC Accepts Compliance Plans to Improve Regional Transmission Planning in the Southeast (Sept. 18, 2008), *available at* http://www.ferc.gov/news/news-releases/2008/2008-3/09-18-08-E-3.asp.

298. *Entergy*, *supra* note 293, at PP 56, 69, 102, 128-133; *Duke*, *supra* note 295, at PP 20-27, 59-60, 75-80; *Southern Company Services, Inc.*, 124 F.E.R.C. ¶ 61,265, at PP 22-23, 34, 70-71, 90-98 (2008); *reh'g*, 127 F.E.R.C. ¶ 61,282 (2009); *Xcel Energy Services, Inc. – Public Service Co. of Colorado*, 124 F.E.R.C. ¶ 61,052, at PP 4-7 (2008). Order 890 also required that non-jurisdictional entities with "reciprocity" tariffs on file under Order 888, must amend those tariffs to comply with the new Order 890 requirements if they were to continue to qualify for open access service from jurisdictional entities under Order 888's reciprocity provisions. FERC also reviewed and approved with modifications such filings in 2008. *See*, *e.g.*, *Order 890*, *supra* note 274, at PP 190-192; *Bonneville, supra* note 297*; Southwestern Power Admin.*, 124 F.E.R.C. ¶ 61,261 (2008); *reh'g*, 127 F.E.R.C. ¶ 61,173 (2009).

299. *PJM*, *supra* note 287, at P 11; Press Release, FERC Transmission Planning Meetings to focus on Interregional Challenges (2009), *available at* http://www.FERC.gov./docs-filing/elibrary.asp.

the progress and benefits of each transmission provider's planning process, gather customer and other stakeholder input and discuss any areas that may need improvement.

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