REPORT OF SYSTEM RELIABILITY & PLANNING COMMITTEE

The EBA System Reliability and Planning Committee is pleased to submit its annual report. This report provides a summary of the most significant decisions, orders, and rules issued by the Federal Energy Regulatory Commission (FERC or Commission) and the North American Electric Reliability Corporation (NERC) regarding electric reliability section 215 of the Federal Power Act (FPA) and transmission planning from July 2011 through the end of June 2013. The Committee's previous report provided a summary of significant FERC and NERC decisions, order, and rules from June 2009 through July 2011.[*]

[*] The System Reliability and Planning Committee wishes to acknowledge the support of the full Committee in producing this report and in addition to recognize specific Committee volunteers who contributed to this report. These members include: Candice Castaneda, Andrew Dressel, Beth Emery, Paul Guarisco, Jesse Halpern, Hester McBride, Brandon N. Robinson, Trevor Stiles, and Jonathan Trotta.

I. RELIABILITY GOVERNANCE, STRUCTURE, AND RULES OF PROCEDURE (ROP)

On August 25, 2011, the Federal Energy Regulatory Commission (FERC) approved North American Electric Reliability Corporation's (NERC) December 1, 2010, proposed changes to its Standards Process Manual (SPM) in compliance with the FERC's September 2010 order, which had approved NERC's proposal to replace the old Reliability Standards Development Process with the new "Standard Processes Manual."[1]

On October 7, 2011, the FERC conditionally accepted changes proposed by NERC on February 18, 2011, to its Rules of Procedure, pro forma delegation agreement, various delegation agreements between NERC and the eight regional entities, and the bylaws for Florida Reliability Coordinating Council (FRCC) and Midwest Reliability Organization (MRO).[2]

On May 7, 2012, the NERC submitted requests for revisions to several sections of the NERC Rules of Procedure and associated appendices.[3] These proposed revisions represented a review of the Rules of Procedure (ROP) to identify improvements in the underlying processes based on the experiences of NERC and the Regional Entities.[4] The proposed revisions were also intended to further implement actions identified in NERC's 2009 Three-Year Electric Reliability Organization (ERO) Performance Assessment Report to eliminate

1. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR10-12-001 (Aug. 25, 2011). NERC also made a supplemental filing on May 17, 2011, clarifying the use of the word "necessary" in its headings. Clarification of Dec. 1, 2010 Compliance Filing in Response to Federal Energy Regulatory Commission's Sept. 3, 2010 Order Approving Petition and Directing Compliance Filing, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR10-12-001 (May 17, 2011).

2. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,028 (Oct. 7, 2011). The FERC directed NERC to temporarily reverse its proposed deletion of section 402.1.3.2, which requires NERC to establish a program to audit registered entities to verify findings of previous compliance audits and to evaluate how regional entities' enforcement programs are meeting their delegated authority and responsibilities. *Id.* at P 22. NERC's November 7, 2011, compliance filing was approved on March 1, 2012. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR10-11-004 (Mar. 1, 2012).

3. Petition of NERC for Approval of Revisions to its Rules of Procedure, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-8-000 (May 7, 2012).

4. *Id.* at 5.

inconsistencies and to make other improvements and clarifications.[5] On December 20, 2012, the FERC conditionally approved, with limited exceptions, the NERC's May 7, 2012 filing, directing compliance and informational filings within sixty days.[6] Paragraph 31 of the order requested an informational filing regarding a perceived conflict regarding the NERC's ability to assess penalties against regional entities for noncompliance.[7] The NERC's February 19, 2013, informational filing explained that it interpreted the provisions to allow assessments of penalties for violations when the regional entity is performing a registered entity function, but not when it is acting as a regional entity.[8] On June 25, 2012, the FERC accepted NERC's separate compliance filing with respect to several directives in the December 20, 2012, order.[9]

On February 28, 2013, NERC submitted for approval several revisions to the NERC SPM intended to provide additional clarity and streamline the drafting, commenting, and balloting processes.[10] In its petition, NERC stated that these proposals were developed using input and recommendations from the NERC Member Representatives Committee (MRC) and its Standards Process Input Group (SPIG), as well as other subject matter experts, groups, and stakeholders.[11] NERC submitted reply comments on April 5, 2013,[12] and the FERC approved NERC's proposed revisions on June 26, 2013.[13]

On April 8, 2013, NERC filed a petition for approval of revisions to Appendix 4D of the NERC Rules of Procedure regarding procedures for requesting and receiving Technical Feasibility Exceptions (TFEs) to NERC Critical Infrastructure Protection (CIP) standards, and Appendix 2, regarding definitions used in the NERC Rules of Procedure.[14] The NERC stated that the proposed revisions are the result of a collaborative process among NERC, regional entities, and stakeholders to revise the CIP TFE process.[15]

II. NERC BUSINESS PLAN AND BUDGET

Between 2011 and 2013, NERC has submitted three NERC Business Plan and Budget Filings,[16] two budget true-ups,[17] and three status reports of NERC's

5. *Id.* at 1.

6. *North Am. Elec. Reliability Corp.*, 141 F.E.R.C. ¶ 61,241 (2012).

7. *Id.* at P 31.

8. Informational Filing of NERC in Response to December 20, 2012, Commission Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-8-000 (Feb. 19, 2013).

9. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-8-001 (June 25, 2013); *see also* Informational Filing, *supra* note 8.

10. Petition of NERC for Approval of Revisions to the Standard Processes Manual, *North Am. Elec. Reliability Corp.*, FERC Docket Nos. RR13-2-000, RR12-3-000, RR10-12-000 (Feb. 28, 2013).

11. *Id.* at 3-4.

12. Reply Comments of NERC, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR13-2 (Apr. 5, 2013).

13. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,273 (2013).

14. Petition of NERC for Approval of Revisions to Appendix 2 and Appendix 4D of the NERC Rules of Procedure, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR13-3-000 (Apr. 8, 2013).

15. *Id.* at 5.

16. Request for Acceptance of 2013 Business Plans and Budgets of NERC and Regional Entities and for Approval of Proposed Assessments to Fund Budgets, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-13-000 (Aug. 24, 2012); Request for Acceptance of 2012 Business Plans and Budgets of NERC and

efforts to address FERC reliability directives.[18] In its order accepting the 2012 NERC Business Plan and Budget, the FERC stated that certain metrics developed in response to the 2011 budget order were of limited value as a comparative tool and could be eliminated.[19] The FERC noted the lack of guidelines applicable to development of regional entity projections, potential inconsistencies between projections and manner of their development, and the lack of complete data.[20] As a result, the FERC eliminated the requirement that NERC create comparative metrics based on the Regional Entity projections.[21]

In 2012, when the FERC accepted the 2013 NERC Business Plan and Budget, it required NERC to make a compliance filing including written criteria for determining whether a NERC activity is eligible for funding under the Federal Power Act (FPA).[22] NERC filed the requisite compliance filing in Docket No. FA11-21-000 in February 2013.[23] The FERC accepted the compliance filing with modifications in April 2013.[24] On January 16, 2013, the FERC approved a settlement between the FERC Office of Enforcement and NERC with regard to the proceeding.[25] The NERC also submitted two compliance filings in Docket No. FA11-21-000 in connection with that settlement.[26]

III. RELIABILITY STANDARDS

A. NERC Files Petition to Retire 34 Requirements in 19 Standards

Paragraph 81 of the March 15, 2012, FERC order approving NERC's Find, Fix, and Track and Report (FFT) enforcement mechanism[27] invited NERC to make specific proposals to revise or remove reliability standards or requirements

Regional Entities and for Approval of Proposed Assessments to Find Budgets, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR11-7-000 (Aug. 24, 2011); Compliance Filing of NERC Regarding 2011 Business Plans and Budgets, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR10-13-001 (Feb. 2, 2011).

17. Report of Comparisons of Budgeted to Actual Costs for 2012 for NERC and the Regional Entities, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR13-6-000 (May 30, 2013); Report of Comparisons of Budgeted to Actual Costs for 2011 for NERC and the Regional Entities, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-11-000 (May 30, 2012).

18. N. AM. ELEC. RELIABILITY CORP., 2012 STATE OF RELIABILITY (May 2012), *available at* http://www.nerc.com/files/2012_sor.pdf; NERC Standards Report, Status and Timetable for Addressing Regulatory Directives, FERC Docket No. RR09-6-003 (Mar. 30, 2012); N. AM. ELEC. RELIABILITY CORP., NERC STANDARDS REPORT, STATUS AND TIMETABLE FOR ADDRESSING REGULATORY DIRECTIVES (2011), *available at* http://www.nerc.com/files/final_2011_direct_report_complete.pdf.

19. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,071 at P 25 (2011).

20. *Id.* at P 26.

21. *Id.* at P 27.

22. *North Am. Elec. Reliability Corp.*, 141 F.E.R.C. ¶ 61,086 at P 30 (2012).

23. Compliance Filing of NERC in Response to Paragraph 30 of November 2, 2012 Commission Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000 (Feb. 1, 2013).

24. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,052 (2013).

25. *North Am. Elec. Reliability Corp.*, 142 F.E.R.C. ¶ 61,042 (2013).

26. Compliance Filing, *supra* note 23; Compliance Filing of NERC, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000 (May 15, 2013).

27. *North Am. Elec. Reliability Corp.*, 138 F.E.R.C. ¶ 61,193 at P 81 (2012), *order on reh'g and clarification*, 139 F.E.R.C. ¶ 61,168. For a discussion of the FERC's order approving the FFT mechanism, see *infra* Section VIII.A.

that "provide little protection to the reliability of the Bulk-Power System or may be redundant" along with the "technical basis for [NERC's] belief."[28] On February 28, 2013, NERC submitted a petition seeking the FERC's approval to retire thirty-four requirements in nineteen reliability standards.[29]

On June 20, 2013, the FERC proposed to approve these retirements and to withdraw another forty-one outstanding directives.[30] The NERC has continued this initiative, may seek FERC approval for the retirement of more requirements and directives, and will incorporate the principles utilized to develop the list of thirty-four standards into the standards development process.[31]

B. Revisions to Bulk Electric System (BES) Definition

As discussed in the last Committee Report,[32] the FERC required NERC to submit a revised BES definition to the FERC by January 25, 2012.[33] NERC filed two petitions on January 25, 2012, for the approval of (1) the revised definition[34] and (2) the exceptions procedure that would amend the NERC Rules of Procedure[35] and become sections 509 (Exceptions to the Definition of the Bulk Electric System), 1703 (Challenges to NERC Determinations of BES Exception Requests Under Section 509), and Appendix 5C (Procedure for Requesting and Receiving an Exception to the NERC Definition of Bulk Electric System) to the NERC Rules of Procedure.[36]

On June 22, 2012, the FERC proposed to approve NERC's petitions, believing the proposed revisions add additional clarity to the definition by providing "granularity" regarding whether "common types of facilities and facility configurations" are part of the bulk electric system.[37] On December 20, 2012, the FERC conditionally approved the revised BES definition for the reasons described above.[38] The FERC also accepted the proposed revisions to NERC's ROP, approved NERC's proposed implementation plan and exception

28. 138 F.E.R.C. ¶ 61,193 at P 1.

29. Petition of NERC for Approval of Retirement of Requirements in Reliability Standards, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-8-000 (Feb. 28, 2013).

30. Notice of Proposed Rulemaking, *Electric Reliability Organization Proposal to Retire Requirements in Reliability Standards*, 143 F.E.R.C. ¶ 61,251 (2013).

31. *Id.* at P 12.

32. *Report of the System Reliability, Planning and Compliance Committee*, 32 ENERGY L.J. 759, 773 (2011) [hereinafter 2011 Report].

33. Order No. 743, *Revision to Electric Reliability Organization Definition of Bulk Electric System*, 133 F.E.R.C. ¶ 61,150 at P 173 (2010).

34. Petition of NERC for Approval of a Revised Definition of "Bulk Electric System" in the NERC Glossary of Terms Used in Reliability Standards, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM12-6-000 (Jan. 25, 2012).

35. *Rules of Procedure*, NERC, http://www.nerc.com/AboutNERC/Pages/Rules-of-Procedure.aspx (last visited Oct. 15, 2013).

36. Petition of NERC for Approval of Revisions to its Rules of Procedure to Adopt a Bulk Electric System Exception Procedure, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM12-7-000 (Jan. 25, 2012).

37. Notice of Proposed Rulemaking, *Revisions to Electric Reliability Organization Definition and Rules of Procedure*, 139 F.E.R.C. ¶ 61,247 at P 3 (2012).

38. Order No. 773, *Revisions to Electric Reliability Organization Definition and Rules of Procedure*, 141 F.E.R.C. ¶ 61,236 at PP 1-2 (2012), 78 Fed. Reg. 804 (2013) (to be codified at 18 C.F.R. pt. 40).

request form, found that the FERC can designate sub-100 kilovolt (kV) facilities as part of the BES and established a process that allows the FERC to determine whether facilities are "used in local distribution."[39] However, the FERC directed NERC to modify the exclusions for radial systems and local networks.[40]

NERC's January 22, 2013, Request for Clarification sought clarification regarding three of the FERC's directives to modify the revised BES definition.[41] On April 4, 2013, as directed by Order No. 773, NERC submitted a compliance filing regarding Exclusion E3, with a schedule "outlining how and when it will modify Exclusion E3 of BES definition to remove the 100 kV minimum operating voltage [from] the local network definition," but that schedule was dependent on the FERC's decisions on the pending Requests for Clarification and Rehearing.[42]

On April 18, 2013, the FERC "denie[d] rehearing in part, grant[ed] rehearing in part[,] and otherwise reaffirm[ed] its determinations in Order No. 773" and "clarifie[d] certain provisions of the Final Rule."[43] Specifically, the FERC granted rehearing "to the extent that, rather than direct NERC to implement exclusions E1 and E3 as described above, [FERC] direct[ed] NERC to modify the exclusions . . . to ensure that generator interconnection facilities at or above 100 kV connected to [BES] generators identified in inclusion I2 are not excluded from the [BES]."[44] The FERC also granted the rehearing request based "on the need to reassess the burden estimates relative to the Final Rule modifications regarding exclusions E1 and E3."[45] The FERC also provided clarification with regard to the effective date of the new BES definition.[46] The FERC denied all other requests for rehearing or clarification.[47]

39. *Id.* at P 3.

40. *Id.* at P 4.

41. Request for Clarification of NERC, *Revisions to Electric Reliability Organization Definition and Rules of Procedure*, FERC Docket Nos. RM12-6-000, RM12-7-000 (Jan. 22, 2013).

42. *See generally* Compliance Filing of NERC at 1-2, *Revisions to Electric Reliability Organization Definition and Rules of Procedure*, FERC Docket Nos. RM12-6-000, RM12-7-000 (Apr. 4, 2013); *see, e.g.*, Request for Rehearing of the American Public Power Association, FERC Docket Nos. RM12-6-001, RM12-7-001 (Jan. 5, 2013); Request for Rehearing and Clarification of Transmission Access Policy Study Group and Electricity Consumers Resource Council, FERC Docket Nos. RM12-6-001, RM12-7-001 (Jan. 22, 2013); Motion for Clarification or Request for Rehearing of the National Rural Electric Cooperative Association, FERC Docket Nos. RM12-6-001, RM12-7-001 (Jan. 22, 2013).

43. Order No. 773-A, *Revisions to Electric Reliability Organization Definition and Rules of Procedure*, 143 F.E.R.C. ¶ 61,053 at P 1 (2013) [hereinafter Order No. 773-A] (to be codified at 18 C.F.R. pt. 40).

44. *Id.* at P 50.

45. *Id.* at P 123.

46. *Id.* at P 118. On May 23, 2013, the NERC petitioned for a one year extension of the implementation date of the revised BES definition. Motion for an Extension of Time and Request for Shortened Comment Period, *Revisions to Electric Reliability Organization Definition and Rules of Procedure*, FERC Docket Nos. RM12-6-000, RM12-7-000 (May 23, 2013). NERC's June 3, 2013, Informational Filing on the BES Definition Exception Process addresses "how a list of facilities and Elements for which Exceptions have been granted and those for which an entity has made a self-determined exclusion, will be maintained . . . [and] identifies how information will be made available to the Commission, Regional Entities, and to other interested persons." Informational Filing of NERC at 1, *Revisions to Electric Reliability Organization Definition and Rules of Procedure*, FERC Docket Nos. RM12-6-000, RM12-7-000 (June 3, 2013). On June 13, 2013, the FERC granted NERC's May 23 request or an extension of time for implementing the revised BES Definition. *Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, 143 F.E.R.C. ¶ 61,231 (2013).

C. Multiple Reliability Standards

On April 18, 2013, the FERC proposed to approve changes to four reliability standards associated with generator requirements at the transmission interface: FAC-001-1 (Facility Connection Requirements), FAC-003-3 (Transmission Vegetation Management), PRC-004-2.1 (Analysis and Mitigation of Transmission and Generation Protection System Misoperations), and PRC-005-1.1b (Transmission and Generation Protection System Maintenance and Testing).[48] The changes would extend their applicability to certain generator interconnection facilities or clarify that the existing standard applies to these facilities.[49]

On October 20, 2011, the FERC proposed to approve Reliability Standards PRC-006-1 (Automatic Underfrequency Load Shedding) and EOP-003-2 (Load Shedding Plans),[50] which establish requirements for automatic underfrequency load shedding programs that arrest declining frequency and assist recovery of frequency following system events leading to frequency degradation. On May 7, 2012, the FERC approved Reliability Standards PRC-006-1 and EOP-003-2.[51] The FERC sought clarification and changes, which NERC provided in an August 9, 2012, compliance filing. The FERC accepted these changes in a November 9, 2012, letter order.[52]

On May 30, 2013, the NERC petitioned for approval of five new Generator Verification Standards—MOD-025-2, MOD-026-1, MOD-027-1, PRC-019-1 and PRC-024-1—and their accompanying Violation Risk Factors (VRFS) and Violation Severity Levels (VSLs).[53] The standards are intended to ensure that power system models used in operating and planning studies reflect a generator's capabilities and operating characteristics of power system elements, and to prevent generators from tripping during certain voltage and frequency excursions or due to improper coordination between protective relays/voltage regulators.[54]

1. Geomagnetic Disturbance (GMD) Reliability Standards (Order No. 779)

On October 18, 2012, the FERC issued a Notice of Proposed Rulemaking (NOPR) proposing to direct NERC to file for approval reliability standards that addressed reliability risks posed by GMD.[55] The NERC filed comments on the

47. Order No. 773-A, *supra* note 43.

48. Notice of Proposed Rulemaking, *Generator Requirements at the Transmission Interface*, 143 F.E.R.C. ¶ 61,049 (2013).

49. *Id.* at P 1.

50. Notice of Proposed Rulemaking, *Automatic Underfrequency Load Shedding and Load Shedding Plans Reliability Standards*, 137 F.E.R.C. ¶ 61,067 (Oct. 20, 2011).

51. Order No. 763, *Automatic Underfrequency Load Shedding and Load Shedding Plans Reliability Standards*, 139 F.E.R.C. ¶ 61,098 (May 7, 2012).

52. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM11-20-002 (Nov. 9, 2012).

53. Petition of NERC for Approval of Five Proposed Reliability Standards MOD-025-2, MOD-026-1, MOD-027-1, PRC-019-1 and PRC-024-1, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-16-000 (May 30, 2013).

54. *Id.*

55. Notice of Proposed Rulemaking, *Reliability Standards for Geomagnetic Disturbances*, 141 F.E.R.C. ¶ 61,045 (Oct. 18, 2012).

NOPR on December 26, 2012,[56] and reply comments on January 10, 2013.[57] On May 16, 2013, the FERC found that existing reliability standards did not adequately address GMD vulnerabilities to the grid, and directed NERC to submit to the FERC for approval proposed reliability standards that address the impact of GMD on the reliable operation of the Bulk-Power System.[58] The FERC directed NERC to implement the directive in two stages.[59]

2. BAL and EOP Standards

On May 16, 2013, the FERC proposed to remand a proposed interpretation of Reliability Standard BAL-002-1, Requirements R4 and R5.[60] On March 29, 2013, the NERC petitioned for approval of proposed Reliability Standard BAL-003-1 (Frequency Response and Frequency Bias Setting), which is designed to ensure that balancing authorities (BAs) in each interconnection provide sufficient frequency response (FR) following a sudden loss of generation or load to restore balance, and prevent underfrequency load shedding (UFLS).[61]

On December 31, 2012, the NERC petitioned for approval of proposed Reliability Standard EOP-004-2 (Event Reporting), which would require entities to have in place an operating plan and procedures for reporting disturbances and other events within twenty-four hours, provided certain triggering events are met.[62] The FERC in a June 20, 2013, order approved EOP-004-2, which replaces existing EOP-004-1 (Disturbance Reporting) and CIP-001-2a (Sabotage Reporting).[63]

3. FAC Standards

On December 21, 2011, NERC petitioned for approval of Reliability Standard FAC-003-2 (Transmission Vegetation Management), which adopts a results-based approach to vegetation management based on a defined "Minimum Vegetation Clearance Distance" (MVCD), derived from the Gallet Equation—a method for calculating required strike distances for insulation of transmission lines.[64] On October 18, 2012, the FERC proposed to approve FAC-003-2.[65] On

56. Comments of NERC in Response to Notice of Proposed Rulemaking, *Reliability Standards for Geomagnetic Disturbances*, FERC Docket No. RM12-22-000 (Dec. 26, 2012).

57. Reply Comments of NERC in Response to Notice of Proposed Rulemaking, *Reliability Standards for Geomagnetic Disturbances*, FERC Docket No. RM12-22-000 (Jan. 10, 2012).

58. Order No. 779, *Reliability Standards for Geomagnetic Disturbances*, 143 F.E.R.C. ¶ 61,147 (2013) (to be codified at 18 C.F.R. pt. 40).

59. *Id.*

60. Notice of Proposed Rulemaking, *Electric Reliability Organization Interpretation of Specific Requirements of the Disturbance Control Performance Standard*, 143 F.E.R.C. ¶ 61,138 (2013).

61. Petition of NERC for Approval of Proposed Reliability Standard BAL-003-1–Frequency Response and Frequency Bias Setting, *Frequency Response and Frequency Bias Setting Reliability Standard*, FERC Docket No. RM13-11-000 (Mar. 29, 2013).

62. Petition of NERC for Approval of Proposed Reliability Standard EOP-004-2–Event Reporting, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-3-000 (Dec. 31, 2012).

63. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,252 at P 2 (2013).

64. Petition of NERC for Approval of Proposed Reliability Standard FAC-003-2–Transmission Vegetation Management, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM12-4-000 (Dec. 21, 2011). On April 23, 2012, the FERC sought comment on a Pacific Northwest National Laboratory report analyzing NERC's use of the Gallet Equation to calculate MVCD. Notice Inviting Comment on Report, *Revision to*

March 21, 2013, the FERC approved Reliability Standard FAC-003-2. The FERC directed NERC to conduct testing and provide a follow-up report to the FERC regarding assumptions used in calculating the MVCD values based on the Gallet equation.[66]

On November 17, 2011, the FERC approved Reliability Standard FAC-008-3 (Facility Ratings).[67] In a January 17, 2012, compliance filing, NERC submitted certain VRF and VSL changes,[68] which the FERC approved in a May 17, 2012 letter order.[69]

On November 17, 2011, the FERC approved NERC's January 28, 2011, petition for approval of FAC-013-2 (Assessment of Transfer Capability for the Near-Term Transmission Planning Horizon),[70] which requires planning coordinators to have a transparent methodology for, and annually assess, the transfer capability of energy in the near-term transmission planning horizon.[71] The FERC directed NERC to further support or revise VRFs and VSLs in the standard.[72] In a January 17, 2012, compliance filing, NERC proposed to revise VRFs and VSLs,[73] which the FERC approved in a May 17, 2012, order.[74]

4. IRO Standards

On April 16, 2013, NERC petitioned for approval of IRO-001-3 (Reliability Coordination–Responsibilities and Authorities); IRO-002-3 (Reliability Coordination–Analysis Tools); IRO-005-4 (Reliability Coordination–Current Day Operations); and IRO-014-2 (Coordination Among Reliability Coordinators).[75] NERC stated that these standards were intended to serve the goals of (1) planning and operating the interconnected BES in a coordinated manner to perform reliability under normal and abnormal conditions; (2) training and qualifying personnel responsible for planning and operating the

Transmission Vegetation Management Reliability Standard, FERC Docket No. RM12-4-000 (Apr. 23, 2012); U.S. DEP'T OF ENERGY, APPLICABILITY OF THE "GALLET EQUATION" TO THE VEGETATION CLEARANCES OF NERC RELIABILITY STANDARD FAC-003-2 (Apr. 2012), *available at* http://www.nerc.com/FilingsOrders/us/FERCOrdersRules/Report%20on%20Applicability%20of%20Gallet%20Equation%20in%20VegMgmt.pdf.

65. Notice of Proposed Rulemaking, *Revisions to Reliability Standard for Transmission Vegetation Management*, 141 F.E.R.C. ¶ 61,046 (2012).

66. Order No. 777, *Revisions to Reliability Standard for Transmission Vegetation Management*, 142 F.E.R.C. ¶ 61,208, 78 Fed. Reg. 18,817 (2013).

67. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,123 (2011).

68. Compliance Filing of NERC in Response to Nov. 17, 2011 Order Approving Reliability Standard FAC-008-3–Facility Ratings, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD11-10-000 (Jan. 17, 2012).

69. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD11-10-000 (May 17, 2012).

70. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,131 at P 1 (2011).

71. *Id.*

72. *Id.* at P 37.

73. Compliance Filing of NERC in Response to Nov. 17, 2011 Order Approving Reliability Standard FAC-013-2–Assessment of Transfer Capability for the Near-Term Transmission Planning Horizon, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD11-3-000 (Jan. 17, 2012).

74. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD11-10-000 (May 17, 2012).

75. Petition of NERC for Approval of Proposed Reliability Standards IRO-001-3, IRO-002-3, IRO-005-4, and IRO-014-2, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-15-000 (Apr. 16, 2013).

interconnected BES to have the responsibility and authority to implement actions; (3) assessing, monitoring, and maintaining the security of the interconnected BES on a wide-area basis; and (4) developing, coordinating, maintaining, and implementing plans for emergency operation and system restoration of interconnected BESs.[76]

NERC requested simultaneous approval of the proposed transmission operations (TOP) reliability standards and corresponding interconnection reliability operations and coordination (IRO) reliability standards because the proposed IRO standards remove requirements from the existing IRO standard for transmission operators that are added as requirements in the proposed TOP reliability standards.[77] Similarly, the proposed TOP reliability standards remove requirements for reliability coordinators from the existing TOP standard that are added as requirements in the proposed IRO reliability standards.[78] NERC stated that simultaneous approval of both petitions would help ensure a smooth transition and implementation for both the industry and NERC.[79]

5. MOD and PER Standards

On August 24, 2012, NERC petitioned for approval of Reliability Standard MOD-028-2 (Area Interchange Methodology),[80] regarding information a transmission provider must include when calculating total transfer capability using the area interchange methodology for the on-peak and off-peak intra-day and next day time periods.[81] The FERC proposed to approve the standard in a March 21, 2013, NOPR.[82] On May 13, 2013, NERC filed comments asking the FERC to approve the MOD-028-2 Reliability Standard as submitted.[83] On September 15, 2011, the FERC approved Reliability Standard PER-003-1 regarding system operator certification.[84]

6. PRC Standards

On September 15, 2011, in Order 773-B, the FERC denied requests for reconsideration and granted partial clarification of Order No. 733-A, involving Reliability Standard PRC-023-1 and "relay loadability.[85] On the same day, in another docket, the FERC concurrently proposed to approve PRC-023-2 (Transmission Relay Loadability) and new ROP section 1700 (Challenges to

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Petition of NERC for Approval of Proposed Reliability Standard MOD-028-2, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM12-19-000 (Aug. 24, 2012).

81. *Id.*

82. Notice of Proposed Rulemaking, *Revisions to Modeling, Data, and Analysis Reliability Standard*, 142 F.E.R.C. ¶ 61,210 (2013).

83. Comments of NERC in Response to Notice of Proposed Rulemaking, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM12-19 (May 13, 2013).

84. *North Am. Elec. Reliability Corp.*, 136 F.E.R.C. ¶ 61,177 at P 2 (2011).

85. Order No. 733-B, *Transmission Relay Loadability Reliability Standard*, 136 F.E.R.C. ¶ 61,185 at P 1 (2011).

Determinations).[86] On March 15, 2012, the FERC approved PRC-023-2 and the revisions to the ROP.[87] On February 19, 2013, NERC submitted a compliance filing in response to FERC Order Nos. 733 and 759, which directed NERC to file a test for Planning Coordinators to identify sub-200 kV critical facilities.[88]

On February 26, 2013, NERC petitioned for FERC approval of proposed standard PRC-005-2, which consolidates existing standards PRC-005, PRC-008, PRC-011, and PRC-017, and establishes requirements for "strong" protection system maintenance programs.[89]

7. TOP Standards

On April 5, 2013, NERC filed for approval of proposed Reliability Standard TOP-006-3 (Monitoring System Conditions), which clarifies that transmission operators are responsible for monitoring and reporting available transmission resources; that balancing authorities are responsible for monitoring and reporting available generation resources; and confirms that reliability coordinators, transmission operators, and balancing authorities are required to supply their operating personnel with appropriate technical information concerning protective relays located within their respective areas.[90]

On April 16, 2013, NERC filed a petition for approval of three transmission operation standards (TOP-001-2 (Transmission Operations), TOP-002-3 (Operations Planning), and TOP-003-2 (Operational Reliability Data), and one protection and control reliability standard (PRC-001-2 (System Protection Coordination)) (collectively, TOP Reliability Standards).[91] The petition also sought retirement of nine existing reliability standards and requirements from one existing reliability standard.[92]

8. TPL Standards

On October 19, 2011, NERC petitioned for approval of a Revised TPL-001-2 Standard (Transmission System Planning Performance

86. Notice of Proposed Rulemaking, *Transmission Relay Loadability Reliability Standard*, 136 F.E.R.C. ¶ 61,187 (2011).

87. Order No. 759, *Transmission Relay Loadability Reliability Standard*, 138 F.E.R.C. ¶ 61,197 (2012).

88. Compliance Filing of NERC in Response to Order Nos. 733 and 759—Transmission Relay Loadability Reliability Standard, *Transmission Relay Loadability Reliability Standard*, FERC Docket Nos. RM08-13-000, RM08-13-001 (Feb. 19, 2013).

89. Petition of NERC for Approval of Proposed Standard PRC-005-2 (Protection System Maintenance), *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-7-000 (Feb. 26, 2013).

90. Petition of NERC for Approval of Proposed Reliability Standard TOP-006-3 Monitoring System Conditions, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-12-000 (Apr. 4, 2013).

91. Petition of NERC for Approval of Three Transmission Operation Standards, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-14-000 (Apr. 16, 2013).

92. *Id.* Specifically, NERC sought retirement of TOP-001-1a (Reliability Responsibilities and Authorities), TOP-002-2.1b (Normal Operations Planning), TOP-003-1 (Planned Outage Coordination), TOP-004-2 (Transmission Operation), TOP-005-2a (Operational Reliability Information), TOP-006-2 (Monitoring System Conditions), TOP-007-0 (Reporting System Operating Limit (SOL) and Interconnection Reliability Operating Limit (IROL) Violations), TOP-008-1 (Response to Transmission Limit Violations), and PER-001-0.2 (Operating Personnel Responsibility and Authority). *Id.* NERC also requested retirement of Requirements R2, R5, and R6 of PRC-001-01 (System Protection Coordination). *Id.*

Requirements) and definitions regarding load loss and transmission planning.[93] On April 19, 2012, the FERC proposed to remand TPL-001-2 for containing vague and unenforceable provisions.[94] On February 28, 2013, NERC petitioned for approval of TPL-001-4.[95] On May 16, 2013, the FERC issued a Supplemental NOPR[96] proposing to approve TPL-001-4 (to supersede TPL-001-2) noting that NERC's changes satisfy the concerns in FERC's April 19, 2013 NOPR.[97] On June 24, 2013, NERC filed comments on the supplemental NOPR.[98]

On October 20, 2011, the FERC proposed to remand NERC's modifications to Reliability Standard TPL-002-0a, Table 1, "footnote b," regarding planned or controlled interruption of electric supply where a single contingency occurs on a transmission system.[99] On April 19, 2012, the FERC remanded NERC's proposed modifications,[100] finding its stakeholder process requirement undefined and unenforceable, and directed NERC to use its Expedited Standards Development Process to develop a revised load loss provision.[101] On August 2, 2012, the FERC granted a NERC request for reconsideration regarding Order No. 762's directive that NERC use its Expedited Standards Development Process with regard to TPL-002-0b "footnote b."[102]

9. VAR Standards

On February 25, 2013, NERC petitioned for approval of revised Voltage and Reactive Control Standard VAR-001-3, developed jointly with Western Electricity Coordinating Council (WECC), which contains a new regional variance for the Western Interconnection that requires conversion of a transmission operator's reactive support schedule to an equivalent voltage schedule.[103] The FERC approved the standard in a June 20, 2013, letter order.[104]

On November 21, 2012, NERC petitioned for approval of VAR-002-2b, (Generator Operation for Maintaining Network Voltage Schedules), which

93. Petition of NERC for Approval of a Revised Transmission Planning System Performance Requirements Reliability Standard and Seven New Glossary Terms and for Retirement of Six Existing Reliability Standards, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM12-1-000 (Oct. 19, 2011).

94. Notice of Proposed Rulemaking, *Transmission Planning Reliability Standards*, 139 F.E.R.C. ¶ 61,059 (2012).

95. Petition of NERC for Approval of Modified Transmission Planning Reliability Standards in the Case of System Performance Following Loss of a Single Bulk Electric System Element, *North Am. Elec. Reliability Corp.*, FERC Docket Nos. RM13-9-000, RM12-1-000 (Feb. 28, 2013).

96. Supplemental Notice of Proposed Rulemaking, *Transmission Planning Reliability Standards*, 143 F.E.R.C. ¶ 61,136 (2013).

97. *Id.*

98. Comments of NERC in Response to Supplemental NOPR, *North Am. Elec. Reliability Corp.*, FERC Docket Nos. RM13-9-000, RM12-1-000 (June 24, 2013).

99. Notice of Proposed Rulemaking, *Transmission Planning Reliability Standards*, 137 F.E.R.C. ¶ 61,077 at P 11 (2011).

100. Order No. 762, *Transmission Planning Reliability Standards*, 139 F.E.R.C. ¶ 61,060 at P 1 (2012).

101. *Id.*

102. *Transmission Planning Reliability Standards*, 140 F.E.R.C. ¶ 61,101 at P 6 (2012).

103. Petition of NERC for Approval of Proposed Reliability Standard VAR-001-3, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-6-000 (Feb. 25, 2013).

104. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-6-000 (June 20, 2013).

ensures generators provide sufficient reactive and voltage control.[105] On January 23, 2013, NERC submitted reply comments.[106] On April 16, 2013, the FERC approved VAR-002-2b.[107]

IV. CIP STANDARDS

A. Version 4 of the CIP Standards

On February 10, 2011, NERC petitioned for approval of version 4 of the CIP Standards.[108] Version 4 sought to improve upon previous versions and to address several outstanding Order No. 706 directives.[109] On September 15, 2011, the FERC proposed to approve the Version 4 standards.[110] In the NOPR, the FERC acknowledged that Version 4 represents an "interim step" to addressing all of the outstanding Order No. 706 directives.[111] The FERC further stated that "the electric industry, through the NERC standards development process, should continue to develop an approach to cybersecurity that is meaningful and comprehensive to assure that the nation's electric grid is capable of withstanding a Cybersecurity Incident."[112]

On November 21, 2011, NERC submitted comments to the CIP Version 4 NOPR,[113] responding to specific matters and requesting prompt approval of the CIP Version 4 Reliability Standards.[114] Several commenters sought to block, delay, or alter the implementation of the Version 4 standard, believing that Version 4 was not an improvement over Version 3 and that the FERC should wait for the impending Version 5 before taking action.[115] Some commenters, such as the Associated Electric Cooperative, Inc. (Associated Electric), Basin Electric Power Cooperative (Basin Electric), and Tri-State Generation and Transmission Association, Inc. (Tri-State) (collectively, the G&T Cooperatives) stated that NERC "no longer appears to have intended that the CIP Version 4

105. Petition of NERC for Approval of Proposed Reliability Standard VAR-002-2b, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-2-000 (Nov. 21, 2012).

106. Reply Comments of NERC, FERC Docket No. RD13-2-000 (Jan. 23, 2013).

107. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,045 (2013).

108. Petition of NERC for Approval of Critical Infrastructure Protection (CIP) Reliability Standards Version 4, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM11-11-000 (Feb. 10, 2011) [hereinafter NERC V4 Petition].

109. *See generally* Order No. 706, *Mandatory Reliability Standards for Critical Infrastructure Protection*, 122 F.E.R.C. ¶ 61,040 (2008). In particular, Version 4 sought to address the FERC's concern with the lack of guidance for the Risk-Based Assessment Methodology (RBAM) present in Versions 1 through 3 of CIP-002—Critical Asset Identification by replacing the RBAM with "bright line criteria" for identifying Critical Assets and Critical Cyber Assets. NERC V4 Petition, *supra* note 108, at 6.

110. Notice of Proposed Rulemaking, *Version 4 Critical Infrastructure Protection Reliability Standards*, F.E.R.C. STATS. & REGS. ¶ 32,679, 76 Fed. Reg. 58,730 (2011) (to be codified at 18 C.F.R. pt. 40).

111. *Id.* at P 3.

112. *Id.*

113. Comments of the NERC in Response to Notice of Proposed Rulemaking, *Version 4 Critical Infrastructure Protection Reliability Standards*, FERC Docket No. RM11-11-000 (Nov. 21, 2012).

114. *Id.* at 3.

115. Order No. 761, *Version 4 Critical Infrastructure Protection Reliability Standards*, 139 F.E.R.C. ¶ 61,058 at P 17 (2012) [hereinafter Order No. 761].

standards go into effect in advance of the CIP Version 5 standards."[116] NERC strongly disagreed with this assertion, stating "NERC continues to request that the Commission approve CIP Version 4 to be effective as proposed."[117]

On April 19, 2012, the FERC approved[118] the eight CIP Version 4 Reliability Standards and set a deadline of March 31, 2013 for NERC to submit a proposed Version 5 and to address the remaining outstanding directives from Order No. 706.[119] On August 3, 2012, the FERC denied a May 18, 2012, joint request for clarification or rehearing sought by National Rural Electric Cooperative Association (NRECA) and the American Public Power Association (APPA).[120] The FERC affirmed that its certification on the potential economic impact of the Version 4 CIP Reliability Standards on small entities satisfies the Regulatory Flexibility Act requirements[121] and, therefore, denied their request for clarification or rehearing.[122]

B. Version 5 of the CIP Standards

On January 31, 2013, NERC filed its petition for approval of proposed Version 5 of the CIP Reliability Standards, along with associated proposed definitions, implementation plan, and VRFs and VSLs.[123] As NERC's petition describes, proposed Version 5 overhauls previous versions of the CIP standards—instead of the "bright-line" approach of only identifying critical assets, Version 5 includes a new process for identifying all "BES Cyber Systems" according to low, medium, or high impact, and then specifying varying levels of protection in the rest of the standards according to the impact category.[124] With respect to the considerable timing and compliance complications arising from the close juxtaposition of current Version 3, the approved but not yet effective Version 4, and proposed Version 5, NERC's petition proposed language that would allow entities to transition from Version 3 directly to Version 5, "thereby bypassing implementation of CIP Version 4 completely upon Commission approval."[125]

On April 18, 2013, the FERC proposed to approve Version 5 of the CIP Standards (Version 5 NOPR).[126] However, the FERC expressed concern that

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116. Reply Comments of the NERC in Response to Notice of Proposed Rulemaking, *Version 4 Critical Infrastructure Protection Reliability Standards*, FERC Docket No. RM11-11-000 (Dec. 5, 2011).

117. *Id.* at 3. While NERC acknowledged that it was possible, and perhaps even preferable, for Version 3 to remain in effect until Version 5 was put into place, it stated that the prudent course of action would be for Version 4 to become effective as proposed due to the uncertainties surrounding the development and implementation of Version 5. *Id.* at 3-5.

118. Order No. 761, *supra* note 115.

119. *Id.* at P 4.

120. *Version 4 Critical Infrastructure Protection Reliability Standards*, 140 F.E.R.C. ¶ 61,109 (2012).

121. *Id.* at P 11.

122. *Id.*

123. Petition of NERC for Approval of Critical Infrastructure Protection Reliability Standards Version 5, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-5-000 (Jan. 31, 2013).

124. *Id.* at 5, 9-15.

125. *Id.* at 4.

126. Notice of Proposed Rulemaking, *Version 5 Critical Infrastructure Protection Reliability Standards*, 143 F.E.R.C. ¶ 61,055 (2013) [hereinafter Version 5 NOPR].

"limited aspects of the proposed CIP Version 5 Standards are potentially ambiguous and, ultimately, raise questions regarding the enforceability of the standards" and, therefore, proposed to direct that NERC develop certain modifications to the standards to address its concerns.[127] Many of the expressed concerns centered around NERC's transition to internal controls with "identify, assess, and correct" language, a perceived insufficiency of specific technical controls, required inventories, timeframes, and comparisons of the proposed Version 5 standards with the NIST Risk Management Framework.[128] The FERC also sought comments on various definitions.[129]

On June 24, 2013, NERC submitted comments on the Version 5 NOPR.[130] NERC's comments respond to many of the FERC's concerns and request approval of the proposed Version 5 standards as filed without modification.[131]

V. INTERPRETATIONS

On December 15, 2011, the FERC approved proposed interpretations of EOP-001-0 Requirements R1 and R3.2, of EOP-001-2 Requirements R1 and R2.2, the associated retirement of EOP-001-0b effective June 30, 2013, and an effective date of July 1, 2013, for EOP-001-2b, consistent with its approval of Reliability Standard EOP-001-2 in Order Nos. 748 and 749.[132]

On September 15, 2011, the FERC approved NERC's interpretation of TOP-001-1, Requirement R8, which it had submitted on July 16, 2010.[133] The interpretation addressed the responsibilities of the Balancing Authority and Transmission Operator to take corrective actions to restore real power and reactive power, respectively.[134] Additionally on September 15, 2011, the FERC approved an interpretation to Reliability Standard TPL-002-0 (System Performance Following Loss of a Single Bulk Electric System Element), Requirement R1.3.10.[135] In its March 18, 2010 NOPR, the FERC proposed to reject NERC's proposed interpretation for an alternative interpretation, but after receiving comments, the FERC approved NERC's proposed interpretation.[136]

On September 26, 2011, the FERC approved interpretations to Reliability Standards PRC-004-1 and PRC-005-1, which address maintenance, testing, and

127. *Id.*

128. *Id.* at P 4.

129. *Id.*

130. Comments of NERC on the Notice of Proposed Rulemaking for Version 5 Critical Infrastructure Protection Reliability Standards, *Version 5 Critical Infrastructure Protection Reliability Standards*, FERC Docket No. RM13-5-000 (June 24, 2013).

131. *Id.* at 58.

132. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,196 (2011); *see also* Order No. 748, *Mandatory Reliability Standards for Interconnection Reliability Operating Limits*, 134 F.E.R.C. ¶ 61,213, (2011); Order No. 749, *System Restoration Reliability Standards*, 134 F.E.R.C. ¶ 61,125 (2011); Order Nos. 748-A, 749-A, *Mandatory Reliability Standards for Interconnection Reliability Operating Limits*, 136 F.E.R.C. ¶ 61,030 (2011).

133. Order No. 753, *Electric Reliability Organization Interpretation of Transmission Operations Reliability Standard*, 136 F.E.R.C. ¶ 61,176 (2011).

134. *Id.* at P 5.

135. *Interpretation of Transmission Planning Reliability Standard*, 136 F.E.R.C. ¶ 61,186 (2011).

136. *Id.*

analysis of transmission and generation protection systems.[137] Regarding whether a radially connected transformer would be considered part of a "transmission [p]rotection [s]ystem," NERC's interpretation states that "a [p]rotection [s]ystem for a radially connected transformer energized from the BES would be considered a transmission [p]rotection [s]ystem and subject to these standards only if the protection trips an interrupting device that interrupts current supplied directly from the BES and the transformer is a BES element."[138]

Also on September 26, 2011, the FERC issued a Notice of Technical Conference to discuss issues related to CIP-006-2 interpretations, including physical access to dial-up intelligent electronic devices that are part of the bulk power system and that use non-routable protocols.[139]

On October 20, 2011, the FERC approved NERC's interpretation of TOP-002-2a (Normal Operations Planning), Requirement R10.[140] Requirement R10 addresses the planning required to meet all System Operating Limits and Interconnection Reliability Operating Limits.[141]

On December 20, 2011, the FERC approved NERC's September 9, 2011, petition for its proposed interpretation of Requirement R1 and R3.2 of EOP-001-0.[142] Requirement R1 requires balancing authorities to have operating agreements with provisions for emergency assistance, including provisions to facilitate emergency assistance from remote balancing authorities, with adjacent balancing authorities.[143] Requirement R3.2 requires each transmission operator and balancing authority to develop, maintain, and implement a set of plans to mitigate operating emergencies on the transmission system.[144]

On February 3, 2012, the FERC approved NERC's proposed interpretation to NERC Reliability Standard PRC-005-1, Requirement R1.[145] NERC's proposed interpretation involved what specific types of equipment were required to be included in the maintenance and testing program.[146] The FERC's December 16, 2010 NOPR had expressed concern that the proposed interpretation may not include all components serving in some protective capacity, such as auxiliary and non-electrical sensing relays, and proposed development of a modification to include any component or devices that is designed to detect defective lines or apparatuses or other power system conditions of an abnormal or dangerous nature.[147] After receiving commenters' concerns that the FERC's proposals would capture many items not used in BES

137. *North Am. Elec. Reliability Corp.*, 136 F.E.R.C. ¶ 61,208 at P 1 (2011).

138. *Id.* at P 7.

139. Notice of Technical Conference, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD10-8-000 (Sept. 26, 2011).

140. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,061 at P 2 (2011).

141. *Id.* at P 6.

142. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,196 at P 2 (2011).

143. *Id.* at P 1.

144. *Id.* at PP 2, 7.

145. Order No. 758, *Interpretation of Protection System Reliability Standard*, 138 F.E.R.C. ¶ 61,094 (2012).

146. *Id.* at P 1.

147. *Id.*

protection,[148] the FERC accepted NERC's proposed interpretation without the added directives but accepted NERC's commitments to address the concerns in the protection system maintenance and testing standard identified in the NOPR within the reliability standards development process.[149] The FERC also directed, in part, that the concerns identified by the NOPR with regard to reclosing relays be addressed within the reinitiated PRC-005 revisions.[150]

On August 1, 2012, NERC submitted for FERC approval its Interpretation of CIP-002-4, Requirement R3, which sought clarity on (1) what types of systems must be classified as Critical Cyber Assets and (2) the phrase "essential to the operation of the Critical Asset."[151] The FERC remanded NERC's proposed interpretation on March 21, 2013, expressing concern that NERC's proposed interpretation of "essential" may leave a window into certain cyber assets, such as laptops connected into the EMS network, that could be exploited.[152] On April 22, 2013, NERC submitted a request for clarification on the FERC's Remand Order, requesting clarification that the FERC's examples regarding laptops were illustrative and not prescriptive and that the FERC's references to and discussion of the NERC guidelines documents were also illustrative, and were not used as the basis for the remand.[153] The FERC responded on June 25, 2013, with an order on clarification on the proposed interpretation of CIP-002, confirming that its examples and references were illustrative only and that only the language of the reliability standards and requirements determine how a reliability standard should be interpreted.[154]

On August 1, 2012, NERC submitted for FERC approval of its proposed interpretation of CIP-004-4a, Requirements R2, R3, and R4.[155] The request for interpretation, submitted by WECC, sought clarification on the definition of "authorized access" as applied to temporary support from vendors.[156] NERC's interpretation clarifies that all cyber access must be authorized, and all authorized cyber access requires compliance with Requirements R2, R3, and R4 of CIP-004-4a.[157] The FERC approved NERC's interpretation of CIP-004-4a on December 12, 2012.[158]

148. *Id.*

149. *Id.*

150. On April 12, 2012, NERC submitted an informational filing in compliance with Order No. 758, including the schedule regarding development of the technical documents including the identification of devices designed to sense to take action against any abnormal system condition that will affect reliable operation. Informational Filing in Compliance with Order No. 758, *Interpretation of Protection System Reliability Standard*, FERC Docket No. RM10-5-000 (Apr. 12, 2012).

151. Petition of NERC for Approval of an Interpretation to Reliability Standard CIP-002-4—Critical Cyber Asset Identification, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD12-5-000 (Aug. 1, 2012).

152. *North Am. Elec. Reliability Corp.*, 142 F.E.R.C. ¶ 61, 204 at P 14 (2013).

153. Request for Clarification of NERC, *Order on Interpretation of Reliability Standard*, FERC Docket No. RD12-5-000 (Apr. 22, 2013).

154. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,721 (2013).

155. Petition of NERC for Approval of an Interpretation to Reliability Standard CIP-002-4—Critical Cyber Asset identification, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD12-6-000 (Aug. 1, 2012).

156. *Id.*

157. *Id.* at 7.

158. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD12-6-000 (Dec. 12, 2012).

On February 12, 2013, NERC petitioned for approval of its interpretation of BAL-002-1 (Disturbance Control Performance), Requirements R4 and R5.[159] The interpretation clarifies the extent to which balancing authorities and reserve sharing groups are subject to compliance enforcement actions for failing to restore area control error (ACE) within the fifteen-minute Disturbance Recovery Period for Reportable Disturbances that exceed the most severe single contingency (MSSC).[160] On May 16, 2013, the FERC proposed to remand the proposed interpretation because it exceeded the permissible scope for interpretations, which should only clarify, and not change, a standard.[161] Several comments were filed on July 8, 2013.[162]

On June 20, 2013, the FERC granted NERC's April 12, 2013, petition for approval of its interpretation of TPL-003-0a (System Performance Following Loss of Two or More Bulk Electric System Elements (Category C)) and TPL-004-0 (System Performance Following Extreme Events Resulting in the Loss of Two or More Bulk Electric system Elements (Category D)).[163] NERC's interpretation response addresses concerns expressed by the FERC in Order No. 754 regarding protection system single points of failure,[164] and clarified that (1) an entity must evaluate both conditions separated by the word "or" in Table 1 of the standards on the basis for a structured reading of the text and information found in an associated footnote,[165] and (2) an entity is permitted to use "engineering judgment" to select the protection system component failures for evaluating or modeling a single point of failure of a protection system, which includes addressing all protection systems affected by the selected component.[166]

VI. REGIONAL ENTITIES AND REGIONAL STANDARDS DEVELOPMENT

On October 5, 2011, the FERC approved the final audit report of Southwest Power Pool's (SPP) functions as a regional entity (RE).[167] The FERC Audit staff approved SPP's implementation of its RE functions but found five issues relating

159. Petition of NERC for Approval of Interpretation to BAL-002-1—Disturbance Control Performance, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM13-6-000 (Feb. 12, 2013).

160. *Id.* at 3-4.

161. Notice of Proposed Rulemaking, *Electric Reliability Organization Interpretation of Specific Requirements of the Disturbance Control Performance Standard*, 143 F.E.R.C. ¶ 61,138 (2013).

162. *See e.g.*, Comments of the ISO/RTO Council, *Electric Reliability Organization Interpretation of Specific Requirements of the Disturbance Control Performance Standard*, FERC Docket No. RM13-6-000 (July 8, 2013).

163. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-8-000 (June 20, 2013).

164. Order No. 754, *Interpretation of Transmission Planning Reliability Standard*, 136 F.E.R.C. ¶ 61,186 (2011).

165. Petition for Approval of an Interpretation to Reliability Standards TPL-003-0a and TPL-004-0, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-8-000 (Apr. 12, 2013).

166. *Id.*

167. Letter Order, *Southwest Power Pool*, FERC Docket No. PA11-2-000 (Oct. 5, 2011); *see generally* OFFICE OF ENFORCEMENT, FED. ENERGY REGULATORY COMM'N, AUDIT OF REGIONAL ENTITY OPERATIONS AT SOUTHWEST POWER POOL (SPP) FOR COMPLIANCE WITH ITS BYLAWS, DELEGATION AGREEMENT, MEMBERSHIP AGREEMENT, AND ITS INDEPENDENCE AS A REGIONAL ENTITY (2011), *available at* http://www.balch.com/files/upload/Final%20Audit%20Report%20on%20SPP.pdf.

to SPP's implementation of its Compliance Monitoring and Enforcement Program (CMEP) and issued fourteen related recommendations.[168]

On October 17, 2011, the FERC approved amendments to the NPCC Delegation Agreement, Bylaws and Regional Reliability Standards Development Procedure (RSDP).[169] The NPCC Amendments: "(1) establish a hybrid Board of stakeholder and independent directors; (2) reduce the total number of stakeholder directors; (3) combine two stakeholder membership sectors; (4) establish procedures for electing stakeholder directors and independent directors; and (5) revise the composition of the NPCC Hearing Body for compliance matters."[170]

On October 20, 2011, the FERC approved NERC's May 31, 2011, submittal of Regional Reliability Standard PRC-002-NPCC-01 (Disturbance Monitoring) and associated definitions.[171]

On November 15, 2011, the FERC accepted NERC's May 25, 2011, petition "requesting approval of: (1) an agreement between NPCC and WECC regarding CMEP of WECC-registered functions; (2) an agreement between NERC and WECC regarding termination of NERC's existing CMEP role regarding WECC-registered functions; and (3) related amendments to delegation agreements between NERC and NPCC, and NERC and WECC."[172] The purpose of the petition, states the FERC letter order, is "to provide for NPCC to assume responsibility for performing Regional Entity [CMEP] functions . . . for which WECC is the registered entity within the United States portion of the WECC region."[173]

On December 20, 2012, the FERC approved Regional Reliability Standard PRC-006-SERC-01 (Automatic Underfrequency Load Shedding Requirements), subject to NERC's and SERC Reliability Corporation's (SERC) proposal to revise its rationale statement for Requirement R6, and its directive in the NOPR to modify the VRF for Requirement R6 from "medium" to "high."[174] The proposed standard would provide regional underfrequency load shedding (UFLS) requirements for registered entities within the SERC region[175] and was designed to ensure that automatic underfrequency load shedding protection

168. Letter Order, FERC Docket No. PA11-2-000, *supra* note 167.

169. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR11-3-000 (Oct. 17, 2011).

170. *Id.*

171. *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,043 at P 2 (2011).

> The regional standard requires transmission owner and generator owners to provide recording capability necessary to monitor the response of the Bulk-Power System to system disturbances, including scheduled and unscheduled outages; requires each Reliability Coordinator to establish requirements for its area's dynamic disturbance recording needs; and establishes disturbance data reporting requirements.

Id. at P 1.

172. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR11-2-000 (Nov. 15, 2011).

173. *Id.* at P 2.

174. Order No. 772, *Regional Reliability Standard PRC-006-SERC-01 Automatic Underfrequency Load Shedding Requirements Under RM12-9*, 141 F.E.R.C. ¶ 61,243 (2012); *see also* Notice of Proposed Rulemaking, *Regional Reliability Standard PRC-006-SERC-01–Automatic Underfrequency Load Shedding Requirements*, 140 F.E.R.C. ¶ 61,056 (2012).

175. 140 F.E.R.C. ¶ 61,056 at P 5.

schemes in the SERC region are coordinated to effectively mitigate the consequences of an underfrequency event.[176]

On May 31, 2012, the FERC approved Regional Reliability Standard IRO-006-TRE-1 (IROL and SOL Mitigation in the ERCOT Interconnection).[177] This proposed standard would provide and execute transmission loading relief procedures that can be used to avoid and mitigate exceedences of the System Operating Limits (SOL) or Interconnection Reliability Operating Limits (IROL) for the purpose of maintaining the reliable operation of the BES in the ERCOT region.[178] Additionally, the proposed standard would provide enforceable requirements to support the NERC Standard IRO-006-5 (Transmission Loading Relief) in the ERCOT Region.[179]

On June 12, 2012, the FERC accepted NERC's petition[180] for amendments to FRCC's Delegation Agreement, Bylaws, and CMEP (Exhibit D).[181] The amendments provide for the election of alternate directors and additional dispute resolution procedures.[182] The amendments to the CMEP provide that an alternate director may serve on the Board Compliance Committee in a regional hearing of a compliance matter.[183]

On June 12, 2012, the FERC approved NERC's uncontested proposed amendments to the SERC Delegation Agreement, Bylaws and Regional Standards Development Procedures to revise the SERC process for developing and adopting regional reliability standards.[184]

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176. *Id.*

177. Order Approving Regional Reliability Standard, *North Am. Elec. Reliability Corp.*, 139 F.E.R.C. ¶ 61,169 (2012); Petition of NERC for Approval of Proposed Regional Reliability Standard IRO-006-TRE-1–IROL and SOL Mitigation in the ERCOT Interconnection, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD12-1-000 (Feb. 1, 2012).

178. Petition of NERC for Approval of Proposed Regional Reliability Standard IRO-006-TRE-1 – IROL and SOL Mitigation in the ERCOT Interconnection at 9, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD12-1-000 (Feb. 1, 2012).

179. *Id.* at 7.

180. Petition of NERC for Approval of Amendments to Delegation Agreement with Florida Reliability Coordinating Council, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-4-000 (Feb. 22, 2012) [hereinafter NERC Petition, No. RR12-4-000].

181. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-4-000 (June 12, 2012).

182. NERC Petition, No. RR12-4-000, *supra* note 180.

183. *Id.*

184. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-5-000 (June 12, 2012); Petition of NERC for Approval of Amendments to Delegation Agreement with SERC Reliability Corporation, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-5-000 (Mar. 15, 2012).

> NERC state[d] the changes to the SERC Bylaws include: amendments to the composition and responsibilities of the SERC Board of Directors and the Board Executive Committee; amendments to conform to requirements of North Carolina law; deletion of duplicative and unnecessary material; and amendments to use consistent terminology. Additionally, NERC state[d] that the revised SERC Regional Standards Development Procedure includes changes that: address issues identified during NERC's 2009 audit of SERC; improve efficiency of the standards development process; and ensure alignment with the NERC Standard Processes Manual.

Id. at 1.

On February 21, 2013, the FERC approved proposed NPCC Regional Standard PRC-006-NPCC-1 (Automatic Underfrequency Load Shedding).[185] The proposed regional Reliability Standard PRC-006-NPCC-1 is designed to work in conjunction with and augment the NERC continent-wide UFLS Reliability Standard PRC-006-1 by mitigating the consequences of underfrequency events while accommodating differences in system transmission and distribution topology among NPCC planning coordinators due to historical design criteria, makeup of load demands, and generation resources.[186]

On June 25, 2012, the FERC approved NERC's May 17, 2012, petition for approval of amendments to NERC's Delegation Agreement with MRO, including approval of amendments to its Bylaws.[187] On October 24, 2012, the FERC approved NERC's July 30, 2012, proposed amendments to the Reliability*First* Corporation (RFC) Delegation Agreement, Bylaws, and RSDP.[188]

On November 8, 2012, the FERC approved NERC's May 24, 2012, filing requesting approval of the renewal of the Compliance Monitoring and Enforcement Agreements (CEA) between SERC, FRCC, and SPP.[189] The FERC also approved NERC's requested changes to the FRCC and SPP delegation agreement relating to the revised CEA agreements.[190]

On March 8, 2013, the FERC approved NERC's December 28, 2012, petition for approval of proposed amendments to the bylaws of Reliability*First*.[191] The amendments enabled Reliability*First* to organize as a corporation eligible for 501(c)(3) tax exempt status.[192]

185. Order No. 775, *Regional Reliability Standard PRC-006-NPCC-1 – Automatic Underfrequency Load Shedding*, 142 F.E.R.C. ¶ 61,128 (2013).

186. Petition of NERC for Approval of Proposed NPCC Regional Reliability Standard PRC-006-NPCC-1 Automatic Underfrequency Load Shedding at 30-31, *North Am. Elec. Reliability Corp.*, FERC Docket No. RM12-12-000 (May 4, 2012).

187. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-9-000 (June 25, 2012). NERC states that the principal purposes of the amendments to the bylaws are to (1) eliminate two end-use customer sectors from the industry sectors of the MRO membership and the two director positions on the MOR board representing these sectors; (2) add two independent directors to the MRO board, thereby making the MRO board a hybrid—instead of balanced stakeholder—board; and (3) add a new, non-voting class of members, referred to as Adjunct Members, to the MRO membership. Petition of NERC for Approval of Amendments to Delegation Agreement with Midwest Reliability Organization, Inc. (MRO)–Amendments to MRO's Bylaws, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-9-000 (May 17, 2012).

188. Letter Order, FERC Docket No. RR12-12-000 (Oct. 24, 2012). The purposes of the amendments to the bylaws were (1) to clarify that the regional reliability standards are not mandatory until approved by both NERC and the FERC; (2) to eliminate Reliability*First*'s members' ability to take actions by written ballot without a meeting; (3) to reorganize text so as to move a provision of the bylaws to a more appropriately located section; and (4) to allow a director resigning from the Reliability*First* board to designate an effective date of the resignation, thereby providing greater flexibility and certainty for the Reliability*First* Members and Board in filling the vacancy in a timely manner. Petition of NERC for Approval of Amendments to Delegation Agreement with Reliability*First* Corporation—Amendments to Reliability*First*'s ByLaws and Reliability Standards Development Procedure at 1-2, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-12-000 (July 30, 2012).

189. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR12-10-000 (Nov. 8, 2012).

190. *Id.*

191. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR13-1-000 (Mar. 8, 2013).

192. *Id.*

On June 12, 2013, the FERC approved NERC's April 9, 2013, proposed amendments to its delegation agreement with Texas Reliability Entity (TRE).[193] The amendments make corrections and update procedures in various articles in the delegation agreement with TRE.[194]

On April 12, 2013, NERC submitted a joint petition of NERC and the WECC for approval of Regional Reliability Standard BAL-002-WECC-2 (Contingency Reserve).[195]

On April 26, 2013, NERC and SPP jointly submitted a petition for approval of PRC-006-SPP-01 (Automatic Underfrequency Load Shedding).[196] MRO filed a motion to intervene and protest on May 20, 2013, asking the FERC to dismiss the joint petition for consideration until NERC files its petition for approval of Reliability Standard PRC-024-01.[197]

On June 12, 2013, the FERC accepted NERC's April 26, 2013, proposed amendments to its delegation agreement with MRO, specifically revisions to its SPM.[198] NERC states the principal purposes of the amendments to the Manual include (1) to greater align MRO's standard development procedures with the NERC SPM; (2) to incorporate a requirement for a review of the Manual every five years; and (3) to provide various clarifications to the process development steps in the Manual.[199]

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193. Letter Order, FERC Docket No. RR13-4-000 (June 12, 2013).

194. Petition of NERC for Approval of Amendments to Delegation Agreement with Texas Reliability Entity, Inc.—Amendments to Texas Reliability Entity, Inc.'s ByLaws, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR13-4-000 (Apr. 9, 2013).

195. Joint Petition of NERC and Western Electricity Coordinating Council for Approval of WECC Regional Reliability Standard BAL-002-WECC-2—Contingency Reserve, *North Am. Elec. Reliability Corp.*, FERC Docket Nos. RM13-13-000, RM09-15-000 (Apr. 12, 2013). In its petition, the NERC states that the purpose of the proposed standard is to provide a regional Reliability Standard that specifies the quantity and types of Contingency Reserve required to ensure reliability under normal and abnormal conditions, and that submitted modifications were developed in response to FERC Order No. 740, which remanded the previously proposed regional Reliability Standard, BAL-002-WECC-1. *Id.* at 2 (citing Order No. 740, *Version One Regional Reliability Standard for Resource and Demand Balancing*, 133 F.E.R.C. ¶ 61,063 (2010)).

196. Joint Petition for Approval of Proposed Regional Reliability Standard PRC-006-SPP-01 (Under Frequency Load Shedding), *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-9-000 (Apr. 26, 2013). The NERC stated that the proposed regional standard "adds specificity not contained in continent-wide Standard PRC-006-1 with respect to the development and implementation of a UFLS program in the SPP RE footprint." *Id.* at 3.

197. Motion to Intervene and Protest of Midwest Reliability Organization, *North Am. Elec. Reliability Corp.*, FERC Docket No. RD13-9-000 (May 20, 2013). MRO asked the FERC to

> carefully consider whether this proposed regional reliability standard promotes bulk power system reliability in the Eastern Interconnection or introduces unnecessary confusion and potential reliability gaps by creating a new arbitrary seam and after such consideration to deny the Joint Petition. In the alternative, MRO ask[ed] the FERC to delay consideration of the Joint Petition until such time as NERC files a petition for approval of NERC Reliability Standard PRC-024-1 which was approved by the NERC Board of Trustees (NERC BOT) on May 9, 2013. MRO believe[d] that the approved continent-wide standard NERC PRC-006-1, coupled with PRC-024-1, significantly undercuts any need for PRC-006-SPP-01.

Id. at 1-2.

198. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR13-5-000 (June 12, 2013).

199. Petition of NERC for Approval of Amendments to Delegation Agreement with Midwest Reliability Organization—Amendments to the MRO Regional Reliability Standards Process Manual, *North Am. Elec. Reliability Corp.*, FERC Docket No. RR13-5-000 (Apr. 26, 2013).

On June 20, 2013, the FERC conditionally granted WECC's March 2013 petition for a declaratory order regarding WECC's plan to establish a separate independent company, "RC Company," to perform the reliability coordinator function in the Western Interconnection.[200] NERC and the Edison Electric Institute (EEI) supported WECC's bifurcation of its functions, but EEI protested the proposal to allow funding of the RC Company under section 215 of the FPA.[201]

VII. REGISTRATION/JOINT REGISTRATION

A. *Retail Only Utilities*

Two cases explore which retail-only utilities bear the burden of compliance with reliability standards under Order No. 693.[202] In *City of Holland, Michigan Board of Public Works*,[203] RFC registered the City of Holland Board of Public Works (Holland) as a transmission owner and transmission operator.[204] RFC and NERC found that Holland's facilities, comprising a looped 138 kV system and multiple generation units, was not radial but instead "an integrated looped system connected through breakers [to third party BES facilities]."[205] NERC rejected Holland's assertion that its system is radial, finding that "bi-directional flows could occur on Holland's system despite its relaying scheme" and that Holland's loss of internal generation could impact neighboring BES facilities.[206]

The FERC affirmed NERC's decision, first noting that Holland's 138 kV facilities "function as transmission facilities" by transporting power at higher voltages from third party BES facilities and Holland's own generation to substations where the power is stepped down for distribution to retail load.[207] The FERC rejected Holland's assertion that its system is entitled to exemption because it is radial, finding that the Holland system can experience bi-directional flows, "unlike a typical radial line," and that "Holland is not serving only load

200. *Western Electricity Coordinating Council*, 143 F.E.R.C. ¶ 61,239 (2013). The FERC was not persuaded that the RC Company's performance of reliability coordinator functions should not be eligible for section 215 funding and thus saw no reason to restrict such funding to a transitional period, but encouraged entities in the Western Interconnection to continue discussing issues such as funding of the RC Company so that interested entities "can work to reach common ground on these issues." *Id.* at PP 41-42. The FERC also found that WECC should be able to exercise compliance and enforcement authority over RC Company, conditioned upon the representations contained in WECC's Petition and Commission review and approval of the finalized governance documents, which appeared to create a sufficient degree of independence. *Id.* at PP 44-45; *see generally* Petition for Declaratory Order, *Western Electricity Coordinating Council*, FERC Docket No. EL13-52-000 (Mar. 12, 2013).

201. Comments and Limited Protest of the Edison Electric Institute, *Western Electricity Coordinating Council*, FERC Docket No. EL13-52-000 (Apr. 18, 2013).

202. Order No. 693, *Mandatory Reliability Standards for the Bulk Power System*, F.E.R.C. STATS. & REGS. ¶ 31,242, 72 Fed. Reg. 16,416 (2007) (to be codified at 18 C.F.R pt. 40), *order on reh'g*, Order No. 693 A, 120 F.E.R.C. ¶ 61,053.

203. *City of Holland, Michigan Board of Public Works*, 139 F.E.R.C. ¶ 61,055 (2012).

204. *Id.* at P 1.

205. *Id.* at P 11.

206. *Id.* at P 12.

207. *Id.* at P 39. The FERC stated that "while we do not here find that facilities of 138 kV can never function as local distribution, . . . the elevated voltage level of Holland's facilities is an additional factor" supporting the finding of a transmission function. *Id.* at P 42.

from one transmission source."[208] Finally, the FERC found that Holland filed to rebut with substantial evidence the presumption that because Holland's facilities exceed the 100 kV threshold, "they are assumed to be material to the Bulk Power System."[209]

In *Southern Louisiana Electric Cooperative Ass'n* (SLECA),[210] the FERC granted a cooperative's appeal, finding NERC had not adequately demonstrated that SLECA was required to remain registered as a distribution provider (DP) and load-serving entity (LSE).[211] Unlike *Holland*, the SLECA had voluntarily registered as a DP and LSE.[212] The SLECA later requested that the SERC allow it to deregister, which SERC denied.[213] The NERC denied the appeal, finding that "SLECA is a *user* of the bulk electric system because it takes service at greater than 100 kV, and 'its distribution facilities (and its load) are directly connected to [the BES].'"[214] NERC agreed, however, that SLECA's facilities are not BES facilities because of their radial configuration, although SLECA owns some 115 kV lines.[215] The FERC's decision in this case turned on a finding that "use" of the BES requires a "direct connection" to the BES, not merely that load is "served through" the BES.[216]

B. Generator Tie Line Facilities

In *Cedar Creek Wind Energy LLC*,[217] the FERC denied appeals by Cedar Creek Wind Energy, LLC (Cedar Creek) and Milford Wind Corridor Phase I, LLC (Milford) regarding their registration by WECC (affirmed by NERC) as transmission owners and operators because they owned generator tie-line facilities.[218] On appeal, the FERC determined that the tie-lines were material to bulk-power system reliability beyond merely loss of their interconnected generation facilities.[219] The FERC was concerned that there might be reliability gaps without their registration as transmission owners and operators (e.g., coordination of protection systems, operations and operating credentials, and restoration of development and communications of system operating limits).[220] NERC sought clarification that the FERC's order (1) did not intend to impact NERC's initiative to clarify generation owner (GO) and generation operator (GOP) obligations at the transmission interface (NERC Project 2010-07) and (2) did not intend to dictate what reliability standards should apply to Cedar

208. *Id.* at PP 41, 45.

209. *Id.* at P 46.

210. *South La. Elec. Coop. Ass'n*, 144 F.E.R.C. ¶ 61,050 (2013).

211. *Id.* at P 1.

212. *Id.* at P 12.

213. *Id.*

214. *Id.* at P 13.

215. *Id.*

216. *Id.* at P 26-29, 26 n.34 (citing *Direct Energy Servs., LLC*, 121 F.E.R.C. ¶ 61,274 at PP 36-38 (2007)). The highly fact-specific finding was based on a determination that "SLECA's facilities are not connected to a transmission network with loop flow capability." *Id.* at P 29 & n.39.

217. *Cedar Creek Wind Energy, LLC*, 135 F.E.R.C. ¶ 61,241 (2011).

218. *Id.* at P 1.

219. *Id.* at P 58.

220. *Id.* at PP 59-63.

Creek and Milford.[221] The FERC denied requests for rehearing, provided clarification that its earlier order established certain minimum reliability standards with which Cedar Creek and Milford must comply, and ordered negotiations to evaluate whether any additional reliability standards also applied.[222] The FERC stated that its Cedar Creek and Milford determinations did not intend to prejudge NERC's efforts in NERC Project 2010-07 exploring the reliability obligations of generator interconnection facilities more generally.[223] In June 2012, the FERC accepted NERC's December 2011 compliance filing identifying the reliability standards applicable to Cedar Creek and Milford as transmission owners and operators.[224]

C. The FERC Grants DOE Appeal on ERO Compliance Registry Determination for Load Serving Entity Status

In April 2012, the FERC decided Ohio Valley Electric Corporation (OVEC) should be registered as the LSE due to its sales to the U.S. Department of Energy (DOE).[225] The FERC found that the power purchased by the DOE from OVEC for delivery at no cost to DOE's third-party contractors or lessees at the project site does not make those third parties customers.[226] The FERC directed NERC to submit a compliance filing that showed either why OVEC should not be registered as the LSE or that registered OVEC as the LSE.[227] NERC sought rehearing or, alternatively clarification, that the FERC's decision was bound by

221. *See generally* Request of NERC for Clarification or, in the Alternative, Rehearing of the Order Denying Appeals of Electric Reliability Organization Registration Determinations, *Cedar Creek Wind Energy, LLC*, FERC Docket Nos. RC11-1-000, RC11-2-000 (July 18, 2011) (identifying other entities seeking rehearing).

222. The FERC found that Cedar Creek should comply with: PRC-001-1, Requirements R2, R2.2, R4; PRC-004-1 Requirement R1; TOP-004-2, Requirements R6, R6.1, R6.2, R6.3, R6.4; PER-003-1, Requirements R1, R1.1, R1.2; FAC-003-1, Requirements R1, R2; TOP-001, Requirement R1 and FAC-014-2, Requirement R2. *Cedar Creek*, 135 F.E.R.C. ¶ 61,241 at P 71. The FERC found that Milford should comply with: PRC-001-1, Requirements R2, R2.2, R4, R6; PRC-004-1 Requirement R1; TOP-004-2, Requirements R6, R6.1, R6.2, R6.3, R6.4; PER-003-1, Requirements R1, R1.1, R1.2; FAC-003-1, Requirements R1, R2; TOP-001, Requirement R1 and FAC-014-2, Requirement R2. *Id.* at P 87.

223. *Cedar Creek Wind Energy, LLC*, 137 F.E.R.C. ¶ 61,141 at P 26 (2011).

224. *Cedar Creek Wind Energy, LLC*, 139 F.E.R.C. ¶ 61,214 (2012); Compliance Filing of NERC, *Cedar Creek Wind Energy, LLC*, FERC Docket No. RC11-1-002 (Dec. 2, 2011). Since these FERC orders were issued, the FERC has also accepted the revised definition of Bulk Electric System with the clarification that certain generator tie lines are part of the Bulk Power System and subject to reliability compliance. Order No. 773, *Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, 141 F.E.R.C. ¶ 61,236 (2012). The NERC has also submitted its filing with the FERC reflecting the results of NERC Project 2010-07 and analysis of which reliability standards apply to GOs and GOPs with generator interconnection facilities such as high-voltage tie lines. These matters are continuing to pend before the FERC. *See generally* Order No. 785, *Generator Requirements at the Transmission Interface*, 144 F.E.R.C. ¶ 61,221 (2013).

225. *U.S. Dep't of Energy*, 139 F.E.R.C. ¶ 61,054 at P 1 (2012).

226. *Id.* at P 26.

227. *Id.* at P 27 ("The issue of who uses the power does not establish whether an entity has undertaken the responsibility to secure energy and transmission service in order to meet an obligation to provide electrical service to customers, consistent with the Registry Criteria definition of load-serving entity."); *see also id.* at P 30 (providing that the FERC disagreed with NERC that to establish LSE status "it is only necessary to establish that the entity secures electric energy and transmission service that is consumed by an end user other than itself").

the unique facts of the case.[228] NERC also submitted a compliance filing arguing that OVEC should not be registered as the LSE.[229] In November 2012, the FERC denied NERC's request for rehearing and denied the request for clarification as unnecessary.[230] The FERC also directed NERC to register OVEC as the LSE.[231] In December 2012, NERC submitted a compliance filing reflecting OVEC's registration as LSE.[232]

VIII. RELIABILITY COMPLIANCE, ENFORCEMENT, AND NOTICES OF PENALTY

A. Find, Fix, Track, and Report (FFT) Compliance Enforcement Initiative

On August 4, 2011, the NERC announced a new FFT enforcement initiative for processing violations of reliability standards.[233] The new process differentiates issues of noncompliance based on "the level of potential risk to the reliability of the bulk power system," using a spreadsheet [NOP] format for issues with "more serious risk" and a "find, fix, track[,] and report" spreadsheet for matters that pose a low risk; both spreadsheets would be filed monthly at the FERC.[234] NERC submitted its first FFT and spreadsheet NOP filings to the FERC on September 30, 2011.[235] On October 28, 2011, the FERC issued a notice that it would not further review the spreadsheet filing.[236]

On March 15, 2012, the FERC approved NERC's proposed FFT mechanism, subject to various conditions and further information.[237] However, the FERC stated its order was prospective only and declined to revisit FFT filings that had already been submitted.[238]

On May 31, 2012, the FERC partially granted NERC's request for clarification that the FERC did not intend to restrict the ability of registered entities without officers to certify with respect to remediation and mitigation plans.[239] The FERC clarified that registered entities without officers may submit

228. Request for Rehearing and Clarification of NERC at 5, *U.S. Dep't of Energy*, FERC Docket No. RC08-5-002 (May 21, 2012).

229. Compliance Filing of NERC at 1, *U.S. Dep't of Energy*, FERC Docket No. RC08-5-003 (July 18, 2012).

230. *U.S. Dep't of Energy*, 141 F.E.R.C. ¶ 61,108 at P 1 (2012).

231. *Id.* at P 2.

232. Compliance Filing of NERC, *U.S. Dep't of Energy*, FERC Docket No. RC08-5-003 (Dec. 7, 2012).

233. *See generally* Petition Requesting Approval of New Enforcement Mechanisms and Submittal of Initial Informational Filing Regarding NERC's Efforts to Refocus Implementation of its Compliance Monitoring and Enforcement Program, *North Am. Elec. Reliability Corp.*, FERC Docket No. RC11-6-000 (Sept. 30, 2011); s*ee also* Press Release, NERC, NERC Announces New Enforcement Initiative (Aug. 4, 2011), *available at* http://www.balch.com/files/upload/NERC_Announces_New_Enforcement_Initiative_04AUG11.pdf.

234. Press Release, NERC, *supra* note 233.

235. Spreadsheet Notice of Penalty, *North Am. Elec. Reliability Corp.*, FERC Docket No. NP11-270-000 (Sept. 30, 2011).

236. Notice, *North Am. Elec. Reliability Corp.*, 137 F.E.R.C. ¶ 61,088 (2011).

237. *North Am. Elec. Reliability Corp.*, 138 F.E.R.C. ¶ 61,193 (2012) [hereinafter March 15 Order].

238. *Id.*

239. *North Am. Elec. Reliability Corp.*, 139 F.E.R.C. ¶ 61,168 (2012). The FERC's March 15 Order had stated that it "will require that a registered entity submit to the [r]egional [e]ntity an affidavit signed by an

affidavits signed by a person in an "executive or leadership position with knowledge of the remediation equivalent to that of an officer."[240] However, the FERC denied NERC's request to the extent it "seeks to broaden the potential signatories who can certify that mitigation is complete to officers, employees[,] or other authorized representatives."[241]

On June 20, 2013, the FERC accepted NERC's March 15, 2013, compliance filing and conditionally accepted four of NERC's five proposed enhancements to the FFT program: (1) expanding the scope to include moderate risk, (2) removing the requirement that FFTs be fully mitigated before filed (if fully mitigated within ninety days), (3) allowing representative sampling, and (4) allowing website posting.[242] However, the FERC rejected NERC's proposal to eliminate the requirement that senior officers certify that possible violations have been fully mitigated.[243]

B. The FERC Commences NERC Financial Performance Audit

On August 22, 2011, the FERC commenced an audit of NERC to evaluate NERC's budget formulation, administration, and execution.[244] On May 4, 2012, the Director of FERC's Office of Enforcement approved the uncontested audit findings and gave NERC thirty days to seek a hearing on the contested findings described in the audit report."[245] In its formal response, the NERC objected to ten of the eleven findings related essentially to four general concerns: (1) the scope of the audit, (2) NERC's jurisdiction, (3) the integrity of NERC's budgeting and operations, and (4) the overall tone of the audit report.[246]

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officer with knowledge of the remediation, certifying that the statement is true and correct." March 15 Order, *supra* note 237, at P 61.

240. 139 F.E.R.C. ¶ 61,168 at P 7.

241. *Id.* at PP 7-8. The FERC stated that neither the CMEP nor Commission precedent cites or even contemplates the new FFT format, and "[r]equiring verification of mitigation by a corporate officer or equivalent . . . assures that appropriate senior personnel within a registered entity are made aware of possible violations and have personal knowledge that they are mitigated." *Id.* at P 8.

242. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,243 (2013); *see also* NERC's Compliance Filing and Report on the Compliance Enforcement Initiative and Proposed Enhancements to the Find, Fix, Track and Report (FFT) Program, *North Am. Elec. Reliability Corp.*, FERC Docket No. RC11-6-004 (Mar. 15, 2013).

243. 143 F.E.R.C. ¶ 61,243 at PP 17, 26, 35.

244. Audit Commencement Letter from Norman Bay, Dir. Office of Enforcement, FERC, to Gerry Cauley, President and CEO, N. Am. Elec. Reliability Corp., (Aug. 22, 2011) (FERC Docket No. FA11-21).

245. Letter Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000 (May 4, 2012). The letter order identified "eleven areas where performance could be enhanced" and made forty-two related recommendations regarding: the funding of retirement plans; determinations as to which NERC activities should be funded under FPA section 215; transparency of the NERC budget process; effectiveness of the time reporting and accounting system; support for employee compensation; support for Board of Trustees compensation and expenses; standard for determining the reasonableness of expenses; staffing levels for the Critical Infrastructure Protection program; NERC's dual role as the Electric Information Sharing and Analysis Center and Electric Reliability Organization; policies and procedures governing employee entertainment expenses; and, process of reviewing Regional Entity (RE) budgets. *Id.*

246. N. AM. ELEC. RELIABILITY CORP., NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION'S RESPONSE TO DRAFT AUDIT REPORT DATED MARCH 23, 2013: FERC DOCKET NO. FA11-21-000 (Apr. 23, 2012), *available at* http://www.nerc.com/news/Headlines%20DL/NERC%20Response%20to%20 Draft%20Audit%20Report.pdf. The NERC's formal response is appended to the audit report as Appendix A. The FERC Audit Staff's response comments are included as Appendix B. Letter Order Approving

On June 4, 2012, the FERC adopted, with modifications, NERC's proposed schedule for a paper hearing.[247] In the order, the FERC noted that it had elected to "designate, with certain exceptions, staff of the Office of Enforcement as non-decisional employees, thereby separating them from serving in an advisory capacity to the Commission with regard to this matter."[248]

The FERC subsequently approved a settlement agreement resolving all outstanding contested recommendations and agreed upon a procedure for confirming progress and implementation of audit recommendations.[249] Pursuant to the settlement agreement, NERC submitted compliance filings on February 1, 2013; April 19, 2013; May 15, 2013; and May 28, 2013.[250] On April 19, 2013, the FERC accepted, with modifications, NERC's proposed criteria for determining whether its activities are eligible for funding under FPA section 215.[251]

C. *Notices of Penalty*

NERC and the FERC have issued and approved numerous notices of penalty (NOPs) over this Report's timeframe. Of particular note are the NOPs and penalty assessments that veered from the traditional path: Grand River Dam Authority (GRDA), the Department of Energy's Southwestern Power Administration (SWPA), PacifiCorp, and Entergy.

In *GRDA*, the FERC approved a $350,000 civil penalty to resolve violations of fifty-two requirements of nineteen reliability standards.[252] This penalty resulted from "a non-public, preliminary investigation into allegations that GRDA's operation of its transmission system was in violation of the reliability standards" conducted by FERC staff in coordination with NERC staff."[253] "In June 2009, GRDA and NERC signed a Settlement Agreement in Lieu of a Remedial Action Directive" pursuant to which "GRDA agreed to take certain immediate actions."[254]

Uncontested Audit Findings and Recommendations and Notice Contested Audit Findings and Recommendation, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000 (May 4, 2012).

247. *North Am. Elec. Reliability Corp.*, 139 F.E.R.C. ¶ 61,179 (2012); *see also* Request for Rehearing of NERC, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-001 (May 15, 2012); Statement on Procedures of NERC, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-002 (May 15, 2012).

248. 139 F.E.R.C. ¶ 61,179 at P 1. The election was made in a separate Notice of Designation of Commission Staff as Non-Decisional issued the same day, excepting six individuals, including the Office's Deputy Director and the Director of the Division of Audits, from the non-decisional pool. Notice of Designation of Commission Staff as Non-Decisional, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000 (June 4, 2012).

249. *North Am. Elec. Reliability Corp.*, 142 F.E.R.C. ¶ 61,042 (2013).

250. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,052 (2013); Compliance Filing of NERC in Response to Paragraph 30 of November 2, 2012 Commission Order, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000, (Feb. 1, 2013); Compliance Filing of NERC, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000 (May 15, 2013); Compliance Filing of NERC, *North Am. Elec. Reliability Corp.*, FERC Docket No. FA11-21-000 (May 28, 2013).

251. *North Am. Elec. Reliability Corp.*, 143 F.E.R.C. ¶ 61,052.

252. *Grand River Dam Authority*, 136 F.E.R.C. ¶ 61,132 (2011) (Stipulation and Consent Agreement).

253. *Id.* at P 6.

254. *Id.*

In *SWPA*, the FERC reviewed a $19,500 penalty assessed against SWPA by SPP.[255] In its application for review, SWPA asked the FERC to dismiss the penalty on the grounds that NERC has no authority to assess a monetary penalty against a federal agency under FPA section 215.[256] In its order, the FERC found "that section 215 of the FPA authorizes the imposition of a monetary penalty against a federal agency for violation of a mandatory [r]eliability [s]tandard" and thus allowed the penalty as assessed.[257] The FERC denied requests for rehearing of its order.[258] DOE, the Department of the Interior, and the SWPA have since appealed the FERC's order to the United States Court of Appeals for the District of Columbia.[259]

In *PacifiCorp*, the FERC approved a settlement agreement under which PacifiCorp agreed to pay a civil penalty of $3,925,000.[260] The settlement agreement resolved violations of twenty-three different requirements of fifteen reliability standards that were identified through a non-public investigation of a February 14, 2008, disturbance.[261]

In *Entergy Services, Inc.*, the FERC approved a settlement agreement under which Entergy agreed to pay a $975,000 civil penalty to resolve violations of twenty-seven requirements of fifteen reliability standards.[262] This marked the first time the FERC has independently assessed a civil penalty for Reliability Standards violations without direct involvement by NERC or its regional entities, as this settlement only involved the FERC's Office of Enforcement and Entergy.[263]

IX. COORDINATED, OPEN, AND TRANSPARENT REGIONAL TRANSMISSION PLANNING

In Order No. 1000,[264] the FERC modified its electric transmission planning and cost allocation requirements for public utility transmission providers. Order No. 1000's stated goal was:

255. *North Am. Elec. Reliability Corp.*, 136 F.E.R.C. ¶ 61,135 at P 1 (2011).

256. Notice of Intervention and Application for Review of NERC Notice of Penalty, *North Am. Elec. Reliability Corp.*, FERC Docket No. NP11-238-000 (Aug. 26, 2011).

257. *North Am. Elec. Reliability Corp.*, 140 F.E.R.C. ¶ 61,048 at P 2 (2012).

258. *North Am. Elec. Reliability Corp.*, 141 F.E.R.C. ¶ 61,242 at P 2 (2012).

259. Petition for Review, *Southwest Power Admin. v. FERC* (D.C. Cir. filed Feb. 15, 2013) (No. 13-1033).

260. *PacifiCorp*, 137 F.E.R.C. ¶ 61,176 at P 1 (2011).

261. *Id.* at PP 13-22.

262. *Entergy Services, Inc.*, 142 F.E.R.C. ¶ 61,241 at PP 1, 7 (2013).

263. Joel deJesus & Jesse Halpern, *FERC Imposes a $975,000 Civil Penalty Against Entergy for 27 Violations of Reliability Standards*, ENERGY & ENVTL. L. ADVISOR (Apr. 4, 2013), http://www.energyenvironmentallawadviser.com/2013/04/04/ferc-imposes-a-975000-civil-penalty-against-entergy-for-27-violations-of-reliability-standard/ ("Unlike other civil penalty assessments for reliability standards violations, which have all previously arisen out of a joint investigation by FERC and NERC staffs and which have resulted in settlements among the registered entity, FERC, and NERC, this settlement only involved [the FERC Office of Enforcement] and Entergy and contains no reference to NERC's participation or that of NERC's regional entity with compliance enforcement authority over Entergy (SERC Reliability Corporation).").

264. Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,323, 76 Fed. Reg. 49,842 (2011) (codified at

> to achieve two primary objectives: (1) ensure that transmission planning processes at the regional level consider and evaluate, on a non-discriminatory basis, possible transmission alternatives and produce a transmission plan that can meet transmission needs more efficiently and cost-effectively; and (2) ensure that the costs of transmission solutions chosen to meet regional transmission needs are allocated fairly to those who receive benefits from them.[265]

Subsequently, in Order No. 1000-A, the FERC rejected requests to reconsider the mandates adopted in Order No. 1000 and instead offered several points of clarification; although, these clarifications did not result in any changes to the text of the regulations.[266]

In Order No. 1000-B, the FERC affirmed the determinations made in Order No. 1000-A, and granted additional clarifications on certain issues, including that (1) nothing in Order No. 1000 is intended to undermine or alter Order No. 681, and (2) reaffirmed its legal authority to eliminate a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation.[267] Commissioner LaFleur dissented on this point stating that the FERC acted prematurely in concluding that *any* amount of regional funding converts an otherwise local reliability project into a regional project for purposes of the right of first refusal and should decide the issue when acting on compliance filings.[268]

Commenters also sought rehearing of "whether a project whose costs are allocated to a single zone with multiple transmission owners" (specifically, RTO pricing zones) "should be considered local" and, therefore, whether the FERC should allow a "public utility transmission provider to retain a federal right of first refusal in these circumstances."[269] The FERC recognized that special consideration is needed when a small transmission provider is located within the footprint of another transmission provider and that there is a continuum of situations of multi-transmission provider zones.[270] The FERC stated that it intends to address these situations on compliance.[271]

18 C.F.R. pt. 35) [hereinafter Order No. 1000], *order on reh'g and clarification*, Order No. 1000-A, 139 F.E.R.C. ¶ 61,132 (2012) [hereinafter Order No. 1000-A], *order on reh'g and clarification*, Order No. 1000-B, 141 F.E.R.C. ¶ 61,044 (2012) [hereinafter Order No. 1000-B].

265. Order No. 1000, *supra* note 264, at P 4.

266. Order No. 1000-A, *supra* note 264, at PP 3, 50-54; *see also* Order No. 1000, *supra* note 264 (addressing objections and finding none sufficient to reevaluate Order No. 1000).

267. Order No. 1000-B, *supra* note 264, at PP 8, 11 (citing Order No. 681, *Long-Term Firm Transmission Rights in Organized Electricity Markets*, F.E.R.C. STATS. & REGS. ¶ 31,226, 71 Fed. Reg. 43,564 (2006), *order on reh'g*, Order No. 681-A, 117 F.E.R.C. ¶ 61,201, *order on reh'g*, Order No. 681-B, 126 F.E.R.C. ¶ 61,254 (2009)). The FERC denied commenters' requests for rehearing of its Order 1000-A determination that an incumbent transmission provider may not retain a federal right of first refusal for a new transmission project if (i) the project is selected in a regional transmission plan for purposes of cost allocation, and (ii) *any* of the costs of the facility are allocated outside of the public utility transmission provider's retail distribution service territory or footprint. The FERC stated in Order 1000-B that once a new transmission facility is selected in the regional transmission plan for purposes of cost allocation, it is no longer a local transmission facility exempt from the requirements of Order Nos. 1000 and 1000-A regarding the removal of federal rights of first refusal. *Id.* at P 52.

268. *Id.* (LaFleur, Comm'r, dissenting)

269. *Id.* at P 54.

270. *Id.*

271. *Id.* at PP 53-54.

With regard to the selection of the developer for a transmission project after the regional planning entity has identified a needed project in its regional transmission plan, the FERC declined to clarify "whether any particular approach to the selection of a transmission developer is a just and reasonable selection process in advance of the compliance filings."[272]

On interregional transmission coordination, the FERC noted that "Order No. 1000 did not specify whether or how a regional or interregional benefit-cost threshold should be applied when selecting a project in the regional transmission plan for purposes of cost allocation, or which costs should be included when calculating a benefit-cost threshold to use in this selection process."[273] The FERC declined to "clarify in advance of the compliance filings how a benefit-cost threshold should be applied."[274]

The FERC has since acted on sixteen proposed transmission planning regions and several waiver requests.[275] The FERC has subsequently addressed compliance filings by numerous entities.[276] In each instance, the FERC directed the parties to submit a further compliance filing addressing concerns identified in the order.[277]

X. MISCELLANEOUS ISSUES

A. Gas-Electric Coordination

On February 16, 2012, the FERC proposed to amend its regulations on Standards for Business Practices of Interstate Natural Gas Pipelines to incorporate the latest version (Version 2.0) of business practice standards adopted by the North American Energy Standards Board (NAESB) applicable to natural gas pipelines.[278] Among several updates proposed by Version 2.0 was

272. *Id.* at P 59. Some commenters expressed concern that some regions are considering a process in which third parties (e.g., one or more states (as compared to the regional planning body)) select the developer, which could lead to sub-optimal results; the decision as to which entity is best suited to build a given project necessarily relies on the developer's qualifications and on the projected benefits. *Id.* at P 58.

273. *Id.* at P 64.

274. *Id.* Some commenters also requested that a region may include an interregional project in its plan if the benefits to the region compare favorably to the share of the costs that would be borne by that region (as distinct from the total project costs).

275. *See, e.g.*, *Duke Energy Carolinas LLC*, 142 F.E.R.C. ¶ 61,130 (2013) (rejecting proposal as not meeting the regional scope requirements of Order No. 1000). *But see Maine Pub. Serv. Co.*, 142 F.E.R.C. ¶ 61,129 (2013) (waiving the regional transmission planning requirements citing a unique geographic and electric situation making it impossible to meet such requirements).

276. *See, e.g.*, *Southwest Power Pool, Inc.*, 144 F.E.R.C. ¶ 61,059 (2013); *Louisville Gas & Elec. Co.*, 144 F.E.R.C. ¶ 61,054 (2013); *Avista Corp.*, 143 F.E.R.C. ¶ 61,255 (2013); *Tampa Elec. Co.*, 143 F.E.R.C. ¶ 61,254 (2013); *PacifiCorp*, 143 F.E.R.C. ¶ 61,151 (2013); *ISO New England Inc.*, 143 F.E.R.C. ¶ 61,150 (2013); *New York Indep. Sys. Operator, Inc.*, 143 F.E.R.C. ¶ 61,059 (2013); *South Carolina Elec. & Gas Co.*, 143 F.E.R.C. ¶ 61,058 (2013); *California Indep. Sys. Operator Corp.*, 143 F.E.R.C. ¶ 61,057 (2013); *NorthWestern Corp.*, 143 F.E.R.C. ¶ 61,056 (2013) (addressing NorthWestern's South Dakota OATT or MAPP services); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 F.E.R.C. ¶ 61,215 (2013); *PJM Interconnection, L.L.C.*, 142 F.E.R.C. ¶ 61,214 (2013); *Public Serv. Co. of Colo.*, 142 F.E.R.C. ¶ 61,206 (2013).

277. *See generally PJM Interconnection, L.L.C.*, 142 F.E.R.C. ¶ 61,214 at P 1.

278. Notice of Proposed Rulemaking, *Standards for Business Practices for Interstate Natural Gas Pipelines*, 138 F.E.R.C. ¶ 61,124 (2012).

the inclusion of standards to support gas-electric interdependency.[279] On March 23, 2012, NERC submitted comments supporting the modified WGQ Standard 0.3.14, which changed the parties to whom pipelines are required to provide notification of operational flow orders and other critical notices, with minor clarifying suggestions.[280] On July 19, 2012, the FERC amended its regulations to incorporate by reference the latest Version 2.0 of the business practices, including those corrected by NAESB in May.[281] The FERC provided guidance on the criteria it will use in deciding whether to grant or deny requests for waivers or extensions and "modifie[d] the compliance filing requirements to add transparency as to where in the tariff incorporated standards may be found."[282]

In part due to increased discussion of gas/electric interdependence in connection with the Southwest cold weather event in early 2011,[283] Commissioner Phillip Moeller requested comments on a set of questions and other text concerning gas-electric interdependence, which led to the assignment of a docket number and request for comments on February 15, 2012.[284] On June 20, 2012, after over seventy sets of comments had been filed, several trade associations[285] wrote a letter to Chairman Wellinghoff supporting his interest in

279. *Id.* at 3. In Order Nos. 698 and 698-A, the FERC had incorporated by reference the NAESB Wholesale Electric Quadrant (WEQ) and WGQ Gas/Electric Coordination Standards, which were adopted to ensure that pipelines "have relevant planning information to assist in maintaining the operational integrity and reliability of pipeline service, as well as to provide gas-fired power plant operators with information as to whether hourly flow deviations can be honored. The standard also required electric transmission operators and power plant operators to "sign up to receive operational flow order notices from connecting pipelines as well as other critical notices." Order No. 698, *Standards for Business Practices for Interstate Natural Gas Pipelines; Standards for Business Practices for Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,251, 72 Fed. Reg. 38,757 (2007) (to be codified at 18 C.F.R. pts. 38, 284); Order No. 698-A, *Standards for Business Practices for Interstate Natural Gas Pipelines*, 121 F.E.R.C. ¶ 61,264 (2007).

280. Comments of NERC in Response to Notice of Proposed Rulemaking on Standards for Business Practices for Interstate Natural Gas Pipelines, *Standards for Business Practices for Interstate Natural Gas Pipelines*, FERC Docket No. RM96-1-037 (Mar. 23, 2012).

281. Order No. 587-V, *Standards for Business Practices of Interstate Natural Gas Pipelines*, F.E.R.C. STATS. & REGS. ¶ 31,332, 77 Fed. Reg. 43,711 (2012) (to be codified at 18 C.F.R. pt. 284) [hereinafter Order No. 587-V]. On May 4, 2012, NAESB filed a status report informing the FERC that it had finalized corrections on two standards to rectify inconsistencies noted in the FERC's NOPR. Report of the NAESB, *Standards for Business Practices of Interstate Natural Gas Pipelines*, FERC Docket No. RM96-1-037 (May 4, 2012).

282. Order No. 587-V, *supra* note 281, at P 1.

283. Several FERC commissioners made statements on the importance of gas-electric interdependence on February 16 and 17, 2012. *See, e.g.*, Statement of Comm'r Cheryl A. LaFleur on Standards for Business Practices for Interstate Natural Gas Pipelines under RM96-1, *Standards for Business Practices for Interstate Natural Gas Pipelines*, FERC Docket No. RM96-1-037 (Feb. 16, 2012); Statement of Commissioner John R. Norris on Standards for Business Practices for Interstate Natural Gas Pipelines under RM96-1, *Standards for Business Practices for Interstate Natural Gas Pipelines*, FERC Docket No. RM96-1-037 (Feb. 17, 2012).

284. Notice Assigning Docket No. and Requesting Comments, *Coordination Between Natural Gas and Electricity Markets*, FERC Docket No. AD12-12-000 (Feb. 15, 2012); Phillip D. Moeller, Comm'r, FERC, Comments on Coordination between the Natural Gas and Electricity Markets (2012), *available at* http://www.ferc.gov/about/com-mem/moeller/moellergaselectricletter.pdf.

285. The letter included the American Forest & Paper Association, the American Gas Association, the Electric Power Supply Association, the INGAA, the Independent Petroleum Association of America, the Natural Gas Supply Association, and PGC. Letter from American Forest & Paper Association et al., Regarding

holding regional conferences and in pursuing further discussions of what policy changes are needed to improve gas/electric coordination.[286] The FERC convened five regional conferences during August 2012 for the purposes of exploring these issues and obtaining further information from electric and natural gas owners and operators regarding coordination between the two industries.[287] Participants expressed concern that Commission rules and policies could be impeding further efforts to improve communication between the industries.[288]

On November 15, 2012, the FERC directed two technical conferences on gas/electric coordination: (1) "to identify areas in which additional guidance or potential regulatory changes regarding information sharing could be considered," and (2) to focus on natural gas and electric industry scheduling practices.[289]

On July 18, 2013, the FERC issued an NOPR regarding the communication of information between natural gas pipelines and electric transmission operators.[290] Recognizing the concerns expressed during the regional conferences, the FERC proposed to expressly authorize the exchange of "non-public, operational information between electric transmission operators and interstate natural gas pipelines."[291] However, the FERC proposed adoption of a "No-Conduit Rule" prohibiting "all public utilities and natural gas pipelines, as well as their employees, contractors, consultants, or agents, from disclosing, or using anyone as a conduit for the disclosure of non-public, operational information they receive under this proposed rule to a third party."[292] The proposed revisions to the regulations also prohibited the disclosure of such non-public, operational information to marketing function employees; however, they do not prohibit communications between transmission operators covered by this rule.[293]

B. Open Access and Priority Rights for Capacity on Interconnection Facilities

On April 19, 2012, the FERC issued a Notice of Inquiry requesting comments on whether and how the FERC should revise its policies on priority

Coordination Between the Natural Gas and Electricity Markets, to the Hon. Jon Wellinghoff, Chairman, FERC (June 20, 2012).

286. *Id.*

287. FED. ENERGY REGULATORY COMM'N, NO. AD12-12-000, STAFF REPORT ON GAS-ELECTRIC COORDINATION TECHNICAL CONFERENCES 22-26 (2012), *available at* http://www.ferc.gov/legal/staff-reports/11-15-12-coordination.pdf.

288. *Id.*

289. *Coordination Between Natural Gas and Electricity Markets*, 141 F.E.R.C. ¶ 61,125 at PP 5, 11 (2012). The order directed RTOs and ISOs to report progress to the FERC on May 16, 2013, and October 17, 2013. *Id.* at P 4. The order also directed staff to report progress on regional efforts in gas-electric coordination at least once each quarter in 2013 and 2014. *Id.* at P 13.

290. Notice of Proposed Rulemaking, *Communication of Operational Information Between Natural Gas Pipelines and Electric Transmission Operators*, 144 F.E.R.C. ¶ 61,043 (2013).

291. *Id.* at P 22. A footnote adds that "[t]he proposed regulations also recognize the existing exchanges of information among pipelines and among electric transmission operators that promote reliable service or operational planning." *Id.* at P 22 n.47.

292. *Id.* at P 26.

293. *Id.*

rights and open access with respect to generator interconnection facilities.[294] On July 19, 2012, the FERC issued a proposed policy statement that would allow developers of new merchant transmission projects and new nonincumbent, cost-based, participant-funded transmission projects to select a subset of customers, based on not unduly discriminatory or preferential criteria, and negotiate directly with those customers on the key terms and conditions for procuring capacity, so long as these developers (1) broadly solicit interest in the project from potential customers and (2) file a report with the FERC describing the solicitation, selection, and negotiation processes.[295]

The FERC issued a final policy statement on January 17, 2013.[296] The FERC's policy statement offered several clarifications and refinements in response to commenters' concerns but stated that the process outlined in the policy statement should address such concerns.[297] On February 19, 2013, NRECA filed a request for clarification and reconsideration, expressing concern over the FERC's statement that it will:

> allow for distinctions among prospective customers based on transparent and not unduly discriminatory or preferential criteria—so long as the differences in negotiated terms recognize material differences and do not result in undue discrimination or preference—with the potential result that a single customer, including an affiliate, may be awarded up to 100 percent of capacity.[298]

NRECA also sought clarification that the FERC "did not intend to diminish customers' rights to transmission service under the [FERC's] existing transmission pricing policy."[299] On March 21, 2013, the FERC dismissed NRECA's request on procedural grounds that a policy statement is not a final Commission determination, and interested parties will be able to challenge its application of the policy statement in the future.[300]

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294. Notice of Inquiry, *Open Access and Priority Rights on Interconnection Facilities Priority Rights to New Participant-Funded Transmission*, F.E.R.C. STATS. & REGS. ¶ 35,574, 77 Fed. Reg. 24,646 (2012) (to be codified at 18 C.F.R. pt. 40).

295. Proposed Policy Statement, *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Project, Priority Rights to New Participant-Funded Transmission*, 140 F.E.R.C. ¶ 61,061 at P 2 (2012). The FERC stated that these policy reforms would "ensure transparency in the capacity allocation process while providing developers the ability to negotiate bilaterally with potential customers the rates, terms, and conditions for the full amount of transmission capacity," and that these reforms would be implemented "within the existing four factor analysis used to evaluate requests for negotiated rate authority." *Id.* "The four factors are: (1) the justness and reasonableness of rates; (2) the potential for undue discrimination; (3) the potential for undue preference, including affiliate preference; and (4) regional reliability and operational efficiency requirements." *Id.* at P 4 n.6.

296. Final Policy Statement, *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Project, Priority Rights to New Participant-Funded Transmission*, 142 F.E.R.C. ¶ 61,038 (2013) [hereinafter Final Policy Statement].

297. *Id.* at P 39.

298. Request for Clarification and Reconsideration of the National Rural Electric Cooperative Association at 2, *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Project, Priority Rights to New Participant-Funded Transmission*, FERC Docket Nos. AD12-9-001, AD11-11-001 (Feb. 19, 2013) (citing Final Policy Statement, *supra* note 296, at P 28).

299. *Id.* at 3.

300. *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Project, Priority Rights to New Participant-Funded Transmission*, 142 F.E.R.C. ¶ 61,213 (2013).

C. The FERC Issues Final Rule 764 on the Integration of Variable Energy Resources

On June 22, 2012, the FERC issued a final rule on the integration of Variable Energy Resources (VER) (Order No. 764),[301] which amended the pro forma Open Access Transmissions Tariff (OATT) to remove unduly discriminatory practices and to ensure just and reasonable rates for FERC-jurisdictional services.[302] The FERC stated it removed barriers to the integration of VER by requiring each public utility transmission provider to: (1) offer intra-hourly transmission scheduling and (2) incorporate provisions into the pro forma Large Generator Interconnection Agreement, requiring interconnection customers whose generating facilities are VERs to provide meteorological and forced outage data to the public utility transmission provider for the purpose of power production forecasting.[303]

D. White House Releases Executive Order on Cybersecurity (February 12, 2012)

On February 12, 2013, the Administration issued an Executive Order on "Improving Critical Infrastructure Cybersecurity."[304] The goal of the executive order was to improve information-sharing about cyber threats between government and industry and establish a framework of cyber-security voluntary best practices.[305] On February 26, 2013, National Institute of Standards and Technology (NIST) issued a Request for Information (RFI) to "help identify, refine, and guide the many interrelated considerations, challenges, and efforts needed to develop" the Cybersecurity Framework.[306] Several entities filed comments.[307] NIST is in the process of holding a series of workshops in order to identify common threads and begin publishing a draft framework by the end of September 2013.[308] While NIST is developing the framework, the U.S. Department of Homeland Security (DHS) will continue working on the

301. Order No. 764, *Integration of Variable Energy Resources*, F.E.R.C. STATS. & REGS. ¶ 61,246 at PP 1-2, 77 Fed. Reg. 41,482 (2012).

302. *Id.* at PP 18-22.

303. *Id.* at PP 2-3.

304. Exec. Order No. 13636, 78 Fed. Reg. 11,739 (Feb. 19, 2013).

305. *Id.* at 11,739.

306. Request for Information Notice, *Developing a Framework to Improve Critical Infrastructure Cybersecurity*, 78 Fed. Reg. 13,024 (Feb. 26, 2013). The RFI questions were organized in the following three major areas: (1) Current Risk Management Practices, (2) Use of Frameworks, Standards, Guidelines, and Best Practices, and (3) Specific Industry Practices. *Id.* at 13,027. The questions range from inquiring into organizational policies and procedures to surveying current cybersecurity approaches in various industries and agencies, to specific practices including asset identification and management, incident handling policies, resiliency practices, privacy and civil liberties protection, and more. *Id.*

307. RFI—Framework for Reducing Cyber Risks to Critical Infrastructure, NAT'L INST. STANDARDS & TECH, http://csrc.nist.gov/cyberframework/rfi_comments.html (last updated Apr. 29, 2013) (list of commenters).

308. *Next Workshop on Critical Infrastructure Cybersecurity Framework is in Dallas, Sept. 11, 2013*, NAT'L INST. STANDARDS & TECH (Aug. 5, 2013), http://www.nist.gov/itl/workshop-080513.cfm.

information-sharing piece of the Executive order, and will develop specific performance measures.[309]

309. *See generally* DEP'T OF HOMELAND SEC., EXECUTIVE ORDER 13636: IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY (2013), *available at* https://www.dhs.gov/sites/default/files/publications/dhs-eo13636-summary-report-cybersecurity-incentives-study_0.pdf (presenting initial observations concerning the Executive Order).

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