

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Revisions to Reliability Standard for
Transmission Vegetation Management**)

Docket No. RM12-4-000

**MOTION FOR LEAVE TO FILE REPLY COMMENTS AND
REPLY COMMENTS OF THE NORTH AMERICAN
ELECTRIC RELIABILITY CORPORATION
REGARDING COMMENTS RECEIVED ON NOTICE OF
PROPOSED RULEMAKING**

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.212 (2012), and in response to comments submitted to the Commission regarding the Notice of Proposed Rulemaking issued in this proceeding on October 18, 2012,¹ the North American Electric Reliability Corporation (“NERC”) respectfully submits this Motion for Leave to File Reply Comments and Reply Comments. NERC provides these reply comments as the Commission-certified² electric reliability organization (“ERO”) responsible for the development and enforcement of mandatory Reliability Standards, including proposed FAC-003-2.

On December 21, 2012, NERC submitted comments addressing several sections of the Commission’s NOPR. A number of other entities also filed comments. NERC respectfully requests that the Commission consider NERC’s reply comments clarifying and responding to certain issues raised by commenters. The Commission should accept these reply comments because they provide information to assist the Commission in this proceeding.

¹ *Revisions to Reliability Standard for Transmission Vegetation Management*, Notice of Proposed Rulemaking, 141 FERC ¶ 61,046 (2012).

² *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh’g and compliance*, 117 FERC ¶ 61,126 (2006), *aff’d sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

I. Notices and Communications

Notices and communications with respect to this filing may be addressed to:³

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II. Comments and NERC Responses

A. The Proposed Definition of Right-of-Way Should Be Approved as Filed in NERC's Petition

A number of commenters raise concerns regarding the proposed definition of Right-of-Way. The proposed definition of Right-of-Way reads:

The corridor of land under a transmission line(s) needed to operate the line(s). The width of the corridor is established by engineering or construction standards as documented in either construction documents, pre-2007 vegetation maintenance records, or by the blowout standard in effect when the line was built. The [Right-of-Way] width in no case exceeds the Transmission Owner's legal rights but may be less based on the aforementioned criteria.⁴

³ Persons to be included on the Commission's service list are indicated with an asterisk. NERC requests waiver of 18 C.F.R. § 385.203(b) to permit the inclusion of more than two people on the service list.

⁴ See NERC Dec. 21, 2011 Petition at 2.

NERC responds here to comments submitted by the ITC Companies (“ITC”) in response to the Commission’s NOPR.⁵ ITC argues that the definition of Right-of-Way should be revised to clarify the phrase “needed to operate the line.” ITC also asks the Commission to provide an additional method for a utility to provide necessary documentation to establish the Right-of-Way other than those identified in the proposed definition. ITC states that the documentation enumerated in the proposed definition may be incomplete, unavailable, or problematic for utilities to implement. ITC further proposes that the Commission modify the proposed Right-of-Way definition to allow Transmission Owners to establish an appropriate standard for establishing the Right-of-Way width based on current industry standards. ITC also proposes a specific modification to the definition that provides additional clarity to the definition of Right-of-Way and provides certainty as to the types of records that support a utility’s determination of a Right-of-Way.

NERC’s Response

The definition of Right-of-Way should be approved as filed in NERC’s Petition, and the Commission should reject ITC’s request to make specific changes to the proposed definition of Right-of-Way in this proceeding. Any changes to the proposed definition, if necessary and ordered by the Commission under section 215(d)(5) of the Federal Power Act,⁶ should be made through the Reliability Standards development process.

NERC draws the Commission’s attention to an industry comment submitted during the development of the proposed standard and NERC’s response, which demonstrates the standard drafting team fielded a similar concern. The comment and response are both included in

⁵ See ITC Dec. 26, 2012 Comments.

⁶ 16 U.S.C. § 824o(d)(5) (2006).

NERC's Petition in this proceeding.⁷ During the fifth posting of the proposed standard, Hydro One commented:

The revised definition of [Right-of-Way] is unclear in regards to the application of standards and/or historic records as a means of determining [Right-of-Way] width; is it necessary for a [Transmission Owner] to select one method to apply in all cases, or can each span be treated in the manner deemed most appropriate by the [Transmission Owner]? Additionally "blowout Standard" has not been defined in the document or in the technical paper, and therefore it is not clear exactly how this method would be applied, and subsequently defended under scrutiny.⁸

In response, the standard drafting team:

- (i) determined that the proposed definition would be sufficient to establish a Right-of-Way because the definition includes a series of options that give the Transmission Owner latitude in establishing Right-of-Way width;
- (ii) explained that the definition of Right-of-Way does not require selecting a single method; and
- (iii) explained that the term "blowout standard" is not a defined term, and is intended to represent the conductor "blow out" design criteria used when the line was constructed. The team explained that inclusion of this undefined phrase in the definition allows a Transmission Owner to use its internal engineering standards or the general engineering standards that were in effect when the line was constructed to determine the Right-of-Way width.

NERC agrees with the standard drafting team that the definition includes the necessary latitude for a Transmission Owner to determine a Right-of-Way using the documentation identified.

B. NERC Has the Authority to Enforce Reporting Obligations Under Its Rules of Procedure

The City of Santa Clara, California (d/b/a Silicon Valley Power ("SVP")) submitted comments urging that the quarterly reporting obligation under proposed FAC-003-2 should be

⁷ See NERC Petition, Ex. E (Consideration of Comments on Draft 5 of FAC-003-2) at 10.

⁸ *Id.*

treated as a section 1600⁹ request for data or information because NERC seeks to move the reporting obligation from the “Requirement” section to the “Additional Compliance Information” section of the proposed standard.¹⁰ Like a section 1600 request for data or information, SVP contends that NERC’s only recourse for noncompliance with the reporting obligation is to request that the Commission exercise its enforcement authority to require the Reporting Entity to comply and for the Commission to take other appropriate enforcement action. SVP insists that like a request for data or information under section 1600, a quarterly reporting obligation that is under the “Additional Compliance Information” section is broad and not directly relevant to monitor a registered entity’s compliance with a particular standard Requirement.¹¹ SVP maintains that section 3.6 of Appendix 4C only assesses a registered entity’s compliance with a Requirement and not with other provisions of a standard such as the “Additional Compliance Information” section.¹²

NERC Response

In NERC’s Petition, NERC proposes to move a quarterly reporting obligation regarding sustained transmission outages caused by vegetation out of the Requirements section of the proposed standard to the “Additional Compliance Information” section of the Reliability Standard. Enforcing the quarterly reporting obligation found in the “Additional Compliance Information” section of the proposed FAC-003-2 Reliability Standard is consistent with the NERC Rules of Procedure¹³ and the regulations corresponding to section 215 of the Federal

⁹ In accordance with section 1600 of the NERC Rules of Procedure, NERC may request data or information that is necessary to meet its obligations under section 215 of the FPA, as authorized by section 39.2(d) of the Commission’s regulations.

¹⁰ SVP Dec. 21, 2012 Comments at 8.

¹¹ *Id.* at 8.

¹² *Id.* at 7.

¹³ References to the Rules of Procedure are to the version effective on December 20, 2012. *See* Order Conditionally Approving Revisions to North American Electric Reliability Corporation Rules of Procedure, 141 FERC ¶ 61,241 (2012) (“ROP Order”).

Power Act. The relevant enforcement mechanisms are Commission-approved and exist in the NERC Rules of Procedure under section 400 and Appendix 4C (Uniform Compliance Monitoring and Enforcement Program).

Section 401.3 of the NERC Rules of Procedure provides that NERC and the Regional Entities can require “[a]ll Bulk Power System owners, operators and users” to provide “such information as is necessary to monitor compliance with the reliability standards.” Appendix 4C to the NERC Rules of Procedure states that the Compliance Enforcement Authority will “*monitor, assess, and enforce* compliance with Reliability Standards using the compliance monitoring processes. . .to collect information in order to make assessments of compliance.”¹⁴ The quarterly reporting obligation in the proposed standard is squarely part of NERC’s compliance, monitoring, and enforcement functions. Section 400 and Appendix 4C of the Rules of Procedure also set forth how failure to comply with a reporting obligation will be addressed. In the event a registered entity does not submit requested data, information, or a report, the registered entity is afforded several opportunities to respond or cure a request or requirement pursuant to Attachment 1 to Appendix 4C.¹⁵ In December 2012, the Commission found that Attachment 1 to Appendix 4C “provides reasonable, measured and lawful responses to entities that are non-responsive to requests for data.”¹⁶

In its NOPR regarding proposed FAC-003-2, the Commission agrees with NERC that pursuant to section 401.3 of NERC’s Rules of Procedure, NERC and the Regional Entities can require Transmission Owners to make quarterly reports of sustained transmission outages because these reports provide information relating to compliance with the requirements of

¹⁴ Section 3.0 (emphasis added).

¹⁵ Attachment 1 to Appendix 4C to the CMEP: Process for Non-Submittal of Requested Data, Steps 1-3.

¹⁶ ROP Order at P 82.

proposed FAC-003-2.¹⁷ The Commission also states that a periodic data submittal is a requirement to provide compliance information pursuant to section 3.6 of NERC’s Compliance Monitoring and Enforcement Program.¹⁸

Commission regulations further provide that all users, owners and operators of the Bulk-Power System “subject to the Commission’s reliability jurisdiction. . .shall comply with applicable Reliability Standards, the Commission’s regulations, and applicable Electric Reliability Organization. . .Rules made effective under this part.”¹⁹ The regulations also provide that “[e]ach user, owner or operator of the Bulk-Power System within the United States. . .shall provide the Commission, the Electric Reliability Organization and the applicable Regional Entity such information as is necessary to implement section 215 of the Federal Power Act as determined by the Commission and set out in the Rules of the Electric Reliability Organization. . .”²⁰ It is, therefore, appropriate for NERC and the Regional Entities to enforce the reporting obligation in proposed FAC-003-2 pursuant to section 400 of NERC’s Rules of Procedure and Appendix 4C to ensure that this data continues to be submitted for compliance and enforcement of the proposed Reliability Standard.

SVP incorrectly cites section 1600 of the Rules of Procedure as the only mechanism for the reporting obligation in proposed FAC-003-2. While section 1600 of the Rules of Procedure provides NERC with the authority to collect data, the procedure under section 1600 does not supersede the application of section 400 and Appendix 4C with respect to the enforcement of Reliability Standards. NERC respectfully requests that the Commission approve the placement of the reporting obligation in the “Additional Compliance Information” section and uphold the

¹⁷ NOPR at P 94.

¹⁸ *Id.* (citing NERC Rules of Procedure, Appx. 4C § 3.6).

¹⁹ 18 C.F.R. § 39.2(b) (2012).

²⁰ 18 C.F.R. § 39.2(d) (2012); *see also* Attachment 1 to Appendix 4C to the NERC Rules of Procedure.

data reporting obligation as mandatory and enforceable under the NERC Rules of Procedure consistent with these comments.

C. Footnote 2 of Proposed FAC-003-2 Does Not Exclude Activity by a Transmission Owner’s Employee or Contractor

In proposed FAC-003-2, footnote 2 explains that Requirements R1 and R2 do not apply to certain conditions or scenarios outside the Transmission Owner’s control that may lead to encroachments. NERC explains in its Petition that the footnote “does not exempt the Transmission Owner from responsibility for encroachments caused by activities performed by their own employees or contractors.”²¹ A number of commenters have raised concerns regarding the footnote. The footnote reads:

This requirement does not apply to circumstances that are beyond the control of a Transmission Owner subject to this reliability standard, including natural disasters such as earthquakes, fires, tornados, hurricanes, landslides, wind shear, fresh gale, major storms as defined either by the Transmission Owner or an applicable regulatory body, ice storms, and floods; human or animal activity such as logging, animal severing tree, vehicle contact with tree, or installation, removal, or digging of vegetation. Nothing in this footnote should be construed to limit the Transmission Owner’s right to exercise its full legal rights on the [Right-of-Way].²²

In its comments, Bonneville Power Administration (“Bonneville”) states that it understands and accepts that Transmission Owners will be held liable for the actions of its employees and contractors, but believes that under some circumstances exceptions to this liability should be considered.²³ Bonneville provides examples of certain unpredictable events that could occur (such as equipment failure, rope breakage, or hidden tree defect, etc.) resulting in a Requirement R1 or R2 encroachment that Bonneville argues warrants an exemption.

²¹ NERC Petition at 23.

²² *Id.*, Ex. A at 4.

²³ *See* Bonneville Dec. 21, 2012 Comments.

Bonneville argues that placing this liability on the Transmission Owner will have potentially significant economic cost impacts such as increasing amounts on liability insurance and performance bonds.

Southern Company Services, Inc. (“Southern”) does not agree with NERC’s interpretation of footnote 2 and, accordingly, urges the Commission to clearly reject it when acting on the NOPR.²⁴ Southern argues that NERC’s interpretation of footnote 2 is contrary to the footnote’s plain language, which clearly and unambiguously states first that “[Requirement R1] does not apply to circumstances that are beyond the control of the Transmission Owner[.]” Moreover, Southern states that footnote 2 expressly mentions “human activity” such as the “installation, removal, or digging of vegetation” as an example of circumstances that are beyond the Transmission Owner’s control. Southern claims that NERC’s statement is clearly inconsistent with the standard’s plain language and with the intent of the FAC-003-2 standards drafting team, which, as Southern understands it, included footnote 2 in the standard, in part, to maintain the exemption from responsibility for contractor-caused violations provided under Version 1.

Pacific Gas and Electric Company (“PG&E”) also does not support NERC’s interpretation that the footnote 2 exemption should not include employees or contractors of the Transmission Owner.²⁵ PG&E argues that the intent of the exemption is to exclude outages from causes that are beyond the control of the Transmission Owner from FAC-003-2, and that footnote 2 specifically includes in its exemption human activities that are associated with vegetation management work.

NERC Response

²⁴ See Southern Dec. 21, 2012 Comments.

²⁵ See PG&E Dec. 24, 2012 Comments.

First, in response to Bonneville, NERC states that the situations Bonneville describes are best left to case-by-case analysis by the Compliance Enforcement Authority and would not be proper for an exemption.

Second, in response to Southern and PG&E, NERC's statements in its Petition regarding footnote 2 are accurate and reflect the intent of the standard drafting team. NERC consulted the standard drafting team in preparing these comments and confirmed that the intent was not to exclude activity of the employee or a contractor. Interpreting footnote 2 as Southern and PG&E suggest would insulate all errors in executing vegetation management plans, effectively encouraging mismanagement. Specific instances of error by employees or contractors in executing a vegetation management plan may be addressed through case-by-case analysis by the Compliance Enforcement Authority.

III. CONCLUSION

For the reasons stated above, NERC respectfully requests that the Commission consider these reply comments and approve the proposed Reliability Standard as filed.

Respectfully submitted,

/s/ William H. Edwards

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Dated: February 5, 2013

*Counsel for North American Electric
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 5th day of February, 2013.

/s/ William H. Edwards

William H. Edwards
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