

161 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

North American Electric Reliability Corporation

Docket No. RR15-2-005

ORDER ON COMPLIANCE FILING

(Issued November 16, 2017)

1. On February 21, 2017, the North American Electric Reliability Corporation (NERC) submitted an annual filing on its Compliance Monitoring and Enforcement Program (CMEP), in accordance with the Commission's prior orders approving NERC's Reliability Assurance Initiative (RAI).¹ In addition to providing the required annual report on the program, NERC requests Commission approval of two proposed program changes: (1) elimination of the public posting of compliance exceptions identified through self-logging; and (2) expansion of the use of compliance exceptions to include certain moderate risk violations.

2. The Commission accepts NERC's 2016 ERO Enterprise Compliance Monitoring and Enforcement Program Annual Report (2016 CMEP Report or Report). However, for the reasons discussed below, the Commission denies NERC's request for approval of two proposed changes to the CMEP: eliminating the public posting of compliance exceptions identified through self-logging and expanding the use of compliance exceptions to include certain moderate risk noncompliance.

I. Background

A. Section 215 of the Federal Power Act

3. Section 215(c) of the Federal Power Act (FPA) requires the Commission to certify an Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, as well as rules to provide fair and impartial procedures for

¹ *North American Electric Reliability Corp.*, 150 FERC ¶ 61,108, at PP 2, 49-52 (RAI Order); *order on compliance*, 153 FERC ¶ 61,130 (2015) (RAI Compliance Order).

enforcement of such Reliability Standards, subject to Commission review and approval.² This statutory requirement is reflected in section 39.3 of the Commission's regulations.³ In addition, section 215(f) of the FPA requires the ERO to file with the Commission for approval of any proposed rule or proposed rule change.⁴

B. NERC Compliance Monitoring and Enforcement

4. On February 3, 2006, the Commission issued Order No. 672 to implement the requirements of section 215 of the FPA governing electric reliability.⁵ On July 20, 2006, the Commission certified NERC as the ERO, including approval of the NERC Rules of Procedure addressing, among other things, NERC's CMEP.⁶ The intent of the ERO compliance program, as noted by the Commission, is to facilitate the "ongoing monitoring of user, owner and operator compliance with Reliability Standards."⁷ The Commission specified that the three required components of an ERO compliance program are: (1) a compliance program that includes proactive compliance audits; (2) an investigation program for alleged violations of Reliability Standards that includes prompt Commission notification of incidents and their dispositions; and (3) a penalty program.⁸

5. On March 15, 2012, the Commission issued an order accepting, with conditions, NERC's petition requesting approval of the Find, Fix and Track (FFT) program, allowing NERC to address lesser-risk, remediated possible violations of Reliability Standards

² 16 U.S.C. § 824o(c)(2)(C) (2012).

³ 18 C.F.R. § 39.3 (2017).

⁴ 16 U.S.C. § 824o(f).

⁵ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁶ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, at P 299, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on compliance*, 118 FERC ¶ 61,190, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007), *rev. denied sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009). The CMEP is Appendix 4C to the NERC Rules.

⁷ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 at P 293.

⁸ *Id.* (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204).

through FFT spreadsheet informational filings as opposed to the formal Notice of Penalty process.⁹

6. On December 20, 2012, the Commission issued an order pursuant to FPA section 215(f) conditionally approving revisions to the NERC Rules of Procedure.¹⁰ Among the revisions approved in the December 20 Order was a proposal to revise CMEP section 5.0 and Sanction Guidelines section 2.2, to grant NERC the flexibility to deviate from the standard CMEP procedures so that other approaches to enforcement could be considered and applied where the circumstances warranted such flexibility.¹¹ In approving NERC's proposed revision, the Commission explained that the new flexibility should be used in "limited circumstances" as a reasonable exercise of NERC's enforcement discretion.¹²

7. On June 20, 2013, the Commission issued an order accepting NERC's first annual FFT report and approving five enhancements to the FFT program.¹³ On September 18, 2014, the Commission issued an order accepting NERC's second FFT annual report, as well as approving the expansion of the FFT program to moderate risk possible violations that meet certain Commission-approved criteria.¹⁴ In approving the expansion of the FFT program, the Commission recognized the efficiencies that had resulted from the FFT program, but the Commission also highlighted situations where NERC and the Regional

⁹ *North American Electric Reliability Corp.*, 138 FERC ¶ 61,193; *order on reh'g*, 139 FERC ¶ 61,168 (2012).

¹⁰ *North American Electric Reliability Corp.*, 141 FERC ¶ 61,241 (2012) (December 20 Order).

¹¹ NERC's Sanction Guidelines, Appendix 4B to the NERC Rules, sets forth procedures to be followed and factors that will be considered when the ERO, and the Regional Entities to which the Commission has approved the ERO's delegation of enforcement authority, determine penalties or sanctions for violations.

¹² December 20 Order, 141 FERC ¶ 61,241 at P 95.

¹³ *North American Electric Reliability Corp.*, 143 FERC ¶ 61,253 (2013) (June 20 Order).

¹⁴ *North American Electric Reliability Corp.*, 148 FERC ¶ 61,214, at PP 3-4 (2014) (the expansion of the FFT program to certain moderate risk possible violations followed a pilot program approved by the Commission in the June 20 Order).

Entities could improve the risk assessments underlying FFT treatment and provide greater clarity in the information provided to support FFT treatment.¹⁵

8. On February 19, 2015, the Commission issued an order approving, with certain conditions, NERC's Reliability Assurance Initiative, designed to transition NERC to a risk-based approach to both compliance monitoring and enforcement.¹⁶ The Commission approved the two primary components of NERC's risk-based approach to enforcement: (1) a compliance exception process intended to identify minimal risk instances of noncompliance, to be recorded and mitigated without triggering a formal enforcement action; and (2) a voluntary self-logging program, which would allow pre-screened registered entities to self-identify, assess, and mitigate minimal risk instances of noncompliance, to be periodically rather than individually reviewed by the Regional Entity and presumptively processed as compliance exceptions. The Commission directed NERC to make certain modifications in those programs, however, requiring NERC to publicly post compliance exceptions in a manner similar to its FFT postings; requiring some level of formal review of an entity's internal controls before allowing participation in the self-logging program; and requiring NERC to include certain additional information in its annual report on the RAI.¹⁷ The Commission accepted NERC's compliance filings in response to the RAI Order, subject to certain conditions, on November 4, 2015.¹⁸

II. NERC's Annual Report and Proposed RAI Enhancements

9. NERC submitted its annual CMEP compliance filing on February 21, 2017 (February 21 Compliance Filing), including the 2016 CMEP Report as an attachment. In the 2016 CMEP Report, NERC describes the key activities that occurred in 2016 and reviews the progress of its risk-based CMEP. Among other things, the 2016 CMEP Report indicates that compliance exceptions continue to be the dominant disposition method for noncompliance that poses a minimal risk to the reliability of the Bulk-Power System, and that the FFT program is used primarily to resolve moderate risk noncompliance that does not warrant a penalty and is otherwise suitable for streamlined treatment. With respect to the self-logging program, the 2016 CMEP Report states

¹⁵ *Id.* PP 28, 30.

¹⁶ RAI Order, 150 FERC ¶ 61,108.

¹⁷ *Id.* PP 36-39, 41-43, 49-52.

¹⁸ RAI Compliance Order, 153 FERC ¶ 61,130; *see also North American Electric Reliability Corp.*, Docket No. RR15-2-004 (May 4, 2016) (letter order accepting changes to NERC Rules of Procedure as required in RAI Compliance Order).

that 59 registered entities have been approved to participate in the program as of December 31, 2016. The Report also indicates that the majority of Regional Entities are consistently implementing the self-logging program, and that self-logging instances of noncompliance reduces processing times by two-thirds when compared with self-reporting.¹⁹

10. In addition to seeking acceptance of the 2016 CMEP Report, and based on the results of NERC's oversight activities for the program, NERC also requests that the Commission approve two enhancements to the program. First, NERC proposes to eliminate the public posting of compliance exceptions identified through self-logging. Second, NERC proposes to expand the use of compliance exceptions to include certain moderate risk noncompliance, most of which are currently processed as FFTs.

A. Self-Logging Program

11. As NERC explains in the February 21 Compliance Filing, the self-logging program currently allows an eligible registered entity to log minimal risk noncompliance for subsequent review by the Compliance Enforcement Authority (i.e., the Regional Entity) in lieu of submitting an individual self-report for each noncompliance or potential noncompliance.²⁰ Self-logged items are limited to those that pose a minimal risk to reliability and, subject to the Regional Entity's review, are presumptively processed as compliance exceptions.²¹

12. NERC explains that, as originally envisioned, the self-logging program was designed to achieve three primary goals: (1) promote the development of strong internal controls to identify, assess, and correct noncompliance; (2) enhance visibility into registered entities' internal controls to identify, assess, and correct minimal risk noncompliance; and (3) increase efficiencies for NERC, Regional Entities, and registered entities through a streamlined processing and resolution of nonpublic minimal risk noncompliance.²² NERC states that it viewed confidentiality as a key feature of the program when it was first proposed, maintaining that "the non-public disposition of noncompliance was at once an incentive for participation but also a way to refocus the

¹⁹ 2016 CMEP Report at 13.

²⁰ February 21 Compliance Filing at 4. Participants are admitted to the self-logging program upon a formal review of internal controls related to their ability to identify, assess, and correct noncompliance.

²¹ *Id.* at 5-6.

²² *Id.* at 4.

attention of the public to enforcement actions which address violations posing greater risk to the [Bulk-Power System].”²³ NERC maintains that the Commission “unintentionally removed an incentive for registered entities to participate in the program” when it required logged noncompliance to be posted publicly, and that this requirement has reduced interest in the program.²⁴

13. As a result, NERC contends, the benefits of the program, such as the possible expansion of the ERO Enterprise’s visibility into entities’ internal controls to identify, assess, and correct noncompliance, have been reduced.²⁵ Furthermore, NERC maintains that the public posting requirement has potentially tempered registered entities’ inclination to include “near misses” in logs. Finally, NERC asserts that the public posting requirement has reduced the efficiency benefits of the program, due to the time required for participants to prepare their logs for public disclosure, and has limited the opportunity for the ERO Enterprise and registered entities to engage in robust trending discussions.²⁶

14. NERC maintains that while the self-logging program provided some positive impacts on reliability, for example, by requiring formal review of an entity’s internal controls before being granted the ability to self-log, the public posting requirement of the program has discouraged participation.²⁷ Based on its assessment of the self-logged noncompliance posted on NERC’s website to date, NERC concludes that the educational value the public could derive from the review of individual logged items is limited.²⁸ NERC expresses concern that publicly posting self-logged noncompliance could potentially divert the public’s attention from the review of higher risk matters, including those routinely processed as Notices of Penalty, and NERC also notes that self-logged

²³ *Id.* at 10.

²⁴ *Id.* at 4.

²⁵ *Id.* In support of its position, NERC states that “nearly all the Regional Entities had received feedback from registered entities that the required public posting of self-logs has led to a lack of continued interest in the Self-Logging Program,” and that the posting requirement “appears to have limited incentives for [participants] because it effectively results in treating the processing of self-logs no differently than other lesser risk issues.” *Id.* at 11.

²⁶ *Id.* at 4.

²⁷ *Id.* at 11.

²⁸ *Id.* at 12.

noncompliance will still be subject to oversight by the Commission as well as NERC. NERC also contends that making self-logs non-public can only encourage more open and full communication between registered entities and Regional Entities.²⁹

15. Instead of public posting, NERC proposes to include all self-logged noncompliance in a separate confidential spreadsheet, similar to the non-redacted Critical Infrastructure (CIP) compliance exceptions currently provided to the Commission.³⁰ NERC further proposes to prepare an anonymized annual summary of self-logged noncompliance, to be included in its CMEP annual reports. According to NERC, these summaries would generally describe the noncompliance identified in the logs; common themes in root cause and risk; and successful mitigation strategies used to address those causes and risk. NERC asserts that these summaries would provide more useful information regarding noncompliance, risk, and mitigation than stakeholders currently receive from simply listing the individual self-logged compliance exceptions.

16. Additionally, NERC states that it would begin posting on its website a list of entities admitted to the self-logging program. NERC maintains that providing a list of such high-performing entities would provide an additional incentive for registered entities to request admission to the program and an additional level of transparency to the public.

B. Expansion of Compliance Exceptions Program

17. With respect to the expansion of the compliance exceptions program to include certain moderate risk noncompliance, NERC proposes criteria for determining which moderate risk noncompliance would be eligible for compliance exception treatment that mirror the criteria currently used for determining FFT eligibility. As is currently done for moderate risk noncompliance being considered for FFT treatment, the Regional Entity would consider the underlying facts and circumstances of the noncompliance, including what happened, why, when, and where. The Regional Entity would also consider: (1) the level of risk to reliability; (2) the registered entity's internal compliance program – including preventative and corrective processes and procedures, management practices that self-identify noncompliance, and commitment to compliance; (3) aggravating factors such as a history of repeat noncompliance;³¹ and (4) any “above and beyond” mitigating

²⁹ *Id.* at 13.

³⁰ *Id.*

³¹ NERC states that it would not consider it appropriate, at this time, to treat a moderate risk noncompliance incident with aggravating compliance history as a compliance exception. *Id.* at 17.

measures.³² NERC states that these criteria would facilitate recognition of those registered entities with strong management practices that self-identify noncompliance, and would provide clear incentives for other registered entities to self-report and improve their management practices. NERC describes this proposed expansion of the compliance exceptions program as “the next logical step in the evolution of the program,”³³ and indicates that it may reconsider the continued need for the FFT program after it gains additional experience with moderate risk compliance exceptions.³⁴

18. Although NERC acknowledges that prior noncompliance processed as a compliance exception is not considered an aggravating factor for penalty purposes, NERC indicates that it would continue to consider such noncompliance as a part of a registered entity’s overall risk profile.³⁵

19. Finally, NERC states that implementation of the proposed changes to the CMEP may require changes to the NERC Rules of Procedure. NERC states it will develop and submit a filing requesting approval for such changes upon Commission approval of the proposed changes, or as otherwise directed by the Commission.

III. Notice of Filing, Interventions, and Comments

20. Notice of NERC’s February 21 Compliance Filing was issued on February 22, 2017 and published in the Federal Register, 82 Fed. Reg. 12,578 (March 6, 2017), with comments due on or before March 14, 2017. The following entities filed timely comments and timely motions to intervene, or had previously intervened in the underlying proceeding: Edison Electric Institute (EEI); PPL Electric Utilities Corporation (PPL); American Electric Power Service Corporation (AEP); and American Public Power Association, Electricity Consumers Resource Council, National Rural Electric Cooperative Association, and Transmission Access Policy Study Group, filing collectively as Joint Commenters. ISO/RTO Council and MISO Transmission Owners filed motions to intervene and comments out-of-time.

21. All commenters support NERC’s proposal to expand the compliance exceptions program to include moderate risk noncompliance, as described in NERC’s filing. All

³² *Id.* at 5-6, 16-17.

³³ *Id.* at 16.

³⁴ *Id.* at 6.

³⁵ *Id.* at 17.

commenters except Joint Commenters support NERC's proposal to allow for non-public resolution of self-logged noncompliance, as further discussed below.

IV. Discussion

22. The timely, unopposed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017). We also grant the untimely motions to intervene, given the parties' interest in the proceeding, the early stage of the proceeding, and the absence of undue delay or prejudice to any other party.³⁶

23. We accept NERC's 2016 CMEP Report, filed in accordance with the requirements of the prior RAI and RAI Compliance Orders. We further find that requiring NERC to make a separate, annual informational filing as described in the RAI Order³⁷ is no longer necessary and terminate that requirement, provided that NERC: (1) continues to include compliance exceptions in the annual "sampling" filing it makes pursuant to the FFT Order,³⁸ and (2) continues to include information on the RAI program, including observed trends and examples of matters treated as compliance exceptions, in the CMEP Report prepared for NERC's Board of Trustees Compliance Committee. While we will also no longer require NERC to include any proposed enhancements to its RAI program as part of this annual filing, we continue to encourage NERC to propose program enhancements, and note that such enhancements or expansions should be filed for Commission approval, accompanied by relevant supporting data.

24. As further discussed below, we deny NERC's request for approval of the two proposed changes to its CMEP because, in most situations, information on NERC's resolution of compliance and enforcement matters should be transparent and publicly

³⁶ See 18 C.F.R. § 385.214(d).

³⁷ See RAI Order, 150 FERC ¶ 61,108, at PP 49-52. In its first annual filing pursuant to the RAI Order, NERC provided additional information on the RAI program as directed by the Commission in paragraphs 50-52 of the RAI Order. That informational filing was accepted by delegated letter order. See *North American Electric Reliability Corp.*, Docket No. RR15-2-004 (May 4, 2016).

³⁸ See June 20 Order, 143 FERC ¶ 61,253 at P 41 (2013) (accepting NERC proposal to make an annual informational filing reporting on FFTs); *North American Electric Reliability Corp.*, Docket No. RC11-6-004 (Nov. 13, 2015 (delegated letter order accepting sampling and evaluation of compliance exceptions as part of NERC's FFT annual informational filing)).

available and processing of noncompliance should reflect the relative risk level of the violation.

A. Self-Logging Program

25. EEI, PPL, ISO/RTO Council, AEP, and MISO Transmission Owners urge the Commission to approve NERC's proposed changes to the self-logging program, allowing for non-public posting of self-logged noncompliance, based on similar arguments to those made by NERC. EEI states, for example, that public posting of self-logged compliance exceptions "promotes no discernible public benefit," and believes such posting can pose security risks.³⁹ Like NERC, these commenters maintain that the public posting requirement discourages participation in the program, and that the treatment of noncompliance in the self-logging program is essentially the same as the treatment of other low risk violations or of self-reported violations.⁴⁰ Similarly, ISO/RTO Council contend that the low number of participants in the self-logging program, 59 out of over 1,200 registered entities, suggests that the incentives to participate in the program are inadequate.⁴¹

26. Joint Commenters oppose NERC's proposal to discontinue the public posting of self-logged compliance exceptions, asserting that the transparency it provides is essential to educating industry and preserving the credibility of NERC's compliance and enforcement program. Joint Commenters contend that, because compliance exceptions are a significant percentage of noncompliance, their public disclosure provides registered entities with invaluable information on how NERC and the Regional Entities interpret what is necessary to comply with the various requirements in Reliability Standards, as well as the acceptable mitigation measures.⁴²

27. Joint Commenters also maintain that the public posting of all compliance exceptions could be an essential tool to help identify unnecessary or redundant

³⁹ EEI Comments at 3; *see also* PPL Comments at 3; ISO/RTO Council Comments at 3-4.

⁴⁰ *Id.*; *see also* PPL Comments at 2. AEP also requests that NERC consider further improvements to the self-logging program, to ensure it confers more discernible benefits beyond those available through self-reporting. AEP recommends "improved tracking mechanisms or allowing entities to self-maintain the log internally with regional oversight." AEP Comments at 2.

⁴¹ IRC Comments at 4.

⁴² Joint Commenters' Comments at 4-5.

requirements in the Reliability Standards.⁴³ Finally, Joint Commenters contend that the relatively low number of entities approved to self-log does not necessarily indicate that the program lacks sufficient benefits. Instead, they point to the similarly low number of Internal Control Evaluations (ICEs) (61) conducted in 2016. Joint Commenters state that the low number of ICE reviews completed, even if “less exacting” than the review required for self-logging participation, suggests that the many registered entities that experience infrequent noncompliance are unlikely to undergo the process to qualify for self-logging, even if the incentives for participation were increased.⁴⁴

28. We agree with Joint Commenters that the value of maintaining the transparency of self-logged noncompliance continues to outweigh the asserted benefit that might accrue from increasing the incentive to participate in the program. The Commission addressed this issue when the compliance exceptions program was first proposed, and rejected NERC’s proposal to treat all compliance exceptions as non-public. The Commission found that the additional burden of public posting is minimal, and that preserving transparency in compliance and enforcement matters provides meaningful benefits, by educating industry and ensuring consistency across NERC’s and the Regional Entities’ compliance and enforcement programs:

We will require NERC to publicly post compliance exceptions in a manner similar to how FFTs are currently posted. We find arguments that publicly posting compliance exceptions is unnecessary or will discourage entities from taking advantage of the efficiencies of RAI unpersuasive. Public disclosure of compliance exceptions would appear to require only minimal additional resources since information will be compiled monthly in a spreadsheet and provided to the Commission. Moreover, the Commission’s requirement for NERC to publicly post FFTs does not appear to have been a burden on registered entities, as NERC states that since 2011, FFTs were used to process over 2,000 instances of non-compliance. Rather, we agree with Joint Commenters that transparency in compliance and enforcement matters is beneficial to educate industry and provide additional oversight of the ERO Enterprise. It also serves to allow interested registered entities and other parties to measure consistency across entities, classes of entities, or Regional Entities, as well as demonstrating the quality of registered

⁴³ *Id.* at 5.

⁴⁴ *Id.* at 7-10.

entities' internal controls programs, particularly an entity's ability to swiftly and effectively identify, assess, and correct possible instances of noncompliance.⁴⁵

29. NERC maintains, based on its experience over the past two years, that the self-logging program is not fulfilling its intended objectives due to the limited incentive to participate. In support of that position, NERC and other commenters point to the feedback provided to Regional Entities and the low number of participants in the program.⁴⁶ We acknowledge that the Commission must balance a number of considerations in evaluating the design and scope of the self-logging program, including the efficiency of the program, its rigor, its transparency, and the level of participation in it. However, while it may be true that interest in the self-logging program could be further enhanced if self-logged, minimal risk instances of noncompliance were not publicly posted, we remain unpersuaded that these potential increases in participation outweigh the benefits of transparency that the Commission identified in the RAI Order.⁴⁷ As of December 31, 2016, 59 registered entities were participating in the program, and the evidence provided to date indicates that these participants have found the program to be beneficial and that the program generates additional processing efficiencies. PPL, for example, describes its experience in the self-logging program as "positive" and a "privilege," and states that the program allowed PPL to "significantly reduce the amount of time devoted to reporting on minimal risk matters."⁴⁸

30. NERC's and commenters' remaining reasons for not requiring the public disclosure of compliance exceptions are similar to arguments made in the RAI proceeding. NERC states, for example, that the requirement for public posting of self-logged noncompliance has reduced the efficiency benefits of the program and that participants have to spend extra time for preparation of self-logs that will be publicly posted.⁴⁹ However, the findings of the 2016 CMEP Report suggest that these burdens do

⁴⁵ RAI Order, 150 FERC ¶ 61,108 at P 36 (footnote omitted). The Commission further stated that it "has maintained a consistent view with regard to transparency in compliance monitoring and enforcement matters." *Id.* P 38.

⁴⁶ *See* February 21 Compliance Filing at 11; ISO/RTO Council Comments at 4.

⁴⁷ *Supra* n. 45.

⁴⁸ PPL Comments at 2-3.

⁴⁹ February 21 Compliance Filing at 4. While NERC refers to public posting of "self-logs," *id.* at 11 and 13, NERC does not state that it publicly posts registered entities' actual "self-logs."

not eclipse the other efficiencies gained through self-logging, as the Report states that self-logging noncompliance reduces processing times by two-thirds when compared with self-reports.⁵⁰

31. We believe that public posting of self-logged compliance exceptions continues to confer significant benefits, encouraging entities to develop and exercise stronger internal control mechanisms, and helping to prevent possible reoccurrence(s) of mitigated issues. Indeed, NERC, and the commenters that support NERC's proposal, acknowledge that the self-logging program has provided benefits. Despite NERC's general claim that the public posting requirement has reduced the efficiency benefits of the self-logging program, NERC elsewhere acknowledges that the self-logging program "resulted in increased efficiencies when compared to the processing of individual Self-Reports and other minimal risk noncompliance."⁵¹

32. In sum, we deny NERC's proposal to treat self-logged compliance exceptions as nonpublic, as NERC and supporting commenters have not provided sufficient justification for reconsidering the Commission's prior decision requiring public posting of all compliance exceptions. Likewise, we are not persuaded by NERC to deviate from the Commission's general policy requiring transparency in the outcome of compliance and enforcement matters relating to noncompliance with Reliability Standards.

B. Treatment of Moderate Risk Violations as Compliance Exceptions

33. As discussed above, NERC proposes to extend the compliance exceptions program to allow for the resolution of certain moderate risk violations, using criteria that it describes as similar to the criteria currently used to determine whether to process a moderate risk violation as an FFT. NERC suggests that approval of its proposal could make the FFT program obsolete, stating that "[a]fter further experience with moderate risk [compliance exceptions], the ERO Enterprise would consider the continued need for the FFT program."⁵² NERC maintains that this modification aligns with NERC's end-state goals for risk-based enforcement, which "requires the flexibility of a range of tools

⁵⁰ 2016 CMEP Report at 13. NERC's current claim that "[p]ublic posting of self-logged noncompliance potentially diverts the public's attention from the review of higher risk matters" was similarly considered and rejected in the RAI Order, and we find no reason to reconsider that argument here. *See* RAI Order, 150 FERC ¶ 61,108 at PP 17, 36-39.

⁵¹ February 21 Compliance Filing at 8.

⁵² *Id.* at 6.

to prioritize and treat noncompliance based on risk and enforcement practices with clear distinctions based on risk posed to the reliability of the [Bulk-Power System].”⁵³

34. All of the commenters support NERC’s proposed expansion of the compliance exceptions program. EEI and other commenters agree that the criteria NERC proposes for determining when moderate level risk violations are eligible for compliance exception treatment are appropriate, and that approval of NERC’s proposal will improve NERC’s ability to focus its resources on issues posing a higher risk to reliability.⁵⁴

35. We are not persuaded that the claimed efficiency gains in processing certain moderate risk violations as compliance exceptions, rather than as FFTs, are sufficient to outweigh our concerns with treating many moderate risk noncompliances through a non-enforcement track. NERC itself indicates that this expansion of the compliance exceptions program would be the first step in the potential elimination of the FFT program, and we are concerned that it would eliminate much, if not all, of the distinction between minimal and moderate risk noncompliance.

36. Given that the criteria NERC would use to determine whether a moderate risk incident should receive compliance exception treatment mirror the criteria currently used to determine whether FFT processing is appropriate, coupled with NERC’s suggested review of the future need for the FFT program, it appears that all or virtually all moderate risk incidents that would have been processed through the FFT program could be processed as compliance exceptions under NERC’s proposal. Thus, NERC appears to be effectively proposing a binary approach: either there is a serious/substantial risk posed by a violation, in which case it is processed through a full Notice of Penalty or spreadsheet Notice of Penalty, or, even if it is a moderate risk violation, it can be resolved as a compliance exception. As such, the violation would be processed on a non-enforcement track, would not be considered as part of the entity’s compliance history (except in a few circumstances), and would not require verified mitigation completion (i.e., mitigation verification by Regional Entities along with an affidavit of mitigation completion signed by the relevant registered entity’s officer or other representative). While this approach may be appropriate for minimal risk violations, NERC has not adequately justified this limited approach for moderate risk violations.

⁵³ *Id.* at 17.

⁵⁴ See EEI Comments at 4; *see also* PPL Comments at 4-5; ISO/RTO Council Comments at 5 (maintaining that “registered entities whose compliance programs mature may still encounter potential non-compliance events with moderate risk profiles, yet effectively manage that risk through timely identification and correction worthy of streamlined processing”).

37. Consistent with prior orders regarding the CMEP, the compliance response should generally reflect to some extent the difference in reliability risks between serious, moderate, and minimal risk instances of noncompliance.⁵⁵ In prior filings, NERC has indicated that “if something serious could have occurred and there were only some protections in place to reduce risk, the risk assessment would likely be moderate.”⁵⁶ The Commission continues to believe that this and other moderate instances of noncompliance require appropriate mitigation and continuing oversight, which is offered through the NOP processes or the FFT program. Accordingly, we deny NERC’s proposal to expand the compliance exceptions program to include certain moderate risk incidents of noncompliance. We continue to support the general direction of NERC’s compliance program towards a focus on risk-based compliance and conclude that our holding today is consistent with that approach.

38. Finally, we take this opportunity to make an observation regarding the proper processing of one form of noncompliance. As part of the Commission’s ongoing oversight of NERC’s CMEP, Commission staff recently conducted a joint review with NERC of a sampling of FFTs and compliance exceptions processed in the 2016 fiscal year. One of the compliance exceptions reviewed involved falsification of battery testing records by a registered entity’s employee. The Commission does not consider it appropriate to process instances of noncompliance involving falsification of records as compliance exceptions or FFTs. Rather, such circumstances warrant a full Notice of Penalty.⁵⁷

The Commission orders:

(A) The Commission hereby accepts NERC’s 2016 CMEP Annual Report, and terminates the annual informational filing requirement regarding the RAI program, as discussed in the body of this order.

⁵⁵ RAI Order, 150 FERC ¶ 61,108 at PP 15, 27.

⁵⁶ *Id.* P 15.

⁵⁷ See *North American Electric Reliability Corp.*, 138 FERC ¶ 61,193 at P 49 (incidents involving “intentional or willful acts or omission” warrant full Notice of Penalty treatment).

(B) The Commission hereby denies NERC's request to modify its Compliance Monitoring and Enforcement Program, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.