

August 27, 2014

VIA ELECTRONIC FILING

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

**Re: North American Electric Reliability Corporation
Docket No. RR14-5-000
Reply Comments of the North American Electric Reliability Corporation to (doc-less)
Motion to Intervene of Eric S. Morris and Comments of Eric S. Morris**

Dear Secretary Bose:

The North American Electric Reliability Corporation (“NERC”) hereby submits the “Reply Comments of the North American Electric Reliability Corporation to (doc-less) Motion to Intervene of Eric S. Morris and Comments of Eric S. Morris” in Docket No. RR14-5-000.

NERC’s filing consists of: (1) this transmittal letter and (2) NERC’s Reply Comments to Eric S. Morris, which are being transmitted in a single PDF file.

Please contact the undersigned if you have any questions concerning this filing.

Respectfully submitted,

/s/ Nina H. Jenkins-Johnston

*Counsel for the North American Electric
Reliability Corporation*

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

NORTH AMERICAN ELECTRIC)
RELIABILITY CORPORATION) **Docket No. RR14-5-000**
)

**REPLY COMMENTS OF
THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
TO DOC-LESS MOTION TO INTERVENE OF ERIC S. MORRIS AND
COMMENTS OF ERIC S. MORRIS**

Pursuant to Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.213 (2013), the North American Electric Reliability Corporation (“NERC”) submits these reply comments to the “(doc-less) Motion to Intervene of Eric S. Morris under RR14-5-000” (“Motion”) filed on August 15, 2014¹ and the “Comments of Eric S. Morris” (“Comments”) filed on August 26, 2014,² in response to NERC’s Five-Year Electric Reliability Organization Performance Assessment Report (“Five-Year Assessment”).³

In the Motion, Mr. Morris requested an extension of time for all intervening parties to submit comments in this proceeding as well as information about (1) whether the current Regional Entity model (with separate Boards of Directors, Presidents, General Counsel, etc.) is justified using a cost-benefit analysis, (2) how NERC ensures the fair and impartial implementation of penalty guidelines and adequate penalties, (3) NERC’s implementation of confidentiality

¹ (doc-less) Motion to Intervene of Eric S Morris under RR14-5-000, Docket No. RR14-5-000 (August 15, 2014).

² Comments of Eric S. Morris, Docket No. RR14-5-000 (August 26, 2014).

³ *North American Electric Reliability Corporation, Five-Year Electric Reliability Organization Performance Assessment Report*, Docket No. RR14-5-000 (July 21, 2014).

provisions under the NERC Rules of Procedure. On August 19, 2014, the Commission granted Mr. Morris' request for an extension of time to respond to the Five-Year Assessment.⁴ Subsequently, Mr. Morris submitted Comments reiterating his concern with the Regional Entity model and stating that the benefits of managing the Regional Entities are grossly outweighed by the costs.⁵ To substantiate his claims, Mr. Morris cited NERC's description of the Regional Entity Compliance Program metrics data as "complicated," "time consuming," and "requiring careful consideration," as well as NERC's explanation of the Electric Reliability Organization ("ERO") Enterprise model found in the NERC budget filing in Docket No. RR14-6.⁶ Mr. Morris requested that NERC provide (1) a comparison of budgetary differences using total net energy load (NEL) for each of the penalty figures requested in his earlier Motion, and (2) a comprehensive cost-benefit analysis to justify the use of a delegated regional model versus a unified single-entity ERO model.

NERC takes this opportunity to respond to Mr. Morris's concerns regarding the Five-Year Assessment.

⁴ *North American Electric Reliability Corporation*, Notice Granting Extension of Time, Docket No. RR14-5-000 (August 19, 2014).

⁵ Morris argues that the regional model is inherently wasteful and cites NERC's description of the Regional Entity Compliance Program and of the relationship between the ERO and Regional Entities to develop his argument. He cites a single IRS Form 990 for ReliabilityFirst Corporation to suggest that the regional model is unnecessarily wasteful. *See* Comments regarding RR14-5 by Eric S. Morris, Docket No. RR14-5-000 (August 26, 2014).

⁶ The relevant language of the ERO Enterprise model explanation, quoted on page 1 of the "Comments regarding RR14-5 by Eric S. Morris," states that, "[t]he ultimate success of the ERO Enterprise depends on there being one compliance program, one enforcement program, one event analysis program, etc. Regulated entities will have greater confidence and trust in the ERO Enterprise if they believe their regulatory oversight is not subject to arbitrary variations and possible discrimination from one region to the next. Outcomes will be more predictable and consistent if each statutory function is operated in a unified fashion across the ERO Enterprise. Outcomes will also be more readily measurable to demonstrate the reliability impacts and benefits of the enterprise programs."

(1) Regional Entity Model

In both Section 215 of the Federal Power Act and Section 39.8 of the Commission's regulations, Congress and the Commission contemplate the creation of an ERO and the delegation of certain authority to a Regional Entity.⁷ The Commission's February 3, 2006 Order No. 672 confirming the rules and procedures of the ERO⁸ and the July 20, 2006 Certification Order in which NERC was approved as the ERO⁹ also anticipate the creation of Regional Entities. The Regional Entity model allows NERC to share responsibilities as the ERO and to implement effective Reliability Standards and enforcement.

The purpose of the ERO's Five-Year Assessment, and all future five-year assessments, is to ensure that the Regional Entities continue to assist the ERO in promoting the effective and efficient administration of bulk power system ("BPS") reliability. In order to maintain delegated authority, a Regional Entity must satisfy the requirements in 16 U.S.C. § 824o(e)(4), which are reiterated in Section 39.8 of the Commission's regulations.¹⁰ The Commission does not call for

⁷ "The Commission shall issue regulations authorizing the ERO to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards. . . The Commission may modify such delegation." 16 U.S.C. § 824o(e) (2012).

"The Electric Reliability Organization may enter into an agreement to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the [ERO] and enforcing Reliability Standards under § 39.7." 18 C.F.R. § 39.7(a) (2013).

⁸ *North American Electric Reliability Organization*, 116 FERC ¶ 61,062 (July 20, 2006).

⁹ *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006).

¹⁰ When the ERO files a delegation agreement, it should include a statement demonstrating that: (1) The Regional Entity is governed by an independent board, a balanced stakeholder board or a combination independent and balanced stakeholder board.

(2) The Regional Entity meets the requirements otherwise applicable to the ERO in FPA § 215(c)(1)-(2), 16 U.S.C. § 824o(c)(1)(2), namely that it (1) has the ability to develop and enforce reliability standards that provide for an adequate level of reliability of the BPS; and (2) has established rules that (A) assure its independence of the users and owners and operators of the BPS, while assuring fair stakeholder representation in the selection of its directors and balanced decision-making in any ERO committee or subordinate organization structure, (B) allocate equitably

a separate cost-benefit analysis of the Regional Entity model. The Five-Year Assessment, and specifically Attachment 3, is NERC's assessment of how the Regional Entities meet these requirements. In the Five-Year Assessment, NERC also identifies function-specific areas of improvement for the Regional Entities as well as for NERC in its oversight role.

NERC is continually improving its execution of its statutory functions as the ERO and the mitigation of BPS reliability risks. This improvement requires continued oversight of the Regional Entities. Attachment 6 to the Five-Year Assessment outlines NERC's plan for achieving excellence in its oversight going forward. This plan calls for (1) clarifying roles and responsibilities of NERC and the Regional Entities, (2) coordinating strategic planning, (3) coordinating operational decision-making, (4) achieving consistency across the ERO, and (5) coordinating external and cross-ERO Enterprise communications.

(2) Confidentiality Requirements for Notices of Penalty

NERC takes very seriously its obligations to ensure the confidentiality of information pursuant to 18 C.F.R. § 39.7(b)(4), including its obligation to ensure that the disposition of each violation or alleged violation that relates to a Cybersecurity Incident¹¹ or that would jeopardize the security of the BPS shall remain nonpublic unless directed otherwise by the Commission. The

reasonable dues, fees, and other charges among end users for all activities, (C) provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties, (D) provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties, and (E) provide for taking appropriate steps to gain recognition in Canada and Mexico.

(3) The Regional Entity operates under a delegation agreement that promotes effective and efficient administration of BPS reliability. *See* 18 C.F.R. § 39.8 (2013).

¹¹ A Cybersecurity Incident is defined as, "a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communications networks including hardware, software and data that are essential to the Reliable Operation of the Bulk-Power System." 18 C.F.R. § 39.1 (2013).

NERC Rules of Procedure provide that NERC shall not disclose any Confidential Information (which includes Cyber Security Incident Information),¹² and will redact such information in any public filings or postings to the NERC website unless disclosure is otherwise permitted by the Rules of Procedure.¹³

The docketed referenced by Mr. Morris were filed in February 2012 and May 2012, respectively. NERC has been redacting identifying information, including violation history, since NERC began filing Notices of Penalty for violations of the Critical Infrastructure Protection Reliability Standards. NERC improved its internal procedures when it documented its redaction guidelines in early 2013 and incorporated them by reference into its internal Compliance Enforcement Manual. These redaction guidelines specifically address the redaction of identifying information, including the redaction of violation history. These guidelines provide assurance that Confidential Information will not be inadvertently disclosed, and instances such as the one described by Mr. Morris will not happen again.

The guidelines address the redaction of two categories of information: the first category includes information that clearly identifies a registered entity, such as name and NERC Registry ID number, and the second category includes information that could be used to identify a registered entity. Such information could include violation history, specific location names, titles, policy names, or technology used by the registered entity, the dates of discovery and mitigation, and other information that could reasonably be used to discern the registered entity's identity. Under current practice, redactions are reviewed by at least two NERC enforcement staff, NERC enforcement

¹² NERC Rules of Procedure at §§ 1501-1502. Cyber Security Event Information is defined as “any information related to, describing, or which could be used to plan or cause a Cyber Security Incident.” *See* Appendix 2 to the NERC Rules of Procedure.

¹³ NERC Rules of Procedure § 401.10 and Appendix 4C (Compliance Monitoring and Enforcement Program) at §§ 8.2 and 9.3.3.

processing management, and Regional Entity staff prior to filing with FERC and posting to the NERC website.

NERC also employs other controls to ensure the confidentiality of information and guard against inadvertent disclosure. Such controls include the use of FTP sites to share documents containing confidential information with Regional Entities, the use of standard file name conventions, and the use of labeling protocols to identify confidential information and information authorized for public release. NERC enforcement reviews its confidentiality procedures at least annually.

(3) Fair and Impartial Procedures for Enforcing Reliability Standards

As described in detail in the Five-Year Assessment, NERC developed a set of penalty guidelines that set forth a range of penalties for violations of Reliability Standards, which have been approved by the Commission pursuant to 18 C.F.R. § 39.7(g).¹⁴ NERC's *Sanction Guidelines*¹⁵ reflect the principle that penalties should be commensurate with the reliability impact of the violation and those levied for similar violations, while still reflecting the unique facts and circumstances related to the violation or the violator. The *Sanction Guidelines* do not contemplate a formulaic, rigid approach to penalty determinations, but one that is flexible in light of the facts and circumstances of a specific case.

The Violation Risk Factor/Violation Severity Level matrix provides a base penalty amount. However, this base penalty amount is just the start of the calculation. The *Sanction Guidelines* require NERC or the Regional Entity to consider, at a minimum, the violator's compliance history, failure of the violator to comply with compliance directives, disclosure of the violation by self-

¹⁴ See Five-Year Assessment Attachment 1 at 26-27.

¹⁵ Sanction Guidelines, Appendix 4B to the NERC Rules of Procedure.

reporting or as the result of compliance self-analysis, degree and quality of cooperation during the enforcement process, the presence and quality of the violator's internal compliance program, whether the violation was resolved through settlement, any attempt by the violator to conceal the violation, whether the violation was intentional, and any extenuating circumstances. The adjusted penalty amount may be further adjusted based on the violator's financial ability to pay or to ensure the disgorgement of unjust profit or gain for economic choice violations.¹⁶ Thus, a comparison of penalties based strictly on the Violation Risk Factor/Violation Severity Level matrix and the duration of the violation would not capture all of the factors that are considered in each individual case.

Further, depending on the circumstances, NERC or the Regional Entity may impose a non-monetary sanction either in lieu of or in addition to a monetary penalty.¹⁷ As described in the NERC Assessment of Regional Entity Delegated Functions,¹⁸ NERC encourages the Regional Entities to work with registered entities in settlement negotiations to accept the completion of certain activities above and beyond those required to ensure compliance with one or more Reliability Standards in lieu of the full monetary penalties permitted by the NERC *Sanction Guidelines* (where it is appropriate to do so).¹⁹ These efforts allow registered entities to allocate their resources to projects that can increase overall reliability, reduce the likelihood of future noncompliance, and provide insight into processes that can manage risk.

NERC reviews all penalties submitted by the Regional Entities for consistency with the

¹⁶ See generally Sanction Guidelines, Appendix 4B to the NERC Rules of Procedure at § 3 et seq.

¹⁷ Sanction Guidelines, Appendix 4B to the NERC Rules of Procedure at § 2.13.

¹⁸ Five-Year Assessment Attachment 3.

¹⁹ See, e.g., Five-Year Assessment Attachment 3 at 100-101 (assessment of ReliabilityFirst Corporation enforcement activities).

Sanction Guidelines and is charged with ensuring “acceptable similarity” in penalties for comparable violations.²⁰ This includes penalties in single-violation cases as well as penalties in multiple-violation cases.²¹ As the facts and circumstances of the violation differ from case to case, penalty outcomes will not always be identical. Each Notice of Penalty provides a description of the facts and circumstances used to determine the penalty calculation in a given case.

Dated: August 27, 2014

Respectfully submitted,

/s/ Nina H. Jenkins-Johnston

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²⁰ See Five-Year Assessment Attachment 1 at 26-27.

²¹ Determining penalties for multiple violations in the aggregate is described in Section 2.5 of the *Sanction Guidelines*.

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 27th day of August, 2014.

/s/ Nina H. Jenkins-Johnston

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Electric Reliability Corporation*