

126 FERC ¶ 61,270
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

North American Electric Reliability Council,
North American Electric Reliability Corporation

Docket No. RR06-1-019

Delegation Agreement Between the North American
Electric Reliability Corporation and Southwest Power
Pool, Inc.

Docket No. RR07-6-005

ORDER ON REHEARING

(Issued March 25, 2009)

1. The Canadian Electricity Association (CEA) and Southwest Power Pool, Inc. (SPP) seek rehearing of the Commission's December 19, 2008 order in the above-captioned proceeding.¹ For the reasons discussed below, we grant, in part, and reject, in part, rehearing.

Background

2. The Commission issued its initial order in this proceeding on July 20, 2006, certifying North American Electric Reliability Corporation (NERC) to serve as the Electric Reliability Organization (ERO) for the continental United States.² The Commission also accepted, subject to conditions, NERC's proposal to delegate certain of its ERO functions to its designated Regional Entities, including SPP. In addition, the Commission accepted, subject to conditions, NERC's proposed *pro forma* NERC/Regional Entity Delegation Agreement and the exhibits to this agreement,

¹ *North American Electric Reliability Corp.*, 125 FERC ¶ 61,330 (2008) (December 19 Order).

² *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (2006).

including the NERC *pro forma* Compliance Monitoring and Enforcement Program (CMEP). Orders addressing NERC's first and second compliance filings were issued by the Commission on April 19, 2007 and March 21, 2008, respectively.³ In the December 19 Order, the Commission addressed NERC's third compliance filing.

3. As noted above, CEA and SPP submitted timely requests for rehearing of the December 19 Order.

Discussion

A. Information Sharing Requirements Under the CMEP

1. December 19 Order

4. The December 19 Order rejected CEA's proposed revision to CMEP section 2.0, a provision addressing, as relevant here, NERC's authority to provide to the Commission and other Applicable Governmental Authorities certain cross-border compliance information.⁴ Specifically, the Commission rejected CEA's proposed deletion of the

³ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007); *North American Electric Reliability Corp.*, 122 FERC ¶ 61,245 (2008).

⁴ December 19 Order, 125 FERC ¶ 61,330 at P 36. CMEP section 2.0, as accepted in the December 19 Order, provides in relevant part as follows:

[D]uring the course of compliance monitoring and enforcement activities relating to U.S. entities, NERC may obtain information that it will provide to FERC and, if the information pertains to a Registered Entity or to a portion of the bulk power system over which another Applicable Governmental Authority has jurisdiction, to such other Applicable Governmental Authority [subject to certain disclosure limitations]. Similarly, during the course of compliance monitoring and enforcement activities relating to non-U.S. entities, NERC may obtain information that it will provide to the Applicable Governmental Authorities, including FERC, that have jurisdiction over the Registered Entity or the portion of the bulk power system to which the information pertains [subject to certain disclosure limitations].

phrase “including FERC” in the concluding sentence quoted in note 4, *supra*.⁵ The Commission found that deletion of this phrase would not change the meaning of section 2.0 and was not otherwise required. The Commission further found that section 2.0, as drafted, provided an appropriate reciprocity assurance as between the Commission, on the one hand, and Canadian and Mexican entities, on the other hand.

5. The December 19 Order also rejected, as unnecessary, CEA’s related proposed clarifications to CMEP sections 3.4.1, step 12, 5.1, 5.4, 5.6, and 8.0, addressing NERC’s authority to disclose additional compliance information.⁶ The December 19 Order rejected CEA’s interpretation of these provisions as requiring NERC to automatically provide to the Commission non-U.S. information about compliance matters that do not fall within the Commission’s jurisdiction.⁷ The Commission further found that CEA’s proposed clarification was unnecessary to ensure that the Commission’s receipt from NERC of Canadian compliance information is subject to prior approval by the relevant Canadian reliability authority under conditions set by that authority and by applicable Canadian law. The Commission found that each international disclosure by NERC of compliance information is subject to the condition that the information pertains to a Registered Entity or a portion of the Bulk-Power System over which the Applicable Governmental Authority that would receive the information has jurisdiction.

⁵ CEA, in its comments, had asserted that section 2.0, as drafted, could be interpreted as requiring NERC to provide to the Commission compliance information relating to non-U.S. entities that do not fall within the Commission’s jurisdiction, thereby expanding the Commission’s jurisdiction beyond its authorized limits.

⁶ *Id.* P 37-38. These provisions address, among other things, NERC’s obligation to notify the Commission and/or another Applicable Government Authority of: (i) compliance enforcement authority determinations (section 3.4.1, step 12); (ii) notices of alleged violations (section 5.1); (iii) approved settlements (section 5.4); (iv) notices of penalty (section 5.6); and (v) quarterly reports (section 8.0).

⁷ *Id.* Accordingly, the Commission rejected CEA’s proposed clarification that “NERC [will provide that applicable report, notice, information or document to] FERC, if the [matter] pertains to a Registered Entity or to a portion of the Bulk-Power System over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the [matter] pertains to a Registered Entity or to a portion of the Bulk-Power System over which the other Applicable Governmental Authority has jurisdiction.”

2. Request for Rehearing

6. CEA requests rehearing regarding the Commission's acceptance of CMEP section 2.0. CEA argues that section 2.0, as drafted, fails to provide an appropriate reciprocity as between the rights of the Commission to receive compliance information and the rights of other Applicable Governmental Authorities to do so. CEA argues, for example, that section 2.0, as drafted, prohibits NERC from disclosing non-public U.S.-related compliance information to Canadian government authorities, *absent prior Commission approval*. CEA argues that, by contrast, NERC is required to disclose to the Commission non-U.S.-related compliance information subject only to the limitation that the Commission has jurisdiction over the Registered Entity or the portion of the Bulk-Power System to which the information pertains and assuming that no limitation has been placed on disclosure by the Applicable Governmental Authority with jurisdiction. CEA points out that section 2.0 does not specifically refer to the ability of Canadian governmental authorities to withhold prior approval of disclosures of non-U.S. related compliance information to the Commission. CEA argues that, as such, section 2.0 lacks the appropriate symmetry as between the Commission's rights and the rights of other applicable governmental entities. To correct this asserted deficiency, CEA argues that the language of section 2.0, regarding the need for prior Commission approval in the case of U.S.-related compliance information, should mirror the corollary right of the Applicable Governmental Authority to give its prior approval to the disclosure of non-U.S.-related compliance information.

7. CEA also seeks rehearing regarding the Commission's acceptance of two other aspects of the CMEP compliance information-sharing provisions regarding CMEP sections 2.0, 3.4.1, step 12, 5.1, 5.4, 5.6, and 8.0. CEA argues that the Commission, in the December 19 Order, appropriately clarified that these provisions do not require the automatic transfer of Canadian compliance information to the Commission because: (i) the applicable Canadian regulator must approve in advance the disclosure to the Commission of any such information; and (ii) the information must pertain to a Registered Entity or a portion of the Bulk-Power System over which the applicable governmental authority that would receive the information has jurisdiction. CEA argues that while these clarifications are helpful, it remains unclear whether and how these clarifications will be applied by NERC to each of the aforementioned sections of the CMEP because the language of these provisions, on their face, requires that NERC provide to the Commission all information to which these sections refer, even if the Commission has no jurisdiction over the entity at issue or any relevant portion of the Bulk-Power System.

8. CEA next notes that these provisions, other than section 2.0, refer to the transfer of a specific document or notification, such as the transfer of a Notice of Alleged Violation pursuant to section 5.1, while providing that “non-public non-U.S. compliance information” may be provided to the Commission only if the Applicable Governmental Authority permits such disclosure. CEA asserts that this difference in language lacks clarity and may raise interpretational issues in the future. For example, CEA asserts that in section 5.1, a “notice of alleged violation” could be treated differently from “compliance information” so as potentially to preclude a Canadian authority that issued a non-public notice of alleged violation from determining whether the Commission may receive it.

3. Commission Determination

9. We reject CEA’s requests for rehearing regarding the need to further revise the *pro forma* CMEP. CEA seeks revision of CMEP section 2.0 because, it claims, this provision lacks symmetry as between the compliance information NERC may provide to the Commission and/or other Applicable Governmental Authorities. Accordingly, CEA requests a change in the wording of section 2.0 to make these provisions parallel in their wording. However, we are not persuaded that further revision of section 2.0 is necessary in order to advance the interpretation of this provision proposed by CEA. Instead, we reiterate our understanding that, under section 2.0, the right of an Applicable Governmental Authority to place limitations “on [NERC’s] disclosure [to the Commission] of non-public, non-U.S. compliance information” implicitly includes, as CEA proposes, prior approval authority over such disclosure. Further, the language of section 2.0 relates only to the international transfer of compliance-related information from NERC and thus cannot prevent the Commission and Canadian and Mexican reliability authorities from entering into inter-governmental agreements to exchange compliance-related information on a reciprocal basis.

10. CEA also seeks revisions to CMEP compliance information-sharing provisions on the ground that these provisions, as drafted, require NERC to provide certain information to the Commission and/or to another Applicable Governmental Authority without the limitations set forth elsewhere in the CMEP, i.e., without the limitation that the information provided concern a Registered Entity or a portion of the Bulk-Power System over which the Applicable Governmental Authority has jurisdiction. However, we are not persuaded that further revision of these provisions is necessary in order to advance the interpretation of these provisions as proposed by CEA. Instead, we observe that in the December 19 Order, the Commission stated that the compliance information NERC provides to the Commission and/or to any other Applicable Governmental Authority, under CMEP sections 2.0, 3.4.1, step 12, 5.1, 5.4, 5.6 or 8.0, may be provided to such Applicable Government Authority only to the extent such information pertains to a

Registered Entity or to a portion of the Bulk-Power System over which such Applicable Governmental Authority has jurisdiction.⁸ This interpretation is consistent with the express language set forth elsewhere in the CMEP.⁹ Specific non-U.S. documents or notifications to which CMEP sections 3.4.1, step 12, 5.1, 5.4, 5.6, and 8.0 constitute “compliance information” so as to fall within the proviso in each such provision that non-public, non-U.S. compliance information may be provided to the Commission only if the Applicable Governmental Authority provides permission for such disclosure.

B. SPP’s Funding Accounts

1. December 19 Order

11. The December 19 Order required that NERC and SPP revise Exhibit E, section 5 of the SPP Delegation Agreement (pertaining to SPP funding) to establish separate accounts for payment of statutory and non-statutory expenses, as between the SPP Regional Entity and the SPP regional transmission organization (RTO).¹⁰

2. Request for Rehearing

12. SPP requests rehearing regarding the Commission’s directive, in the December 19 Order, that the SPP Regional Entity pay all of its statutory expenses out of a separately maintained account for the Regional Entity and not from a single SPP RTO operating account. SPP asserts that the December 19 Order failed to provide a rational basis for precluding SPP from accounting for statutory expenses by separate recording of SPP Regional Entity expenses, with reimbursements paid to SPP from a separate bank account holding all funding payments received from NERC. SPP argues that no purpose is served by the Commission’s directive, while substantial inefficiencies will be imposed on SPP were it required to comply with the Commission’s directive.

⁸ December 19 Order, 125 FERC ¶ 61,330 at P 38.

⁹ See, e.g., CMEP sections 3.1.6 (addressing compliance audit reports), 3.4 (addressing compliance violation investigations) and 3.4.1, step 2 (addressing the process steps for a compliance violation investigation).

¹⁰ *Id.* P 111.

13. SPP points out that it has established a separate account (the Regional Entity Statutory Funding Account) to hold all payments received from NERC, thus ensuring that statutory funding will be kept separate from non-statutory funding. SPP points out that, in addition, all statutory expenses incurred by the SPP Regional Entity will be separately tracked and recorded as statutory expenses.¹¹ SPP adds that, under its proposal, SPP Regional Entity expenses are paid, during a given month, by the SPP RTO from a second account (the joint SPP operating account), but that this operating account is then reimbursed at the end of the month by funds drawn from the Regional Entity Statutory Funding Account.

14. SPP asserts that this accounting treatment is appropriate as a matter of efficiency. SPP cites as an example employee salaries and benefits, an expense that accounts for approximately 35 percent of the SPP Regional Entity's overall expenses. SPP argues that while over 75 percent of the employees who carry out the business of the SPP Regional Entity are shared employees who perform tasks for both the SPP Regional Entity and the SPP RTO, the extent to which these employees are shared varies from month to month. SPP argues that, as such, these employees could not easily be paid an RTO salary and a separate SPP Regional Entity salary each month. SPP adds that payroll must be processed on a regular and routine basis, without delays to ascertain employees' statutory and non-statutory activities over a given pay period.

15. SPP further argues that if a shared employee were to incur travel expenses related to a SPP Regional Entity function and pay for these expenses with the SPP corporate credit card, under the approach directed by the Commission, SPP would be required to allocate the credit card bill between Regional Entity and non-Regional Entity charges and then pay the single credit card bill with two checks (one from the joint SPP operating account and one from the Regional Entity Statutory Funding Account). SPP argues that this requirement would add several layers of complexity and administrative burden without providing any discernable benefit.

¹¹ As explained below, the Commission addressed the sufficiency of SPP's recordation practices in an order issued February 19, 2009. *See North American Electric Reliability Corp.*, 126 FERC ¶ 61,123 (2009) (February 19 Order).

3. Commission Determination

16. We grant rehearing of the December 19 Order regarding the directive that SPP revise Exhibit E, section 5 of the SPP Delegation Agreement to establish separate accounts for payment of statutory and non-statutory expenses as between the SPP Regional Entity and the SPP RTO.

17. In the February 19 Order, the Commission, in addressing matters related to SPP's 2007 budget, directed SPP to develop and implement accounting procedures consistent with the NERC System of Accounts – a record-keeping requirement intended to ensure that SPP's statutory and non-statutory activities will be properly recorded and appropriately segregated.¹² In a separate order issued January 15, 2009, the Commission, in addressing an SPP Audit Report, as prepared by the Division of Audits in the Office of Enforcement (OE), found that there will be an appropriate separation as between SPP's RTO and Regional Entity functions, subject to the following actions, among others: (i) the retention, by SPP, of a full-time Regional Entity manager to oversee all delegated functions of the Regional Entity and to serve as SPP Regional Entity's primary representative to NERC; (ii) authorization, on the part of the Regional Entity managers and trustees, to approve unbudgeted expenses; (iii) authorization, on the part of the Regional Entity manager, to authorize withdrawals from the Regional Entity bank account, consistent with the Regional Entity budget; and (iv) authorization, on the part of the Regional Entity, to account for funds available to the Regional Entity and to address discrepancies resulting from an audit, bank account reconciliation, or internal reviews of the Regional Entity's segregated funds.¹³ These actions will provide the SPP Regional Entity with authority and control over the Regional Entity accounts.

18. We are satisfied that, with the proper implementation of these directives, we need not, at this time, require SPP to establish a new account for the payment of its statutory and non-statutory expenses.

¹² February 19 Order, 126 FERC ¶ 61,123 at P 9.

¹³ *Southwest Power Pool*, 126 FERC ¶ 61,045 (2009).

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The Commission orders:

Rehearing of the December 19 Order is hereby granted, in part, and rejected, in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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