

127 FERC ¶ 61,293
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 Corporation

Docket Nos. RR08-4-003
RR08-4-004

ORDER ON COMPLIANCE FILING

(Issued June 24, 2009)

1. On December 19, 2008, the North American Electric Reliability Corporation (NERC), submitted two compliance filings pertaining to violation severity level assignments: (1) a filing in compliance with the Commission's June 19, 2008 order¹ and (2) a filing in compliance with the Commission's November 20, 2008 order.² The Commission accepts both compliance filings, as discussed below.

I. Background

2. In the VSL Order, the Commission articulated four guidelines for evaluating violation severity levels.³ The Commission's guidelines are: (1) violation severity level assignments should not have the unintended consequence of lowering the current level of compliance; (2) violation severity level assignments should ensure uniformity and consistency among all approved Reliability Standards in the determination of penalties; (3) violation severity level should be consistent with the corresponding requirement; and

¹ *North American Electric Reliability Corporation*, 123 FERC ¶ 61,284 (2008) (VSL Order).

² *North American Electric Reliability Corporation*, 125 FERC ¶ 61,212 (2008) (VSL Rehearing Order).

³ NERC and the Regional Entities use violation severity levels to determine an appropriate base penalty range for an individual violation of a requirement of a Reliability Standard.

(4) violation severity level assignments should be based on a single violation, not on a cumulative number of violations.⁴

3. In the VSL Order, the Commission, applying the guidelines, approved NERC's proposed violation severity levels corresponding to 83 Commission-approved requirements of mandatory Reliability Standards, but directed modifications to certain violation severity level assignments and directed several additional compliance filings. *Inter alia*, the Commission directed NERC to submit a compliance filing within six months that provides a justification for the inconsistencies in the single violation severity level assigned to binary requirements.⁵ The Commission stated "NERC may either (1) modify the single violation Severity Level by consistently applying the same severity level or (2) modify the violation severity level assignment by changing from a binary approach to an approach using gradation, as explained in Guideline 2."⁶

4. In the VSL Rehearing Order, the Commission granted NERC's request for rehearing on certain violation severity levels assignments directed by the Commission in the VSL Order.⁷ As a result, the Commission directed NERC to submit a further compliance filing, within 30 days of the date of the VSL Rehearing Order.

II. NERC Compliance Filings

A. Compliance Filing on "Binary" Violation Severity Levels

5. NERC's filing in compliance with the Commission's VSL Order addresses paragraph 47 of the VSL Order, which directed NERC to submit a justification for the inconsistencies in the single violation severity level assigned to binary requirements; or alternatively, to modify the single violation severity level by consistently applying the same severity level or by changing from a binary approach to an approach using

⁴ VSL Order, 123 FERC ¶ 61,284 at P 20-36.

⁵ Binary requirements are those for which compliance is defined in terms of "pass" or "fail."

⁶ VSL Order, 123 FERC ¶ 61,284 at P 47.

⁷ The VSL Rehearing Order, 125 FERC ¶ 61,212 at P 52-74 and 76, required revisions to the violation severity level assignments for six Reliability Standards: EOP-003-1, Requirement R4; EOP-003-1, Requirement R7; FAC-003-1, Requirement R2; VAR-001-1, Requirement R1; VAR-001-1, Requirement R8; and IRO-006-3, Requirement R6.

gradation.⁸ NERC states that it identified 322 binary requirements in the original 83 Commission-approved Reliability Standards. NERC explains that 176 of these requirements and sub-requirements were not assigned a “severe” violation severity level. NERC further states that, “after careful consideration of the inconsistencies in the assignment of [violation severity levels] NERC could not identify a compelling technical justification to maintain different violation severity level assignments.”⁹ Thus, NERC proposes to modify the violation severity levels assigned the 176 requirements so that the failure to meet the intent of the requirement would be assigned a “severe” violation severity level.

6. Further, NERC states that it remains concerned about the assignment of violation severity levels for binary sub-requirements that completely support the reliability objective of the base requirement to which they are subordinate. NERC asserts that, by virtue of the violation severity level assignment of binary requirements at the severe level, the potential exists, however unlikely in practice, to establish a base starting point using NERC’s Sanctions Guidelines at an exorbitantly high level for what could be an administrative oversight.

B. Filing in Compliance with the VSL Rehearing Order

7. On December 19, 2008, in compliance with paragraph 76 in the VSL Rehearing Order, NERC submitted the Commission-approved modifications of violation severity levels for the six requirements on which the Commission granted rehearing.¹⁰

III. Public Notice and Comments

8. Notice of both NERC filings was published in the *Federal Register*, 74 Fed. Reg. 1,207 (2009), with comments due on or before January 21, 2009. The ISO/RTO Council filed one set of comments in both dockets.

9. ISO/RTO Council states that it does not object to the concept that binary standards should have violation severity levels that ensure uniformity and consistency in the determination of penalties; however, it does not agree that each and every one of the 322 requirements submitted by NERC are in fact “true” binary requirements. ISO/RTO Council contends that such non-binary standards are susceptible to degrees of violation and a universal application of the “severe” violation severity level is arbitrary and

⁸ NERC December 19, 2008 Filing, Docket No. RR08-4-004.

⁹ NERC December 19 VSL Order Compliance Filing at 3.

¹⁰ NERC December 19, 2008 Filing, Docket No. RR08-4-003.

capricious. ISO/RTO Council also asserts that many of the NERC-identified binary sub-requirements are merely explanations of the actual core requirement or the conditions required to fully meet the core requirement and thus, they do not add any incremental substantive obligations beyond the core requirement. ISO/RTO Council asserts that in these instances, any penalty imposed for violation of a sub-requirement would necessarily be duplicative of the penalty imposed for violating the core requirement and would be arbitrary and capricious. ISO/RTO Council argues that sub-requirements that explain the core requirement should be made sub-text or bullets of the main requirement, and sub-requirements that are the conditions for the core requirement should be “rolled-up” into the core requirement to enable a proper violation severity level to be determined for the main requirement.

10. ISO/RTO Council requests that the Commission direct NERC to comprehensively review all of the 322 binary requirements to determine whether such requirements are appropriately categorized as binary or whether they should be modified as non-binary requirements. ISO RTO Council suggests that the Commission direct NERC to work through Reliability Standards development processes to develop an appropriate long-term solution for these standards.

IV. Discussion

A. ERO Filing in Compliance with VSL Order

11. With regard to the ERO’s filing in compliance with the VSL Order, consistent with Guideline 2a, NERC proposes to modify 176 violation severity level assignments associated with binary requirements and sub-requirements so that the failure to meet the intent of the requirement would be assigned a “severe” violation severity level. The Commission agrees with the designation of “severe” for the single violation severity level the ERO determined to be appropriate for binary requirements. As we stated in the VSL Order, a “severe” designation is consistent with the application of a pass/fail test for binary requirements.¹¹

12. ISO/RTO Council contends that a portion of the binary violation severity level assignments “are not truly binary” but, rather, are susceptible to degrees of violation. However, ISO/RTO Council does not identify any specific instances to support its general claim. Further, the Commission directed the ERO in the VSL Order to “either (1) modify the single violation Severity Level by consistently applying the same severity level or (2) modify the violation severity level assignment by changing from a binary approach to an approach using gradation, as explained in Guideline 2.”¹² By submitting

¹¹ VSL Order, 123 FERC ¶ 61,284 at P 46.

¹² *Id.* P 47.

a compliance filing that consistently applies the same severity level, the ERO has complied with the directive in the VSL Order.

13. Accordingly, the Commission accepts the ERO's filing in compliance with the VSL Order.

B. ERO Filing in Compliance with VSL Rehearing Order

14. The Commission also accepts the ERO's filing in compliance with the VSL Rehearing Order. NERC filed, as directed, modifications of violation severity levels for the six requirements addressed in the VSL Rehearing Order. Accordingly, the Commission accepts, as filed, the ERO's VSL Rehearing Order compliance filing.

C. General Concerns Regarding Violation Severity Levels

15. The ERO and ISO/RTO Council also raise concerns regarding the assignment of violation severity levels for sub-requirements and suggest that sub-requirements that are the conditions for the core requirement should be "rolled-up" into the core requirement. We addressed this matter in Order No. 722, in which we encouraged the ERO to develop a new and comprehensive approach that would better facilitate the assignment of violation severity levels.¹³ Consistent with our determination in Order No. 722, we believe that it is premature to change our current policy in the current proceeding, which is limited to NERC's filing in compliance with two prior Commission orders. Accordingly, we will not address the "roll up" of violation severity levels in this proceeding.

16. Further, we reject ISO/RTO Council's contention that an entity could be assessed duplicative financial penalties for non-compliance with a core requirement and associated binary sub-requirements. The Commission addressed the same issue in the VSL Order, where commenters raised concerns about possible "double jeopardy" for violation of multiple sub-parts of one requirement.¹⁴ In the VSL Order, we stated that this concern is a compliance issue that is best addressed on a case-by-case basis in the context of a compliance proceeding.¹⁵ We find that the same rationale applies here, that the matter is best addressed in a case-by-case basis in the context of a compliance proceeding.

¹³ *Version Two Facilities Design, Connections and Maintenance Reliability Standards*, Order No. 722, 126 FERC ¶ 61,255, at P 44 (2009).

¹⁴ *Id.* P 53.

¹⁵ *Id.* P 54.

The Commission orders:

(A) The Commission hereby accepts NERC's filing in compliance with the VSL Order, as discussed in the body of this order.

(B) The Commission hereby accepts NERC's filing in compliance with the VSL Rehearing Order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.