

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

North American Electric Reliability Corporation)
)
) Docket No. RC11-6-000

LIMITED REQUEST OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, REHEARING

I. INTRODUCTION

Pursuant to Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §385.713, the North American Electric Reliability Corporation (“NERC”) requests clarification or, in the alternative, rehearing, of the order of the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued on March 15, 2012 in this docket.¹ NERC is authorized to state that the following organizations support this filing: the American Public Power Association, the Edison Electric Institute, the Electricity Consumers Resource Council, the Electric Power Supply Association, the National Rural Electric Cooperative Association and the Transmissions Access Policy Study Group.

In the March 15 Order, among other things, the Commission accepted, with limited conditions, NERC’s petition requesting approval of its proposal to make informational filings in a Find, Fix, Track and Report (“FFT”) spreadsheet format of lesser-risk, remediated possible violations of Reliability Standards. The Commission also required NERC to make a compliance filing within sixty days of the date of this order, and directed NERC to submit two informational filings.

The NERC Compliance Enforcement Initiative (“CEI”) and, in particular, the FFT program are integral parts of NERC’s broader efforts to refocus on reliability excellence. This

¹ *North American Electric Reliability Corporation*, 138 FERC ¶ 61,193 (2012) (“March 15 Order”).

objective is manifested in other efforts throughout the organization, particularly those related to the identification of reliability priorities based on NERC's expert knowledge of the bulk power system and related risks. NERC appreciates the Commission's acknowledgment, in the March 15 Order, that the change in paradigm for monitoring and enforcing compliance with Reliability Standards represented by NERC's CEI and FFT proposals is warranted at this time and that the Commission is willing to consider and evaluate ways to improve the program as further experience is gained. NERC also appreciates the statement that NERC and the Regional Entities should have the flexibility to more efficiently process and track lesser risk violations in order to focus their resources on the issues that pose the greatest risks to reliability.

However, the March 15 Order contains a requirement that could be read as an unexplained departure from the current Commission-approved language in NERC's Compliance Monitoring and Enforcement Program ("CMEP").² In continuing to process the FFTs, it has become evident that not all registered entities have officers and, therefore, potentially could be excluded from the FFT program. Given that this creates a conflict between the two FERC orders and may hinder some entities' ability to participate in the FFT program, NERC requests that FERC clarify such requirement to avoid unintended consequences.

Accordingly, for the reasons discussed below, NERC requests that the Commission grant clarification or, in the alternative, rehearing, of the March 15 Order, consistent with the discussion below.

II. REQUEST FOR CLARIFICATION

The Commission should clarify that it did not intend to limit the ability of registered entities to designate appropriate signatories for the certification of mitigation activities associated with remediated issues to officers of the registered entity. Rather, we believe the Commission

² The CMEP is found in Appendix 4C to the NERC Rules of Procedure.

intended to require that the certification of remediation must be submitted by an officer *employee, attorney or other authorized representative* of the registered entity with knowledge of the remediation, as required for similar submittals under the CMEP.

In the March 15 Order, the Commission stated that:

To ensure effective remediation of possible violations accorded FFT treatment, we accept NERC's proposal to require a registered entity to submit to its Regional Entity a statement certifying that remediation has occurred and is completed. We will require that a registered entity submit to the Regional Entity an affidavit, signed by an officer with knowledge of the remediation, certifying that the statement is true and correct.³

Taken literally, registered entities that are not organized as corporations, *e.g.*, public power utilities that are political subdivisions of a state, might become ineligible for the FFT program because as a matter of law, they have no officers. In an order providing for efficiency and streamlining, placing a higher burden for certification is inconsistent with the goals of the FFT program and the previous FERC order. Importantly, there is accountability for all registered entities, regardless of their organizational structure, bolstered by the CEI Order that prevents FFT treatment for a given possible violation if the violation was not mitigated as certified by an authorized representative of the registered entity. This also would be taken into account in evaluating the registered entities compliance history and culture of compliance.

Absent such clarification, the March 15 Order also would create a greater burden than what is currently required by the CMEP in connection with the certification of mitigation activities associated with possible violations filed in notices of penalty.

Section 3.0 of the CMEP, which provides that “[a]ny report or other submission of information by a Registered Entity required by the Compliance Program shall be signed by an officer, employee, attorney or other authorized representative of the Registered Entity. Electronic signatures are permitted in accordance with processes established by NERC and the Regional Entity.

³ March 15 Order at P 61 (footnote omitted, emphasis added).

NERC or the Compliance Enforcement Authority may require the signer to provide a statement of the basis of his or her authority to sign on behalf of the Registered Entity.”⁴ Importantly, the flexibility contained in the CMEP for registered entities to determine the appropriate signatory for certification of statements provided to NERC and the Regional Entities resulted from a requirement of the Commission. In *North American Electric Reliability Corporation*, 119 FERC ¶ 61,060 (2007), the Commission agreed with intervenors that objected to the then-proposed requirement that “officers” or “officer equivalents” sign for or appear in an official capacity on behalf of registered entities under the then Uniform Compliance Program. Specifically, intervenors requested that, under general principles of agency, registered entities be allowed to participate in or act on reliability matters through officers, employees or other company representatives. The Commission found that “registered entities and other parties should be permitted to use general principles of agency and representation when acting on reliability issues pursuant to FPA section 215. This determination is consistent with our practice for representatives of entities that appear before us, *i.e.*, that all appearances be made and pleadings be executed by an entity’s officer or other qualified representative.”⁵

The statement in the March 15 Order, requiring that certifications be signed by an officer is inconsistent with the above decision and the language of the CMEP. Therefore, NERC requests that the Commission clarify that it did not intend to restrict the ability of Registered Entities to designate appropriate signatories pursuant to the CMEP.

⁴ Emphasis added.

⁵ See *North American Electric Reliability Corporation*, 119 FERC ¶ 61,060 (2007) at P 197-198, *citing* 18 C.F.R. §§ 385.2005(a)(3) and 385.2101.

III. STATEMENT OF ISSUES/SPECIFICATION OF ERROR **ALTERNATIVE REQUEST FOR REHEARING**

If the Commission disagrees with NERC's request for clarification discussed in section II above, NERC, in the alternative, requests rehearing with respect to the referenced finding of the March 15 Order. Pursuant to 18 C.F.R. §385.713(c), NERC seeks, in the alternative, rehearing on the following issue:

- FERC erred in limiting the scope of potential signatories for certifications of mitigation activities associated with remediated issues filed through FFTs in contravention of the CMEP and the Commission's prior orders on this issue.

With respect to this issue, FERC has failed to properly support its finding and conclusion and, therefore, failed to engage in reasoned decision-making. The courts have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) and that FERC's failure to do so prevents courts from evaluating whether or not the agency engaged in reasoned decision-making, *New York v. FERC*, 535 U.S. 1 (2002).

In further support of its alternative request for rehearing, NERC respectfully refers the Commission to the discussion in section II of this filing.

IV. CONCLUSION

For the reasons set forth in this filing, NERC requests that the Commission grant clarification of the March 15 Order consistent with the discussion herein. Alternatively, if the Commission does not grant the request for clarification, then for the reasons set forth in this filing, the Commission should grant rehearing and modify the March 15 Order consistent with the discussion herein.

Respectfully submitted,

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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, DC this 16th day of April, 2012.

/s/ Rebecca J. Michael

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Associate General Counsel for Corporate and
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