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

North American Electric Reliability Corporation) Docket No. RR08-4-000

**REQUEST OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
FOR CLARIFICATION AND REHEARING,
OF THE ORDER ON VIOLATION SEVERITY LEVELS PROPOSED BY
THE ELECTRIC RELIABILITY ORGANIZATION**

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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 and rehearing of the Federal Energy Regulatory Commission's (FERC or the Commission) June 19, 2008 Order¹ ("VSL Order"). The Commission's VSL Order (i) approved Violation Severity Levels for 83 Commission-approved Reliability Standards that NERC filed with the Commission on March 3-4, 2008 in compliance with the Commission's June 7, 2007 Order,² (ii) directed changes to Violation Severity Levels for twenty requirements in five Reliability Standards, and (iii) directed a number of reports and compliance filings to bring the remainder of NERC's Violation Severity Levels into compliance with the Commission's additional guidelines for evaluating Violation Severity Levels.

By this filing, NERC requests clarification with respect to one element of the VSL Order and requests rehearing with respect to four additional elements of the VSL Order.

II. REQUEST FOR CLARIFICATION

NERC requests clarification with respect to one element of the VSL Order.

Issue 1: In the VSL Order, the Commission states that NERC may, but need not develop, or revise, Violation Severity Levels through its Reliability Standards Development Procedure (RDSP). NERC seeks clarification that NERC may continue to use its standards development process identified in the NERC RSDP to develop Violation Severity Levels if that process works to produce timely results, so long as NERC also amends its Rules of Procedure to establish an alternative procedure for developing Violation Severity Levels in the event the standards process identified in the NERC RSDP does not yield Violation Severity Levels in a timely manner. This is consistent with the clarification the Commission provided with respect to the development of Violation Risk Factors.

In the VSL Order, the Commission holds:

¹ *Order on Violation Severity Levels Proposed by the Electric Reliability Organization*, 123 FERC ¶ 61,284 (2008) (the "VSL Order").

² *Order on Compliance Filing*, 119 FERC ¶ 61,248 (2007).

that Violation Severity Levels, like the Violation Risk Factors, are not part of the Reliability Standards. As such, the Commission is not limited to the options of “approve” or “remand” as with a Reliability Standard. Further, since the Violation Severity Levels are appropriately treated as an appendix to NERC’s Rules of Procedure, NERC may, but need not develop, or revise, Violation Severity Levels through its Reliability Standards Development Procedure.³

With respect to the development of Violation Risk Factors, the Commission clarified that NERC may continue to use its standards development process identified in the NERC RSDP to develop Violation Risk Factors if that process works to produce timely results, so long as NERC amended its Rules of Procedure to establish an alternative procedure for developing Violation Risk Factors in the event the standards process identified in the NERC RSDP does not yield Violation Risk Factors in a timely manner.⁴ Subsequently, NERC filed and the Commission approved Section 1403 of the NERC Rules of Process which includes that alternative procedure.

NERC believes this was the Commission’s intent when it stated that NERC may, but need not, develop or revise Violation Severity Levels through its RSDP and NERC requests that the Commission grant clarification in this regard. With this clarification, NERC will file to amend its Rules of Procedure to include an alternative process for developing Violation Severity Levels if the standards process does not produce timely results, similar to that set forth in Section 1403 of the NERC Rules of Procedure.

This approach will help ensure consistency and uniformity in the Violation Severity Levels that apply to both U.S. and Canadian entities. It will preserve the process by which Canadian entities contribute to the development of reliability standard elements, such as the Violation Severity Levels, and will allow the Board of Trustees to utilize an alternative procedure only when the RDSP will not produce a timely result. Importantly, Canadian

³ VSL Order at P 50.

⁴ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,046 at P 33 (April 19, 2007).

regulatory authorities have generally accepted the Violation Severity Levels approved by NERC through its development process.

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

Pursuant to 18 C.F.R. § 385.713, NERC seeks rehearing on the following four additional issues (Issues 2, 3, 4 and 5):

Issue 2: In the VSL Order, the Commission directs NERC to (i) submit a report to the Commission within six months documenting whether the Violation Severity Level assignments allow for a level of compliance lower than the historical performance (Report No. 1); (ii) file a compliance filing within six months either justifying the inconsistency in the single Violation Severity Level assigned to binary requirements, or revising those assignments to reflect a consistent approach (Report No. 2); and (iii) review all Violation Severity Level assignments, with the exception of those for which the Commission directs modification in this order (VSL Order), for compliance with Guidelines 2b, 3, and 4 and submit a compliance filing either validating the current Violation Severity Level assignments or proposing revision within six months (Report No. 3). In the long run, the value of the three Reports is driven by the quality of the data. Development of the Report Nos. 1-3 will require a significant devotion and diversion of resources from similar and other important and time-sensitive initiatives that already are underway and will likely produce suboptimal results under the directed timeframes. With respect to Report No. 1, NERC respectfully submits that the use of historical data under a voluntary compliance regime and its comparison to six months of data derived from a mandatory compliance regime would produce results that would be suspect at best. Instead, the Commission should permit NERC to collect data for all of 2008 to determine if the desired level of compliance is being achieved, without regard to historical references. With respect to Report Nos. 2 and 3, these issues are more appropriately taken into account as part of the three year work plan to review and reevaluate Reliability Standards, as well as the associated Violation Risk Factors and Violation Severity Levels. The Commission should permit NERC to modify its work plan to the extent necessary to explicitly address these specific requirements as part of the work plan. The Commission should permit NERC to include the review of Commission Guidelines 2a, 2b, 3, and 4 as part of the activities associated with projects in the three year work plan and report as such when new or modified standards are presented for Commission approval. In all events, changes to Violation Severity Levels should be made on a prospective basis. NERC also requests that the Commission reverse its determination and to act to approve the assignment of the Violation Severity Level for NUC-001-1 on rehearing.

Issue 3: In the VSL Order, the Commission stated that it believes the application of Guideline 1⁵ will help to maintain at least the current level of compliance and reliability and ensure that ultimately Violation Severity Levels are not arbitrarily assigned; and that NERC should use the levels of non-compliance for which it has historical data when setting Violation Severity Levels.⁶ Pointing to NERC Compliance Enforcement Program Summary Reports from 2003-2006, the Commission noted that historical records state that 95 percent of applicable entities have been 100 percent compliant with reliability standards NERC has actively monitored during that time. According to the Commission, it wants to ensure that the new Violation Severity Levels that are replacing the levels of non-compliance do not have the unintended consequence of lowering the current level of compliance or reducing industry performance. NERC is concerned, however, with the Commission's statements that it wants to maintain the "current level of reliability." Given the Commission's statements in the VSL Order, NERC understands this to mean the level of reliability under the voluntary environment. While NERC agrees that the Violation Severity Levels should not provide perverse signals to industry participants that it will be acceptable to reduce performance, as the Commission has acknowledged, the levels of non-compliance are inadequate for use in a mandatory environment. NERC believes the use of historical data accumulated for requirements in a voluntary environment is an inappropriate indicator of expected performance in a mandatory environment. Notably, under the voluntary environment, only a limited number of functional entity designations were included in the compliance enforcement program as compared to those in place now, only about 200 entities were registered and performance pertained primarily to implementing operational policies or transmission planning. Now, there are over 1,800 entities registered, many of which are registered for the first time. NERC believes that the focus of Guideline 1 should be ensuring that an adequate level of reliability exists, as required by the Energy Policy Act of 2005 and the Commission's implementing regulations. The VSL Order provisions regarding Guideline 1 are problematic for the reasons stated above. The value of the historical data is speculative at best. The better approach is to collect the data for 2008 and to evaluate actual performance. That information could then be used to evaluate the VSLs as part of NERC's Reliability Standards work plan. Accordingly, NERC requests that the Commission grant rehearing and revise this portion of the VSL Order to revise Guideline 1 to allow NERC to gain a year of experience under the mandatory and enforceable reliability standards and to evaluate whether the desired level of compliance is being achieved.

Issue 4: In the Appendix to the VSL Order, the Commission directed changes to Violation Severity Levels for several of the 20 requirements that are inconsistent with the Commission's guidelines articulated in the VSL Order. Accordingly, the Commission should grant rehearing and revise this portion of the VSL Order to

⁵ Guideline 1 states that "Violation Severity Level assignments should not have the unintended consequence of lowering the current level of compliance."

⁶ VSL Order at PP 20 and 21.

approve the Violation Severity Levels filed by NERC in its March 3-4, 2008 submissions, as further clarified herein.

Issue 5: In the VSL Order, the Commission proposed a new Guideline 4 that states that Violation Severity Level assignments should be based on a single violation, not on a cumulative number of violations, unless otherwise appropriate in accordance with a given Reliability Standard. In the implementing paragraphs, the Commission explained, among other things, that the application of Guideline 4 is appropriate because, *unless otherwise stated in the requirement*, each instance of non-compliance with a requirement is a separate violation.⁷ NERC seeks rehearing with respect to three issues regarding this guideline. First, with respect to the implementing paragraphs related to this guideline, the use of the term “requirement” is inappropriate, because there are other provisions in a given Reliability Standard, such as the “Additional Compliance” section that may address the issue. Accordingly, NERC seeks rehearing to make clear that the guiding principle is what is in the Reliability Standard and not simply a requirement thereunder. Second, the Commission also should make clear that Violation Severity Level assignments may be based on a larger sample size, as appropriate, to ensure that the resultant penalty bears a reasonable relation to the violation itself. Third, the text of Guideline 4 itself should be revised to make clear that the Commission defers to NERC to determine the method for assigning Violation Severity Levels, in accordance with the provisions of a given Reliability Standard.

IV. ARGUMENTS IN SUPPORT OF REQUESTS FOR REHEARING

NERC seeks rehearing on the following four elements of the VSL Order.

Issue 2: In the VSL Order, the Commission directs NERC to (i) submit a report to the Commission within six months documenting whether the Violation Severity Level assignments allow for a level of compliance lower than the historical performance (Report No. 1); (ii) file a compliance filing within six months either justifying the inconsistency in the single Violation Severity Level assigned to binary requirements, or revising those assignments to reflect a consistent approach (Report No. 2); and (iii) review all Violation Severity Level assignments, with the exception of those for which the Commission directs modification in this order (VSL Order), for compliance with Guidelines 2b, 3, and 4 and submit a compliance filing either validating the current Violation Severity Level assignments or proposing revision within six months (Report No. 3). In the long run, the value of the three Reports is driven by the quality of the data. Development of the Report Nos. 1-3 will require a significant devotion and diversion of resources from similar and other important and time-sensitive initiatives that already are underway and will likely produce suboptimal results, if any. With respect to Report No. 1, NERC respectfully submits that the use of historical data under a voluntary compliance regime and its comparison to six

⁷ VSL Order at P 36.

months of data derived from a mandatory compliance regime would produce results that would be suspect at best. Instead, the Commission should permit NERC to collect data for all of 2008 to determine if the desired level of compliance is being achieved, without regard to historical references. With respect to Report Nos. 2 and 3, these issues are more appropriately taken into account as part of the three year work plan to review and reevaluate Reliability Standards, as well as the associated Violation Risk Factors and Violation Severity Levels. The Commission should permit NERC to modify its work plan to the extent necessary to explicitly address these specific requirements as part of the work plan. The Commission should permit NERC to include the review of Commission Guidelines 2a, 2b, 3, and 4 as part of the activities associated with projects in the three year work plan and report as such when new or modified standards are presented for Commission approval. In all events, changes to Violation Severity Levels should be made on a prospective basis. NERC also requests that the Commission reverse its determination and to act to approve the assignment of the Violation Severity Level for NUC-001-1 on rehearing.

As an initial matter, the Commission's directives to perform and submit reports and compliance filings within six months lack a sound rationale given that, in the VSL Order, the Commission has: (i) approved Violation Severity Levels that will be in place as of the summer of 2008; (ii) reviewed and directed changes to certain specific Violation Severity Level assignments; (iii) previously directed a general review of a significant number of standards and the associated Violation Risk Factors and Violation Severity Levels as part of NERC's three-year Reliability Standard Development Process work plan through which modifications thereto may be developed; and (iv) not identified specific concerns with respect to the factors considered by NERC or the totality of NERC's proposed Violation Severity Levels. Indeed, the Commission expressly stated that its new four guidelines were not intended to replace the seven factors considered by NERC. For these reasons, NERC seeks rehearing of the scope and timing of the Report Nos. 1-3 directed to be filed by the Commission and requests the following changes thereto.

With respect to the requirement to submit Report No. 1 to the Commission within six months documenting whether the Violation Severity Level assignments allow for a level of

compliance lower than the historical performance, the Report relies only on partial year data derived during a transition phase and compares that data under two completely types of regimes—mandatory and voluntary periods of compliance. NERC submits that the efforts required to be expended will not be outweighed by the benefits, if any, to be derived. As discussed in greater detail below, the value of historical performance and data is suspect at best, particularly given the number of self-reported violations of reliability standards immediately prior to the effective date of the mandatory and enforceable reliability standards. While NERC agrees that it may be helpful to consider the levels of compliance achieved post-June 18, 2008 in assigning future Violation Severity Levels, this is not necessarily the case for the prior June 18 period. Instead, NERC requests that the Commission allow NERC to collect data for the full year 2008 and to evaluate whether the desired level of compliance is being achieved, without regard to pre-June 18 data and performance. That information could then be used to evaluate the VSLs as part of NERC’s Reliability Standards Development work plan.

With respect to Report No. 2, the Commission has directed NERC to file a compliance filing within six months either justifying the inconsistency in the single Violation Severity Level assigned to binary requirements, or revising those assignments to reflect a consistent approach. With respect to Report No. 3, the Commission has directed NERC to review all Violation Severity Level assignments for all 83 reliability standards, with the exception of those for which the Commission directs modification in this order (VSL Order), for compliance with Guidelines 2b, 3, and 4 and submit a compliance filing either validating the current Violation Severity Level assignments or proposing revision within six months.

All of these issues are more appropriately taken into account as part of NERC’s three year work plan to review and reevaluate Reliability Standards, as well as the associated Violation

Risk Factors and Violation Severity Levels, and to modify them where appropriate and necessary. This effort is already underway and NERC will modify its work plan to the extent necessary to explicitly address these specific requirements as part of the work plan. However, the six month filing timeframe set forth in the VSL Order would require the significant and seemingly unnecessary diversion of resources devoted to other pressing initiatives already underway.

For example, as the Commission is well aware, NERC has accelerated work on critical infrastructure protection standards⁸ in response to the Order 706, which is a project that will require a highly concentrated industry effort for the remainder of the year. NERC also is completing the set of standards regarding Available Transfer Capability that is required to be submitted in 2008.

Moreover, NERC is actively implementing its Reliability Standards Development Work Plan: 2008-2010. Toward this end, NERC currently has over 20 active standards projects, involving over 70 existing NERC reliability standards. Thus, many of the 83-Commission approved Reliability Standards at the core of the VSL Order already are being actively reviewed by the standards drafting teams working on these projects. NERC believes the value of the additional and likely duplicative Commission-directed review of the current assignment of Violation Severity Levels is greatly diminished given the likelihood that the reliability standards and their requirements are likely to be modified in the short-term. It would be best to allow the existing standards drafting teams to review the Violation Severity Levels using the Commission guidelines as part of that process. Such an approach is preferable because it better optimizes the use of NERC and industry resources to achieve the objectives outlined in the VSL Order.

⁸ See Project 2009-07 Cyber Security in NERC's *Reliability Standard Development Plan: 2008-2010* filed with the Commission on an informational basis on October 5, 2007.

Furthermore, NERC requests that the Commission reverse its decision and act to approve the Violation Severity Levels submitted for the NUC-001-1 – Nuclear Plant Interface Coordination, rather than deferring such determination until the filing of the directed compliance filings. This will ensure that a permanent Violation Severity Level is in place until such time as it may be changed through the NERC RSDP.

For these reasons, NERC requests that the Commission permit NERC to include the review of Commission Guidelines 2a, 2b, 3, and 4 as part of the activities associated with projects in the three year work plan and report as such when new or modified standards are presented for Commission approval.

Issue 3: In the VSL Order, the Commission stated that it believes the application of Guideline 1⁹ will help to maintain at least the current level of compliance and reliability and ensure that ultimately Violation Severity Levels are not arbitrarily assigned; and that NERC should use the levels of non-compliance for which it has historical data when setting Violation Severity Levels.¹⁰ Pointing to NERC Compliance Enforcement Program Summary Reports from 2003-2006, the Commission noted that historical records state that 95 percent of applicable entities have been 100 percent compliant with reliability standards NERC has actively monitored during that time. According to the Commission, it wants to ensure that the new Violation Severity Levels that are replacing the levels of non-compliance do not have the unintended consequence of lowering the current level of compliance or reducing industry performance. NERC is concerned, however, with the Commission’s statements that it wants to maintain the “current level of reliability.” Given the Commission’s statements in the VSL Order, NERC understands this to mean the level of reliability under the voluntary environment. While NERC agrees that the Violation Severity Levels should not provide perverse signals to industry participants that it will be acceptable to reduce performance, as the Commission has acknowledged, the levels of non-compliance are inadequate for use in a mandatory environment. NERC believes the use of historical data accumulated for requirements in a voluntary environment is an inappropriate indicator of expected performance in a mandatory environment. Notably, under the voluntary environment, only a limited number of functional entity designations existed as compared to those in place now, only about 200 entities were registered and performance pertained primarily to implementing operational policies or transmission planning. Now, there are over 1,800 entities

⁹ Guideline 1 states that “Violation Severity Level assignments should not have the unintended consequence of lowering the current level of compliance.”

¹⁰ VSL Order at PP 20 and 21.

registered, many of which are registered for the first time. NERC believes that the focus of Guideline 1 should be ensuring that an adequate level of reliability exists, as required by the Energy Policy Act of 2005 and the Commission's implementing regulations. While Guideline 1 on its face purports to be a reasonable objective, the VSL Order provisions that seek to implement it are problematic for the reasons stated above. The value of the historical data is speculative at best. The better approach is to collect the data for 2008 and to evaluate actual performance. Accordingly, NERC requests that the Commission grant rehearing and revise this portion of the VSL Order to revise Guideline 1 to allow NERC to gain a year of experience under the mandatory and enforceable reliability standards and to evaluate whether the desired level of compliance is being achieved.

NERC agrees that the Violation Severity Level assignments should not provide a perverse incentive for industry participants to reduce their level of performance, and thereby reduce reliability. Therefore, on its face Guideline 1 seems to be a reasonable objective. However, the VSL Order provisions to implement Guideline 1 are problematic.

As an initial matter, NERC must ensure that an adequate level of reliability exists. Actual performance is a superior alternative to historical data that may have little relevance given the significant changes that have resulted in the actual nature and scope of reliability standards, the nature and number of entities rising from 200 to 1,800 registered entities and the increased number of functional entity categories. Moreover, NERC believes that the levels of non-compliance that formerly existed in the Reliability Standards are not appropriate for use in a mandatory environment. The Commission itself seemed to recognize this in the VSL Order. As the Commission stated: "In the June 7, 2007 Order, the Commission approved use of the levels of non-compliance on an interim basis as a substitute for the Violation Severity Levels in determining Base Penalty Amount ranges, but rejected NERC's proposal to develop Violation Severity Levels over the next three years, stating that NERC itself acknowledges that the levels of non-compliance are not sufficient going forward in an ERO environment."¹¹

¹¹ VSL Order at P 51 (citing June 7 Order at P 80).

Under the voluntary environment, levels of non-compliance were not developed consistently over the course of their history. Some levels of non-compliance were developed in the course of individual standards projects. Some were developed in the context of projects affecting all of NERC's Reliability Standards, such as the effort to add measures of non-compliance to most of the Version 0 standards that were initially approved without these elements. With respect to levels of non-compliance that assessed the risk to the bulk power system, these ultimately became Violation Risk Factors. Others assessed the degree of non-compliance and reflect the Violation Severity Levels that are the subject of the VSL Order. It would be a huge undertaking to evaluate the overall quality of the historical compliance data because a comprehensive review of the information would need to be performed. This would require significantly more time than the six months allowed in the VSL Order and would likely result in a determination that the information is sufficiently suspect to warrant eliminating this Guideline in its current form.

Further, NERC also is concerned with the requirement to use historical compliance data to develop Violation Severity Levels on a forward-going basis. The Commission directive regarding Guideline 1 assumes that historical data is truly reflective of the compliance performance of the associated entities. However, this assumption is inconsistent with the NERC experience immediately prior to June 18, 2007, the date when mandatory standards became effective in the United States. While historical data suggested that functional entities were compliant with most NERC standards and requirements, when faced with potential sanctions, a number of entities self-reported that they were in violation of NERC's reliability standards, which further renders the quality of the data suspect.

In the VSL Order, the Commission fails to specify how a set of Violation Severity Levels might result in lowering the current level of compliance. NERC has safeguards in place in its compliance enforcement program to prevent an entity from choosing not to comply based on an economic decision. Accordingly, NERC does not believe that the associated set of Violation Severity Levels proposed will lead to the unintended consequence of lowering the intended level of compliance.

In addition, the purpose of developing a Violation Severity Level is to indicate how badly an entity violated a particular standard requirement. To implement Guideline 1, the superior approach is to collect the data for 2008 and to evaluate actual performance. Accordingly, NERC requests that the Commission grant rehearing and revise this portion of the VSL Order to revise Guideline 1 to allow NERC to gain a year of experience under the mandatory and enforceable reliability standards and to evaluate whether the desired level of compliance is being achieved.

Accordingly, NERC requests rehearing of the Commission directive in the VSL Order with respect to Guideline 1 and its associated reporting requirements and to revise it as set forth above.

Issue 4: In the Appendix to the VSL Order, the Commission directed changes to Violation Severity Levels for several of the 20 requirements that are inconsistent with the Commission's guidelines articulated in the VSL Order. Accordingly, the Commission should grant rehearing and revise this portion of the VSL Order to approve the Violation Severity Levels filed by NERC in its March 3-4, 2008 submissions, as further clarified herein.

EOP-003-1 Requirement R3

This requirement requires that each Transmission Operator and Balancing Authority shall coordinate load shedding plans among other interconnected Transmission Operators and Balancing Authorities. The Commission has directed in its VSL Order that the determination of compliance be based on whether or not an audited entity has coordinated load shedding plans

“affecting 5% or less of its required entities” for the Lower category and increasing percentages for the Moderate, High and Severe levels. The Commission indicates that this change is being directed to eliminate ambiguity from the Violation Severity Levels NERC proposed as it contained subjective terms such as “minor exception.” While NERC agrees with the removal of ambiguity in the Violation Severity Level, NERC is concerned that the use of simple percentages with respect to the number of affected entities will result in inconsistent determinations of penalties across the U.S. For example, using the Commission’s criteria, for an entity with ties to up to six other entities would be assigned a Severe Violation Severity Level for failure to coordinate with one entity and would never be assigned any level other than Severe. However, using the Commission’s criteria, an entity that has ties with 15 entities that fails to coordinate with one entity results in a Violation Severity Level assignment of Moderate. For this reason, NERC requests rehearing and urges the Commission to reverse the Violation Severity Level modification to EOP-003-1 Requirement R3.

To address the Commission’s concerns, NERC believes a more appropriate approach would be to identify the number of entities with ties to the applicable entity and determine a number of entities with whom they did not coordinate for each category of Violation Severity Level, as follows:

Lower: For Transmission Operators or Balancing Authorities required to coordinate with:

- Between four and nineteen entities, inclusive, coordinated with all but one of the required entities.
- More than 20 entities, coordinated with 95% or more but less than 100% of all required entities.

Moderate: For Transmission Operators or Balancing Authorities required to coordinate with:

- Between four and nineteen entities, inclusive, coordinated with all but two of the required entities.
- More than 20 entities, coordinated with 90% or more but less than 95% of all required entities.

High: For Transmission Operators or Balancing Authorities required to coordinate with:

- Four or less entities, coordinated with all but one of the required entities.
- Between four and nineteen entities, inclusive, coordinated with all but three of the required entities.
- More than 20 entities, coordinated with 85% or more but less than 90% of all required entities.

Severe: For Transmission Operators or Balancing Authorities required to coordinate with:

- Four or less entities, coordinated with all but two or more of the required entities.
- Between four and nineteen entities, inclusive, coordinated with all but four or more of the required entities.
- More than 20 entities, coordinated with 0% or more but less than 85% of all required entities.

NERC believes the above language is consistent with the basis underlying the Commission's directed changes.

EOP-003-1 Requirement R4

This requirement mandates that a Transmission Operator or Balancing Authority must consider at least one of five factors when designing an automatic load shedding scheme. The Commission has directed that the Violation Severity Level be modified to be a "binary" (pass/fail) requirement, and that a Severe Violation Severity Level be assigned when an entity does "not consider one of the five required elements, as directed by the requirement."¹² The Commission indicates that this change is being directed to remove ambiguity from the Violation Severity Level.

While NERC supports the basis underlying the change directed by the Commission, NERC believes that the language, as re-written by the Commission is ambiguous, and could be

¹² VSL Order Appendix A at 2.

interpreted to mean that all five elements must be considered. For this reason, NERC requests rehearing on the assigned Violation Severity Level modification to EOP-003-1 Requirement R4 and urges the Commission to adopt the following alternative language:.

Severe: The Transmission Operator or Balancing Authority did not consider at least one of the five elements (frequency, rate of frequency decay, voltage level, rate of voltage decay, or power flow levels) listed in the requirement.

NERC believes the above language is consistent with the basis underlying the Commission's directed changes.

EOP-003-1 Requirement R7

This requirement specifies that a Transmission Operator or Balancing Authority must coordinate its automatic load shedding with other automatic actions (such as isolation of generating units and tripping of shunt capacitors) that are expected to occur under abnormal frequency, voltage, or power flow conditions. The Commission has directed that the Violation Severity Levels be modified such that they utilize a percentage of automatic actions with which the entity did not coordinate to determine the appropriate Violation Severity Level. The Commission has indicated this change is being directed to remove ambiguity from the NERC-proposed Violation Severity Level.

While NERC supports the Commission's desire to eliminate ambiguity, NERC believes that further ambiguity is introduced by virtue of the directed change. For instance, do the 5% thresholds apply to an entire group of "automatic actions" or individual "automatic actions?" How would a Violation Severity Level be applied if an applicable entity failed to coordinate with 2 of 10 generating units? Is generator underfrequency relaying coordination with all generators considered one automatic action or are the individual generators in and of themselves considered

an individual automatic action. If the former interpretation is intended, that is, as a whole, coordination of generator underfrequency relaying with all generators is considered one automatic action, NERC is further concerned that the assigned 5% increments are overly restrictive. On this basis, NERC requests rehearing on the assigned Violation Severity Level modification to EOP-003-1 Requirement R7.

NERC believes that the following supplemental language could remedy this situation through the addition of the following statement to the Violation Severity Levels:

“Coordination with individual generating units is considered as one automatic action for purposes of determining Violation Severity Levels.”

NERC believes the above language is consistent with the basis underlying the Commission’s directed changes.

FAC-003-1 Requirement R1.1

This requirement directs that the TVMP shall contain schedules of and types of inspection that are performed with regard to Right-of-Way vegetation inspections. The Commission has directed that the Violation Severity Levels be modified such that the primary focus is on the documentation of the schedule and type of inspections, rather than the basis for the schedule and its flexibility. The Commission has indicated that the directed change will ensure consistency with the requirement.

While NERC supports the intent of the changes directed by the Commission, NERC is concerned that the approach the Commission directed with respect to the High Violation Severity Level redefines the requirement and therefore, violates Guideline 3 that the suggested language was intended to address. The language of the requirement states that the TVMP should have a schedule *and* type of inspection specified, whereas the Commission’s language separates the

schedule from the type of inspection. NERC believes these two concepts should be viewed concurrently as the success of the overall TVMP is conditioned on both aspects with respect to action on specific facilities. In this regard, NERC believes that this requirement is appropriately treated as a binary requirement. NERC therefore requests rehearing and reversal of the Commission-directed change to FAC-003-1 Requirement R1.1, High Violation Severity Level assignment and that the Severe Violation Severity Level should be accepted as previously proposed.

FAC-003-1 Requirement R2

This requirement specifies that a Transmission Owner must have and implement an annual plan for vegetation management, that plan must include two specific elements, and the Transmission Owner must be capable of tracking processes of work being performed under the plan. The Commission has directed changes to the Violation Severity Levels to utilize the number of required elements as one way to determine Lower, Moderate, and High Violation Severity Level assignments, and absence of the plan or implementation of the plan as a Severe Violation Severity Level. The Commission has indicated that this directed change will ensure consistency with the requirement.

While NERC supports the intent of the changes directed by the Commission, NERC is concerned that the Commission's changes do not eliminate the ambiguity. NERC requests that the Commission reverse its modifications and adopt the following language:

Lower: The Transmission Owner did not meet one of the three required elements (including in the annual plan a description of methods used for vegetation management, maintaining documentation of adjustments to the annual plan, or having systems and procedures for tracking work performed as part of the annual plan) specified in the requirement.

Moderate: The Transmission Owner did not meet two of the three required elements (including in the annual plan a description of methods used for vegetation management,

maintaining documentation of adjustments to the annual plan, or having systems and procedures for tracking work performed as part of the annual plan) specified in the requirement.

High: The Transmission Owner did not meet the three required elements (including in the annual plan a description of methods used for vegetation management, maintaining documentation of adjustments to the annual plan, or having systems and procedures for tracking work performed as part of the annual plan) specified in the requirement.

Severe: The Transmission Owner does not have an annual plan for vegetation management, or the Transmission Owner has not implemented the annual plan for vegetation management.

VAR-001-1 Requirement R1

This requirement specifies that Transmission Operators will develop formal policies and procedures for monitoring and controlling voltage and MVAR flows. The Commission notes that NERC did not provide Violation Severity Levels with this requirement, and directs the incorporation of specific language using the percentage of voltage levels and MVAR flows to determine the Violation Severity Levels.

NERC is concerned that the criteria specified by the Commission (a percentage based on the number of a Transmission Operator's own and their neighbors voltage levels and MVAR flows) would be difficult to determine, as the requirement is not clear regarding how to determine whether or not such levels and flows are "affected" as the Commission language specifies. In this regard, the Commission-proposed Violation Severity Levels remain ambiguous and NERC requests rehearing to ensure that the approved Violation Severity Levels are not ambiguous.

NERC proposes instead that these Violation Severity Levels be based on the existence of the policies and procedures, whether they are current, if they have been implemented, and the number of neighbors with which they have been coordinated. NERC proposes the following alternative language:

Lower: N/A

Moderate: The Transmission Operator has formal policies and procedures for monitoring and controlling voltage and MVAR flows, but they are not current.

High: The Transmission Operator has formal policies and procedures for monitoring and controlling voltage and MVAR flows that are current, but they have not been coordinated with one or more neighboring Transmission Operators.

Severe: The Transmission Operator has formal policies and procedures for monitoring and controlling voltage and MVAR flows, but has not implemented them; or, the Transmission Operator does not have formal policies and procedures for monitoring and controlling voltage and MVAR flows.

NERC believes the above language is consistent with the basis underlying the Commission's directed changes.

VAR-001-1 Requirement R8

This requirement specifies that the Transmission Operator shall operate or direct the operation of capacitive and inductive reactive resources within its area to maintain system and Interconnection voltages within established limits, and offers three examples of operations that are within the scope of the requirement. The original Violation Severity Levels were based on the duration when the Transmission Operator was able to meet the requirement; the Commission has directed the use of a percentage based on the number of resources of load shedding operated or directed to operate, using a range of 0% to 15% of the number of resources operated to determine the Violation Severity Levels. The Commission has indicated that this change has been made because Violation Severity Levels assignments should be based on a single violation, not on a cumulative number of violations.

As written, NERC believes that the Commission-directed language inadvertently and inappropriately excluded the word "not" in its language for each Violation Severity Level. NERC believes the language intended should be, for example, "The applicable entity did *not*

operate or direct the operation of capacitive and inductive reactive resources or load shedding within its area, as directed by the requirement, affecting 5% or less of the required resources.”

Issue 5: In the VSL Order, the Commission proposed a new Guideline 4 that states that Violation Severity Level assignments should be based on a single violation, not on a cumulative number of violations, unless otherwise appropriate in accordance with a given Reliability Standard. In the implementing paragraphs, the Commission explained, among other things, that the application of Guideline 4 is appropriate because, *unless otherwise stated in the requirement*, each instance of non-compliance with a requirement is a separate violation.¹³ NERC seeks rehearing with respect to three issues regarding this guideline. First, with respect to the implementing paragraphs related to this guideline, the use of the term “requirement” is inappropriate, because there are other provisions in a given Reliability Standard, such as the “Additional Compliance” section that may address the issue. Accordingly, NERC seeks rehearing to make clear that the guiding principle is what is in the Reliability Standard and not simply a requirement thereunder. Second, the Commission also should make clear that Violation Severity Level assignments may be based on a larger sample size, as appropriate, to ensure that the resultant penalty bears a reasonable relation to the violation itself. Third, the text of Guideline 4 itself should be revised to make clear that the Commission defers to NERC to determine the method for assigning Violation Severity Levels, in accordance with the provisions of a given Reliability Standard.

Changes to Guideline 4 and the Commission’s implementing paragraphs are required to ensure clarity in the assignment of Violation Severity Levels. For example, in the VSL Order, the Commission states that:

NERC’s proposed Violation Severity Level assignments for that requirement are based on the number of occasions during a calendar month that a Reliability Coordinator did not direct its required entities to address those potential violations. NERC assigns a “Lower” Violation Severity Level if the Reliability Coordinator did not direct action one time during a calendar month; and “Moderate,” if action is not directed two to three times in a calendar month. In this example, NERC’s Violation Severity Level assignment is based on a cumulative number of violations over the period of a calendar month. *However, the compliance measurement period of a calendar month is not stated in the text of the requirement.*¹⁴

¹³ VSL Order at P 36 (emphasis added).

¹⁴ *Id.* at P 35 (emphasis added).

Yet, contrary to the last sentence above, the requirement to provide a monthly report and to provide exception reporting indicating the dates studies were not done is set forth in the Compliance Monitoring Process Section of IRO-004-1. Specifically, Section 1.1 of the Compliance Monitoring Process sets forth the exception reporting requirements:

*Exception Reporting: Reliability Coordinators will prepare a monthly report to the Regional Reliability Organization for each month that system studies were not conducted, indicating the dates that studies were not done and the reason why.*¹⁵

Thus, while measures of compliance may be included in a requirement, they currently also are addressed under other headings or provisions in a given Reliability Standard, such as the Section D. “Compliance” section of the standard, in particular, the “Compliance Monitoring Period and Reset Timeframe” portion identified as Section D.1.2. In support of this statement, NERC’s Reliability Standards Development Procedure, Version 6.1, included in Appendix 3A of NERC’s Rules of Procedure, states on page 9 that “the time period in which performance or outcomes is measured, evaluated, and then reset” is part of the compliance elements of a standard, not in the requirement itself. Thus, the implementing provisions should make clear that the language in the Reliability Standard in total governs, and not simply the requirements contained in the Reliability Standard. This clarification is necessary and appropriate and consistent with the Commission-approved Rules of Procedure.

Moreover, some Reliability Standards and the requirements thereunder require an entity to perform actions repetitively throughout every day (such as a real-time analysis every 5 minutes). It is not appropriate to require the Compliance Enforcement Authority (CEA) to look at just one limited, discrete sample in analyzing the data. This is particularly true where a more accurate picture of compliance activities would be developed by looking at a larger sample size, such as over the entire day. In addition, the Commission’s proposed approach could potentially

¹⁵ IRO-004-1, Compliance Monitoring Process, Section 1.1 (emphasis added).

result in significant financial penalties without a corresponding benefit to improving reliability. For example, if a Reliability Standard requires an entity to provide data every three seconds and the entity fails to provide the required data on one day every three seconds for all of its twenty facilities, the associated financial penalty would be at an astronomical level if each three-second failure was designated as a separate violation and thus, may not bear a reasonable relation to the violation.

Notably, there are other Reliability Standards that warrant assessing a violation on a “per event” basis. One such example is an instance of exceeding an IROL for time greater than the IROL’s Tv. Otherwise, the assessment of the penalty may not be reasonably related to the seriousness of the violation.

For these reasons, the Commission should defer to NERC to determine the method for assigning Violation Severity Levels and should recognize that such assignments may be determined on the basis of all elements of the Reliability Standard and not merely a requirement thereunder.

V. CONCLUSION

For the reasons set forth in this filing, NERC requests that the Commission issue an order granting the requests for clarification and rehearing as set forth above

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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, D.C. this 21st day of July, 2008.

/s/ Rebecca J. Michael
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