

**Summary of Proposed Revisions to NERC Pro Forma
Delegation Agreement and CMEP/Hearing Procedures and
NERC Rules of Procedure in Response to
Directives in FERC March 21, 2008 Order**

I. FERC Directives on Pro Forma Delegation Agreement (“RDA”)

Allocations of costs based on Net Energy for Load

1. NERC is to further revise §8(b) of the RDA and Exhibit E, §2 so that a proposed change in cost allocation formula may be submitted in advance of the annual Business Plan & Budget (“BP&B”), not to be effective until the following BP&B are in effect. (P 25)

Proposed revision: Added text in both §8(b) of the RDA and §2 of Exhibit E stating that alternate allocation formulas to NEL must be approved by both NERC and FERC and do not take effect till first annual BP&B submitted after approval is received.

Regional Advisory Body budgets and funding

2. When NERC reports WIRAB’s total approved funding, NERC must include breakdown of total funds allocated by country and an explanation of how WIRAB’s funding affects allocation and collection of costs to WECC end users in U.S. [*No revisions to RDA and no compliance filing required.* However, consider adding this point to the agreement text as a “reminder.”] (P 27)

Proposed revision: No revisions proposed to RDA,

Regional Entity deviations from NERC system of (balance sheet) accounts

3. NERC must file with FERC, for informational purposes, any waiver NERC grants to a Regional Entity to deviate from balance sheet accounts in the NERC System of Accounts along with an explanation supporting the waiver. [*No revisions to RDA and no compliance filing required.* However, consider adding this point to the agreement text as a “reminder.”] (P 31)

Proposed revision: Added text to §8(e) of the RDA stating “NERC shall make an informational filing with the Commission describing any such waiver it permits and providing an explanation supporting the permitted departure.”

Regional Entity listing of non-statutory activities in Exhibit E

- 3A. FERC directed that Exhibit E to the delegation agreements with several Regional Entities should list the Regional Entity’s non-statutory activities and its

procedures for ensuring separation of statutory funding and costs from non-statutory funding and costs. (PP 33, 163, 176, 216, 254-56)

Proposed revision: Revised §5 of Exhibit E to provide a template for this information (or for indicating the Regional Entity has no non-statutory activities).

II. FERC Directives on NERC Compliance Monitoring and Enforcement Program (“CMEP”)

Compliance Audits and Investigations (CMEP §3.0)

4. §3.1.3 should be modified to specify NERC and FERC will receive notice of an unscheduled Compliance Audit on or before the date the entity to be audited is notified. (P 39)

Proposed revision: Added text to CMEP §3.1.3 stating that prior to or on the same date the Compliance Enforcement Authority (“CEA”) notifies the Registered Entity an unscheduled Compliance Audit will be initiated, the CEA will notify NERC and FERC.

5. §3.0 should be modified to clarify the circumstances in which the Compliance Enforcement Authority (“CEA”) can utilize the “accuracy and completeness” review process. Further, the accuracy and completeness review process should *not* take place *before* the CEA submits its report of Alleged Violation to NERC. (P 40)

Proposed revisions: (i) In CMEP §1.1.1, definition of “Alleged Violation”, deleted “has completed its accuracy and completeness review”. (ii) Deleted the 3rd paragraph of CMEP §3.0, which described the “accuracy and completeness” review. The original intent of this provision was to allow the CEA to review and verify allegations and reports of noncompliance received from various sources before reporting this information to NERC (and thence to FERC, *see* CMEP §8.0), but FERC has directed that the information must be reported to NERC before any such review takes place. Further, review by the CEA of the facts and the applicability of the Reliability Standard at issue to the Registered Entity before the CEA issues a notice of Alleged Violation to the Registered Entity is embedded into each of the individual compliance monitoring processes in the CMEP. Therefore, this provision was redundant.

6. §3.3 should be modified to provide the opportunity for an audited entity, in the case of a spot check, to object to a compliance auditor (other than a NERC or FERC staff member). (P 41)

Proposed revision: Inserted a new second bullet point in CMEP §3.3.1, stating that during the advance notice period for the Spot Checking process, the CEA will notify the Registered Entity of the names and employment histories of the persons

who will be conducting the Spot Checking; the Registered Entity may object to any such person (other than NERC or FERC staff members) in accordance with CMEP §3.1.5; and any such objections must be submitted by the later of 5 business days before the requested information is submitted or 5 business days after the Registered Entity is notified of the persons on the Spot Checking team.

7. NERC and Regional Entity Compliance Audits conducted in the U.S. must be consistent with GAO standards, specifically “professional accounting standards recognized in the U.S., such as Generally Accepted Accounting Standards, Generally Accepted Government Auditing Standards, and standards sanctioned by the Institute of Internal Auditors.” (P 42 & fn 29)

Proposed revisions: Added text in CMEP §3.1 that Compliance Audit processes for Compliance Audits conducted within the U.S. shall be based on professional accounting standards recognized in the U.S., including GAAP, Generally Accepted Government Auditing Standards and standards sanctioned by the Institute of Internal Auditors; and that Compliance Audit processes for Compliance Audits conducted outside the U.S. may be based on Canadian or other international standards.

8. §3.4 should be revised to provide that where an “Applicable Governmental Authority” commences an investigation into a U.S.-related matter, NERC must provide notice of the investigation to FERC prior to disclosure of any information relating to the matter to the Applicable Governmental Authority. Also, NERC’s notice must disclose the nature of the proposed disclosure and the procedures to be used to ensure compliance with the requirements of 18 CFR 39.7(b)(4). (P 45)

Proposed revision: Added text to CMEP §3.4 stating that where an Applicable Governmental Authority other than FERC initiates a Compliance Violation Investigation, NERC shall provide notice to FERC prior to any disclosure of information concerning the matter to be investigated to the other Applicable Governmental Authority; shall describe the proposed disclosures; and shall describe the processes NERC will utilize to ensure compliance with the nondisclosure requirements of 18 C.F.R. §39.7(b)(4).

9. §3.4 – NERC’s proposed changes to §3.4 and other provisions of the CMEP in which NERC would permit itself, prior to obtaining FERC’s permission, to disclose non-public U.S. compliance information covered by 18 CFR 39.7(b)(4) to Canadian or Mexican governmental authorities are **rejected**. (P 47)
 - a. Specifically, changes of text that currently permit the submission of non-public compliance information to “the Commission *or* Applicable Governmental Authorities” to require submission of the information to “the Commission *and* any other Applicable Governmental Authority” are **rejected**, because absent appropriate procedures to protect the non-public nature of U.S. compliance-related information, public disclosure of the

information could occur in violation of 18 CFR 39.7(b)(4). FERC lists these CMEP sections as including such changes (P 47 fn 3):

8.0 (2d par.) (notice of evidence or allegations of violations)

3.1.6 (providing final compliance audit reports)

3.4.1 step 12 (notice that an investigation concluded no violation occurred)

5.1 (notification of issuance of notice of alleged violation)

5.6 (filing of notice of penalty which may contain non-public information)

8.0 (6th par.) (quarterly reports on status of alleged and confirmed violations)

Proposed revisions: Added text in CMEP §3.1.6; 3.4.1 step 2; 3.4.1 step 12; 5.1; 5.4; 5.6; 8.0 2d paragraph; and 8.0 6th paragraph so that each of these provisions now contains substantially the following statement (some variations required to conform to the structure of the particular provision): “NERC notifies FERC and, if the [compliance activity] relates to a Registered Entity or to a portion of the bulk power system over which another Applicable Governmental Authority has jurisdiction, such other Applicable Governmental Authority [of the compliance activity, within a stated time period], provided, that NERC will not disclose non-public U.S. compliance information to an Applicable Governmental Authority other than FERC without first obtaining permission from FERC for such disclosure and subject to any limitations placed by FERC on such disclosure.”

Also, added text in CMEP §2.0 stating the above and also stating: “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, but subject to any limitations or restrictions placed on the disclosure of non-public, non-U.S. compliance information by the Applicable Governmental Authority with jurisdiction or by other law of the applicable jurisdiction.”

- b. NERC’s proposal is overbroad and requires further clarification. It is unclear if NERC would provide notice of all Regional Entity reports of alleged violations, compliance audit reports, notices of alleged violations and quarterly updates to Canadian and Mexican authorities regardless of whether these reports address matters pertaining to particular Canadian or Mexican portions of the Bulk-Power System. (P 48)

Proposed revisions: See proposed revisions under item a above.

- c. It is unclear if NERC would provide these reports and information to each Canadian or Mexican regulatory authority with jurisdiction over reliability or solely to those authorities that might have an interest in a particular report. (P 49)

Proposed revisions: See proposed revisions under item a above.

- d. NERC does not indicate if it intends to provide to FERC “reciprocal reports” of compliance information relating to Canadian or Mexican entities that might affect the U.S. portion of the Bulk-Power System. (P 49)

Proposed revisions: See proposed revisions under item a above.

- e. NERC does not describe how it would protect the non-public nature of information it would provide to Canadian and Mexican authorities. (P 49)

Proposed revisions: See proposed revisions under item a above.

Appeals (CMEP §5.5) and Notice of Penalty (CMEP §5.6)

10. §5.5 and 5.6 should be amended to delete the qualifiers “clearly conflicts with the goal of consistent national reliability enforcement” and “where the requirement to revise the decision is necessary for NERC’s oversight of Regional Entity compliance activities.” (P 60)

Proposed revisions: Deleted the referenced language from CMEP §5.5 and §5.6.

11. NERC should work with Regional Entities and other interested parties to propose language changes “consistent with our findings herein” on the issues of (i) why the reopening of proceedings by a participant would be appropriate in all instances in which NERC has directed a Regional Entity to revise a decision, and (ii) why a “participant” other than the Registered Entity to whom the penalty was assessed, or the compliance staff, should have the right to reopen a proceeding. The limitations suggested by EEI/NRECA have merit and should be considered. (P 61)

Proposed revisions: Revised CMEP §5.5 to state (i) NERC’s remand of a Regional Entity decision “may include directions to the Regional Entity to revise the decision”; and (ii) “If NERC directs the Regional Entity to revise its decision, whichever of the Registered Entity that was the subject of the decision or the Compliance Staff of the Regional Entity whose interests are adversely affected by the directed revision may reopen the proceeding on any issue whose resolution is

affected by NERC's directive, irrespective of whether the issue was previously litigated, settled or unopposed."

Also, revised CMEP §5.6 so that this provision now states that if NERC directs a Regional Entity to revise a penalty, the Registered Entity subject to the penalty (if the penalty is increased) or the Compliance Staff of the Regional Entity (if the penalty is reduced) may reopen the proceedings on any issue on which the penalty was based, irrespective of whether the issues was previously litigated, settled or opposed.

12. The proposal NERC made in its Answer to add, to §5.5, the §5.6 phrase "irrespective of whether the issue was previously litigated, settled or opposed" is neither accepted nor rejected (*see* P 59); apparently, it should be considered as part of the P 61 directive.

Proposed revision: Added "irrespective of whether the issue was previously litigated, settled or opposed" to CMEP §5.5 (see proposed revision under item 11, above).

Mitigation of Violations (CMEP §6.0)

13. §6.5 – NERC's proposed revision to §6.5, as amended in its Answer (*i.e.*, to state that NERC will be given 30 days to complete its review of a Mitigation Plan), is accepted. (P 70)

Proposed revision: Added text to CMEP §6.5, 2d paragraph, 2d sentence so that this sentence now states: "NERC will review the accepted Mitigation Plan and, within thirty (30) days following its receipt of the Mitigation Plan from the Regional Entity, will notify the Regional Entity, which in turn will notify the Registered Entity, as to whether the Mitigation Plan is approved or disapproved by NERC." This is the language that was proposed in NERC's Answer.

14. §6.5 & Figure 6.1 – NERC's proposal in its Answer to conform Figure 6.1 to the text of §6.5 is accepted. (P 70)

Proposed revision: Figure 6.1 needs to be revised to conform to the text of CMEP §6.5 [not done yet in this version of the CMEP].

15. §6.5 & ROP §400 – It is unclear if ROP §400 is consistent with NERC's revisions to §6.5 to comply with the directives in the *Mitigation Plan Order*. (P 70)
 - a. ROP 404.2 refers to the submission of a Mitigation Plan to NERC by an owner, operator or user of the Bulk-Power System or a regional reliability organization when NERC finds such an entity to be noncompliant, but does not cover NERC's review of Mitigation Plans approved by Regional Entities, and so must be revised. (P 70 fn 39)

Proposed revision: It was determined that this directive would be more appropriately addressed in ROP 403, “Required Attributes of Regional Entity Compliance Enforcement Programs,” §403.18. The following sentence has been added to §403.18: “The regional entity shall submit the approved mitigation plan to NERC in accordance with NERC’s form. NERC shall, within thirty (30) days, approve or disapprove the mitigation plan, in the case of disapproval with a statement of reasons (which may include a list of changes to the mitigation plan that would make it acceptable to NERC).”

- b. The reference to “regional reliability organizations” in ROP §400 is outdated and should be revised. (P 70 fn 39)

Proposed revision: “Regional reliability organization” is either deleted or replaced by “regional entity”, as the context requires, at various places throughout §400 of the ROP. Affected sections are 401.2, 402.6, 403.1, 403.7.3, 403.7.4, 404, 404.1, 404.2, 404.3, and 404.4. Also deleted definition of “Regional reliability organization” in ROP §202.

In addition, consistent with FERC’s apparent intent that references to “regional reliability organization” be deleted (or replaced by “regional entity” if appropriate) throughout the ROP, such changes were made in sections 200 (definition of “Regional criteria”), 313.2, 501, 501.1.2.2, 804 (1st, 3rd, 4th and 5th paragraphs), 805. 805.1, 805.2, 805.3, 805.4 and 1106.3.

Remedial Action Directives (CMEP §7.0)

16. §7.0 – NERC must revise this section to include a means for ensuring that a Registered Entity receives actual notice of a Remedial Action Directive and for ascertaining that date on which actual notice occurs. NERC should also revise P 1.9.1 of the Hearing Procedures to refer to a Registered Entity’s actual receipt of a Remedial Action Directive. (P 73 and fn 41)

Proposed revisions: Revised CMEP §7.0 as follows: (i) Revised 4th paragraph to state that the CEA will cause the notice of Remedial Action Directive to be delivered to the Registered Entity by facsimile to the Registered Entity’s designated contact person and by a recognized express courier service that provides verification of delivery, with the date of delivery as specified by the courier service’s verification to be deemed the date of actual receipt. (ii) Revised 6th paragraph to state that the Registered Entity may contest the Remedial Action Directive by giving written notice to do so to the CEA with two business days following the date of actual receipt of notice of the Remedial Action Directive.

Also, revised Hearing Procedures P 1.9.1 to state: (i) the Remedial Action Directive shall be delivered to the Registered Entity in accordance with CMEP §7.0; and (ii) the Registered Entity must provide written notice to contest the Remedial Action Directive to the CEA within two business days following the date of actual receipt of the Remedial Action Directive as defined in CMEP §7.0.

NERC Hearing Procedures (CMEP Attachment 2)

Editorial Corrections

17. P 1.4.6 – in the third sentence, delete “in” following the phrase “in regard to”. (P 75 fn 43)

Proposed revision: Made the above correction to P 1.4.6.

18. P 1.4.10 – substitute “all” in place of “both” in the phrase “may exercise its discretion to examine the actions of both Registered Entities.” (P 75 fn 43)

Proposed revision: Made the above correction to P 1.4.10.

Definitions

19. Definitions and ROP 1501.3 – NERC should adopt the revised definition of “Critical Energy Infrastructure Information” in the ReliabilityFirst delegation agreement, which reflects FERC’s recent amendment of this term in Order No. 683 (see 18 CFR §388.113(c)(1)). (P 75)

Proposed revisions: (i) Revised the definition of “Critical Energy Infrastructure Information” in (a) Hearing Procedures P 1.1.5 and (b) ROP 1501.3 to conform to definition of this term adopted by FERC at 18 C.F.R. §388.113(c)(1) (and used in the ReliabilityFirst Hearing Procedures). (ii) Deleted statements in Hearing Procedures P 1.5.10(b) and ROP §1501.3 that the NERC *Security Guidelines for the Electric Sector and Protecting Potentially Sensitive Information* may be consulted for additional guidance – since the FERC definition on “Critical Energy Infrastructure Information has now been adopted, reference to this NERC guidance document is not longer appropriate and may be at variance with the FERC definition.

20. P 1.1.5 (“Respondent”) – this definition should be revised to include a Registered Entity that is the subject of a contested Remedial Action Directive. (P 79)

Proposed revision: Revised definition of “Respondent” in Hearing Procedures P 1.1.5 to include a Registered Entity who is the subject of the “contested Remedial Action Directive.”

21. P 1.1.5 – a definition of “document” should be added. (P 80)

Proposed revision: Added the following definition of “Document” to Hearing Procedures P 1.1.5: “means, in addition to the commonly understood meaning of the term as information written or printed on paper, any electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained, and shall be translated by the producing party into reasonably usable form.” The proposed definition is based largely on Federal Rule of Civil Procedure 34(a)(1)(A). (There is no definition of “document” in the discovery provisions of the FERC Rules of Practice and Procedure.)

Proceedings Closed to the Public (P 1.2.13)

22. P 1.2.13 – FERC construes the authorization for NERC to publicly release information relating to a non-public proceeding to refer only to the limited circumstances previously authorized by FERC – consider putting this clarification into the text of P 1.2.13. (P 86)

Proposed revision: Revised P 1.2.13 to state that hearings shall not be open to the public and notices, rulings, orders, transcripts or other issuances shall not be publicly released, unless the ERO “in accordance with the authorization previously granted by FERC to release information about a non-public proceeding” or FERC determines that public release is appropriate.

Hearing Requests (P 1.3.1)

23. P 1.3.1 – FERC clarifies that this paragraph allows a Registered Entity to request a hearing only where the compliance staff rejects a revised Mitigation Plan submitted by the Registered Entity – consider putting this clarification into the text. (P 87)

Proposed revisions: (i) Revised P 1.3.1(b) to state that a Registered Entity may request a hearing if the CEA rejects the Registered Entity’s proposed revised Mitigation Plan submitted after Compliance Staff rejected the Registered Entity’s initial proposed Mitigation Plan. (ii) Made several other conforming revisions to P 1.3.1 to refer to the Staff’s “rejection” of the proposed “revised” Mitigation Plan (rather than to Staff’s “disagreement” with a proposed Mitigation Plan).

24. P 1.3.1 – This paragraph should be revised to state that if a party seeks the full hearing procedure it must ask for it. (April 19 Order at P 161) (P 89)

Proposed revision: Revised P 1.3.1 to state that if the Registered Entity requests the shortened hearing procedure, and Staff then makes a filing requesting the full hearing procedure, then the full hearing procedure shall apply; otherwise the shortened hearing procedure as requested by the Registered Entity shall apply

(i.e., deleted provision that full hearing procedure applies if Staff either fails to file a response or files a response but “does not agree to use” the shortened hearing procedure).

Shortened Hearing Procedure (P 1.3.2)

25. P 1.3.2 – the time periods for compliance staff to produce documents for copying under the shortened hearing procedure should be the same time period as under the full hearing procedure. (P 92)

Proposed revision: Revised P 1.3.2(b) to state that in the shortened hearing procedure, Staff shall make documents available to the Registered Entity within five (not seven) business days after the notice of hearing is issued.

Notice of Hearing (P 1.4.1)

26. P 1.4.1 – the requirement that the notice of (initial) hearing issued by the Regional Entity clerk must include a statement that the Registered Entity can request either the shortened hearing procedure or the full hearing procedure, can be deleted. (P 93)

Proposed revision: Deleted last sentence of P 1.4.1, which contained this statement.

Interlocutory Review (P 1.4.4)

27. P 1.4.4 should be clarified to state the content and purpose of the Hearing Officer’s report that is to be issued when a petition for interlocutory review is filed. (P 98)

Proposed revision: Added sentence to P 1.4.4, 2d paragraph: “The Hearing Officer’s report shall set forth the relevant facts and other background information relating to the ruling on which interlocutory review is sought, the basis for the Hearing Officer’s ruling, a summary of the Participants’ arguments on the petition for interlocutory review, and the recommendation of the Hearing Officer for the disposition of the petition by the [HEARING BODY].”

28. P 1.4.3 and 1.4.4 should be revised to state the standard to be applied by the Hearing Body in considering a petition for interlocutory review; although the FERC standard need not be adopted, there must be some limitations on the right to seek interlocutory review in order to deter unduly dilatory maneuvers by litigants. (P 98)

Proposed revisions: (i) Added text to P 1.4.4, 1st paragraph to state that a Participant can seek interlocutory review of a ruling of the Hearing Officer “where the ruling for which interlocutory review is sought presents an

extraordinary circumstance which makes prompt review necessary to prevent prejudice to a Participant's ability to present its position in the proceeding." (ii) Added text to P 1.4.4, 1st paragraph to specify that the petition for interlocutory review "shall contain, in a separately identified section, a demonstration that the ruling for which interlocutory review is sought presents an extraordinary circumstance which makes prompt review necessary to prevent prejudice to the Participant's ability to present its position in the proceeding." (iii) Added text to P 1.4.4, 3rd paragraph, providing that the Hearing Body may reject the petition for interlocutory review on the grounds that the ruling for which review is sought does not meet the "extraordinary circumstance, etc." standard (stated above), without considering or ruling on the substance of the petitioner's arguments. (iv) Added text to P 1.4.3(4) to refer to consideration by the Hearing Body of a petition for interlocutory review "meeting the requirements of Paragraph 1.4.4."

Ex Parte Communications (P 1.4.5 and 1.4.7)

29. P 1.4.7(d) should be revised to specify that a notice that an *ex parte* communication has occurred shall include a listing of each person who made or received the prohibited communication. (P 101)

Proposed revision: Added text to P 1.4.7(d) to state that a notice of *ex parte* communication must include a list of each person who made or received the communication.

Waiver of Time Limits (P 1.5.1)

- 29A. P 1.5.1, stating that a Registered Entity that elects the full hearing procedure waives any time limit requirements in the NERC ROP, is unsupported and should be deleted unless NERC can revise or provide further support for this provision. (P 102)

Proposed revision: Deleted text of P 1.5.1 and (temporarily) replaced text with "Intentionally left blank."

Experts (P 1.5.6)

30. P 1.5.6 (requiring an expert to sign a confidentiality agreement) is **rejected** as unnecessary, because (i) the hearings will generally be closed to the public; (ii) P 1.5.10 has provisions for protective orders applicable to "participants", and (iii) FERC construes "participant" to include experts. NERC may further support the need for this provision in its compliance filing; if it does so, NERC must explain (i) why separate confidentiality agreements are necessary for experts, versus participants, and (ii) the meaning of the phrase in P 1.5.6 "appropriate to the level of involvement in the proceeding." (P104)

Proposed revisions: In P 1.5.6, changed the text referring to a “confidentiality agreement appropriate to the level of involvement in the proceeding” to be executed by the expert, to “an agreement evidencing the expert’s understanding and acknowledgement of the non-public nature of the proceeding and that disclosure of information obtained in connection with the expert’s participation in the proceeding is prohibited.” The justification of this provision to FERC should include that a retained expert is not bound by the same nondisclosure obligations as a Registered Entity (and its employees under its control) and CEA Staff, therefore requiring execution of a separate agreement by the expert is warranted.

Also, because this directive (and others, *see* PP 78 and 232) indicates a broader reading of the defined term “Participant” than was intended, revised definition of “Participant” in P 1.1.5 to the following: “a Respondent and any other Person who is allowed or required by FERC to participate as an intervenor in a proceeding conducted pursuant to these Hearing Procedures, and as used herein shall include the members of the Compliance Staff of the Compliance Enforcement Authority that participate in a proceeding.”

Documents Made Available for Inspection and Copying (P 1.5.7(a))

31. P 1.5.7(a)(1) and (2) should be revised to require compliance staff to produce documents prepared or obtained through any compliance process, not just through an “investigation”. (P 108)

Proposed revisions: (i) Changed P 1.5.7(a)(1) from “all documents prepared or obtained by Staff in connection with the investigation that led to the institution of the proceeding” to “all documents prepared or obtained by Staff through or in connection with any compliance monitoring process(es) that led to the institution of the proceeding”. (ii) In first sentence of P 1.5.7(a)(3) (formerly P 1.5.7(a)(2)), changed “requests for information are issued by Staff related to the same investigation leading to the institution of the proceeding”, to “requests for information are issued by Staff related to the same compliance monitoring process(es) that led to the institution of the proceeding.”

32. P 1.5.7(a) should be revised to specify that compliance staff need not make available to a participant exact copies of documents the participant previously provided to compliance staff. (P 108)

Proposed revision: Added text to P 1.5.7(a)(1) to state that the documents made available by Staff for inspection and copying need not include “exact copies of documents the Respondent previously provided to Staff”.

33. P 1.5.7(a)(1) provision that specified documents will be made available “unless otherwise provided by this Rule” is ambiguous and unsupported and should be either explained or deleted. (P 108)

Proposed revision: In first sentence of P 1.5.7(a)(1), deleted “by this Rule, or”; sentence will now read: “Unless otherwise provided by order of the Hearing Officer or [HEARING BODY]”

34. P 1.5.7(a) – in proceedings with participants other than the Registered Entity and compliance staff, the Hearing Officer or Hearing Body should oversee compliance staff’s proposed designation of documents and the execution and enforcement of the protective order. [FERC does not direct any changes here, but consider whether amendment of P 1.5.7(a) is appropriate to express this point in the Hearing Procedures.] (P 110)

Proposed revision: Added new P 1.5.7(a)(2) stating that “Where there are Participants in a proceeding in addition to a single Respondent and Compliance Staff, the Hearing Officer or [HEARING BODY] shall oversee the Staff’s designation of documents to be produced to each Participant and the development, execution and enforcement of any protective order deemed necessary.”

Withholding of Documents (P 1.5.7(b) and (c))

35. P 1.5.7(b)(2) should be revised to provide that compliance staff’s obligation to make exculpatory evidence available does not operate as a limitation on the privileges specified in P 1.5.7(b)(1). (FERC also notes that the work product doctrine is absolute and the work product doctrine permits disclosure of attorney work product only on a showing of substantial need.) (P 113)

Proposed revisions: Revised P 1.5.7(b)(2) to stated the “Nothing in Subparagraph (b)(1)(B), (C) or (D) authorizes Staff to withhold a document, or a part thereof, that contains exculpatory evidence.” This change effectively deletes reference to P 1.5.7(b)(1)(A), which allow Staff to withhold a document that is privileged to Staff or constitutes attorney work product of Staff’s counsel.

Also added text to P 1.5.7(b)(1)(A) (concerning privilege grounds on which Staff may withhold a document) stating that in applying this provision, the attorney-client privilege shall be recognized as absolute and that any demand for production of attorney work product shall be granted only after a showing of substantial need.

36. P 1.5.7(c) should be revised to provide (i) compliance staff is obligated, in every case without exception, to compile a list of documents withheld, without the need for a motion or involvement of the Hearing Officer; (ii) this list must be provided by compliance staff at the time it is required to make documents available; (iii) this obligation also applies to a Respondent that is required to make documents available. (P 114)

Proposed revisions: (i) Deleted first sentence of P 1.5.7(c) which provided that the Hearing Officer may require Staff to submit to the Hearing Officer a list of

withheld documents; replaced it with text specifying that at the time Staff is required to make documents available, Staff shall provide to the Hearing Officer, Respondent, and any other Participant to which documents are being made available, a list of documents withheld by Staff pursuant to P 1.5.7(b)(1). (ii) Added sentence to P 1.5.7(c) that a list of withheld documents shall also be provided by any other Participant required to produce documents, at the time the documents are required to be produced. (iii) Deleted last sentence of P 1.5.7(c) which referred to a motion to require Staff to produce a list of documents withheld, since provision of such a list will now be required in all instances.

Failure to Produce Documents (P 1.5.7(g))

37. P 1.5.7(g) should be revised to provide that where compliance staff fails to produce documents it was required to produce, the burden of proof to show absence of harm to Respondent’s case is imposed on compliance staff (or on whatever party fails to produce a required document – see next item). (P 117)

Proposed revision: In P 1.5.7(g), (i) changed text that no rehearing or amended decision of proceeding shall be required “unless Respondent establishes that the failure to make the document available was not harmless error”, to “where the failure to make the document available was harmless error”; and (ii) added sentence, “Should a dispute arise as to whether a rehearing or amended decision is required due to the failure of Staff or another Participant to produce a document, the burden shall be on Staff or the other Participant that failed to produce the document to show that such failure was harmless error.”

38. P 1.5.7(g) should be revised to apply to any participant that fails to produce a document it was required to produce, not just compliance staff. (P 117)

Proposed revision: In P 1.5.7(g), (i) added text to first sentence referring to “a document required to be produced by any other Participant is not produced to the Respondent”; and (ii) in the new sentence on burden of proof (see item 37 above), included reference to “another Participant” (in addition to Staff) that fails to produce a document.

Discovery Procedures (P 1.5.8)

39. P 1.5.8 should be revised to eliminate requirement that a prehearing discovery conference be held in every case. (P 124)

Proposed revisions: (i) P 1.5.8 completely revised; provision that proposed discovery shall be presented to the Hearing Officer at the prehearing conference, at a status hearing or by written motion and that the Hearing Officer shall issue a ruling setting forth the discovery to be conducted and a schedule, are eliminated in the revised text. (ii) In P 1.5.2, listing purposes of the prehearing conference, revised subparagraph (2) from “Develop a schedule for any discovery to be

conducted and address any discovery issues”, to “Discuss a schedule for any discovery to be conducted and address any discovery issues that are raised at that time.”

40. P 1.5.8 should be revised to eliminate reference to discovery practices of “civil courts.” (P 124)

Proposed revision: P 1.5.8 completely revised; in the revised text, reference to “all other discovery methods commonly used in civil courts” replaced with “all other discovery methods provided for in Rules 402 through 408 of the FERC Rules of Practice and Procedure.”

41. P 1.5.8 should be revised to include standard discovery procedures and timelines; NERC may adopt or incorporate by reference FERC’s procedures for discovery in hearings before ALJs. (P 124)

Proposed revisions: P 1.5.8 completely revised. New text states that Participants may use all other discovery methods provided for in Rules 402-408 of the FERC Rules of Practice and Procedure, “including data requests, written interrogatories and requests for production of documents or things, depositions by oral examination, requests for inspection of document and other property, and requests for admission.” New text also states that unless otherwise directed by the Hearing Officer or Hearing Body, such discovery and the resolution of any disputes concerning such discovery shall be conducted in accordance with Rules 402-408 and 410 of the FERC Rules of Practice and Procedure. However, exceptions and limitations to the foregoing are stated, including: (i) P 1.5.7(b) – (g) shall be applicable to any such discovery; (ii) FERC Rule 403(b)(2) [this FERC Rule specifies that FERC Chief ALJ may waive the requirement that the presiding ALJ issue an order memorializing any discovery ruling] and FERC Rule 410(d)(2) [this FERC rule pertains to parties obtaining discovery from FERC] are not applicable; (iii) the Hearing Officer and Hearing Body do not have authority to issue subpoenas or to compel the appearance of, or production of documents by, any person or entity that is not a Participant; (iv) certain references in the incorporated FERC Rules to “the Commission” shall be deemed to be to the Hearing Body; (v) unless otherwise ordered, the minimum response time that can be specified in a discovery request is 21 days; (vi) unless otherwise ordered, all discovery shall be requested, scheduled and conducted to as to be completed within 6 months following date of initial prehearing conference; and (vii) notwithstanding (v) and (vi), if the shortened hearing procedure of P 1.3.2 is used in a proceeding, the Hearing Officer, on his/her own motion or motion of a Participant, shall establish a schedule for discovery, including response periods for responding to discovery requests, that are consistent with the expedited nature of the proceeding contemplated by the shortened hearing procedure.

Protective Orders (P 1.5.10(b))

42. P 1.5.10(b) should be clarified as to the scope of documents subject to it (“e.g., with an appropriate cross reference to paragraph 1.5.7(b)(1)”). (P 127)

Proposed revision: Added the following sentence to P 1.5.10(b): “Nothing in this Subparagraph 1.5.10(b) shall require Staff to produce any documents it is entitled to withhold under Subparagraph 1.5.7(b).”

43. Documents protected from disclosure by P 1.5.7(b)(1) will only be produced if compliance staff voluntarily agrees to do so, if they are redacted to remove protected information, or if non-protected portions of the documents are required to be produced as exculpatory evidence. [FERC does not direct specific revisions on this point, but consider whether this point should be made explicit in P 1.5.7(b)(1) or P 1.5.10(b).] (P 127)

Proposed revision: Added sentence to P 1.5.7(b)(2): “Nothing in Subparagraph (b)(1) [*i.e.*, P 1.5.7(b)(1)] requires Staff to withhold a document from disclosure.”

Burden of Persuasion and Receipt of Evidence (P 1.6.2)

44. P 1.6.2 – the first two sentences should be moved to an introductory provision of the Hearing Procedures, and any necessary conforming changes should be made consistent with this directive. (P 131)

Proposed revisions: (i) Deleted first two sentences of P 1.6.2 and moved them to new second paragraph in P 1.1.1. (ii) Deleted “Burden of Proof” from title of P 1.6.2.

Deadline for Contesting a Remedial Action Directive (P 1.9)

45. P 1.9 – the two-day deadline for a Registered Entity to contest a Remedial Action Directive (i) should be two business days, and (ii) should be tied to the Registered Entity’s actual receipt of the Remedial Action Directive. (P 138)

Proposed revisions: (i) Revised text in P 1.9.1, 2d paragraph to state that Registered Entity must provide notice to CEA to contest a Remedial Action Directive within two business days following date of actual receipt of the notice of Remedial Action Directive (as defined in CMEP §7.0).

46. P 1.9.2 – the time periods for the prehearing conference and the evidentiary hearing should refer to business days. (P 138)

Proposed revisions: (i) Revised P 1.9.2(a) to state that Hearing Officer or Hearing Body will hold a prehearing conference within two business days after receipt of the Registered Entity’s request for a hearing on the Remedial Action Directive.

(ii) Revised P 1.9.2(b) to state that an evidentiary hearing will be conducted within 7 business days after the prehearing conference.

Other Unrelated Editorial Corrections to CMEP/Hearing Procedures

- A. In CMEP 6.5 and 7.0, changed “Hearing Process” to “Hearing Procedures” to be consistent with title of Attachment 2.
- B. In CMEP 6.5, changed “Commission” to “FERC” (“FERC” is defined term used throughout the CMEP and Hearing Procedures).
- C. In CMEP 9.1, deleted “Reliability Standards” (appeared twice in sentence).
- D. In Hearing Procedures P 1.1.1, changed “this Paragraph 1.0” to “this Attachment 2.”