

UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation	Docket No. RR06-1-012
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Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc.	Docket No. RR07-3-002
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COMPLIANCE FILING OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
AND NORTHEAST POWER COORDINATING COUNCIL, INC.
IN RESPONSE TO PARAGRAPH 174 OF MARCH 21, 2008 COMMISSION ORDER

North American Electric Reliability Corporation	Docket No. RR06-1-012
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Delegation Agreement Between the North American Electric Reliability Corporation and Florida Reliability Coordinating Council	Docket No. RR07-8-002
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COMPLIANCE FILING OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
AND FLORIDA RELIABILITY COORDINATING COUNCIL
IN RESPONSE TO PARAGRAPH 252 OF MARCH 21, 2008 COMMISSION ORDER

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I. INTRODUCTION

In this filing, (1) the North American Electric Reliability Corporation (“NERC”) and the Northeast Power Coordinating Council, Inc. (“NPCC”) submit their response to P 174 of the Commission’s March 21, 2008 Order in Docket Nos. RR06-1-012 *et al.*¹, and (2) NERC and the Florida Reliability Coordinating Council (“FRCC”) submit their response to P 252 of the March 21 Order.² In P 174 of the March 21 Order, the Commission directed NERC and NPCC to submit a filing by May 20, 2008, presenting a schedule for ending the process of review by NPCC technical committees of technical aspects associated with proposed notices of alleged violations of Reliability Standards, or a justification for continuation of this process. In P 252 of the March 21 Order, the Commission directed NERC and FRCC to submit a filing by May 20, 2008, presenting a schedule for ending the process of review by the FRCC stakeholder Compliance Committee of proposed notices of alleged violations of Reliability Standards, or a justification for continuation of this process. Because of the similar subject matters of these required filings and the common filing deadline, NERC is submitting the response of NERC and NPCC to P 174 and the response of NERC and FRCC to P 252 in the same filing.

Summary of NERC-NPCC Response to P 174 of March 21 Order

NPCC is revising its compliance enforcement process to provide that (i) the NPCC Compliance Staff will be the sole entity responsible for determining whether to issue, and issue, a Preliminary Notice of Alleged Violation and a Notice of Alleged Violation with Penalty or Sanction to a Registered Entity under the NPCC compliance enforcement process, and (ii) the

¹ *Order Addressing Revised Delegation Agreements*, 122 FERC ¶61,245 (2008) (“March 21 Order”). The docket pertaining to the NERC-NPCC delegation agreement is Docket No. RR07-3-002.

² The docket pertaining to the NERC-FRCC delegation agreement is Docket No. RR07-8-002.

NPCC Compliance Staff may (but will not be required to) consult with a NPCC technical committee or committees for advice on a complex technical matter(s), but not for purposes of making a compliance/non-compliance determination, before the NPCC Compliance Staff issues a Notice of Alleged Violation with Penalty or Sanction to a Registered Entity. These changes will be reflected in revisions to Exhibit D to the amended and restated delegation agreement between NPCC and NERC that are required to be submitted in a compliance filing to the Commission, in response to the March 21 Order, due on or before July 21, 2008.³

Summary of NERC-FRCC Response to P 252 of March 21 Order

FRCC and NERC believe there is a continuing need for the FRCC stakeholder Compliance Committee to perform a technical advisory role in the FRCC compliance enforcement process, because (i) FRCC has not been able to develop a staff of experienced, full-time compliance auditors as quickly as envisioned, and (ii) a number of the Commission-approved NERC Reliability Standards lack clarity, so that the ability to obtain input from technical advisors experienced in reliability matters remains a valuable resource for FRCC Compliance Staff at this time. However, FRCC will revise its compliance enforcement process to remove the current provisions by which the stakeholder compliance committee must either concur or disagree with the determination of FRCC Compliance Staff as to whether a Reliability Standard has been violated, and to make consultation with the Compliance Committee on technical matters optional for the FRCC Compliance Staff. These revisions to the FRCC Compliance Monitoring and Enforcement Program (“CMEP”) will be included in the

³ The March 21 Order directed NERC and the Regional Entities to make a compliance filing within 120 days (*i.e.*, by July 21, 2008), addressing directives in the March 21 Order for revisions to the NERC *pro forma* amended and restated delegation agreement, the NERC Compliance Monitoring and Enforcement Program and Hearing Procedures, and the individual delegation agreements between NERC and the eight Regional Entities. *See* March 21 Order, Ordering Paragraph (B).

compliance filing in response to directives in the March 21 Order that is due on or before July 21, 2008.

II. NOTICES AND COMMUNICATIONS

Notices and communications with respect to this filing may be addressed to:

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III. RESPONSE OF NERC AND NPCC TO PARAGRAPH 174 OF MARCH 21, 2008 ORDER

In P 174 of the March 21 Order, the Commission stated:

174. It is also unclear whether NPCC intends the review process for violations which NPCC has described in section 3.0 [of Exhibit D to its delegation agreement] to be on an ongoing or temporary basis. It appears that the review process described is for routine matters. While there may be more complex and technical matters requiring the expertise of technical committees, we expect compliance staff to be able to make determinations on most routine matters, such as self-certifications, without consultation from others and ultimately to discontinue the technical committee review process. Accordingly, we direct NERC and NPCC to submit, within 60 days of the date of this order, a schedule for ending the technical committee review process or a justification supporting its continuation.

Also relevant to understanding the Commission's directive in P 174, and NPCC's response, is the Commission's discussion and directive in P 173 of the March 21 Order:

173. NPCC has not described with specificity the difference between an “initial determination” of violation that its compliance staff is to make and a “final compliance determination” that compliance staff would make after consulting with the appropriate NPCC technical committees. In particular, NPCC states that its compliance staff will make a penalty determination in connection with this review process after issuing a notice of alleged violation. However, this procedure is inconsistent with CMEP section 5.1, which provides that a notice of alleged violation is to include a proposed penalty or sanction. Because NPCC has not justified this deviation from *pro forma* section 5.1, we direct NPCC to clarify the review procedures set forth in section 3.0 of its Exhibit D.

The provisions of Exhibit D, section 3.0 of the NPCC delegation agreement (as filed with the Commission in Attachment 6 to NERC’s October 30, 2007 Compliance Filing to the Commission’s April 19, 2007 Order⁴) referred to in P 174 of the March 21 Order are as follows (only pertinent text of Exhibit D, section 3.0 is quoted below; text referring to consultation by NPCC Compliance Staff with technical committees is *italicized*):

Implementation of the NERC Compliance Monitoring and Enforcement Program by NPCC requires that the NPCC independent Compliance Staff make the initial compliance determination for all compliance submittals. *After consultation, as appropriate, with the technical committee of NPCC, the Reliability Coordination Committee, and the Task Forces on Coordination of Planning, Coordination of Operation, System Studies, System Protection and Infrastructure Technology,* NPCC independent Compliance Staff then makes the final compliance determination before forwarding a report to the NPCC Compliance Committee. The NPCC independent Compliance Staff as well as the aforementioned technical groups will be bound by the antitrust guidelines, code of conduct, conflict of interest, confidentiality and any other applicable policies as referenced in the NERC Compliance Monitoring and Enforcement Program. . . .

NPCC Compliance Staff will initially review all submittals received to assure that the information forwarded is accurate and complete. This process will be conducted by the staff members and may require contact via e-mail or phone to confirm information. Once information is confirmed, the Staff will review the information and make an initial determination. If the Compliance Staff identifies that a potential violation occurred it then issues a “Notice of Alleged Violation” to

⁴ *Compliance Filing of the North American Electric Reliability Corporation in Response to April 19, 2007 Order*, Docket Nos. RR06-1-012 *et al.* (October 30, 2007) (“October 2007 Compliance Filing”). The “April 19 Order” is *Order Accepting ERO Compliance Filing, Accepting ERO/Regional Entity Delegation Agreements, and Accepting Regional Entity 2007 Business Plans*, 119 FERC ¶61,060 (2007).

the Registered Entity, the Compliance Committee and NERC. *The Compliance Staff will then conduct its detailed analysis of the potential violation, consulting the technical groups identified above if necessary and then making a final compliance determination.* At this point the Compliance Staff will also make a penalty determination and include that in its report to the Compliance Committee. Once endorsement has been received by the NPCC Compliance Committee and BOD [Board of Directors] the Compliance Staff will issue a “Notice of Regionally Verified Violation” to the Registered Entity, the CC, BOD and NERC
.....

NPCC anticipates clarifying the process questioned by the Commission in P 173 of the March 21 Order, as follows: if the NPCC Compliance Staff, after receiving a compliance submittal and based on its initial review of the submittal, identifies an instance of non-compliance with a Reliability Standard, the Compliance Staff will immediately issue a “Preliminary Notice of Alleged Violation,” without any penalty or sanction stated, to the Registered Entity (with a copy provided to NERC and a redacted summary provided to the NPCC Compliance Committee). After issuing the Preliminary Notice of Alleged Violation, NPCC Compliance Staff will continue to perform a more detailed and comprehensive review of the compliance submittal. During this more comprehensive review, NPCC Compliance Staff will confirm the determination of a violation of a Reliability Standard (or determine that a violation has not occurred), and (if it has confirmed that a violation occurred) will calculate an appropriate penalty or sanction. If NPCC Compliance Staff confirms that a violation of a Reliability Standard has occurred, it will issue a “Notice of Alleged Violation with Penalty or Sanction” to the Registered Entity, with a copy to NERC.

With respect to P 174 of the March 21 Order, NPCC and NERC intend to revise the procedure set forth in section 3.0 of Exhibit D to their delegation agreement to specify that during the review process between issuance of a Preliminary Notice of Alleged Violation and a Notice of Alleged Violation with Penalty or Sanction, NPCC Compliance Staff *may* consult with

NPCC technical committees, but *only* on a non-decisional basis for advice regarding a complex technical matter involved in the occurrence or circumstances being investigated. The revised procedure will specify that consultation by NPCC Compliance Staff with a technical committee or committees will **not** be for purposes of making a compliance/noncompliance determination. NPCC Compliance Staff will have sole responsibility for determining whether either or both a Preliminary Notice of Alleged Violation or a Notice of Alleged Violation with Penalty or Sanction should be issued. Further, the revised process to be specified in section 3.0 of Exhibit D will state that any information furnished by Compliance Staff to a technical committee as part of this consultative process will not include the name of the Registered Entity involved in the matter, but rather will only include facts stated on a generic, no-name basis sufficient to be able to get the technical committee's input on the complex technical matter for which Compliance Staff seeks advice.

NPCC and NERC agree with the implicit if not explicit point of the Commission's discussion in P 174 of the March 21 Order, that NPCC technical committees should not be involved in determining whether or not a Registered Entity has violated a Reliability Standard, and that such determinations should be made solely by NPCC Compliance Staff (subject, of course, to the Registered Entity's rights to a hearing before the NPCC Hearing Body, to appeal an adverse decision of the NPCC Hearing Body to NERC, and to appeal an adverse decision by NERC to the Commission). However, while consultation by NPCC Compliance Staff with technical committees on a decisional basis (or even on a non-decisional basis) is not (and, the revised process described in Exhibit D will make clear will not be) an inherent part of the compliance review process, NPCC's experience has been that resort to its technical committees to assist in understanding complex technical matters has been valuable. Accordingly, the process

to be described in revised section 3.0 of Exhibit D will allow NPCC Compliance Staff to continue to use technical committees on an *ad hoc* basis to provide technical input and expertise when NPCC Compliance Staff determines such input to be necessary and useful.

In light of the way in which NPCC Compliance Staff will be allowed to consult with and obtain input from NPCC technical committees on complex technical matters involved in compliance issues, as described above and as revised section 3.0 of Exhibit D to the delegation agreement will make clear, NPCC and NERC do not believe it is necessary to develop a schedule for removing optional consultation with technical committees on technical matters from the process for identifying and determining violations of Reliability Standards set forth in section 3.0 of Exhibit D.

The preceding paragraphs describe NPCC's and NERC's planned revisions to section 3.0 of Exhibit D to their delegation agreement in response to P 174 (and P 173) of the March 21 Order. The specific textual revisions must go through a public comment process, then be approved by the NPCC Board of Directors, and finally be approved by the NERC Board of Trustees. Additionally, other revisions must be made to the NERC-NPCC delegation agreement in response to directives in the March 21 Order, both with respect to Commission directives specific to the NERC-NPCC delegation agreement⁵ and to conform the agreement to changes required in the NERC *pro forma* amended and restated delegation agreement.⁶ For these reasons, NERC and NPCC will submit a revised version of Exhibit D to their delegation agreement responsive to P 173 and P 174 (and other provisions) of the March 21 Order in the compliance filing that is due on or before July 21, 2008.

⁵ See March 21 Order at PP 171-177.

⁶ See March 21 Order at P 170.

**IV. RESPONSE OF NERC AND FRCC
TO PARAGRAPH 252 OF MARCH 21, 2008 ORDER**

In P 252 of the March 21 Order, the Commission stated:

252. With respect to FRCC's CMEP, section 3.0 describes how the FRCC stakeholder compliance committee will assist FRCC compliance staff in determining whether to issue a notice of alleged violation. FRCC asserts that the stakeholder compliance committee has technical expertise and experience to assist FRCC compliance staff. The Commission approved use of the stakeholder compliance committee as a transitional tool to assist FRCC in light of FRCC's traditional use of industry volunteers and recent turnovers in FRCC compliance staff.¹³³ We believe that these rationales will become less relevant as FRCC staff increases in number and gains experience. Accordingly, we direct NERC and FRCC to submit, within 60 days of the date of this order, a schedule for ending the stakeholder compliance committee review process, or a justification supporting its proposed continuation.

¹³³ *April 19 Order*, 119 FERC ¶ 61,060 at P 574.

The discussion in P 252 of the March 21 Order is referring to the following text in Section 3.0 of the FRCC CMEP:

The FRCC Compliance Staff will report the determination of alleged violation to the FRCC Compliance Committee (CC) for review. With respect to a notice of alleged violation proposed to be issued to a particular registered entity, no member of the FRCC CC who is employed by, or has a financial or other interest in, the registered entity or any of its affiliates may participate in the review. If the FRCC CC does not concur with the FRCC Compliance Staff determination and the FRCC Compliance Staff after discussion with the FRCC CC, maintains its original determination, then the disagreement will be sent to the FRCC Board Compliance Committee for a ruling on the disagreement. If the FRCC Compliance Staff does not contest the decision of the FRCC CC within thirty (30) days, it shall be deemed to have accepted the FRCC CC determination of violation.⁷

As indicated by the above-quoted provision from Section 3.0 of the FRCC CMEP, at present the FRCC Compliance Committee reviews alleged violations of Reliability Standards and is requested to either concur or disagree with the determination made by the FRCC

⁷ The FRCC CMEP, redlined against the NERC *pro forma* CMEP, was included in Attachment 4 to the October 2007 Compliance Filing. The provision quoted above from section 3.0 of the FRCC CMEP does not appear in the NERC *pro forma* CMEP.

Compliance Staff. In response to P 252, FRCC and NERC have concluded that there is not a need for the FRCC Compliance Committee to concur or disagree with Compliance Staff's determination of an alleged violation. However, FRCC does believe that information received by the Compliance Staff through technical discussions with the Compliance Committee will aid the Compliance Staff in making sound determinations as to whether or not a Reliability Standard has been violated. Therefore, FRCC intends to modify its CMEP to eliminate the decisional, "concurrence" component of the Compliance Committee's role, but to provide for a continued role of the Compliance Committee as a non-decisional technical advisor.

It has been FRCC's experience since Commission-approved Reliability Standards became mandatory and enforceable that discussions between Compliance Staff and the Compliance Committee during review of several proposed alleged violations were helpful in achieving an increased understanding of what is necessary to comply with the Reliability Standards. These discussions have also provided more insight into the complexities of the requirements of the Reliability Standards, and have been especially helpful for those requirements that lack clarity and place greater reliance on application of professional judgment by the compliance auditors.⁸ FRCC also notes that members of the stakeholder Compliance Committee have benefited from these reviews and discussions; they have gained knowledge about the requirements of and expectations concerning Reliability Standards, as well as increased understanding and acceptance of the compliance monitoring and enforcement process, which they have been able to bring back to their respective organizations. FRCC believes this

⁸ NERC has recognized the need for improved clarity in Reliability Standards and has targeted achieving greater clarity and reducing ambiguity in standards in its three-year Reliability Standards work plan. See *Reliability Standards Development Plan 2008-2010*, Vol. I (October 5, 2007) at 13-19 and 21 (filed with the Commission on October 5, 2007, in Docket Nos. RM05-17-000, RM05-25-000 and RM06-16-000, in response to P 206 of Order No. 693).

increased understanding, knowledge and acceptance will aid its member owners, operators and users of the bulk power system in more quickly achieving, and then maintaining, compliance with Reliability Standards, thereby enhancing the reliability of the bulk power system. Finally, as FRCC expands and fills out its full-time Compliance Staff, FRCC believes these reviews and discussions will be beneficial in the education of newer, less experienced Compliance Staff members.

However, FRCC and NERC do not believe such technical discussions between the FRCC Compliance Staff and the Compliance Committee will be necessary in connection with the determination of every alleged violation. Rather, the FRCC Compliance Staff will determine when it wants to bring a potential violation to the Compliance Committee for a non-decisional technical review and discussion. Additionally, review and discussion of potential violations with the Compliance Committee should only take place in face-to-face meetings, and not via conference calls, in order to provide greater controls over the release of information about individual occurrences and specific Registered Entities, and over the persons participating in the discussions.

FRCC will develop textual revisions to Section 3.0 of its CMEP to incorporate the changes described in the immediately preceding three paragraphs. The specific textual revisions must go through a public comment process, then be approved by the FRCC Board of Directors, and finally be approved by the NERC Board of Trustees. Additionally, other revisions must be made to the NERC-FRCC delegation agreement in response to directives in the March 21 Order, both with respect to Commission directives specific to the NERC-FRCC delegation agreement⁹ and to conform the agreement to changes required in the NERC *pro forma* amended and restated

⁹ See March 21 Order at PP 250-251 and 253-256.

delegation agreement.¹⁰ For these reasons, NERC and FRCC will submit a revised version of Exhibit D to their delegation agreement responsive to P 252 (and other provisions) of the March 21 Order in the compliance filing that is due on or before July 21, 2008.

With respect to a schedule for elimination of the involvement of the FRCC Compliance Committee in the non-decisional, technical advisory review of potential violations when determined by Compliance Staff to be useful, FRCC and NERC have concluded, after consideration of the factors mentioned in P 252 as well as other factors, that this role should be continued until December 31, 2010. There are several reasons for this proposed duration of the Compliance Committee's role. First, while FRCC has had some success in filling vacant Compliance Staff positions, at this time FRCC is still trying to find qualified, experienced candidates to fill two vacant Compliance Staff positions. Further, FRCC plans in 2009 to discontinue the use of industry volunteers to perform compliance audits and will rely only on FRCC's paid, full-time Compliance Staff employees (along with NERC and Commission Staff members who are available and elect to participate in particular compliance audits or other compliance review processes), which will necessitate retaining additional Compliance Staff. As FRCC continues to build its Compliance Staff to its eventual steady-state level, the continued ability of Compliance Staff to use the Compliance Committee as a technical, advisory resource when needed will be valuable.

Second, and perhaps more significantly, in the process of seeking to hire additional Compliance Staff members, FRCC has found that experienced, qualified personnel are in great demand and consequently in short supply. As a result, it has been necessary for FRCC to hire new Compliance Staff employees with less experience than ideal. These employees must

¹⁰ See March 21 Order at P 249.

undergo, to varying degrees, an educational process or “learning curve” as they begin their careers as FRCC Compliance Staff members. (NERC and FRCC believe other Regional Entities are having similar experiences as they seek to hire additional compliance staff employees to fulfill their responsibilities to monitor and enforce compliance with mandatory Reliability Standards.) Again, as FRCC continues to transition to a fully-staffed and trained Compliance Staff, the continued ability of Compliance Staff to use the Compliance Committee as a technical, advisory resource when needed will be valuable.

Third, as noted earlier, the clarity of many requirements in the initial set of Commission-approved mandatory Reliability Standards can be improved, and NERC’s three-year (2008-2010) *Reliability Standards Development Plan* is intended to (among other tasks) improve the clarity of and reduce ambiguity in existing Reliability Standards. The initial set of 83 Reliability Standards approved by the Commission were, for the most part, standards previously developed and adopted by NERC through collaborative industry processes to be followed by the electric industry (albeit on a voluntary basis). As such, during the initial period of application and enforcement of these Reliability Standards as mandatory, Commission-approved standards, the input of experienced industry professionals, such as are represented on the FRCC Compliance Committee, on technical questions relating to the application of the standards should continue to be of great value to the FRCC Compliance Staff. NERC and FRCC’s plan to continue the optional consultative role of the Compliance Committee until December 31, 2010 is consistent with the end point of NERC’s current three-year *Reliability Standards Development Plan* (2010). On or before January 31, 2011, NERC and FRCC will file a report with the Commission advising of the termination of this role for the Compliance Committee in the FRCC compliance

enforcement process, or providing a justification for the continuation of this role for an additional, finite time period.

V. CONCLUSION

NERC and NPCC respectfully request that the Commission accept Section III of this filing as compliance with P 174 of the March 21 Order; and NERC and FRCC respectfully request that the Commission accept Section IV of this filing as compliance with P 252 of the March 21 Order.

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 Chicago, Illinois this 19th day of May, 2008.

/s/ Owen E. MacBride
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*Attorney for North American Electric
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