

125 FERC ¶ 61,330
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

North American Electric Reliability Council, North American Electric Reliability Corporation	Docket Nos. RR06-1-016 and RR06-1-017
Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT	Docket No. RR07-1-004
Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization	Docket No. RR07-2-004
Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc.	Docket Nos. RR07-3-004 and RR07-3-005
Delegation Agreement Between the North American Electric Reliability Corporation and Reliability <i>First</i> Corporation	Docket No. RR07-4-004
Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation	Docket No. RR07-5-005
Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc.	Docket No. RR07-6-004
Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council	Docket Nos. RR07-7-004 and RR07-7-005
Delegation Agreement Between the North American Electric Reliability Corporation and Florida Reliability Coordinating Council	Docket Nos. RR07-8-004 and RR07-8-005

ORDER ACCEPTING COMPLIANCE FILINGS,
SUBJECT TO CONDITIONS

(Issued December 19, 2008)

1. On July 21, 2008, as supplemented on August 28, 2008 and September 30, 2008, the North American Electric Reliability Corporation (NERC) submitted a compliance filing in response to the Commission's March 21, 2008 order issued in this proceeding.¹ NERC's compliance filings include revisions to NERC's *pro forma* delegation agreement and the individual delegation agreements between NERC and each of the eight Regional Entities.² For the reasons discussed below, we accept NERC's compliance filings, subject to revision, to become effective 15 days from the date of this order. We also require NERC to submit an additional compliance filing within 60 days of the date of this order.

I. Background

A. Prior Orders

2. Pursuant to Order No. 672³ and section 215 of the Federal Power Act (FPA),⁴ the Commission issued its initial order in this proceeding, on July 20, 2006, certifying NERC

¹ *North American Electric Reliability Corp.*, 122 FERC ¶ 61,245 (2008) (March 21 Order). NERC's supplemental filings and an additional compliance filing submitted May 19, 2008, are addressed in section I.C of this order, below.

² NERC's eight Regional Entities are: Texas Regional Entity (TRE), a Division of the Electric Reliability Council of Texas (ERCOT); Midwest Reliability Organization (MRO); Northeast Power Coordinating Council, Inc. (NPCC); ReliabilityFirst Corporation (RFC); SERC Reliability Corporation (SERC); Southwest Power Pool, Inc. (SPP); Western Electricity Coordinating Council (WECC); and Florida Reliability Coordinating Council (FRCC).

³ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 213, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁴ 16 U.S.C.A. § 824o (2006).

to serve as the Electric Reliability Organization (ERO).⁵ The Commission also accepted, subject to conditions, NERC's proposal to delegate certain of its ERO functions to its designated Regional Entities. The Commission also accepted, subject to conditions, NERC's proposed *pro forma* NERC/Regional Entity Delegation Agreement.

3. On April 19, 2007, the Commission issued its second order in this proceeding, addressing NERC's proposed compliance with the ERO Certification Order.⁶ The April 19 Order addressed NERC's proposed Uniform Compliance Monitoring and Enforcement Program (CMEP), revised *pro forma* Delegation Agreement, and eight unexecuted Regional Entity Delegation Agreements and their exhibits (including, among other things, Regional Entity bylaws). The Commission approved NERC's *pro forma* Delegation Agreement and the *pro forma* CMEP. The Commission also approved each of the eight Regional Entity Delegation Agreements, to become effective, upon execution and re-filing, within 30 days of the date of the Commission's order.⁷ In addition, the Commission identified areas of concern and, where necessary to provide greater uniformity and clarity, required modifications to the *pro forma* Delegation Agreement, the CMEP, and the individual Delegation Agreements (and corresponding exhibits), in a filing to be made within 180 days of the Commission's order.

4. In the March 21 Order, the Commission's third major order in this proceeding, the Commission accepted NERC's 180-day filing, as made in response to the April 19 Order. The Commission also required that additional modifications be made to the *pro forma* Delegation Agreement, the *pro forma* CMEP, and each of the individual Delegation Agreements. The Commission required NERC to submit a compliance filing within 120 days of the Commission's order.

⁵ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006) (ERO Certification Order), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007), *appeal docketed*, *Alcoa Inc. v. FERC*, D.C. Cir., Case No. 06-1426.

⁶ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007) (April 19 Order).

⁷ The Delegation Agreements went into effect on June 5, 2007. *See Delegation Agreement Between NERC and TRE, et al.*, 119 FERC ¶ 61,232 (2007).

B. NERC's July 21 Compliance Filing

5. On July 21, 2008, NERC made its compliance filing in response to the March 21 Order. NERC's compliance filing includes a revised *pro forma* Delegation Agreement, proposed revisions to the *pro forma* CMEP (including revised Attachment 2 hearing procedures), revised and amended Regional Entity Delegation Agreements, and proposed revisions to the NERC Rules of Procedure. NERC states that, in addition, it proposes to make a small number of non-substantive typographical and editorial changes and corrections relating to each of these documents.

6. NERC states that its compliance filing also contains a letter from the president, chief executive officer or other designated executive of each of the Regional Entities affirming that the Regional Entity is prepared to execute the revised delegation agreement to which it is a party upon receipt of Commission approval.⁸ NERC further states that revisions included in its filing were approved by the NERC board of trustees on July 15, 2008.

C. Additional Filings

7. On May 19, 2008, NERC, NPCC, and FRCC submitted a compliance filing addressing the NPCC Delegation Agreement and the FRCC Delegation Agreement. NERC and NPCC state that their compliance filing addresses the NPCC technical committee consultation process, as required by P 174 of the March 21 Order. NERC and NPCC propose that: (i) the NPCC compliance staff will be the sole entity responsible for determining whether to issue a preliminary notice of alleged violation and a notice of alleged violation; and (ii) the NPCC compliance staff may (but is not required to) consult with an NPCC technical committee for advice on a complex technical matter(s), but not for the purpose of making a compliance/non-compliance determination before the NPCC compliance staff issues a notice of alleged violation.

⁸ NERC notes, however, that as of the date of its compliance filing, the revisions to the WECC Delegation Agreement had not been approved by the WECC board, but that board action was expected on August 15, 2008. NERC, in its August 28, 2008 supplemental filing (addressed below), confirmed that WECC board approval was received.

8. With respect to the FRCC Delegation Agreement, NERC and FRCC state that their compliance filing addresses the on-going status of the FRCC stakeholder compliance committee, as required by P 252 of the March 21 Order. NERC and FRCC assert that 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.

9. On August 28, 2008, NERC and RFC submitted corrections to NERC's and RFC's July 21, 2008 proposed compliance filing revisions to the RFC Delegation Agreement, at Exhibit B. NERC and RFC explain that, as included in the July 21 compliance filing, the RFC bylaw revisions included revisions unrelated to NERC's and RFC's compliance obligations. NERC and RFC state that these unrelated amendments have been removed from NERC's and RFC's proposed compliance filing revisions, herein, and are being resubmitted in a separate filing.⁹

10. Also on August 28, 2008, in a separate, supplemental filing, NERC and WECC submitted a WECC corporate authorization applicable to NERC's and WECC's July 21, 2008 proposed compliance filing revisions to the WECC Delegation Agreement. In addition, NERC and WECC also submitted typographical corrections applicable to the redline draft of Exhibit C to the WECC Delegation Agreement.

11. Finally, on September 30, 2008, NERC and WECC submitted a second supplemental filing proposing to both clarify and justify NERC's and WECC's proposed revisions to Exhibit E, section 3 of the WECC Delegation Agreement, as included in NERC's July 21, 2008 compliance filing (addressing the transfers of statutory funding made by NERC to WECC and the Western Interconnection Regional Advisory Body (WIRAB)).¹⁰ NERC and WECC propose to clarify that NERC will transmit to WECC and WIRAB the portions of assessments collected by WECC and remitted to NERC representing WECC and WIRAB statutory funding, within three business days after

⁹ See *North American Electric Reliability Corporation*, Delegated Letter Order, Docket No. RR08-7-000 (November 25, 2008).

¹⁰ March 21 Order, 122 FERC ¶ 61,245 at P 238.

WECC remits the collected assessments to NERC, rather than funding WECC's and WIRAB's statutory costs in four equal quarterly payments, as specified in the *pro forma* Exhibit E. NERC and WECC assert that this proposed deviation is justified because WECC, unlike the other Regional Entities, bills and collects statutory assessments through a single annual invoice.

II. Notice of Filings and Responsive Pleadings

12. Notice of NERC's July 21, 2008 compliance filing and the aforementioned supplemental compliance filings was published in the *Federal Register*, with interventions, protests and comments due on or before August 11, 2008. Comments were timely filed by the Canadian Electricity Association (CEA) and the Transmission Agency of Northern California (TANC). A protest was timely filed by the Transmission Access Policy Study Group (TAPS). On September 15, 2008, NERC filed an answer to TAPS' protest.

III. Discussion

A. Procedural Matters

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NERC's answer because it has provided information that assisted us in our decision-making process.

B. Revisions to the NERC *Pro Forma* Delegation Agreement, CMEP, and CMEP Attachment 2 Hearing Procedures

14. Except as otherwise noted below, we accept NERC's proposed compliance with the March 21 Order, as it relates to the NERC *pro forma* Delegation Agreement, CMEP, CMEP attachment 2 hearing procedures, and the NERC Rules of Procedure. We also require minor, clarifying revisions.¹¹

¹¹ Specifically, we require NERC to substitute the term "Generally Accepted Auditing Standards" in place of the term "Generally Accepted Accounting Standards, at CMEP section 3.1. In addition, with respect to the hearing procedures in Attachment 2 to the *pro forma* CMEP, we direct that NERC's proposed addition to paragraph 1.5.7(c) (stating 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") be transferred, along with any conforming changes, as may be required, from
(continued...)

1. **Notice of Compliance Violation Investigations and Cross-Border Disclosure of Non-Public Compliance Information (CMEP, Sections 2.0, 3.1, 3.4, 5.1, 5.4, 5.6 and 8.0)**

a. **March 21 Order**

15. The March 21 Order approved NERC's revision to CMEP section 3.4 to provide that, in addition to NERC and the Commission, governmental authorities in Canada and Mexico with subject matter jurisdiction over reliability may commence an investigation into a U.S.-related matter. The Commission's approval was on the condition that prior to NERC's disclosure to such an authority of any information relating to the matter, NERC must notify the Commission of the investigation, any proposed disclosures of information, and procedures to ensure compliance with section 39.7(b)(4) of the Commission's regulations.¹²

16. The Commission rejected as overbroad or unclear other changes NERC proposed to section 3.4 and other CMEP provisions under which NERC, prior to obtaining Commission permission, could disclose non-public U.S. compliance information covered by section 39.7(b)(4) to Canadian or Mexican governmental authorities with jurisdiction over reliability. The Commission agreed that such authorities would have a legitimate interest in obtaining such information and noted that the Commission would authorize transmittals of this information under appropriate conditions.

paragraph 1.5.7(c), a provision which applies to documents in the possession of compliance staff, to paragraph 1.5.8, a more appropriate provision addressing "other discovery procedures." We likewise direct that NERC move to paragraph 1.5.8 references NERC proposes to insert into paragraph 1.5.7(g) to procedures relating to documents that a participant other than compliance staff fails to produce.

¹² March 21 Order, 122 FERC ¶ 61,245 at P 45. Section 39.7(b)(4) generally requires violations and alleged violations of Reliability Standards to be treated as non-public until the matter is filed with the Commission as a notice of penalty or otherwise resolved by an admission of violation, a settlement or other negotiated disposition. *See* 18 C.F.R. § 39.7(b)(4) (2008). The Commission stated that before seeking comparable information from Canadian and Mexican governmental authorities, the Commission expects to enter into reciprocal agreements recognizing the international nature of NERC and affected Regional Entities and their roles in enforcing mandatory Reliability Standards within the United States. March 21 Order, 122 FERC ¶ 61,245 at P 46.

17. Nevertheless, the Commission found unclear whether NERC proposed to notify Canadian and Mexican reliability authorities of all Regional Entity reports of alleged violations, compliance audit reports, notices of alleged violations and quarterly updates, regardless whether these reports would pertain to particular Canadian and Mexican portions of the Bulk-Power System. The Commission also found unclear: (a) whether NERC would provide reports and information to each Canadian or Mexican regulatory authority or only to those authorities with interest in a particular report; (b) whether NERC would provide the Commission with reciprocal reports of compliance-related information relating to Canadian or Mexican entities that might affect the U.S. portion of the Bulk-Power System; and (c) how NERC would protect the non-public character of U.S. compliance information it proposed to provide to Canadian and Mexican authorities.¹³

b. NERC's Response

18. NERC proposes to revise CMEP section 3.4 to state that NERC will notify the Commission of any compliance violation investigation that a Canadian or Mexican Applicable Governmental Authority initiates into a possible violation of a Reliability Standard prior to disclosure of any non-public U.S.-related compliance information regarding the matter.¹⁴ NERC's notice would describe the nature of the proposed disclosures to the Canadian or Mexican authority and NERC's procedures, in connection with the investigation, to ensure compliance with section 39.7(b)(4).

19. In addition, NERC proposes to revise section 3.4 to state that if the Commission initiates a "compliance violation investigation" of a non-U.S.-related matter, NERC shall notify the Canadian or Mexican authority having jurisdiction over the Registered Entity or the portion of Bulk-Power System that is the subject of the investigation prior to NERC's disclosure to the Commission of any non-public, non-U.S.-related compliance information regarding the matter.¹⁵ NERC's notice to the Canadian or Mexican authority

¹³ *Id.* P 47-49.

¹⁴ CMEP section 1.1.3 defines the term "Applicable Governmental Authority" as "[the Commission] within the United States and the appropriate governmental authority with subject matter jurisdiction over reliability in Canada and Mexico."

¹⁵ CMEP section 1.1.8 defines the term "Compliance Violation Investigation" as "[a] comprehensive investigation, which may include an on-site visit with interviews of the appropriate personnel, to determine if a violation of a Reliability Standard has occurred."

would describe the nature of the proposed disclosures to the Commission and any procedures NERC would use to ensure compliance with regulations of the authority or other law of the applicable jurisdiction concerning disclosure of non-public compliance information.

20. NERC proposes to revise several CMEP provisions to address concerns the Commission identified with respect to the types of U.S.-related compliance information NERC would provide to Canadian and Mexican entities and the conditions NERC intends to apply to such disclosures to comply with section 39.7(b)(4). NERC proposes to insert a paragraph into CMEP section 2.0, which applies to all CMEP compliance monitoring and enforcement processes, stating that during compliance monitoring and enforcement activities relating to U.S. entities, NERC may obtain information that it will provide to the Commission and to a Canadian or Mexican governmental authority with reliability jurisdiction if that information pertains to a Registered Entity or a portion of the Bulk-Power System over which that authority has jurisdiction.

21. The new paragraph of section 2.0 also would state that NERC will not provide non-public U.S. compliance information that is subject to section 39.7(b)(4) to Canadian or Mexican reliability authorities without first obtaining permission from the Commission for such disclosures and making them subject to limitations the Commission may place on them. Conversely, the new paragraph of section 2.0 would state that NERC may provide information it obtains during compliance monitoring and enforcement activities relating to non-U.S. entities to Applicable Governmental Authorities, including the Commission, which have jurisdiction over a particular Registered Entity or the portion of the Bulk-Power System to which the information pertains, but subject to any limitation 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.

22. NERC further proposes to revise the following CMEP provisions that address NERC's reporting to the Commission of specific compliance monitoring or enforcement processes: (i) section 3.1.6 (issuance of a final compliance audit report); (ii) section 3.4.1, step 2 (commencement of a compliance violation investigation); (iii) section 3.4.1, step 12 (completion of such an investigation with a finding that no violation has occurred); (iv) section 5.1 (issuance to a Registered Entity of a Notice of Alleged Violation and Proposed Penalty or Sanction);¹⁶ (v) section 5.4 (NERC's approval of a settlement); (vi) section 5.6 (NERC's filing of a notice of penalty); (vii) section 8.0, second paragraph

¹⁶ For brevity, we refer to this document, below, as a "notice of alleged violation."

(notice of receipt of an allegation or evidence of a violation of a Reliability Standard); and (viii) section 8.0 (quarterly reporting on the status of alleged violations and of violations for which mitigation activities have not been completed).

23. CMEP section 3.1.6 provides that NERC will submit a final compliance audit report to “FERC if the report pertains to a Registered Entity or to a portion of the Bulk-Power System over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the report pertains to a Registered Entity or to a portion of the Bulk-Power System over which the other Applicable Governmental Authority has jurisdiction.” CMEP section 5.1 provides that NERC shall forward a copy of a Notice of Alleged Violation “to FERC and, if the alleged violation pertains to a Registered Entity or to a portion of the Bulk-Power System over which another Applicable Governmental Authority has jurisdiction, to such other Applicable Governmental Authority[.]” CMEP sections 3.4.1, 5.4, 5.6, and 8.0 each convey the same meaning using slightly different language.

24. Each of these disclosures is subject to the following two provisos: (i) “NERC will not disclose non-public U.S. compliance information that is subject to 18 C.F.R. § 39.7(b)(4) to Applicable Governmental Authorities other than FERC without first obtaining permission from FERC for such disclosure and subject to such limitations as FERC may place on such disclosure[;]” and (ii) “NERC will not disclose non-public non-U.S. compliance information to an Applicable Governmental Authority (including FERC) without first obtaining permission for such disclosure from the Applicable Governmental Authority with jurisdiction over the Registered Entity or the portion of the Bulk-Power System to which such non-public information pertains and subject to any limitations placed on such disclosure by such Applicable Governmental Authority or by other law of the applicable jurisdiction.”¹⁷

c. Responsive Pleadings

25. CEA comments that NERC’s proposed CMEP revisions regarding its disclosure of non-public compliance information to applicable governmental authorities satisfy CEA’s concerns that: (i) NERC could give the Commission control over the release of such information, even if an investigation had no relevance to the Commission; and (ii) while the Commission could restrict U.S. compliance information from being disclosed to Canadian governmental authorities, there would be no comparable provisions under

¹⁷ Amended section 3.1.6 includes this version of the provisos. Some of the proposed provisos in other provisions contain minor differences in wording.

which Canadian authorities could restrict the transfer of non-U.S. compliance information to the Commission.

26. CEA states that it has a third concern that NERC's proposed revisions do not fully address: that NERC could notify the Commission of all compliance measures and provide the Commission with all related information, regardless of the legal relevance of such information to the Commission. For example, CEA believes that NERC's proposed revisions to other CMEP provisions would require NERC to provide the Commission with compliance information that does not fall within the Commission's jurisdiction, thereby expanding the Commission's jurisdiction beyond the limits specified in the FPA. CEA asserts that in the March 21 Order, the Commission expressed concern with NERC's release of information to Canadian and Mexican regulatory authorities regardless of whether the information might address matters pertaining to particular Canadian and Mexican portions of the Bulk-Power System. CEA requests changes to NERC's proposed revisions that would clarify that notification of compliance measures and the release of related information would be made to the Applicable Governmental Authority that has jurisdiction over the particular Registered Entity or portion of the Bulk-Power System.

27. Specifically, NERC's proposed revision to CMEP section 2.0 states that "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." CEA proposes to delete the phrase "including FERC." As to CMEP sections 3.4.1, step 12; 5.4; 5.6; 8.0, second paragraph; and 8.0, sixth paragraph, CEA proposes to amend the provision that describes the scope of NERC's disclosure of the relevant compliance information generally to state, "NERC [will provide the applicable report, notice, information or document to] FERC, if the [matter] pertains to a Registered Entity or to a portion of the Bulk-Power System over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the [matter] pertains to a Registered Entity or to a portion of the Bulk-Power System over which the other Applicable Governmental Authority has jurisdiction."

d. Commission Determination

28. We accept NERC's proposed amendments to CMEP section 3.4, with conditions. With respect to NERC's proposed changes to section 3.4, we repeat our commitment in the March 21 Order to work together with Canadian and Mexican reliability authorities to develop procedures under which the Commission receives notice that an Applicable Governmental Authority outside the United States wishes to obtain information from or about a U.S.-based Registered Entity for purposes of conducting an investigation and, conversely, that appropriate Canadian or Mexican authorities receive notice that the

Commission seeks information about an entity registered in Canada or Mexico for the same purpose.

29. NERC's revisions to CMEP section 3.4 include appropriate notification procedures with respect to the proposed disclosure by NERC of compliance-related information it receives. As we directed in the March 21 Order, these notice procedures require NERC to address how it would protect from public disclosure non-public, compliance-related information for entities subject to Reliability Standards, whether registered in Canada, Mexico or the United States.

30. NERC properly includes in the description of its proposed notices the nature of the U.S.-related compliance information NERC would disclose to a Canadian or Mexican reliability authority and the procedures NERC would use to ensure that its disclosure complies with section 39.7(b)(4) of our regulations. In this regard, we require that NERC identify in these notices each particular Applicable Governmental Authority to which it proposes to disclose this information and the specific procedures for protecting from public disclosure any non-public compliance information that would be transferred. Moreover, our acceptance of NERC's amendments to section 3.4 does not constitute our prior permission for NERC to transfer information obtained in investigations about U.S. entities to Canadian or Mexican reliability authorities. We note, in this regard, that NERC has not yet explained how it would protect from public disclosure non-public U.S. compliance information subject to section 39.7(b)(4). We require NERC to submit this explanation in its compliance filing.

31. We also agree that the reciprocal procedure NERC proposes to notify a Canadian or Mexican Applicable Governmental Authority that the Commission or its staff requests NERC to provide compliance-related information for an entity within that authority's jurisdiction appropriately addresses how NERC's disclosure of this information to the Commission would comply with the governmental authority's regulations or other applicable law concerning disclosure of non-public compliance information.

32. We note that the FPA and Part 1b of the Commission's regulations, not the CMEP, govern the procedures for an investigation that the Commission or its staff may commence into a possible violation of a Reliability Standard. Such an investigation would not necessarily fit within the CMEP's definition of a Compliance Violation Investigation. Therefore, we direct NERC to substitute "investigation" for "Compliance Violation Investigation" when NERC refers to a Commission investigation in section 3.4.

33. We stress that the new notice procedures in section 3.4 cover only the international transfer of compliance-related information that NERC or a Regional Entity, through NERC, would disclose to an Applicable Governmental Authority. Nothing in the CMEP

prevents the Commission and Canadian and Mexican reliability authorities from entering into intergovernmental agreements to exchange compliance-related information on a reciprocal basis that recognizes the international nature of NERC and affected Regional Entities and their roles in enforcing mandatory Reliability Standards.¹⁸

34. We accept NERC's amendments to CMEP section 2.0, subject to conditions and the following observations. First, we note that revised section 2.0 will apply to NERC's disclosure to a Canadian or Mexican reliability authority of U.S. compliance-related information developed by any of the compliance monitoring or enforcement activities set forth in the CMEP that "pertains to a Registered Entity or a portion of the Bulk-Power System over which the Applicable Governmental Authority has jurisdiction." Likewise, revised section 2.0 will establish reciprocal provisions for the disclosure of such Canadian or Mexican compliance-related information to the Commission and its staff.

35. We observe that, unlike section 3.4 (which relates to investigations), revised section 2.0 does not require notice to the Commission or Canadian and Mexican authorities of specific CMEP compliance or enforcement activities that could trigger disclosure of non-public compliance information. Rather, revised section 2.0 would allow NERC to make, on an ongoing basis, international transfers of compliance-related information it obtains pursuant to the CMEP, if the conditions set forth in section 2.0 for these transfers are met. Our acceptance of revised section 2.0 does not constitute our prior permission for NERC to transfer non-public compliance information about U.S. entities to foreign reliability authorities, because NERC has not yet explained how it would protect from public disclosure non-public U.S. compliance information subject to section 39.7(b)(4). We require NERC to submit this explanation in its compliance filing. We observe that revised section 2.0 does not prohibit NERC's cross-border transfer of information that is not directly related to a specific Registered Entity's compliance with a requirement of a Reliability Standard.

36. We decline CEA's suggestion to delete the phrase "including FERC" from the third sentence of NERC's proposed revision to section 2.0. First, deletion of this phrase would not change the meaning of the sentence, which permits NERC, under appropriate conditions, to transfer compliance information relating to non-U.S. entities to the Commission, as the applicable governmental entity for the United States. Moreover, even if deletion of this phrase would preclude the Commission from receiving compliance information relating to non-U.S. entities, the first sentence of NERC's proposed insert would still enable NERC to provide U.S. compliance information to

¹⁸ See March 21 Order, 122 FERC ¶ 61,245 at P 46.

Canadian and Mexican authorities. Section 2.0 would thereby lose its reciprocity as between the Commission and Canadian and Mexican entities.

37. For the reasons discussed above, regarding NERC's revisions to CMEP section 2.0, we accept NERC's proposed revisions to CMEP sections 3.1.6, 3.4.1, 5.1, 5.4, 5.6 and 8.0. These revisions are similar to NERC's section 2.0 revisions but apply to specific notices and reports that the CMEP requires NERC to provide to the Commission with respect to U.S. compliance matters. We disagree with CEA that NERC's proposed changes to section 3.4.1, step 12, 5.1, 5.4, 5.6 and 8.0 require NERC automatically to provide the Commission with non-U.S. information about compliance matters that do not fall within the Commission's jurisdiction. Revised section 5.1, for example, would provide that NERC may provide to the Commission a Notice of Alleged Violation issued to a Canadian entity only if the Applicable Governmental Authority with jurisdiction over the Canadian entity or the portion of the Bulk-Power System to which the notice pertains approved in advance the Commission's receipt of the notice, subject to any limitations placed on the transfer by the applicable Canadian authority or other law of the Canadian jurisdiction.

38. The wording changes CEA suggests to section 5.1 and other provisions are not necessary to ensure that the Commission's receipt of Canadian compliance information is subject to prior approval by the relevant Canadian reliability authority under conditions set by that authority and by applicable Canadian law. In addition, as in revised section 2.0, each international disclosure by NERC of compliance information pursuant to these revised provisions is on the condition that the information pertains to a Registered Entity or a portion of the Bulk-Power System over which the Applicable Governmental Authority that would receive the information has jurisdiction. All non-U.S. compliance information the Commission would receive under these provisions must pertain to a Registered Entity or a portion of the Bulk-Power System over which the Commission has jurisdiction. Accordingly, we reject as unnecessary CEA's proposed amendments to these provisions.

2. Mitigation of Violations (CMEP, Sections 6.4 and 6.5)

a. March 21 Order

39. The March 21 Order generally accepted NERC's proposed revisions to CMEP section 6.5 (addressing, among other things, NERC's review of a Regional Entity-approved mitigation plan), but found that it was unclear whether this revised provision

was consistent with section 400 of the NERC Rules of Procedure.¹⁹ Accordingly, the Commission directed NERC to amend, or further support, section 400.²⁰

b. NERC's Response

40. NERC proposes to revise CMEP section 6.5 to include the following italicized text:

Regional Entities will notify NERC within five (5) business days of the acceptance of a Mitigation Plan and will provide the accepted Mitigation Plan to NERC. 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 will in turn notify the Registered Entity, as to whether the Mitigation Plan is approved or disapproved by NERC.

41. NERC also proposes that a parallel provision to section 6.5 be added to section 403.18 of the NERC Rules of Procedure. In addition, NERC states that in its review of section 6.5, it discovered a potential source of confusion regarding NERC's obligation to "submit to the Commission, as non-public information, an approved Mitigation Plan relating to violations of Reliability Standards within seven (7) business days after NERC approves the Mitigation Plan." NERC asserts that this provision could be read to mean (erroneously) that an approved Mitigation Plan will remain a non-public document when submitted to the Commission, contrary to the requirements of CMEP 8.0 and section 408.6 of the NERC Rules of Procedure. NERC therefore proposes to add the following clarification to section 6.5 (and make a parallel revision to section 403.18 of the NERC Rules of Procedure): "NERC may subsequently publicly post the approved Mitigation Plan as part of the public posting of the report of the related Confirmed Violation in accordance with section 8.0."

¹⁹ The March 21 Order noted that while section 404.2 of the NERC Rules of Procedure addresses 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 with a Reliability Standard, section 404.2 does not address NERC's review of mitigation plans approved by Regional Entities. *Id.* P 70, n. 39.

²⁰ *Id.* P 70.

c. **Responsive Pleadings**

42. TAPS requests that a revision be made to the second paragraph of section 6.5 clarifying that “[t]he Registered Entity shall not be subject to findings of violations of Reliability Standards or to imposition of penalties or sanctions for such violations with respect to the period of time the Mitigation Plan was under consideration by NERC and for a reasonable period following NERC’s disapproval of the Mitigation Plan, so long as the Registered Entity promptly submits a modified Mitigation Plan that addresses the concerns identified by NERC.” TAPS argues that while the March 21 Order did not expressly require that this provision be added to section 6.5, the Commission nonetheless signaled its support for this provision, as initially proposed by TAPS.²¹

43. TANC argues that, under NERC’s proposed 30-day notice revision to section 6.5, a Registered Entity need not be notified of an action on a mitigation plan to which it is subject until the Regional Entity receives notice of NERC’s approval or rejection. TANC asserts that the existing language is superior because it allows Registered Entities to rely on the *de facto* acceptance of a mitigation plan 30 days from its receipt by the Regional Entity (absent an extension of the consideration period by the Regional Entity).

44. TANC requests that the first paragraph of section 6.5 be revised to: (i) provide for a 30 day *de facto* approval when a “compliance enforcement authority” is referring a plan to NERC and a 65 day *de facto* approval when a compliance enforcement authority is referring to a Regional Entity;²² (ii) remove the term compliance enforcement authority to cure confusion over different timeframes relating to whether a Regional Entity or NERC is acting as the compliance enforcement authority; and (iii) require that Regional Entities, within 30 days of initial receipt of a mitigation plan, simultaneously issue to NERC and the Registered Entity a written statement either accepting the mitigation plan and stating that the Regional Entity had submitted, or would submit, the mitigation plan to NERC for review, or rejecting the mitigation plan.

45. TANC also requests that the Commission revise the second paragraph of section 6.5 to: (i) clarify that a Regional Entity must submit a mitigation plan to NERC for review and approval within a specified period, whether the Regional Entity has

²¹ *Id.* P 68 and P 70. NERC, in its answer, supports this proposed revision.

²² CMEP section 1.1.7 defines the term “Compliance Enforcement Authority” as “NERC or the Regional Entity in their respective roles of monitoring and enforcing compliance with the NERC Reliability Standards.”

affirmatively approved the plan or provided a *de facto* approval through inaction; (ii) state that Regional Entities will notify NERC of acceptance of a mitigation plan and will provide the accepted mitigation plan to NERC within five business days from the acceptance, but that under no circumstances should NERC receive the accepted mitigation plan and written statement after 35 days of the Regional Entity's receipt of the mitigation plan; and (iii) require NERC, within 30 days of its receipt of a Registered Entity's mitigation plan from a Regional Entity, to notify the Regional Entity and the Registered Entity simultaneously of NERC's acceptance or rejection of the mitigation plan. TANC also requests that NERC remove references in both paragraphs of section 6.5 to both "days" and "business days" and establish a maximum of 65 days for *de facto* approval by the Regional Entity and NERC.

46. TANC further requests that the Commission revise the NERC Rules of Procedure to parallel section 6.5 more closely than NERC proposes. Specifically, TANC argues that revisions to section 403.10.4 are required to: (i) make clear that after a Regional Entity approves a mitigation plan, the Regional Entity must submit the plan and its acceptance to NERC for review and approval; and (ii) state that acceptance of a plan by a Regional Entity is alone insufficient. TANC also requests that NERC move its proposed revision of section 403.18 to section 404 (a provision addressing the circumstances in which it is appropriate for NERC to review and approve mitigation plans submitted by a Registered Entity or a Regional Entity).

47. Finally, TANC notes that WECC's forms for submitting self-reports and self-certifications appear to suggest that Registered Entities must submit mitigation plans prior to the time required by CMEP section 6.4.²³ TANC requests clarification that CMEP section 6.4 is controlling.

d. Commission Determination

48. The Commission accepts NERC's proposed revisions to section 6.5, subject to the following conditions. First, we note that the first paragraph of section 6.5 contemplates that a Registered Entity may submit a mitigation plan initially either to a Regional Entity or to NERC. This is so because, by definition, a Regional Entity or NERC may be a "compliance enforcement authority." We understand that Registered Entities generally submit mitigation plans initially to Regional Entities. However, there are instances in

²³ Section 6.4 provides that a Registered Entity must submit a mitigation plan within 30 days after being served a notice of alleged violation, if it does not contest the alleged violation.

which it is appropriate that NERC initially review a mitigation plan. For example, NERC may initially receive a mitigation plan from a Registered Entity because NERC is conducting a compliance violation investigation of the Registered Entity. NERC may also receive a mitigation plan from a Regional Entity for a violation of a Reliability Standard applicable to the Regional Entity.²⁴ Accordingly, we construe the first paragraph of section 6.5 to apply to the initial review of a mitigation plan, either by a Regional Entity or by NERC.²⁵

49. The Commission rejects TANC's request that section 6.5 be revised to provide for a 30-day *de facto* approval when a compliance enforcement authority refers a mitigation plan to NERC. The second paragraph of section 6.5 would state, as proposed by NERC, that within 30 days of receipt of a mitigation plan from a Regional Entity, NERC will either approve or disapprove the plan. The 65-day *de facto* approval period that TANC seeks for NERC's referral of a mitigation plan to a Regional Entity is not necessary because section 6.5 does not contemplate such a referral. Nor do we agree that the term "compliance enforcement authority" should be deleted from the first paragraph of section 6.5, given our interpretation of this provision. Finally, we reject TANC's proposal to amend that paragraph to require that a Regional Entity notify NERC and the relevant Registered Entity within 30 days of receipt of a mitigation plan that the Regional Entity either accepts or rejects the plan. This proposal would remove the Regional Entity's appropriate discretion, already established in the first paragraph of section 6.5, to extend the period for review of a mitigation plan beyond 30 days after its receipt.

50. However, we agree with TANC that a Registered Entity that submits a mitigation plan should receive some certainty about the time period for the plan's initial consideration. Accordingly, we direct NERC to amend the first paragraph of section 6.5 to provide that if a compliance enforcement authority extends the period for initial review of a mitigation plan, it must, within 30 days of the date of receipt of the mitigation plan: (i) notify the Registered Entity (and NERC, if NERC is not itself acting as the

²⁴ See section 404.2 of the NERC Rules of Procedure.

²⁵ NERC may consult with the relevant Regional Entity when NERC receives a mitigation plan for initial review, or transfer the mitigation plan to a Regional Entity for initial review if NERC concludes that a transfer would be appropriate. However, section 6.5 does not contemplate that, after NERC initially approves a mitigation plan, a Regional Entity would review NERC's approval. If NERC approves a mitigation plan it initially receives, NERC must submit the approved plan to the Commission as set forth in the second paragraph of section 6.5.

compliance enforcement authority) that the period has been extended; and (ii) identify the date by which it will complete review of the plan. This notice must also state that, by the latter date, if the compliance enforcement authority has not issued a written notice as to whether it accepts or rejects the plan, NERC's review of the plan will be extended further or the plan will be deemed accepted.

51. We reject as unnecessary TANC's requested revision to section 6.5 to provide that a Regional Entity must submit a mitigation plan to NERC within a specified period, whether the Regional Entity has specifically approved the plan or permitted a *de facto* approval. With the revision we direct to the first paragraph of section 6.5, this section will provide that, if a mitigation plan is approved by a Regional Entity, the Regional Entity will submit a mitigation plan to NERC for review by a specified date. To provide specific notice to a Registered Entity that a Regional Entity has submitted an approved mitigation plan to NERC for review, we direct NERC to revise the first sentence of the second paragraph to state that Regional Entities will notify NERC and an affected Registered Entity of acceptance of a mitigation plan.

52. We reject TANC's proposal that NERC receive a mitigation plan within 35 days of a Regional Entity's receipt of the plan. Such a requirement would eliminate a Regional Entity's discretion, as provided in the first paragraph of section 6.5, to extend the time for initial consideration of a mitigation plan. However, we agree with TANC that NERC should notify the Regional Entity and the Registered Entity at the same time as to whether NERC has accepted or rejected a mitigation plan that the Regional Entity approved. Accordingly, we direct NERC to so amend the second paragraph of section 6.5.

53. We reject TANC's request that NERC be required to remove references to "business days" for certain time periods specified in section 6.5. TANC has not demonstrated that this revision would be useful or is required.

54. Further, we direct NERC to revise section 6.5 to include the clarification requested by TAPS, and supported by NERC, that "[t]he Registered Entity shall not be subject to findings of violations of Reliability Standards or to imposition of penalties or sanctions for such violations with respect to the period of time the Mitigation Plan was under consideration by NERC and for a reasonable period following NERC's disapproval of the Mitigation Plan, so long as the Registered Entity promptly submits a modified Mitigation Plan that addresses the concerns identified by NERC."

55. We accept NERC's proposed sentence at the second paragraph of section 6.5 stating that NERC may publicly post a previously non-public mitigation plan as part of the posting of a confirmed violation. However, NERC's proposed language fails to mention another circumstance in which a mitigation plan may be made public. The

Commission previously stated that it could determine on its own motion to review settlements into which Registered Entities enter with respect to alleged violations of reliability standards.²⁶ A settlement in which a Registered Entity neither admits nor denies that it violated a Reliability Standard is not a “Confirmed Violation,” as defined in CMEP section 1.1.9. The language NERC proposes to insert into the second paragraph of section 6.5 does not address such settlements. If a mitigation plan is relevant to such a settlement, NERC should publicly post it at the same time that NERC files with the Commission a Notice of Alleged Violation applicable to the settlement. Accordingly, we direct NERC to amend the second paragraph of section 6.5 and any other relevant CMEP provisions to so provide.²⁷

56. We reject, as unnecessary, TANC’s proposed revisions to section 403.10.4 of the NERC Rules of Procedure. Section 403.18, as amended pursuant to NERC’s filing herein, requires that Regional Entities submit approved mitigation plans to NERC and further states that NERC may disapprove such plans. As such, it is unnecessary to insert these same assurances in section 403.10.4. We also reject TANC’s argument that the tracking provisions should be located in section 404 of the NERC Rules of Procedure, rather than section 403.10.4. NERC explains that section 404 pertains only to initial review by NERC of mitigation plans. However, because NERC intends to track the provisions of section 6.5 in the NERC Rules of Procedure, we direct NERC to submit in its compliance filing amendments to the NERC Rules of Procedure to parallel the revisions we direct in section 6.5.

57. Finally, we agree with TANC that Regional Entity compliance forms, such as the self-reporting form and self-certification form described by TANC, must be consistent with the explicit provisions of the CMEP.

3. Hearing Requests (CMEP Attachment 2, Paragraph 1.3.1)

58. The March 21 Order found that paragraph 1.3.1 (addressing the applicability of a full hearing procedure and a shortened procedure) failed to specify that a party, if it seeks

²⁶ *Review of Notices of Penalty for Violations of Reliability Standards*, 123 FERC ¶ 61,046, at P 17 (2008).

²⁷ We also require NERC to revise CMEP figure 6.1 to conform to the section 6.5 revisions directed herein.

the full hearing procedure, must ask for it. Accordingly, the Commission directed NERC to amend this provision.²⁸

59. NERC proposes to revise paragraph 1.3.1 to state, in relevant part: “If Staff makes a filing requesting the full hearing procedure, then the full hearing procedure shall apply; otherwise, the shortened hearing procedure requested by the Registered Entity shall be used.”

60. We accept NERC’s proposed changes to paragraph 1.3.1, subject to revision. Paragraph 1.3.1, as filed, does not address the election of hearing procedures in the context of multiple respondents. In this instance, the request for a full hearing made by one or more respondent must be honored. Similarly, where all respondents have requested the applicability of the shortened procedure, the full procedure may also be requested through a responsive pleading submitted by the Regional Entity compliance staff. We require NERC to include these clarifications in the text of paragraph 1.3.1.

4. Confidentiality Agreements (Paragraph 1.5.6)

a. March 21 Order

61. The March 21 Order required NERC to eliminate or justify paragraph 1.5.6, addressing the requirement that an expert called upon to testify in a proceeding sign a confidentiality agreement, since the subject of this provision, i.e., the issuance of a protective order applicable to a hearing “participant,” is already addressed at paragraph 1.5.10.²⁹

b. NERC’s Response

62. NERC states that the March 21 Order, in assuming that the issuance of a protective order, as addressed by paragraph 1.5.10, also covers the issuance of a protective order, as addressed by paragraph 1.5.6, appears to have construed the term participant, as used in paragraph 1.5.10, more broadly than NERC intended. NERC asserts that this term was intended to be synonymous with the term “party” and thus was not intended to include an expert witness (the intended subject of paragraph of 1.5.6), but rather any entity allowed by the Commission to intervene as well as the compliance enforcement authority’s compliance staff. To clarify this intended distinction, NERC

²⁸ March 21 Order, 122 FERC ¶ 61,245 at P 89.

²⁹ *Id.* P 104.

proposes to revise the definition of the term participant, at paragraph 1.1.5, to mean “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.”

63. With this clarification, NERC proposes to retain paragraph 1.5.6, subject to the additional clarifications (as shown in italics): “[a]ny expert utilized [to testify or consult in a proceeding] shall sign *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.*”

c. Commission Determination

64. We accept NERC’s proposed revision to paragraph 1.1.5. We also accept NERC’s proposed revision to paragraph 1.5.6, subject to revision. NERC’s proposed revision to paragraph 1.5.6 sets forth a prohibition applicable to the disclosure of information obtained by an expert in connection with the expert’s participation in a proceeding. This proposed prohibition, however, is overbroad. Specifically, the proposed provision would prohibit disclosure by the expert of *any* information obtained in the non-public proceeding.

65. An expert, however, may be required to disclose information obtained in the proceeding to participants and to other experts involved in the proceeding by way of a discovery response or in testimony at the hearing. The objective of the confidentiality agreement, in this context, is to prohibit the *public* disclosure by the expert of this information except as may otherwise be permitted (for example, if the Commission were to determine that any hearing in the proceeding should be public or to authorize any other public disclosure by the expert). Accordingly, we direct NERC to revise paragraph 1.5.6 to state that such agreements will prohibit “unauthorized public disclosure” of information the expert obtains in connection with participation in the proceeding.

5. Documents to be Made Available for Inspection and Copying (Paragraph 1.5.7(a))

66. The March 21 Order required NERC to revise paragraph 1.5.7(a), as it relates to the right of a Registered Entity to seek discovery from the compliance enforcement authority. Among other things, the March 21 Order found that the paragraph 1.5.7(a)(1)

requirement that the specified documents will be made available “[u]nless otherwise provided by this Rule” is ambiguous and otherwise unsupported. Accordingly, the Commission directed NERC to explain or delete this requirement.³⁰

67. NERC proposes to revise paragraph 1.5.7(a)(1) to state that compliance staff will be required to make documents available “[u]nless otherwise provided by order of the Hearing Officer or [hearing body].”

68. We accept NERC’s proposed changes to paragraph 1.5.7(a)(1), subject to revision. The March 21 Order found that paragraph 1.5.7(a)(1) was vague as it relates to the compliance staff’s obligation to make requested documents available “[u]nless otherwise provided by this Rule.” The Commission’s finding contemplated, in response, a revision to paragraph 1.5.7(a)(1) that would cure this ambiguity, i.e., an express reference, or cross-reference, to those provisions in NERC’s hearing procedures (e.g., paragraph 1.5.7(b)) that permit compliance staff to withhold a given document from production. NERC’s proposed revision, which refers only to an order of the hearing officer, fails to cure this ambiguity. Moreover, NERC’s proposed requirement that an order from the hearing officer operate as a precondition to compliance staff’s ability to withhold a document from production would unreasonably limit compliance staff’s ability legitimately to withhold a given document. Accordingly, we require that paragraph 1.5.7(a)(1) cross-reference paragraph 1.5.7(b) as the sole basis pursuant to which compliance staff will be authorized to withhold documents from production.

6. Discovery Procedures (Paragraph 1.5.8)

69. The March 21 Order required that NERC revise paragraph 1.5.8 to include standard discovery procedures and timelines. The Commission added that NERC may, if it wishes, adopt or incorporate by reference the Commission’s procedures for discovery relating to hearings before administrative law judges, as may be applicable.³¹

70. NERC proposes to revise paragraph 1.5.8 to include many of the procedures included in the Commission’s discovery rules for proceedings before administrative law judges. NERC also proposes, at paragraph 1.5.8(c), language stating that “the Hearing Officer and [the hearing body] do not have the authority to issue subpoenas to, or otherwise order or compel the appearance by, or production of documents or information

³⁰ *Id.* P 108.

³¹ *Id.* P 124.

by, any person or entity that is not a Participant.” In support of this proposed provision, NERC asserts that neither NERC nor the Regional Entities possess subpoena authority.

71. We accept NERC’s proposed revisions to paragraph 1.5.8, subject to revision. NERC’s proposed sub-part (c) to paragraph 1.5.8 assumes that neither NERC nor a regional entity possess a power to subpoena or compel the production of documents or testimony in a hearing. We disagree. While NERC may be correct as to the power to issue subpoenas that FPA section 307(b) grants to a member of the Commission or an officer designated by it,³² the CMEP already authorizes NERC and regional entity compliance staff to compel information and testimony in a different context than a hearing. CMEP section 3.4.1, step 6, provides that during a compliance violation investigation a compliance enforcement authority’s compliance staff may require a Registered Entity to: (i) provide verification under oath of the Registered Entity’s responses to requests for documents and information and (ii) produce authorized representatives to provide testimony under oath concerning the matters under investigation.

72. A Registered Entity in the United States is subject to the Commission’s FPA section 215 jurisdiction and must comply with NERC’s rules, including the CMEP Attachment 2 hearing procedures.³³ Accordingly, if pursuant to the CMEP a compliance enforcement authority’s compliance staff possesses the power to compel evidence during an investigation with respect to Registered Entities, we see no legal impediment to the use by a hearing officer or a hearing body of that authority in appropriate circumstances to enable a participant to obtain documents or testimony from a Registered Entity that is not a participant in a particular proceeding.³⁴ We further note that Rule 410(a) of the Commission’s Rules of Practice and Procedure provides that a participant in a proceeding

³² 16 U.S.C. § 825f(b) (2006).

³³ 18 C.F.R. § 39.2(a)-(b) (2008). CMEP section 1.1.17 defines the term “Registered Entity” as “[a]n owner, operator or user of the Bulk-Power System or the entities registered as their designees for the purpose of compliance that is included in the NERC and Regional Compliance Registry.” The CMEP and its attachments are incorporated into the NERC Rules of Procedure at Appendix 4B.

³⁴ We note that the Financial Industry Regulatory Authority (FINRA), the self-regulatory organization associated with the Securities and Exchange Commission, has a Rule 8210 that authorizes a FINRA adjudicator or FINRA staff to require testimony or the production of documents in FINRA staff investigations and proceedings. *See* 73 *Federal Register* 57,174 (2008).

or a recipient of a subpoena issued by a Commission administrative law judge may provide a notice of objection or a motion to quash.³⁵ The Commission thereby provides an opportunity for an entity to object to a subpoena issued in a hearing. We likewise believe that a Registered Entity subject to an order to compel issued in a hearing should have the opportunity to object to such an order.

73. Accordingly, we direct NERC to insert into paragraph 1.5.8 appropriate provisions relating to the issuance in a proceeding of orders to compel production of documents or testimony by a hearing officer or a hearing body to Registered Entities that are not participants in the proceeding, or to provide a further explanation of NERC's position that it and the Regional Entities lack such authority.³⁶

C. Regional Entity Delegation Agreement Revisions

74. Except as otherwise noted below, we accept NERC's and Regional Entities' proposed July 21, 2008 compliance and supplemental compliance with the March 21 Order, as it relates to the individual NERC/Regional Entity Delegation Agreements, to be made effective 15 days of the date of this order. We also require that the individual delegation agreements be revised, consistent with the revisions directed above regarding NERC's *pro forma* delegation agreement and supporting documents such as the CMEP.

1. TRE Delegation Agreement

75. NERC and TRE state that their proposed revisions to the TRE Delegation Agreement comply with the requirements of the March 21 Order. No responsive pleadings addressing this matter were filed. We agree with NERC and TRE. Accordingly, we accept the amended and restated TRE Delegation Agreement, without revision.

³⁵ 18 C.F.R. § 385.410(a) (2008).

³⁶ We do not address at this time the issue of the authority of a hearing officer or a hearing body to compel the production of documents or testimony from a person or entity that is not a Registered Entity. We note that in the March 21 Order, at P 125, the Commission stated that it would address matters relating to compulsory discovery on a case-by-case basis, using its existing authority to compel the production of documents and testimony, as necessary.

2. MRO Delegation Agreement

a. March 21 Order

76. The March 21 Order required MRO to revise the definition of the term “sub-regional variance,” as it appears in the MRO Standards Development Process Manual. The Commission noted that the MRO manual defined this term, in relevant part, as “[a]n aspect of a Reliability Standard . . . that applies only within a particular regional entity sub-region.” However, the Commission found that this definition could be misinterpreted as allowing exemptions that establish a level of reliability less than that set by the continent-wide Reliability Standard. The Commission noted the Order No 672 discussion regarding regional differences where the Commission stated:

As a general matter, we will accept the following two types of regional differences, provided they are otherwise just, reasonable, not unduly discriminatory or preferential and in the public interest, as required under the statute: (1) a regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not; and (2) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System.^{37]}

77. The March 21 Order also found that MRO’s proposed \$1,000 initiation fee is a membership fee and that any such fee must be identified and justified by MRO in its annual budget and business plan.³⁸

b. NERC’s and MRO’s Response

78. NERC and MRO propose to revise the definition of the term “sub-regional variance,” as it appears in the MRO Standards Development Process Manual to include the following additional sentence: “[a] Sub-regional variance cannot establish a level of reliability less than that set by a continent-wide Reliability Standard and such a variance would only exempt a group of entities from a MRO Reliability Standard.”

79. With respect to MRO’s previously proposed initiation fee, NERC and MRO state that this fee was not and is not addressed in the MRO bylaws or in any other MRO

³⁷ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 291.

³⁸ March 21 Order, 122 FERC ¶ 61,245 at P 162.

document, but was previously adopted by the MRO board. NERC and MRO state, however, that in response to the March 21 Order, the MRO board has adopted a resolution eliminating this fee. In addition, NERC and MRO also propose to revise Exhibit E, section 5 of the MRO Delegation Agreement as follows:

MRO has no other membership or initiation fees. The MRO Board of Directors approves the budget and may establish “initiation fees” for new members. MRO had established a \$1,000 initiation fee to cover administrative costs, but waived the fee for small end use load members. In accordance with the Commission’s findings, the MRO Board has approved that no membership-related fees are assessed to new or existing members of MRO.

c. Commission Determination

80. We accept NERC’s and MRO’s proposed changes to the MRO Delegation Agreement, subject to revision. With respect to the proposed revision at Exhibit E, section 5 (i.e., the language stating that the MRO board may establish initiation fees for new members), we clarify that MRO may not charge a membership fee of any kind unless that fee has been submitted for Commission approval as a Regional Entity Rule change and may only take effect upon Commission approval.³⁹ Exhibit E, section 5 states that MRO shall provide a budget for non-statutory activities to NERC at the same time that it submits to NERC its budget for statutory activities. However, the MRO bylaws, at section 5.8, address this requirement only in part, providing that “[t]he board of directors shall propose to NERC a budget for delegated functions exercised by [MRO].” Given the potential inconsistency between these provisions, we clarify that the MRO bylaws, at section 5.8, will be construed consistent with the requirements of Exhibit E, section 5.

3. NPCC Delegation Agreement

a. March 21 Order

81. The March 21 Order stated that it was unclear whether the voting protocols applicable to the NPCC hearing body (NPCC Exhibit D at section 2.0) comply with the Commission’s prior directive that a hearing body render its decisions by a majority of the votes cast by a quorum. The Commission noted that, under the NPCC bylaws, the

³⁹ See 18 C.F.R. § 39.10 (2008).

compliance committee (the entity authorized to serve as the NPCC hearing body) would be required to use the quorum and voting rules applicable to the NPCC board and that board actions, in turn, required the receipt of a two-thirds affirmative majority of the weighted sector votes, i.e., not a simple majority. Accordingly, the Commission directed NPCC to modify the voting rules applicable to the NPCC hearing body.⁴⁰

82. The Commission also directed that within 60 days NERC and NPCC submit a schedule for ending the technical committee review process described in Exhibit D, section 3.0, or provide a justification for its proposed continuation.⁴¹

83. The March 21 Order required that the NPCC CMEP, at section 3.3 (addressing the use of spot-checking), conform to the *pro forma* CMEP provision, thus rejecting as unsupported a proposed deviation that would have authorized spot-checking for the limited purpose of verifying self-certifications.⁴² The March 21 Order also rejected a proposed deviation, described at Exhibit D, section 3.0, which would have provided that a compliance violation investigation will be conducted “upon completion of an initial event analysis.” The Commission held, instead, that these investigations should be commenced as soon as evidence of a possible violation of a Reliability Standard is discovered, whether during an event analysis or through other means.⁴³

84. The March 21 Order also found that the NPCC Exhibit D, at section 3.0, failed to clarify the difference between an “initial determination” of a violation and a “final compliance determination,” and the extent to which this provision is consistent with section 5.1 (a provision stating that a notice of alleged violation is to include a proposed penalty or sanction). The Commission found that because NPCC had not justified this

⁴⁰ March 21 Order, 122 FERC ¶ 61,245 at P 175.

⁴¹ *Id.* P 174 (noting that the NPCC compliance staff would be able to make determinations on most routine matters and that, as such, NPCC would not be required to continue the technical review process). By delegated letter order issued by the Commission on July 15, 2008, the Commission accepted NERC’s and NPCC’s report that they would propose in the July 21 filing to retain this provision, without prejudice to the Commission’s further consideration of this matter herein.

⁴² *Id.* P 171.

⁴³ *Id.* P 172.

deviation from *pro forma* CMEP section 5.1, NPCC would be required to clarify the review procedures set forth in section 3.0.⁴⁴

85. Finally, the Commission held that NPCC had not explained how an NPCC compliance staff member may serve as chairman of the NPCC compliance committee that rules on matters brought by the NPCC compliance staff. Accordingly, the Commission directed NPCC to submit a full explanation or, in the alternative, amend its Exhibit D.⁴⁵

b. NERC's and NPCC's Response

86. In response to the March 21 Order's requirement regarding the voting requirements applicable to the NPCC hearing body, NERC and NPCC propose to modify the NPCC Exhibit D, at section 2.0, to state as follows:

When the NPCC [compliance committee] is acting as a Hearing Body, the Chairman of the [compliance committee] will not be part of the Hearing Body and voting will be by a simple majority. The Hearing Body will be led by the stakeholder elected Vice-Chair, as long as he/she does not represent the Registered Entity involved in the Hearing.

87. NERC and NPCC also propose to revise Exhibit D at section 3.0. First, NERC and NPCC propose to clarify that spot checks may be performed to verify self-reports and periodic data submittals as well as self-certifications. With respect to the description of how NPCC will conduct an event analysis, NERC and NPCC propose to add a statement referring to a determination that a compliance violation investigation is warranted "based on evidence of a possible violation of a Reliability Standard, whether based on information obtained in an event analysis or obtained through other means." NERC and NPCC also propose to revise section 3.0, characterizing the compliance staff's initial determination as a "Preliminary Notice of Alleged Violation." NPCC describes this document as being issued before completion of a comprehensive review and

⁴⁴ *Id.* P 173.

⁴⁵ See *North American Electric Reliability Corporation*, 119 FERC ¶ 61,248, at P 41-42 (2007) (finding that NERC's director of compliance should be excluded from membership on, or authority to vote in, NERC's stakeholder compliance and certification committee).

determination to issue a notice of alleged violation that includes either a proposed sanction or penalty.

88. Finally, with respect to the Exhibit D, section 3.0 allowance for a technical committee review process, NERC and NPCC propose to revise section 3.0 to provide, among other things, that the “Compliance staff may [during the course of its investigation] consult with technical committees on a non-decisional basis for advice regarding a complex technical matter only, not a matter of compliance/non-compliance determination, before the Compliance Staff renders its final decision and issues a notice of [alleged violation].” NPCC asserts that in the past, NPCC’s use of technical committees to address and resolve complex technical matters has proven useful. NPCC further states that any information NPCC compliance staff furnishes to a technical committee on an *ad hoc* basis would include generic facts needed to resolve or clarify a technical matter but not identify any specific Registered Entity.

c. Commission Determination

89. We accept NERC’s and NPCC’s proposed revisions to the NPCC Delegation Agreement, subject to revisions. With respect to NPCC’s proposed modifications to the NPCC Exhibit D, at section 2.0, regarding the voting requirements applicable to the NPCC hearing body, it remains unclear whether the corollary requirement that no two stakeholder sectors may control, and no single stakeholder sector may veto, a decision by the NPCC board or any of its committees (a requirement set forth under the NPCC Delegation Agreement, at section 2(a)(i)), will apply to the compliance committee’s actions as a hearing body. Accordingly, we direct NPCC to clarify whether this requirement applies to the actions of the compliance committee as a hearing body or justify why it should not. We observe that sections VII.E and VIII of the NPCC bylaws are unclear as to whether the compliance committee, when acting as the hearing body, will render its decisions by a majority of the votes cast by a quorum. To that extent, the NPCC bylaws may be inconsistent with section 2.0 of the NPCC Exhibit D. Accordingly, we require NPCC to amend its bylaws to remove this ambiguity.

90. With respect to NERC’s and NPCC’s proposed revision to NPCC Exhibit D, section 3.0, we clarify that NPCC may use spot checks in the circumstances identified in CMEP section 3.3, i.e., at random or initiated in response to events, as described in Reliability Standards, operating problems or system events. With respect to the initiation of investigations, we clarify that while NPCC places this revision within a parenthetical in a provision of section 3.0 that focuses on how NPCC will handle an event analysis, the new language applies to the initiation of investigations of possible violations upon their discovery by any means. We also observe that NPCC’s revised section 3.0 refers to the review by NPCC compliance staff of “compliance submittals” and “compliance inputs” for possible violations. We find no indication in section 3.0 that NPCC compliance staff

may review complaints submitted pursuant to CMEP section 3.8 for possible violations; however, we expect that NPCC compliance staff will review complaints as specified in section 3.8.

91. NERC's and NPCC's proposed revision to NPCC Exhibit D, section 3.0 also characterizes the initial determination made by the NPCC compliance staff as a "Preliminary Notice of Violation," a reasonable description of a notice permitted under CMEP section 5.1 (i.e., a notice that need not be accompanied by a proposed penalty or sanction). However, because the term "Preliminary Notice of Alleged Violation" differs from the term used in CMEP section 5.1 (which refers to an initial notice of alleged violation), we direct NERC and NPCC to consider whether to amend NPCC's Exhibit D, section 3.0, CMEP section 5.1, or both, for purposes of consistency and clarity.

92. With respect to NERC's and NPCC's proposed continued reliance on technical committees, we note that although NPCC proposes that consultations will not occur with respect to a determination of violation or of compliance, NPCC does not foreclose the possibility that NPCC compliance staff would consult with technical committees on the determination of an appropriate proposed penalty or sanction for a violation in a notice of alleged violation that NPCC would issue pursuant to CMEP section 5.1. Nor does NPCC foreclose the possibility that a technical committee could initiate a consultation or identify particular technical matters for the compliance staff that the committee believes would be appropriate for consultation.

93. As the Commission held in the March 21 Order, a Regional Entity's compliance staff must be independent and technically competent. Thus, we are not persuaded that the technical committee consultation process, as revised in section 3.0, should be permanent. To the contrary, we continue to believe that the consultation process is a transitional measure that should be phased out. Further, if the consultation process is to be limited to complex technical matters, as proposed, consultations should not relate to the development of proposals for a penalty or sanction for violations, as could be permitted under NPCC's proposal. NPCC compliance staff should also be responsible for determining those technical matters that are sufficiently complex as to require consultation. As a result, only NPCC compliance staff should initiate such a consultation process. Moreover, we require NPCC to report on its use of the technical committee consultation process so we can ascertain its usefulness.

94. Accordingly, we accept NPCC's proposed revision of its Exhibit D, section 3.0 on this issue, subject to the following directives. First, we require NERC and NPCC to amend section 3.0 to state that the consultation process is to be initiated only by compliance staff and that the process may not be used to determine appropriate proposals for penalties or sanctions for violations. Second, 30 days after the end of each calendar quarter, we require NERC and NPCC to submit non-public reports to the Commission

staff on technical committee consultations during that calendar quarter that list: (i) the topic of each consultation initiated or continued during that quarter; (ii) the date on which the consultation began and ended; (iii) the reason why NPCC staff initiated the consultation; (iv) the persons who participated in the consultation; and (v) the result of the consultation, if any. Finally, we require NERC and NPCC to submit a filing on or before June 30, 2010 that incorporates the results of these quarterly reports and proposes a schedule for the termination of the consultations or a detailed justification for their continuation.

4. RFC Delegation Agreement

95. The March 21 Order found that because the RFC hearing procedures refer to (but do not otherwise address) RFC's "settlement procedures," it was appropriate that these procedures be expressly enumerated at paragraph 1.5.5 (a provision addressing the suspension of the procedural schedule in the case of settlement negotiations).⁴⁶

96. NERC and RFC submit that rather than incorporate RFC's settlement procedures (a five-page document) into its hearing procedures, it would be preferable to state, at paragraph 1.5.5 and in a corollary provision, at paragraph 1.8, that the full text of these procedures is available for review on RFC's website (as they currently are). NERC and RFC state that allowing RFC to rely on this cross-reference will eliminate the need for future revisions to the RFC hearing procedures in the event these settlement procedures require amendment or revision.

97. We accept NERC's and RFC's proposed changes to the RFC Delegation Agreement. We find reasonable NERC's and RFC's proposal to provide a website cross-reference to RFC's settlement procedures, in lieu of incorporating these provisions in their entirety in the RFC hearing procedures. However, RFC must revise the text of its cross reference, at paragraphs 1.5.5 and 1.8, if and when the website address changes.⁴⁷

⁴⁶ March 21 Order, 122 FERC ¶ 61,245 at P 188.

⁴⁷ We note that our acceptance of this cross-reference does not constitute approval or acceptance of the underlying document, which is not before us here.

5. SERC Delegation Agreement

a. March 21 Order

98. The March 21 Order found that the SERC bylaws do not address or otherwise ensure that the SERC hearing body (as comprised by the SERC board compliance committee, or a designated subset of that committee) satisfies the Commission's requirements concerning control by industry sectors over a Regional Entity's decisions. The Commission also found that SERC failed to explain how a subset of the compliance committee, serving as the hearing body, would report to the SERC board. Finally, the Commission found that the SERC bylaws do not provide that the hearing body will decide questions in a hearing by a majority of the votes cast by a quorum.⁴⁸

b. NERC's and SERC's Response

99. NERC and SERC propose to revise section 7.1 of the SERC bylaws (addressing the authority of the SERC compliance committee). Specifically, in addition to the existing authority, which provides that the compliance committee shall recommend to the SERC board such actions as may further the purposes of the SERC Delegation Agreement, NERC and SERC propose to add: "[or] that extend beyond the scope of authority delegated to a Hearing Body in [revised] section 7.3."

100. Section 7.3, as revised, states that the compliance committee shall conduct hearings in accordance with hearing procedures approved by the Commission and that in compliance hearings in which an entity may contest a finding of an alleged violation, a proposed mitigation plan, a remedial action directive, or any other action that may be taken by the hearing body, the compliance committee shall establish and maintain a hearing body with authority to conduct and render decisions on the matter. Section 7.3, as proposed, also establishes quorum, sector control and voting requirements applicable to the SERC hearing body and further provides that the decisions of the hearing body shall be final and binding on SERC.⁴⁹

⁴⁸ March 21 Order, 122 FERC ¶ 61,245 at P 200.

⁴⁹ NERC and SERC also propose to make corresponding revisions to section 2.0 of the SERC Exhibit D.

c. **Commission Determination**

101. The Commission accepts NERC's and SERC's changes to the SERC Delegation Agreement. With respect to SERC's designation of its board compliance committee, or a subset of it, as SERC's hearing body, we note that section 7.5 of the SERC bylaws provides that the board compliance committee may appoint *ad hoc* committees of technical experts to advise it on compliance or technical issues, among other things. Section 7.5 also provides that "[e]ach member (or another entity) that requests that the Compliance Committee review a compliance finding against it may request that an *ad hoc* committee be formed to assist the Compliance Committee in its review."

102. If a section 7.5 *ad hoc* committee is acting in an advisory capacity to the SERC hearing body, the members of that advisory panel must comply with the provisions of the SERC hearing procedures addressing this matter, including paragraphs 1.4.5 (addressing disqualification), 1.4.6 (relating in part to disclosure of information about technical advisors) and 1.4.7 (prohibiting *ex parte* communications).

6. **SPP Delegation Agreement**

a. **March 21 Order**

103. The March 21 Order provided that:

With respect to SPP's annual membership fee, we accept SPP's statement that this fee is for membership in Southwest Power Pool, Inc. and is not required to participate in Regional Entity activities. To clarify this distinction, we direct SPP to revise its bylaws to explicitly state that membership in the Regional Entity is open to any entity and that SPP will not charge a fee for such participation.^{50]}

104. With respect to funding, the March 21 Order found that SPP's proposed funding mechanism, as set forth in Exhibit E, section 5 to the SPP Delegation Agreement, failed to address how the funds collected by SPP for non-statutory expenses will be kept separate from funds collected under FPA section 215. Accordingly, the Commission directed NERC and SPP to establish, at section 5, the procedures necessary to ensure this separation of accounts, or otherwise justify the existing provision.⁵¹

⁵⁰ March 21 Order, 122 FERC ¶ 61,245 at P 213.

⁵¹ *Id.* P 216.

105. The Commission also stated that it remained concerned regarding the adequacy of the separation of functions between the SPP RTO and SPP Regional Entity. The March 21 Order noted that Commission staff is auditing SPP Regional Entity's organizational structure and practices, and a final Commission determination regarding the adequacy of the separation of functions between SPP Regional Entity and SPP RTO will remain pending the results of the audit.

b. NERC's and SPP's Response

106. With respect to membership fees and SPP Regional Entity participation rights, NERC and SPP propose to add a new section 2.5 to the SPP bylaws (Participation in SPP Regional Entity Activities) providing that "[p]articipation in SPP Regional Entity activities is open to the public and does not require either membership in [the SPP RTO] or any of the obligations of membership, including [the SPP RTO's] annual fee." NERC and SPP further explain that while the March 21 Order specifically referred to "membership in the Regional Entity," the concept of membership in the SPP Regional Entity does not exist within the SPP governance structure. NERC and SPP state that their proposed bylaw revision is offered as the optimal approach to achieve the clarification the March 21 Order required without creating further confusion by inferring that membership is available.

107. With respect to SPP funding matters, NERC and SPP state that the SPP Delegation Agreement has been revised to make clear that SPP's costs for statutory activities and its costs for non-statutory activities will be separately recorded. NERC and SPP also propose to revise section 5 to provide that upon receipt of quarterly payments from NERC to fund SPP's statutory activities, "SPP will deposit these funds into an account established solely to receive and hold funding received from NERC pursuant to SPP's performance of statutory activities under the Delegation Agreement." NERC and SPP add that transfers out of this account will only be made as expenses incurred by SPP for statutory activities are recorded and paid. Section 5, as revised, also provides that "[o]n a monthly basis, all expenses incurred by SPP for statutory activities and for non-statutory activities [will be] recorded and paid from the SPP operating account."

c. Commission Determination

108. We accept NERC's and SPP's proposed changes to the SPP Delegation Agreement, subject to revision. While we accept NERC's and SPP Regional Entity's proposed changes to the SPP Regional Entity bylaws, it remains unclear to the Commission whether this new bylaw provision fully resolves the concerns set forth in the March 21 Order. NERC and SPP Regional Entity explain that the SPP Regional Entity allows open participation in its activities and SPP Regional Entity does not have membership. Thus, all interested entities may participate in matters such as the

development of a regional Reliability Standard, or voting on a regional standard as part of the SPP Regional Ballot Body. However, other SPP Regional Entity functions and activities are conducted through the existing committees and structure of SPP Inc., i.e., the regional transmission organization.

109. For example, the SPP Inc. Market and Operations Committee appoints a standing SPP Inc. subcommittee or work group to serve as the Reliability Standards development team for developing a new or revised regional Reliability Standard. While it appears that other interested entities may join and participate in the Reliability Standards development team, the team is initially selected by a SPP Inc. committee. Likewise, once a draft regional Reliability Standard receives an affirmative vote by the SPP Regional Entity Ballot Body, the draft standard is then submitted to the SPP Inc. Market and Operations Committee and subsequently the SPP Inc. Board of Directors/Members Committee for advisory votes before reaching the SPP Regional Entity independent trustees for a final vote. While these votes are “advisory,” the Markets and Operation Committee and SPP Inc. Board of Directors/Members Committee also have the ability to “remand” a draft regional Reliability Standard back to the Reliability Standards development team for further consideration or even “terminate” the draft standard, albeit subject to notice to the SPP Regional Entity trustees with an opportunity to override such actions.⁵²

110. Thus, the SPP Markets and Operation Committee and SPP Board of Directors/Members Committee have the opportunity to significantly delay, if not terminate, a draft regional Reliability Standard after the SPP Regional Entity Ballot Body has affirmatively voted on the standard. Pursuant to the SPP Inc. bylaws, it appears that participation in the Market and Operations Committee and the SPP Inc. Board of Directors/Members Committee is limited to members of SPP Inc. Further, membership in SPP Inc. is subject to a \$6,000 annual membership fee and agreement to pay a significant exit fee. In these circumstances, it is not clear to the Commission whether the new bylaw provision generally assuring that participation in SPP Regional Entity activities is open to the public and does not require membership in SPP Inc. is consistent with other provisions of the SPP Inc. bylaws and the SPP Regional Entity Standards Development Process Manual that identify particular SPP Regional Entity functions and activities, some of which are discussed above, that are conducted by SPP Inc. membership-based committees. We direct NERC and SPP Regional Entity to provide in its compliance filing a further explanation on this matter. We preserve the right to take further action on this issue either in response to the compliance filing or, if appropriate, in

⁵² See SPP Regional Entity Standards Development Process Manual at section IV.

the context of NERC's first performance assessment that is due at the three-year anniversary of its certification as the ERO.

111. With respect to SPP funding matters, we accept NERC and SPP's proposal to establish an account solely to receive and hold funding received from NERC pursuant to SPP's performance of statutory activities under the SPP Delegation Agreement. We also expect SPP to deposit any amounts received for statutory activities into the same account. However, we are not convinced that SPP's proposal to use a joint operating account to pay SPP's non-statutory and statutory expenses ensures that statutory funding will be kept separate from non-statutory funding. It is also unclear why SPP's statutory expenses cannot be paid from a separate account. Accordingly, we direct NERC and SPP to revise Exhibit E, section 5 to establish separate accounts for payment of statutory and non-statutory expenses.

112. Consistent with the March 21 Order, a final Commission determination regarding the adequacy of the separation of functions between SPP Regional Entity and SPP RTO will continue to remain pending until the results of the audit are complete.⁵³

7. WECC Delegation Agreement

a. March 21 Order

113. The March 21 Order required that the WECC hearing procedures be revised, at paragraph 1.4.1(b), with respect to WECC compliance staff's obligation to produce exculpatory evidence.⁵⁴ Specifically, the Commission required that this obligation be subject to and limited by any applicable privilege and required WECC to explain why this obligation should extend, at paragraph 1.4.1(b)(3), to documents not otherwise discoverable or needed for a complete record. The Commission also directed WECC to clarify the meaning of the term "material" exculpatory evidence in the context of proposed paragraph 1.4.1.

114. The March 21 Order also rejected, as unsupported, the WECC Exhibit E omission, at section 3(b), of the following *pro forma* provision: "[u]pon approval of the annual funding requirements by applicable governmental authorities, NERC shall fund [Regional Entity's] costs identified in this Exhibit E in four equal quarterly payments." The March

⁵³ March 21 Order, 122 FERC ¶ 61,248 at P 212, n.117.

⁵⁴ *Id.* P 233.

21 order also directed NERC and WECC to revise the WECC Delegation Agreement, consistent with the Commission's required modifications to the *pro forma* Delegation Agreement. In addition, the March 21 Order directed NERC and WECC to revise section 12.3 of the WECC bylaws to reflect that the allocation of non-statutory costs be based on the voluntary participation in these non-statutory functions, not as proposed by NERC and WECC on who "benefits" from these non-statutory functions.⁵⁵ The Commission stated that WECC may not condition membership in the Regional Entity on payment of non-statutory activities, whether or not the member benefits from such activities.

115. With respect to the right of non-members to participate in WECC's Reliability Standards development process, the March 21 Order found that WECC's proposed eligibility criterion, i.e., its proposal to limit participation to interested stakeholders with a "substantial business interest," was overly narrow. The Commission found that the term "interested stakeholder" was sufficient.⁵⁶

b. NERC's and WECC's Response

116. NERC and WECC state that because paragraph 1.4.1(b)(1) of WECC's hearing procedures provides that "[d]ocuments subject to the attorney-client or attorney work-product privileges" are not subject to disclosure by compliance staff, no revision to paragraph 1.4.1(b) is required. NERC and WECC also propose to delete the phrase "not containing material exculpatory evidence" from paragraph 1.4.1(b)(2). In addition, NERC and WECC propose to revise paragraph 1.4.1(b)(3) to state that documents not subject to disclosure will include "[d]ocuments containing confidential information, to the extent that disclosure would violate any applicable confidentiality requirement."

117. NERC and WECC also propose to revise Exhibit E to the WECC Delegation Agreement to provide that NERC will transmit to WECC and to the Western Interconnection Regional Advisory Body (WIRAB) the portions of assessments collected by WECC and remitted to NERC within three business days after WECC remits the collected assessments to NERC.⁵⁷ NERC and WECC acknowledge that the timing by which NERC transfers to WECC and WIRAB the assessments has been raised in two

⁵⁵ *Id.* P 227.

⁵⁶ *Id.* P 229.

⁵⁷ These revisions are proposed by NERC and WECC in their September 30, 2008 filing. *See supra* section I.C of this order.

prior Commission orders; and that NERC and WECC failed to explain in the ensuing compliance filings and rehearing requests why this provision is necessary and justified.

118. NERC and WECC explain that WECC's billing and collecting of assessments differ from the method followed by the other Regional Entities in two respects. First, NERC and WECC note that WECC bills and collects assessments from the designated load serving entities and balancing authorities in its region, whereas in the other regions NERC is responsible. Second, NERC and WECC point out that the assessments are billed and collected by way of an annual invoice (issued by November 15 and due to NERC by the following January 2), whereas assessments for the other Regional Entities are billed and collected through quarterly invoices. NERC and WECC state that WECC's annual collection requirement ensures an efficient and low-cost process that allows for the availability of sufficient funds as working capital throughout the year. WECC adds that this policy also enables WECC to take advantage of beneficial banking relationships that require maintenance of minimum balance requirements and that these funds generate interest income which can be used to offset WECC's expenses.

119. With respect to the right of non-members to participate in WECC's Reliability Standards development process, NERC and WECC state that the WECC bylaws have been revised, at section 12.3, to delete the phrase "or voluntarily benefit from" as an eligibility criterion. In addition, NERC and WECC state that the WECC bylaws, as well as the WECC Standards Development Process Manual, have been revised to comply with the March 21 Order's requirement regarding the rights of non-members to participate in the Reliability Standards development process, i.e., that a party need only be an "interested stakeholder" in order to participate. In addition, NERC and WECC propose, at WECC bylaw section 3.21, to define the term "Participating Stakeholder," in place of the prior section 3.21 defined term, "Interested Stakeholder." The term Participating Stakeholder is defined to mean "[a]ny person or entity that is not a WECC Member, but is an interested stakeholder and has applied and been granted . . . participation and voting rights [as set forth in the WECC bylaws]."⁵⁸

⁵⁸ Pursuant to WECC bylaw section 8.6.2, "[a]ny person or entity that is an interested stakeholder may apply to WECC for Participating Stakeholder status and, upon WECC's acceptance of such application, acquire . . . participation and voting rights[.]"

c. **Commission Determination**

120. We accept NERC's and WECC's proposed changes to the WECC Delegation Agreement, subject to revision. With respect to the Commission's requirements regarding the availability of the attorney-client privilege and attorney work-product doctrine, we accept, in part, NERC and WECC's statement that no amendment of paragraph 1.4.1(b) of WECC hearing procedures is necessary to ensure that WECC compliance staff's obligation to produce evidence is subject to and limited by any applicable privilege. However, this statement appears to assume that the only privileges that could be asserted by WECC compliance staff are the attorney-client privilege or the attorney work-product doctrine. In contrast, the comparable provision of the *pro forma* hearing procedures, paragraph 1.5.7(b)(1)(A), is a more general statement that compliance staff may withhold a document from inspection and copying by a respondent if "the document is privileged to staff or constitutes attorney work product of Staff's counsel." WECC's deletion of the former language of paragraph 1.4.1(b)(3), which would have served as a means for WECC enforcement staff to assert any other privilege that might apply, brings into question whether WECC's current version of paragraph 1.4.1(b) would recognize any other privilege that WECC compliance staff might successfully assert.⁵⁹

121. In addition, WECC's revisions to section 1.4.1(b) eliminate completely the concept codified in paragraph 1.5.7(b)(2) of the *pro forma* hearing procedures that, in the absence of an assertion of privilege, no circumstance that would otherwise protect a document from disclosure authorizes compliance staff to withhold exculpatory evidence contained in the document. Thus, WECC's revisions appear to be inconsistent with the *pro forma* hearing procedures on this matter. Our strong preference is for consistency in fundamental matters relating to compliance hearings before all Regional Entities and NERC. To resolve the inconsistencies discussed above with respect to the bases on

⁵⁹ WECC's new section 1.4.1(b)(3) could protect from disclosure by WECC compliance staff certain documents containing confidential information. However, it is not clear that the definition of "confidential information" in section 1501(1) of NERC's Rules of Procedure would cover privileges that WECC compliance staff could assert. That definition does not refer explicitly to information in documents for which an evidentiary privilege is asserted. We also note that, while section 1.5.7(b)(1)(D) of the *pro forma* hearing procedures provides a hearing officer residual authority to grant leave to compliance staff to withhold documents that are not relevant, or otherwise for good cause shown, WECC's proposed hearing procedures do not include an analogous provision.

which compliance staff may withhold or provide documents, we direct NERC and WECC to submit in their compliance filing a proposal to reconcile these matters.⁶⁰

122. With respect to funding matters, we accept WECC's proposal to revise section 3 of Exhibit E to reflect its arrangements for invoicing, collecting and funding its statutory activities.

123. With respect to the right of interested stakeholders to participate in WECC's Reliability Standards development process, we accept NERC's and WECC's proposed compliance revisions to the WECC bylaws. Based on WECC's revisions, it appears that any interested stakeholder has the right to participate in the WECC Reliability Standards development process, consistent with the policy established by the Commission in Order No. 672.

8. FRCC Delegation Agreement

a. March 21 Order

124. The March 21 Order directed NERC and FRCC to submit a schedule for ending the stakeholder compliance committee review process (as addressed in the FRCC Exhibit D at section 3.0) or otherwise support retention of this provision.⁶¹ The Commission also found that the FRCC hearing procedures failed to demonstrate that the actions of the FRCC hearing body will be made by a majority of the votes of its members when a quorum is present. Accordingly, the Commission directed FRCC to show how the board compliance committee will meet the majority vote criterion for actions it takes as FRCC's hearing body or, if not, how FRCC will restructure the board compliance committee or select another hearing body to do so.⁶²

⁶⁰ Paragraph 1.4.2(3) of the WECC hearing procedures (addressing the power to compel testimony or the production of documents) is substantially identical to *pro forma* paragraph 1.5.8(c). As such, our rulings herein on *pro forma* paragraph 1.5.8(c) also apply to WECC paragraph 1.4.2(3).

⁶¹ March 21 Order, 122 FERC ¶ 61,245 at P 252.

⁶² *Id.* P 253.

b. NERC's and FRCC's Response

125. NERC and FRCC propose to retain the use of the stakeholder compliance committee review process until FRCC has developed sufficient expertise. NERC and FRCC also propose to revise section 1.2 of the FRCC Exhibit D and section 3.0 of the FRCC CMEP to provide that the technical review by the stakeholder compliance committee will be voluntary and non-decisional. In addition, section 1.2 of the FRCC Exhibit D has been revised to state that the purpose of this review is to:

[P]rovide an increased understanding of how to comply with Reliability Standards. This is especially important for those standard requirements that may lack the clarity necessary to ensure compliance and increased reliability[.] The FRCC believes this process assures an increased understanding of standard requirements by both Registered Entities and compliance staff; helps build trust and transparency in the process and ultimately results in increased reliability to the Bulk-Power System.

126. To show how the board compliance committee will meet the majority vote criterion for actions it takes as FRCC's hearing body, NERC and FRCC propose to amend section 5.4 of the FRCC bylaws to clarify that the stakeholder compliance committee is not the board compliance committee. NERC and FRCC explain that the stakeholder compliance committee is a standing committee of FRCC created by article V of the FRCC bylaws and is governed by the quorum and voting provisions applicable to standing committees as set forth in sections 5.6 and 5.7 of the FRCC bylaws. In contrast, the board compliance committee is a separate committee of the FRCC board that conducts any hearings pursuant to the FRCC hearing procedures. NERC and FRCC state that the board compliance committee is subject to the 50 percent quorum and majority voting requirements, as specified in section 2.0 of the FRCC Exhibit D and paragraph 1.7.8 of the FRCC hearing procedures.

c. Commission Determination

127. The Commission accepts NERC's and FRCC's proposed changes to the FRCC Delegation Agreement, subject to revision. With respect to FRCC's compliance committee review process, we expect each Regional Entity's compliance staff to be independent and technically competent. Thus, we are not persuaded that the compliance committee review process, as revised in Exhibit D, section 1.2, should be permanent. Further, if the process is to be limited to a review of how to comply with requirements of the Reliability Standards, as proposed, reviews should not relate to the development of proposals for a penalty or sanction for violations, as could be permitted under NERC's and FRCC's proposal. In addition, only FRCC compliance staff should initiate the review process, when it believes that a review is appropriate. We require NERC and

FRCC to amend section 1.2 to state that the review process is to be initiated only by compliance staff and that the process may not be used to determine proposals for penalties or sanctions for violations.

128. In addition, because FRCC does not propose a timetable for the phase-out of the compliance committee review process, we require that, in lieu of the quarterly reports that FRCC currently provides on compliance committee reviews, NERC and FRCC submit non-public reports to the Commission staff 30 days after the end of each calendar quarter on compliance committee reviews during that calendar quarter. We require that these submissions list: (i) the topic of each review initiated or continued during that quarter; (ii) the date on which the review began and ended; (iii) the reason why FRCC staff initiated the review; (iv) the persons who participated in the review; and (v) the result of the review. We also require NERC and FRCC to file, on or before June 30, 2010, a report that incorporates the results of these quarterly reports and proposes a schedule for the termination of the reviews or a justification for their continuation. Should FRCC's compliance staff have technical questions concerning its evaluation of alleged violations, FRCC's compliance staff is encouraged to seek advice from NERC or Commission staff.⁶³

129. Finally, with respect to FRCC's proposed modifications to the FRCC Exhibit D, at section 2.0 (addressing voting requirements applicable to the FRCC hearing body), it remains unclear whether the corollary requirement that no two stakeholder sectors may control, and no single stakeholder sector may veto, a decision by the FRCC board, or any of its committees,⁶⁴ applies to the compliance committee's actions as a hearing body. Accordingly, we direct FRCC to clarify whether this requirement applies to the actions of the compliance committee as a hearing body or justify why it should not. In addition, the FRCC bylaws do not appear to refer to a compliance committee of the FRCC board.⁶⁵ As such, the FRCC bylaws may be inconsistent with section 2.0 of the FRCC Exhibit D. We require FRCC to amend its bylaws to remove any such ambiguity and to list the quorum

⁶³ These quarterly reporting requirements supersede the quarterly reporting requirements imposed by the Commission in the April 19 Order. *See* April 19 Order, 119 FERC ¶ 61,060 at P 576.

⁶⁴ *See* FRCC Delegation Agreement, at section 2(a)(i).

⁶⁵ The only references in the FRCC bylaws to a committee of the FRCC board appear in sections 3.11(a)-(c), which refer to a personnel and compensation committee of the board.

and voting rules applicable to the actions of the board compliance committee when it serves as the FRCC hearing body.

The Commission orders:

(A) NERC's July 21, 2008 compliance filing, in Docket No. RR06-1-017, *et al.*, as supplemented on August 28, 2008 and September 30, 2008, is hereby accepted, subject to conditions, as discussed in the body to this order, to be made effective 15 days from the date of this order.

(B) NERC and its Regional Entities are hereby directed to make a compliance filing within 60 days of the date of this order, as discussed in the body of this order.

(C) NERC's May 19, 2008 compliance filing, in Docket No. RR06-1-016, *et al.* (addressing NPCC's use of technical committees and FRCC's reliance on a stakeholder compliance committee) is hereby accepted, subject to conditions, as discussed in the body of this order.

(D) NERC and NPCC are hereby directed to submit to Commission staff reports, which shall be treated as non-public, 30 days after the end of each calendar quarter, addressing NPCC's technical committee consultations during that calendar quarter, as discussed in the body of this order. In addition, NERC and NPCC are hereby directed to submit a filing on or before June 30, 2010 incorporating the results of these quarterly reports and proposing a schedule for the termination of the consultations or a detailed justification for their continuation.

(E) NERC and FRCC are hereby directed to submit to Commission staff reports, which shall be treated as non-public, 30 days after the end of each calendar quarter addressing FRCC's compliance committee reviews during that calendar quarter, as discussed in the body of this order. In addition, NERC and FRCC are hereby directed to submit a filing on or before June 30, 2010, incorporating the results of these quarterly reports and proposing a schedule for the termination of the reviews or a detailed justification for their continuation.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.