UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE AMERICAN PUBLIC POWER ASSOCIATION, THE EDISON ELECTRIC INSTITUTE, THE ELECTRICITY CONSUMERS RESOURCE COUNCIL, THE LARGE PUBLIC POWER COUNCIL, THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND THE TRANSMISSION ACCESS POLICY STUDY GROUP, *Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent.*

NO. 10- 10-1387

PETITION FOR REVIEW

Pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. §825l(b), and Rule 15(a) of the Federal Rules of Appellate Procedure, the American Public Power Association, the Edison Electric Institute, the Electricity Consumers Resource Council, the Large Public Power Council, the National Rural Electric Cooperative Association, and the Transmission Access Policy Study Group, who intervened in the proceedings below, hereby petition this Court for review of the following Orders of the Federal Energy Regulatory Commission ("FERC"), copies of which are contained in Appendix A:

(1) North American Electric Reliability Corporation, *Order Directing NERC to Propose Modification of Electric Reliability Organization Rules of Procedure,* 130 FERC ¶ 61,203 (March 18, 2010);[1] and

(2) North American Electric Reliability Corporation, *Order Denying Rehearing, Denying Clarification, Denying Reconsideration, and Denying Request for a Stay*, 132 FERC ¶ 61,218 (September 16, 2010).[2]

Petitioners are aggrieved by certain of FERC's rulings in the listed Orders. The corporate disclosure statement required by Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 is attached to this petition. Pursuant to Rule

[1] *Available at* http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20100318-3082.

[2] *Available at* http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20100916-3021.

15(c) of the Federal Rules of Appellate Procedure, a list of the parties served with a copy of this Petition is attached hereto as Appendix B.

Respectfully submitted,

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November 12, 2010

APPENDIX A

130 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

North American Electric Reliability Corporation Docket No. RR09-6-000

ORDER DIRECTING NERC TO PROPOSE MODIFICATION OF ELECTRIC RELIABILITY ORGANIZATION RULES OF PROCEDURE

(Issued March 18, 2010)

1. In this order, pursuant to section 215(f) of the Federal Power Act (FPA),[1] the Commission directs the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), to propose modifications to its Rules of Procedure that pertain to the development of Reliability Standards.[2] With respect to the details of the modifications, we give NERC discretion to propose specific modifications that address the concerns identified herein, and we will issue a final order after receiving public comment on NERC's specific proposed modifications.

2. We take this action because of a growing concern that the current voting process in the ERO rules of procedure can be used to prevent compliance with Commission directives to address particular reliability matters. We recognize that the statutory paradigm in section 215 of the FPA, by which the ERO is responsible for developing Reliability Standards through a stakeholder process that represents a balance of interests, differs significantly from the rest of the FPA statutory framework. However, we do not

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[1] 16 U.S.C. § 824o(f) (2006). Section 215(f) of the FPA provides that the Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule change "shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just and reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of [section 215(c)]."

[2] *See* NERC Rules of Procedure, Section 300 (Reliability Standards Development), and Appendix 3A (Reliability Standards Development Procedure). These two provisions of NERC's Rules of Procedure are referred to, collectively, as the "Standards Development Process" throughout this order.

interpret section 215 to permit a process by which voting stakeholders or stakeholder committees in effect can prevent the ERO from adequately responding to Commission directives to address specific reliability matters, nor do we believe that Congress intended this paradigm. While we do not anticipate that the current voting process and other process rules will be used in this way as a matter of course, a particular event has raised concerns sufficient to cause us to direct NERC to propose modifications to the process.

3. Specifically, NERC should develop a proposed modification to its Rules of Procedure to address a conflict between NERC's Standards Development Process and its obligation as the ERO to comply with a Commission directive pursuant to section 215(d)(5) of the FPA.[3] Section 215(d)(5) authorizes the Commission to direct the ERO to submit to the Commission a proposed new or modified Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Standard appropriate to carry out section 215. Under NERC's Standards Development Process, however, each new or modified Reliability Standard must be approved by two-thirds of the stakeholder ballot body before it can be presented to the NERC board of trustees. Consequently, if just more than one third of a ballot pool votes against a Reliability Standard drafted to comply with a Commission directive, the Standard will be rejected, not presented to the NERC board of trustees for a vote, and not submitted to the Commission for review – even in circumstances where the Standard would have complied with the Commission's directive. Thus, under current ERO rules, the ballot body can delay or prevent NERC's compliance with its obligation under section 215(d) of the FPA. As discussed in more detail below, this occurred with respect to a Commission order directing the ERO to modify FAC-008-1, a Reliability Standard governing Bulk-Power System facility ratings.

4. We further note that before a new or modified draft Reliability Standard reaches the stakeholder ballot body, it is drafted by a team of industry volunteers that may or may not agree with the Commission's directive. Under the current process, a Standards drafting team populated by industry volunteers can develop a new or modified draft Reliability Standard that is not responsive to a Commission directive to draft a new or modified Standard, and the ballot body can approve the non-responsive Standard. If this occurs, it would leave the NERC board of trustees with a Hobson's choice of either rejecting the draft Reliability Standard or approving a Standard not responsive to a Commission directive for submission to the Commission.

5. To resolve the conflict between the Standards Development Process and the ERO's statutory obligation to comply with Commission directives to develop or modify a particular Reliability Standard, we direct the ERO, within 90 days of the date of this

[3] 16 U.S.C. § 824o(d)(5) (2006).

order, to submit to the Commission a filing containing specific proposed modifications to the NERC Standards Development Process. These proposed modifications shall be designed to ensure that NERC's Rules of Procedure allow it to comply with Commission directives to submit new or modified Reliability Standards. The Commission will notice NERC's filing for public comment and issue a subsequent order on proposed modifications to NERC's rules. As discussed herein, we also direct the ERO, within 90 days after our subsequent order, to fully comply with our previous directive to develop modifications to Reliability Standard FAC-008-1.

I. Background

A. Section 215 and Mandatory Reliability Standards

6. Section 215 of the FPA requires a Commission-certified ERO to develop mandatory and enforceable Reliability Standards, subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.[4] Following a selection process, the Commission selected and certified NERC as the ERO.[5] Consequently, NERC, as the certified ERO, develops and submits for Commission review and approval Reliability Standards that apply to users, owners and operators of the Bulk-Power System, as set forth in each Reliability Standard.[6]

7. NERC's application for certification as the ERO included Rules of Procedure, which address Reliability Standards development, compliance and enforcement, and other matters for which the ERO is responsible. In the order certifying NERC as the ERO, the Commission approved NERC's Rules of Procedure, and directed certain revisions in a compliance filing.[7] NERC's Rules of Procedure include Section 300 (Reliability Standards Development) and Appendix 3A (Reliability Standards Development Procedure). Together, these provisions set forth the ERO process for development and ERO approval of mandatory Reliability Standards.

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[4] 16 U.S.C. § 824o(e).

[5] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (ERO Certification Order), *order on reh'g & compliance*, 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc. v. FERC*, No. 06-1426, 2009 U.S. App. LEXIS 9905 (D.C. Cir. May 8, 2009).

[6] 16 U.S.C. § 824o(d)(1).

[7] ERO Certification Order, 117 FERC ¶ 61,126 at P 250-252.

B. NERC's Standards Development Process

8. The first step in NERC's Standards Development Process is the initiation of a Standard Authorization Request. The Standard Authorization Request describes the new or modified Reliability Standard, defines its purpose and scope, and offers reasons for its justification. After the Standard Authorization Request is posted for public comment, the Standards Committee votes on whether to authorize a draft Reliability Standard. If the Committee authorizes a draft Reliability Standard, it appoints a team that drafts the Standard, submits it for comment and any necessary field tests, analyzes and responds to comments and test results, and makes any necessary revisions.

9. Following these steps, the ballot body must approve the draft Reliability Standard by a two-thirds vote on a sector weighted basis before it is submitted to the NERC board of trustees for approval.[8] When members of the ballot body consider the draft Reliability Standard, they can vote: (1) Affirmative, (2) Affirmative, with comment, (3) Negative with reasons, (4) Negative without reasons, or (5) Abstain.

10. The result of a vote is contingent on the two-thirds majority and whether any member of the ballot body votes "negative with reasons." For example, if the ballot body approves a new or modified Reliability Standard by a two-thirds vote, and there are no negative votes with reasons, the proposal is submitted to the NERC board of trustees. If adopted by the NERC board of trustees, the draft Reliability Standard is submitted to the Commission.

11. However, if any member of the ballot body votes negative with reasons, there must be a second vote, referred to as a "recirculation ballot."[9] This is the case even if on the first ballot two-thirds of the ballot body voted in favor of the draft Reliability Standard. The Standards drafting team provides responses to comments accompanying a negative ballot, after which the recirculation ballot occurs. If the draft Reliability Standard fails in the recirculation ballot, it is rejected and the development process is ended. Any further work then requires a new Standard Authorization Request, which requires the process to begin from the first step described above.

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[8] NERC Rules of Procedure, App. 3A (Reliability Standard Development Procedure), version 6.1, at 22.

[9] In the recirculation ballot, each member of the ballot body is free to change its vote. In fact, votes are counted by exception only; that is, unless a member of the ballot body indicates a revision to its original vote its vote remains the same as in the first ballot.

II. Potential Conflict between Section 215(d)(5) and NERC's Standards Development Process

A. Generally

12. Pursuant to section 215(d)(5) of the FPA, the Commission may direct the ERO to submit to the Commission a new or modified Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Standard appropriate to carry out section 215. As the ERO, NERC must be able to comply with a Commission directive pursuant to section 215(d)(5) of the FPA. However, NERC's current Standards Development Process does not provide reasonable assurance that NERC is capable of complying with such directives. In particular, when a NERC Standards drafting team develops a new or modified Reliability Standard in response to a Commission directive pursuant to section 215(d)(5) of the FPA, the Standards Development Procedure provides ballot body members with the opportunity to ballot down the new or revised Reliability Standard. Thus, the ballot body may effectively veto a Commission directive by refusing to approve a new or modified Reliability Standard intended to comply with the Commission's directive. This situation occurred in December 2008, with respect to NERC's attempt to modify Reliability Standard FAC-008-1, which is a Standard addressing the methodology for determining the capacity ratings of Bulk-Power System facilities.

B. Reliability Standard FAC-008-1

13. Reliability Standard FAC-008-1 requires each transmission owner and generator owner to develop a methodology for determining the ratings of its Bulk-Power System facilities and also requires that the methodology incorporate specific data and conditions identified in the Standard. In Order No. 693,[10] the Commission approved FAC-008-1. In addition, pursuant to section 215(d)(5) of the FPA, the Commission directed NERC to develop and submit three specific modifications. One of these modifications was the addition of a requirement that, "for each facility, [each transmission owner and generator owner] identify the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting."[11] In other words, when [o]a reliability coordinator, transmission operator, transmission planner, or planning coordinator requests specific types of system information about a limited set of transmission facilities

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[10] *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

[11] *Id.* P 755-758; 771.

that are critical for reliability, including information about what equipment causes system limitations and how much the thermal rating would increase if the most limiting equipment no longer limited the facilities' capability, then the transmission owner must provide that information. Access to such information enhances reliability by enabling neighboring systems to accurately study the effects of other facilities on their own systems and determine the critical elements for increasing facility ratings, provides operators specific information about the limiting elements and therefore allows them to assess the risks associated with circuit loadings, and provides transmission operators information about which component within a transmission element is limiting so they have more information to guide their decisions about how to provide for Reliable Operation of the Bulk-Power System.

14. Several commenters objected to the Commission's proposal to require transmission and generator owners to identify the resulting increase in rating if the limiting component was no longer limiting, arguing that it "promotes commercial use of the grid . . . and relates more to transmission access [than to reliability]."[12] In Order No. 693, the Commission rejected this argument and explained that the modification addresses a reliability objective:

> When the transmission operators know which component within the transmission element is limiting they have more information to inform their decisions about how to provide for the Reliable Operation of the Bulk-Power System. Our . . . modification does not require any entity to invest in equipment to increase ratings of any facility; it simply requires the next limiting componet [sic] of each facility to be identified in order to understand what components are causing the limits that are to be used in reliability mitigation assessments. The identification of the first limiting component is already an inherent requirement in the existing rating process.[13]

No entity sought rehearing of this directive regarding FAC-008-1.

15. In January 2007, NERC initiated the process of complying with the Commission's directive by approving a Standard Authorization Request to develop revisions to FAC-008-1. An industry drafting team developed FAC-008-2, which addressed the three modifications directed by the Commission in Order No. 693. Requirement R7 of the revised Reliability Standard addressed the Commission's directive that the ERO develop a modification that requires transmission and generator owners to identify, for critical facilities, the resulting increase in rating if the limiting component was no longer

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[12] *Id.* P 757.

[13] *Id.*

limiting; that is, for certain transmission interconnections, transmission and generator owners must determine how much more transfer capability would be available if the weakest element was improved so that it no longer would limit the rest of the interconnection facilities.

16. In November 2008, the ballot body approved FAC-008-2 with a 70.01 percent affirmative (weighted segment) vote in the initial ballot. Although this percentage exceeded the two-thirds majority of the weighted segment votes required for passage, because negative votes with comments were received, NERC's Standards Development Process required a recirculation ballot. Some of the comments that accompanied the negative votes pertained to Requirement R7 of the draft Reliability Standard. These comments argued that Requirement R7 did not address a reliability concern, but rather a business concern better addressed in the context of a tariff. The NERC drafting team responded to these comments by stating that:

> if FERC issues a directive and the time for a rehearing has passed, the drafting team is to comply with the directive provided the directive is not detrimental to reliability, regardless of the opinion of the drafting team or the industry as to its perceived reliability benefit. .... In the case of FERC Order 693, NERC did not ask for rehearing during the 30-day period....[14]

17. In December 2008, NERC held the recirculation ballot. FAC-008-2 was voted down, receiving only a 57.37 percent affirmative vote, less than the two-thirds affirmative votes necessary for approval. Pursuant to NERC's rules, the project ended after the failed recirculation ballot.

18. On January 15, 2009, NERC's Standards Committee approved the posting of a new Standard Authorization Request for FAC-008-2, which included the draft Reliability Standard without Requirement R7. The draft Standard Authorization Request directed the drafting team to "consider" applicable Commission directives.[15] It is unclear how or when NERC will address the Commission directive addressed by Requirement R7.

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[14] Reliability Standard development record for FAC-008-2, available on the NERC website at http://www.nerc.com/docs/standards/sar/Project2006-09_C_of_C_Initial_Ballot_FAC-008_2008Dec08.pdf

[15] An initial ballot window for proposed Reliability Standard FAC-008-2 and an associated implementation plan closed on January 22, 2010. Since at least one negative ballot included a comment, these results are not final. A second (or recirculation) ballot must be conducted.

III. Discussion

A. Concerns Raised By FAC-008-2 Development Process

19. The Commission is concerned about the use of the balloting procedures within the NERC Standards Development Process to delay or block NERC's ability to respond to a Commission directive intended to protect reliability of the Bulk-Power System. The NERC development record in FAC-008-2 indicates that NERC staff and the Standards drafting team understood the need to comply with the directives of a final Commission order and had taken diligent steps towards compliance.[16] Yet, these efforts were effectively halted by a group of stakeholders that were able to "ballot down" FAC-008-2. As noted by the FAC-008-2 Standards development team, the concerns raised by stakeholders regarding Requirement R7 were precisely the concerns raised by commenters and rejected by the Commission in Order No. 693. These stakeholders and all other stakeholders were provided ample opportunity to comment on the Commission's proposed directive, yet no entity sought rehearing of the directive, and it became a final Commission directive that must be implemented by the ERO.

20. The ERO has not yet complied with the Order No. 693 directives to develop certain modifications to Reliability Standard FAC-008-2. Since the new Standard Authorization Request for FAC-008-2 does not include Requirement R7 (the requirement to share information about increased ratings if the limiting component no longer limited the facilities' capability), it is uncertain when or how the ERO will comply. Thus, the balloting down of FAC-008-2 has significantly delayed, if not blocked, NERC's ability to respond to the Commission's directive.

21. In *North American Electric Reliability Corp.*,[17] the Commission affirmed that, as the ERO, NERC has responsibility for the content of Reliability Standards as well as for appropriately managing the Standards Development Process. The Commission does not believe it is in the public interest or consistent with the intent of section 215 to allow continuation of a process that does not allow the ERO to meet its statutory obligation to comply with Commission directives and provide for Reliable Operation of the Bulk-Power System.

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[16] As the Commission never had the opportunity to review it, we do not intend our discussion to imply that the version of FAC-008-2 that was balloted down would have complied with the Commission's directive in Order No. 693. Likewise, we do not intend to prejudge the results of NERC's current effort to comply with the Commission's directive.

[17] *North American Electric Reliability Corp.*, 126 FERC ¶ 61,021, at P 10-12 (2009).

22. As mentioned above, before a new or modified draft Reliability Standard reaches the stakeholder ballot body, it is drafted by a team of industry volunteers that may or may not agree with the Commission's directive. The Commission is concerned that, just as the balloting procedures within NERC's Standards Development Process can be used to delay or block NERC's ability to respond to a Commission directive, the Standards drafting process can block the drafting of a Reliability Standard that complies with a Commission directive. Similarly, the Standards drafting team can draft a new or modified Reliability Standard that purposefully fails to respond to a Commission directive. If the ballot body approved a non-responsive Reliability Standard, the NERC board of trustees would then be faced with the choice of either approving or rejecting the non-responsive draft Reliability Standard. In either case, the "balloting up" of a non-responsive draft Reliability Standard will delay or block NERC's ability to comply with the Commission's directive.

23. Such misuse of the NERC Standards Development Process would thwart the fundamental goal of Congress in enacting section 215 to protect reliability of the Bulk-Power System. When the Commission directs that the ERO develop a new or modified Reliability Standard to address a specific concern pursuant to section 215(d)(5) of the FPA, the Commission provides due process, including notice and opportunity for comment and opportunity to seek rehearing. Users, owners and operators of the Bulk-Power System should raise their concerns with a proposed Commission directive in the appropriate Commission proceeding. However, once a Commission directive is final, the participants in NERC's Standards Development Process do not have the discretion to simply ignore the directive or develop provisions to a new or revised Reliability Standard that clearly contradicts the plain understanding of the Commission directive. As the Commission explained in Order No. 693, when the Commission offers a specific approach to address a concern, the ERO has flexibility to develop "an equivalent alternative approach provided that the ERO demonstrates that the alternative will address the Commission's underlying concern or goal as efficiently and effectively as the Commission's proposal."[18] The ERO, however, does not have discretion not to comply with the Commission's directive. Neither a Standards development team nor a ballot body should have the ability to thwart the ERO's good faith efforts to comply.

B. Relevant Statutory and Regulatory Provisions

24. A number of statutory and regulatory provisions provide authority for Commission action when the ERO fails to comply with a Commission directive. Section 215(e)(5) of the Federal Power Act provides that:

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[18] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 186.

> the Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.[19]

In Order No. 672, the Commission implemented this part of the FPA by stating that it would "take appropriate action . . . if the ERO or a Regional Entity fails to comply with a Commission order requiring that a Reliability Standard be developed or modified as necessary to maintain reliability."[20]

25. Section 215(f) of the Federal Power Act authorizes the Commission to propose a change to the ERO's rules that will take effect upon a finding by the Commission that it is just, reasonable, not unduly discriminatory or preferential, in the public interest, and satisfies the requirements of section 215(c).[21]

C. Modification to NERC Rules of Procedure

26. As discussed above, the Commission stated in Order No. 672 that it would take appropriate action if the ERO fails to comply with a Commission order requiring that a Reliability Standard be developed or modified as necessary to maintain reliability. The Commission in Order No. 672 also indicated that it would determine appropriate Commission action regarding the ERO on a case-by-case basis.[22] In this case, we believe that it is appropriate in the first instance to require that the ERO develop a prospective remedy to ensure future compliance. Thus, we direct the ERO to propose a modification to its Rules of Procedure and the Standards Development Process to ensure that the ERO can comply with a Commission directive to develop a new or modified Reliability Standard pursuant to section 215(d)(5) of the FPA. However, we will leave it to the discretion of the ERO to submit detailed proposed rule changes on which the public may

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[19] 16 U.S.C. § 824o(e)(5). Section 39.9 of the Commission's regulations, 18 C.F.R. § 39.9 (2008), includes language similar to section 215(e)(5), and also identifies possible compliance actions against the ERO such as imposition of civil penalties, suspension or decertification of the ERO, and suspension or rescission of approval of a delegation agreement.

[20] *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 761, 765, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[21] 16 U.S.C. § 824o(f).

[22] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 762.

comment. The Commission will notice the proposed changes and will issue an order on proposed modifications after consideration of the comments. NERC is directed to submit detailed proposed rule changes within 90 days of this order.

27. The ERO's proposed modifications to the Standards Development Process must address our concern, discussed above, to assure that Standards drafting teams comply with Commission directives by developing new or revised Reliability Standards that satisfy applicable Commission directives.

28. Further, pursuant to section 215(f) of the FPA, any revision to the ERO's Rules of Procedure must "satisf[y] the requirements of subsection (c)," which includes providing for reasonable notice and opportunity for comment, due process, openness, and balance of interest in developing Reliability Standards.[23] We believe that this provision provides sufficient flexibility for the ERO to develop modifications to its Rules of Procedure that ensure the ERO's ability to comply with Commission directives pursuant to section 215(d)(5) while satisfying the requirements of section 215(c).

29. Moreover, consistent with the Commission's regulations,[24] we direct the ERO, within 90 days of our subsequent order on proposed modifications to the ERO's rules, to comply with the Commission's directive in Order No. 693 to modify Reliability Standard FAC-008-1.[25] As explained in greater detail in Order No. 693, the required modifications include (1) document underlying assumptions and methods used to determine normal and emergency facility ratings; (2) develop facility ratings consistent with industry standards developed through an open, transparent and validated process; and (3) for each facility, identify the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting.[26]

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[23] *See* section 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D) (2006).

[24] 18 C.F.R. § 39.5(g) (2009)("The Commission, when remanding a Reliability Standard to the [ERO] or ordering the [ERO] to submit to the Commission a proposed Reliability Standard or proposed modification to a Reliability Standard that addresses a specific matter may order a deadline by which the [ERO] must submit a proposed or modified Reliability Standard.").

[25] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 771.

[26] *Id.* P 755-762.

The Commission orders:

(A) NERC is hereby directed to file proposed modifications to the NERC Rules of Procedure, within 90 days of the date of this order, as discussed in the body of this order.

(B) NERC is hereby directed to submit to the Commission, within 90 days of the issuance of a Commission order on proposed modifications to NERC's rules, modifications to Reliability Standard FAC-008-1 that comply with the Commission's directive in Order No. 693, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

132 FERC ¶ 61,218
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

North American Electric Reliability Corporation Docket No. RR09-6-001

ORDER DENYING REHEARING, DENYING CLARIFICATION, DENYING RECONSIDERATION, AND DENYING REQUEST FOR A STAY

(Issued September 16, 2010)

1. In the March 18, 2010 order in this proceeding,[1] the Commission directed the North American Electric Reliability Corporation (NERC), the Commission-certified Electric Reliability Organization (ERO), to propose revisions to its Rules of Procedure that pertain to the development of Reliability Standards.[2] Specifically, the Commission directed NERC to propose revisions that address a conflict between its Standards Development Process and its obligation as the ERO to submit to the Commission a new or modified Reliability Standard pursuant to a directive under section 215(d)(5) of the Federal Power Act (FPA).[3] In addition, the Commission ordered NERC to fully comply with a previous Commission directive to develop modifications to Reliability Standard FAC-008-1, which governs Bulk-Power System facility ratings. The Commission took these actions because the current Standards Development Process can prevent the ERO from complying with a Commission directive under section 215(d)(5), and has in fact prevented the ERO from fully complying with the Commission's directive to modify FAC-008-1.

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[1] *North American Electric Reliability Corp.*, 130 FERC ¶ 61,203 (2010) (March 18 Order).

[2] *See* NERC Rules of Procedure, Section 300 (Reliability Standards Development), and Appendix 3A (Reliability Standards Development Procedure). These two provisions of NERC's Rules of Procedure are referred to, collectively, as the "Standards Development Process" throughout this order.

[3] 16 U.S.C. § 824o(d)(5) (2006).

2. NERC and other entities request rehearing and/or clarification of the March 18 Order. NERC also requests that the Commission reconsider and withdraw the directive to develop modifications to FAC-008-1, stay the directives in the March 18 Order, and convene a public conference to consider general issues pertaining to the Commission's prospective implementation of section 215 of the FPA and technical issues specific to FAC-008-1.

3. The rehearing requests in this proceeding reflect concern that the Commission intends to effect a fundamental change in its relationship to the ERO. NERC and others characterize the Commission's directive requiring NERC to propose revisions to its Rules of Procedure as requiring revisions that will allow the Commission to dictate the specific content of a Reliability Standard. These entities argue that such a directive violates the language and intent of section 215 of the FPA, marks a departure from Commission precedent, and threatens to undermine NERC's ability to function as an international ERO.

4. As explained in more detail below, we deny rehearing, reconsideration, and the request for a stay.[4] Contrary to the arguments on rehearing, the March 18 Order does not require NERC to change its rules so that the Commission can dictate the specific content of Reliability Standards; instead, it requires NERC to develop and propose for Commission review an affirmative mechanism designed to ensure that NERC can comply with its obligation as the ERO to submit to the Commission a new or modified Reliability Standard pursuant to a directive under section 215(d)(5) of the FPA. Thus, the March 18 Order is intended to prevent the Standards Development Process from effectively negating a Commission directive, not to preclude the ERO from exercising its freedom to respond to Commission directives with alternative approaches that address the Commission's underlying concern or goal in an equally effective and efficient manner.

5. We also reject the claim that either section 215 of the FPA or Commission precedent permits the ERO to decide not to comply with a final Commission directive under section 215(d)(5) of the FPA, provided that the directive is *considered* through the Standards Development Process. NERC and industry stakeholders can exercise their technical expertise as part of the Standards Development Process; intervene in Reliability Standard rulemakings; comment on Commission proposals to direct new or modified Standards pursuant to section 215(d)(5); request rehearing of Commission directives they

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[4] Although the request for stay is denied, we note that we granted, collectively, a 180-day extension of time past the original deadline for NERC to submit a proposed modification to its Rules of Procedure. *See North American Electric Reliability Corp.*, 131 FERC ¶ 61,237 (2010) and *Notice of Extension of Time*, Docket No. RR09-6-000, (August 19, 2010).

judge to be misguided, overly prescriptive, technically unsound, or *ultra vires*; seek judicial review if the Commission confirms the directives; and develop equivalent alternatives that address the concerns or goals underlying the directives as efficiently and effectively as the directives themselves. They cannot, however, treat Commission directives under section 215(d)(5) as if those directives require no response other than consideration during the Standards Development Process. The ERO is not required to develop a modification or new Reliability Standard that rigidly adheres to the technical approach specified in a final Commission directive, but it must develop and submit to the Commission some proposal that affirmatively responds to the concern or goal underlying the directive and an adequate technical analysis if it decides to take a different approach. The ERO has a statutory obligation to comply with Commission directives under section 215(d)(5); it is not absolved of that obligation by merely considering a Commission directive in the Standards Development Process.

I. Background

6. In the March 18 Order, the Commission expressed a growing concern that the current voting rules in NERC's Standards Development Process can be used to prevent NERC from complying with its obligation as the ERO to submit to the Commission a new or modified Reliability Standard pursuant to a directive under section 215(d)(5) of the FPA.[5]

7. Section 215(d)(5) of the FPA authorizes the Commission to direct the ERO to submit to the Commission a new or modified Reliability Standard that addresses a specific matter if the Commission considers the new or modified Standard appropriate to carry out section 215. Under the current Standards Development Process, however, a draft Reliability Standard cannot be presented to the NERC board of trustees for consideration unless approved by a two-thirds majority of the stakeholder ballot body.[6] Consequently, if just more than one-third of a ballot pool votes against a Reliability Standard drafted to comply with a Commission directive, the Standard will be rejected and will not be presented to the NERC board of trustees for a vote or to the Commission for review – even in circumstances where the Standard would have complied with the Commission's directive. Thus, under current ERO rules, the ballot body can delay or prevent NERC's compliance with its statutory obligation.

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[5] March 18 Order, 130 FERC ¶ 61,203 at P 2.

[6] For a more complete discussion of the current Standards Development Process, *see id.* P 8-11.

8. As the Commission explained in the March 18 Order, this situation occurred with respect to its directive to the ERO to modify Reliability Standard FAC-008-1.[7] The Commission approved FAC-008-1 in Order No. 693.[8] It also required NERC to submit three modifications. One of these modifications was the addition of a requirement that, "for each facility, [each transmission owner and generator owner must] identify the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting."[9] In other words, for certain transmission interconnections, the Commission required that transmission and generator owners determine how much more transfer capability would be available if the weakest element was improved so that it no longer limited the rest of the interconnection facilities.

9. When the Commission proposed this modification in the notice of proposed rulemaking (NOPR), several commenters objected on the basis that it "promotes commercial use of the grid . . . and relates more to transmission access [than to reliability]."[10] In Order No. 693, the Commission rejected this argument and explained that the modification addresses a reliability objective:

> When the transmission operators know which component within the transmission element is limiting they have more information to inform their decisions about how to provide for the Reliable Operation of the Bulk-Power System. Our . . . modification does not require any entity to invest in equipment to increase ratings of any facility; it simply requires the next limiting componet [sic] of each facility to be identified in order to understand what components are causing the limits that are to be used in reliability mitigation assessments. The identification of the first limiting component is already an inherent requirement in the existing rating process.[11]

No entity sought rehearing of this directive regarding FAC-008-1.

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[7] *See id.* P 13-18.

[8] *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

[9] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 755-758, 771.

[10] *Id.* P 757.

[11] *Id.*

10. NERC initiated the process of complying with the Commission's directive by approving a Standard Authorization Request to develop revisions to FAC-008-1. An industry drafting team developed FAC-008-2, which addressed the three modifications directed by the Commission in Order No. 693. Requirement R7 of the revised Reliability Standard addressed the Commission's directive that the ERO develop a modification requiring transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed.

11. In November 2008, the ballot body approved FAC-008-2 with a 70.01 percent affirmative (weighted segment) vote in the initial ballot. Although this percentage exceeded the two-thirds majority of the weighted segment votes required for passage, because negative votes with comments were received, NERC's Standards Development Process required a recirculation ballot. Some of the comments that accompanied the negative votes pertained to Requirement R7 of the draft Reliability Standard. These comments argued that Requirement R7 did not address a reliability concern, but rather a business concern better addressed in the context of a tariff. The NERC drafting team responded to these comments by stating that:

> if FERC issues a directive and the time for a rehearing has passed, the drafting team is to comply with the directive provided the directive is not detrimental to reliability, regardless of the opinion of the drafting team or the industry as to its perceived reliability benefit. .... In the case of FERC Order 693, NERC did not ask for rehearing during the 30-day period....[12]

12. In December 2008, NERC held the recirculation ballot. FAC-008-2 was voted down, receiving only a 57.37 percent affirmative vote, less than the two-thirds affirmative vote necessary for approval. Pursuant to NERC's rules, the project ended after the failed recirculation ballot. On January 15, 2009, NERC's Standards Committee approved the posting of a new Standard Authorization Request for FAC-008-2, which included the draft Reliability Standard without Requirement R7. The NERC board of trustees approved this draft of Reliability Standard FAC-008-2 at its May 2010 meeting.

13. In the March 18 Order, the Commission cited the FAC-008-2 development process as an example of the conflict between NERC's rules and NERC's obligation as the ERO

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[12] *See* Consideration of Comments Submitted with Initial Ballots for FAC-008-2 — Project 2006-09 Reliability Standard, *available at* http://www.nerc.com/docs/standards/sar/Project2006-09_C_of_C_Initial_Ballot_FAC-008_2008Dec08.pdf.

to comply with a Commission directive to submit a new or modified Reliability Standard. The Commission explained that once a Commission directive is final, the participants in NERC's Standards Development Process do not have the discretion to simply ignore the directive or develop a response that clearly contradicts the plain understanding of the directive. The Commission noted that the ERO may respond with an equivalent alternative approach that addresses the Commission's underlying concern or goal as efficiently and effectively as the Commission's proposal, but that the ERO does not have discretion to choose not to comply with a final Commission directive.[13]

14. These considerations led the Commission to find that it is not in the public interest or consistent with the intent of section 215 of the FPA to allow continuation of a process that does not allow the ERO to meet its statutory obligation.[14] Consequently, the Commission exercised its authority under section 215(f) of the FPA[15] and directed the ERO to propose revisions to its Standards Development Process that will ensure that the ERO can comply with a Commission directive to develop a new or modified Reliability Standard. The Commission gave the ERO discretion in developing the proposed revisions,[16] requiring only that the rules satisfy the requirements of section 215(c)(2)(D) of the FPA by providing for "reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards."[17] The Commission stated that it will notice the proposed revisions and issue an order on them after considering comments. The Commission directed the ERO to file the proposed revisions no later than 90 days from the date of the March 18 Order.[18] The Commission also directed the ERO to fully comply with the Commission's directive to modify Reliability Standard FAC-008-1 no later than 90 days from the date of the Commission's future order on NERC's proposed revisions.

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[13] March 18 Order, 130 FERC ¶ 61,203 at P 23.

[14] *Id.* P 21.

[15] 16 U.S.C. § 824o(f) (2006). Section 215(f) of the FPA provides that the Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule change "shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just and reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of [section 215(c)]."

[16] March 18 Order, 130 FERC ¶ 61,203 at P 1, 26.

[17] *See* section 215(c)(2)(D), 16 U.S.C. § 824o(c)(2)(D) (2006).

[18] As noted previously, the Commission has subsequently extended the compliance deadline to 270 days from the date of the March 18 Order.

II. Responsive Pleadings

A. Motions to Intervene and Comments

15. In addition to NERC, the Trade Associations,[19] the Georgia Corporations,[20] and the Canadian Electricity Association (CEA)[21] submitted motions to intervene and requests for clarification or rehearing of the March 18 Order. Several other entities submitted motions to intervene and either comments supporting the rehearing requests filed by NERC and/or the Trade Associations and CEA or requests for rehearing adopting as their own NERC's requests for rehearing.[22]

16. In general, the entities seeking to intervene recognize that intervention is typically not permitted at the rehearing stage. They argue, however, that intervention should be permitted in this proceeding because: (1) the Commission issued the March 18 Order in a new docket, precluding earlier intervention; (2) they intervened in the proceedings that resulted in Order Nos. 672[23] and 693, which are closely related to this proceeding, and denial of intervention in this proceeding would effectively frustrate their rights as parties

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[19] The Trade Associations consist of: the Edison Electric Institute, the American Public Power Association, the National Rural Electric Cooperative Association, the Canadian Electricity Association, the Large Public Power Council, the Transmission Access Policy Study Group, and the Electricity Consumers Resource Council.

[20] The Georgia Corporations consist of: Georgia Transmission Corporation and Georgia System Operations Corporation.

[21] Although it joined the Trade Associations' filing, CEA filed a separate pleading emphasizing the possibility that the March 18 Order will undermine NERC's ability to function in Canada.

[22] These entities are: Dominion Resources Services Inc., Exelon Corporation, the Independent Electricity System Operator, the Regional Entities (Reliability*First* Corporation, Midwest Reliability Organization, Florida Reliability Coordinating Council, Texas Regional Entity, Northeast Power Coordinating Council, Inc., Western Electricity Coordinating Council, SERC Reliability Corporation, and Southwest Power Pool Regional Entity), Tampa Electric Company, and the Wisconsin Electric Power Company.

[23] *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, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

to those proceedings; (3) nothing in the FPA envisions the Commission directing NERC to change its Rules of Procedure without an opportunity for public comment; and (4) while the motions should not be deemed out-of-time, the Commission's rules permit late interventions for good cause.

B. Commission Determination

17. In the context of this proceeding, which the Commission initiated *sua sponte*, there was no prior opportunity for any entity to intervene. Consequently, we will consider the motions to intervene filed in this proceeding as timely. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[24] the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

III. Discussion

18. NERC, the Georgia Corporations, and the Trade Associations request rehearing of the Commission's directive requiring NERC to propose revisions to its Rules of Procedure. In general, they argue that the directive conflicts with multiple provisions of section 215 of the FPA. NERC also claims that the directive is not justified by its overall track record in responding to Commission directives. In addition, NERC requests reconsideration of the directive requiring it to develop a modification to Reliability Standard FAC-008-1 that will require transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed. NERC argues that this directive serves commercial, rather than reliability goals. Finally, NERC requests that the Commission stay its directives and convene a public conference to discuss general issues related to how the Commission intends to prospectively implement section 215 and technical issues specific to Reliability Standard FAC-008-1. As we explain more fully below, we deny rehearing, deny reconsideration, and deny the request for a stay.

A. Requests for Rehearing and Clarification of Rules Change Directive

19. The rehearing and clarification requests in this proceeding indicate a general misunderstanding of the March 18 Order. The Commission did not, as they claim, require NERC to change its Rules of Procedure so that the Commission can dictate the specific content of Reliability Standards.[25] As a result of this misunderstanding, NERC,

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[24] 18 C.F.R. § 385.214 (2010).

[25] The Trade Associations request that the Commission clarify the nature of its directive. The Trade Associations recognize that the Commission must have assurances that NERC is capable of complying with a Commission directive to submit a new or modified Reliability Standard addressing a specific matter. *See* Trade Associations'

(continued...)

the Georgia Corporations, and the Trade Associations argue that the Commission's directive conflicts with sections 215(d)(5), 215(c)(2)(D), 215(d)(2),[26] and 215(c)(2)(E)[27] of the FPA. We are not persuaded by these arguments and deny the requests for rehearing, as discussed below.

1. The Commission's Directive Does Not Conflict With Section 215(d)(5) of the FPA

a. Rehearing Requests

20. Section 215(d)(5) of the FPA authorizes the Commission to direct the ERO to submit to the Commission a new or modified Reliability Standard that addresses a specific matter if the Commission considers the new or modified Standard appropriate to carry out section 215. NERC, the Georgia Corporations, and the Trade Associations argue that the directive in the March 18 Order, which they characterize as requiring NERC to allow the Commission to dictate the specific content of a Reliability Standard required under section 215(d)(5), marks a shift in how the Commission understands its authority under section 215(d)(5), and signals a departure from Congressional intent and Commission precedent concerning the nature and purpose of Commission directives under section 215(d)(5).

21. NERC, the Georgia Corporations, and the Trade Associations quote extensively from the legislative history behind the language that ultimately became section 215 of the FPA to show that the Commission lacks authority to dictate the specific content of Reliability Standards. According to NERC and the Trade Associations, this history began in 1998, when a United States Department of Energy task force (DOE Task Force) recommended legislation authorizing a self-regulatory reliability organization, rather than the Commission, to develop mandatory and enforceable reliability standards that the

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Rehearing Request at 9, 26 (Trade Associations). Thus, to the extent that the March 18 Order requires NERC to propose revisions to its Rules of Procedure that provide for a Reliability Standard to be submitted to the Commission in response to a Commission directive under section 215(d)(5) of the FPA, the Trade Associations do not challenge the directive. *Id.* at 9, 26. However, to the extent that the directive requires NERC to adopt in a new or modified Reliability Standard specific technical content, they join NERC and the Georgia Corporations in seeking rehearing. *Id.* at 9-10, 23, 27.

[26] 16 U.S.C. § 824o(d)(2) (2006).

[27] *Id.* § 824o(c)(2)(E).

Commission would then either approve or remand, but not modify.[28] The Trade Associations add that when President Clinton proposed such legislation, the Secretary of Energy testified before a House Subcommittee that the legislation would authorize the Commission to oversee a self-regulatory organization that would prescribe and enforce mandatory Reliability Standards.[29]

22. NERC, the Georgia Corporations, and the Trade Associations further argue that the 2002 Senate debate over the "Daschle Bill" and "Thomas Amendment" is evidence that section 215 of the FPA contemplates that NERC, as the presumptive self-regulatory reliability organization, would develop mandatory and enforceable reliability standards through a consensus-based process. They explain that Senator Daschle sponsored legislation proposing to authorize the Commission to develop Reliability Standards, while Senator Thomas offered an amendment—the language of which is almost identical to what was eventually enacted three years later as section 215 of the FPA—proposing to vest the authority in a participant-run ERO. The Trade Associations quote Senator Bingaman, who supported the Daschle Bill, and Senator Thomas to show that Senators perceived the choice between the Daschle Bill and Thomas Amendment as a choice between whether NERC or the Commission would be responsible for developing Reliability Standards. Senator Thomas argued that NERC, rather than the Commission, had the technical expertise, consensus building experience, and existing mechanisms necessary to develop technically sound reliability standards that account for regional and international differences. At the conclusion of the debate, the Senate adopted the Thomas amendment.[30]

23. In light of this history, and the language of sections 215(d)(2) and 215(d)(4)[31] of the FPA, NERC, the Georgia Corporations, and the Trade Associations argue that the

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[28] NERC Request for Rehearing and Reconsideration, Motion for Stay, and Request for Public Conference at 7-8 (NERC); Trade Associations at 14-16.

[29] Trade Associations at 15-16.

[30] NERC at 5-6, 9; Georgia Corporations' Rehearing Request at 9-10 (Georgia Corporations); Trade Associations at 16-20.

[31] 16 U.S.C. § 824o(d)(4) (2006). Section 215(d)(4) directs the Commission to remand any proposed Reliability Standard or modification that it disapproves of in whole or in part. Section 215(d)(2), *inter alia*, authorizes the Commission to approve a Reliability Standard or a modification to a Reliability Standard proposed by the ERO if the Commission determines that it is just, reasonable, not unduly discriminatory or preferential, and in the public interest.

Commission is limited to either approving or remanding a Reliability Standard developed by NERC, and is without authority to develop a Standard, dictate the contents of a new or modified Standard, or re-write a proposed Standard by directing an overly prescriptive modification. The Trade Associations further argue that, given the statute's clear language and legislative history, the Commission cannot rely on *Chevron* deference[32] to support a reading of section 215 that would permit a Commission directive that requires NERC to let the Commission dictate the specific technical content of a Reliability Standard.[33] The Trade Associations add that the Commission recognized these limits in Order Nos. 672 and 672-A, when it acknowledged its statutory obligation to give due weight to the technical expertise of the ERO[34] and clarified that it did not intend to prescribe the text or substance of any Reliability Standard.[35]

24. NERC, the Georgia Corporations, and the Trade Associations also claim that the Commission's directive marks a significant shift in the how the Commission understands the nature and purpose of its authority under section 215(d)(5) of the FPA. They point out that the Commission carefully addressed this subject in Order No. 693, where it explained, *inter alia*, that: (1) "a direction for modification [under section 215(d)(5)] should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process;"[36] (2) "where a directive for modification appears to be determinative of the outcome, the Commission provides flexibility by directing the ERO to address the underlying issue through the Reliability Standards development process without mandating a specific change to the Reliability Standard;"[37] (3) "where the Final Rule identifies a concern and offers a specific approach to address that concern, [the Commission] will consider an equivalent alternative approach provided that the ERO demonstrates that the alternative will adequately address the Commission's underlying concern or goal as efficiently and effectively as the

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[32] *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984) (*Chevron*).

[33] Trade Associations at 24-25.

[34] *Id.* at 20 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 344).

[35] *Id.* (citing Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 34).

[36] NERC at 12; Trade Associations at 20 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 185).

[37] NERC at 12; Georgia Corporations at 11 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 186).

Commission's proposal;"[38] (4) "any modification to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through NERC's Reliability Standards development process;"[39] and (5) "the Commission [must] provide sufficient guidance so that the ERO has an understanding of the Commission's concerns and an appropriate, but not necessarily exclusive, outcome to address those concerns."[40]

25. Against this backdrop, NERC argues that the Commission's assertion in the March 18 Order that the ERO lacks discretion with respect to whether it should comply with a Commission directive directly contradicts Order No. 693.[41] The Georgia Corporations and the Trade Associations make similar arguments. In particular, the Georgia Corporations maintain that the Commission made the unqualified statement in Order No. 693 that, with respect to Commission directives pursuant to section 215(d)(5) of the FPA, the Commission "'does not direct any outcome other than that [the Commission's] comments receive consideration.'"[42] In a footnote, the Trade Associations assert that NERC drafting teams "must be free to make an informed judgment, from a reliability perspective, on whether [the Commission's] guidance as to the technical content of a standard should be adopted."[43]

b. Commission Determination

26. We deny rehearing. NERC, the Georgia Corporations, and the Trade Associations misunderstand the requirements in the March 18 Order. The Commission did not require NERC to change its Rules of Procedure so that the Commission can dictate the specific content of Reliability Standards; instead, it ordered NERC to develop and propose for

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[38] NERC at 12 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 186).

[39] NERC at 12; Georgia Corporations at 11; Trade Associations at 21 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 187).

[40] NERC at 12; Georgia Corporations at 11; Trade Associations at 20-21 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 185).

[41] NERC at 11 ("According to the Commission, the ERO does not have discretion not to comply with the Commission's directive [to modify FAC-008-1]. The position the Commission has asserted . . . with respect to directives directly contravenes its pronouncements in Order No. 693 as to the nature and purpose of directives.").

[42] Georgia Corporations at 11-12 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 188).

[43] Trade Associations at n.10.

Commission review an affirmative mechanism designed to prevent the Standards Development Process from negating a Commission directive to submit a new or modified Standard. Additionally, the Commission has not changed how it views its authority under section 215(d)(5) of the FPA; we continue to adhere to the explanation of our authority set forth in Order No. 693 and in relevant parts of Order Nos. 672 and 672-A.[44]

27. NERC, the Georgia Corporations, and the Trade Associations do not explain the basis for their conclusion that the Commission's directive requires NERC to let the Commission dictate the specific content of Reliability Standards. To the contrary, in the March 18 Order the Commission explicitly acknowledged that it lacks authority to prescribe the specific content of a Reliability Standard. For example, the Commission recognized that the statutory paradigm in section 215 differs significantly from the rest of Part II of the FPA precisely because it authorizes an independent ERO to develop Reliability Standards through a stakeholder process that represents a balance of interests.[45] The Commission also confirmed its longstanding position that when a Commission directive to submit a new or modified Reliability Standard offers a specific approach, the ERO has the freedom and flexibility to develop an equally efficient and effective alternative.[46] Moreover, the Commission made clear that, apart from requiring the ERO to propose a solution that addresses the problem identified in the March 18 Order, it was not requiring the ERO to submit any specific type of revision to its Rules of Procedure.[47]

28. Equally as important, the facts set forth in the March 18 Order demonstrate that the Commission's directive was driven by specific circumstances that gave rise to a specific type of problem. It was not our intention then, nor now, to take on the role of the Standards Development Process. The Commission explained the need for its directive by pointing to the failure of FAC-008-2 in December 2008, which demonstrated the potential that the Standards Development Process could effectively block attempts to comply with a Commission directive. As the Commission explained in the March 18 Order, and as NERC confirms on rehearing, the stakeholders' rejection of FAC-008-2 resulted in a new draft Reliability Standard that does not include any attempt to comply

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[44] *See, e.g.*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 185-187; Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 424; Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 34.

[45] March 18 Order, 130 FERC ¶ 61,203 at P 2.

[46] *Id.* P 23.

[47] *Id.* P 1, 26.

with the directive at issue,[48] thereby delaying, if not blocking NERC's ability to respond.[49] The March 18 Order merely points out that the stakeholder process must not prevent the ERO from complying with a critical aspect of the statutory model in which it operates—its obligation to comply with a Commission directive pursuant to section 215(d)(5) of the FPA—and requires the ERO to propose revisions to its Rules of Procedure that will prevent a failure to fulfill such a Commission directive.

29. Additionally, the Commission has previously expressed concern about the possibility that the Standards Development Process could be used to block compliance with a Commission directive. In the order certifying NERC as the ERO, the Commission expressed concern that the super-majority voting requirement in the Standards Development Process could allow a small portion of industry to veto a draft Reliability Standard designed to improve reliability or remedy flaws in an existing Standard, and directed NERC to address this possibility in a compliance filing.[50] In the compliance filing, NERC defended the super-majority requirement and argued that industry had repeatedly demonstrated its willingness to adopt Reliability Standards even if they did not enjoy universal support.[51] In its subsequent order, the Commission noted that while the super-majority voting requirement was not required for accreditation by the American National Standards Institute (ANSI), it appeared to have worked well for independent system operators and regional transmission organizations.[52] The Commission weighed these observations against the fact that the ERO and industry were then in the midst of changing from the old regime of voluntary Reliability Standards to the current regime of mandatory and enforceable Reliability Standards backed by the possibility of significant penalties for violations. With these considerations in mind, the Commission concluded that it would not, at that time, direct the ERO to reduce the super-majority voting

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[48] *See id.* P 13-23.

[49] NERC's rehearing request gives no indication of when, or if, NERC intends to comply with the directive.

[50] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, at P 240 (ERO Certification Order), *order on reh'g & compliance filing*, 117 FERC ¶ 61,126 (ERO Rehearing Order) (2006), *order on compliance filing*, 118 FERC ¶ 61,030 (2007) (ERO Certification Compliance Order), *order on compliance filing*, 118 FERC ¶ 61,190 (2007) (Second ERO Certification Compliance Order), *order on clarification & reh'g*, 119 FERC ¶ 61,046 (2007) (ERO Certification Compliance Order Rehearing), *aff'd sub nom. Alcoa, Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

[51] *See* ERO Certification Compliance Order, 118 FERC ¶ 61,030 at P 12.

[52] *Id.* P 18.

requirement. However, the Commission reserved the right to revisit the issue if future voting patterns, such as the balloting down of a Reliability Standard in order to subsequently approve a less stringent version, signaled the need for an improvement in the voting process.[53] Consequently, NERC and industry have long had notice of the Commission's concerns in this area.

30. Nevertheless, to clarify our intention, we state that the Commission is not changing course from Order Nos. 672 and 693 and is not denying the ERO the opportunity to develop Reliability Standards using its technical expertise. We stand by Order Nos. 672 and 672-A, where we explained that the Commission does not intend to prescribe the text or substance of Reliability Standards[54] and confirmed that the ERO alone can change a Standard.[55] We also stand by our comprehensive explanation in Order No. 693 of the relationship between Commission directives under section 215(d)(5) of the FPA and the ERO's statutory right to develop new and modified Reliability Standards using its technical expertise. As we explained in Order No. 693, and confirm today, when the Commission issues a directive pursuant to 215(d)(5) of the FPA, the ERO has the flexibility to respond with an alternative that is an equally effective and efficient means of addressing the Commission's underlying goal or concern.[56]

31. NERC, the Georgia Corporations, and the Trade Associations also appear to argue that either Order No. 693 or section 215 of the FPA, or both, permit or require the ERO to decide whether it will comply with a Commission directive under section 215(d)(5) of the FPA. For example, NERC argues that the Commission's statement that the ERO lacks discretion to decide whether to comply with a Commission directive contradicts Order No. 693.[57] Similarly, the Georgia Corporations quote Order No. 693 to attempt to show that, with respect to Commission directives pursuant to section 215(d)(5), the Commission "'does not direct any outcome other than that [the Commission's] comments receive consideration.'"[58]

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[53] *Id.*

[54] Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 34.

[55] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 416, 424.

[56] *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 31, 185-187.

[57] NERC at 11.

[58] Georgia Corporations at 11-12 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 188).

32. In Order No. 693, the Commission made clear that the ERO has discretion in how it responds to a Commission directive to submit a new or modified Reliability Standard—but the discretion exists in *how* the ERO chooses to affirmatively respond, not in *whether* the ERO will affirmatively respond. Order No. 693 explains that when the Commission issues a final directive pursuant to section 215(d)(5), the ERO is free to comply by developing a response that addresses the concern or goal underlying the directive rather than by simply transcribing the directive into the new or modified Reliability Standard or adopting the Commission's technical analysis without subjecting it to stakeholder evaluation—but Order No. 693 also requires that the ERO respond with a proposal.[59] Thus, while Order No. 693 recognizes the Commission's need to provide the ERO with detailed and specific information about its directives, and the ERO's statutory right (or, from a different perspective, obligation) to exercise its technical expertise to develop new and modified Reliability Standards through an open and collaborative stakeholder process, Order No. 693 always contemplates that the ERO will, at the conclusion of the Standards Development Process, submit some affirmative response to the Commission's directive.

33. The Georgia Corporations attempt to persuade the Commission that Order No. 693 requires NERC only to *consider* a Commission directive in the Standards Development Process and that such a directive can be satisfied even if NERC decides to submit nothing in response. The Commission never set forth such a policy in Order No. 693. The language quoted by the Georgia Corporations in support of their argument is taken out of context and, as a result, does not support their conclusion.

34. Specifically, the Georgia Corporations quote the Commission as stating that it "does not direct any outcome other than that [the Commission's] comments receive consideration." This quote is inaccurate, however, because of the addition of the words "the Commission's" to the original language. Rather than providing clarity for the reader, this bracketed addition actually changes the entire meaning of the original language. Read outside of its original context, the quote with the additional bracketed language can be read to suggest that NERC complies with its obligation as the ERO by *simply considering* a Commission directive, even if it ultimately decides to reject it. However, when the quoted language is read in its original context, without the bracketed language, it carries a much different meaning. In context, the quotation refers to NOPR comments submitted by various parties on the multiple Reliability Standards under

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[59] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 31 ("We emphasize that we are not, at this time, mandating a particular outcome by way of these directives, *but we do expect the ERO to respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is as effective as or more effective than the Commission's example or directive.*") (emphasis added); *see also id.* P 185-187.

consideration in Order No. 693; it does not refer to the Commission's directives with respect to the Reliability Standards.[60] The Commission was stating that in circumstances where commenters offered suggestions to improve or otherwise modify a Reliability Standard, and the suggestions pertained to issues not raised in the NOPR, it was directing the ERO to consider the comments rather than directing any specific outcome related to them.[61] This point is entirely different from a statement by the Commission that NERC need only consider directives to develop a new or modified Reliability Standard pursuant to section 215(d)(5). In Order No. 693, the Commission explored in great detail the relationship between the ERO's statutory right and obligation to develop new and modified Reliability Standards through a stakeholder process, and its obligation to comply with Commission directives pursuant to section 215(d)(5). The Commission recognized that the ERO is free to deviate from the specifics of a Commission directive, provided that it responds to the directive with an equivalent alternative that addresses the directive's underlying concern or goal as efficiently and effectively as the directive itself.[62]

35. Section 215(d)(5) provides that the Commission "may order the [ERO] to submit to the Commission a proposed reliability standard or modification to a reliability standard that address a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out [section 215]." There are at least two reasons why this language precludes the notion that the ERO has discretion to disregard a final Commission directive. First, the statute provides that the Commission "may order the [ERO] to submit" a new or modified Reliability Standard. The only reasonable reading of this language is that if the Commission has authority to order the ERO to submit a Reliability Standard, then the ERO is legally obligated to submit it. This seems particularly true in the case of section 215, which contains no language that qualifies or

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[60] In fact, such a reading would render that part of the paragraph unintelligible. *See id.* P 188 ("As noted throughout the standard-by-standard analysis that follows, various commenters provide specific suggestions to improve or otherwise modify a Reliability Standard that address issues not raised in the NOPR. In such circumstances, the Commission directs the ERO to consider such comments as it modifies the Reliability Standards during the three-year review cycle contemplated by NERC's Work Plan through the ERO Reliability Standards development process. The Commission, however, does not direct any outcome other than that the comments receive consideration.").

[61] *Compare id.* P 420, 439, 471, 508, 540, 566, 583 (directing a modification to a Reliability Standard pursuant to section 215(d)(5) of the FPA) *with id.* P 462, 470, 515, 523, 539 (directing the ERO to "consider" in the Standards Development Process issues raised by commenters).

[62] *See, e.g.*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 31, 185-186.

creates exceptions to the ERO's obligation to comply. Second, the Commission can require a new or modified Reliability Standard "if the Commission considers such a new or modified reliability standard appropriate to carry out [section 215 of the FPA]." While section 215 vests the ERO with the responsibility to develop Reliability Standards, and requires the Commission to give "due weight" to the ERO's technical expertise in that context, it conditions the Commission's authority to direct a new or modified Standard on the Commission's judgment that the subject of the new or modified Standard needs to be addressed. In other words, the Commission, not the ERO, is the entity responsible for determining the need for a section 215(d)(5) directive. Once the Commission determines that a new or modified Reliability Standard is "appropriate to carry out [section 215 of the FPA]" and issues a final directive to that effect, the ERO is not free to substitute its judgment for the Commission's judgment by concluding through the Standards Development Process that the directive is technically unsound or unnecessary. The ERO is free to respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is at least as effective and efficient as the Commission's approach.[63] Once the Commission has made a final determination that addressing the concern or goal identified by the Commission is technically justified, the ERO must comply with the Commission's directive.[64]

36. Of course, the ERO and other industry participants have multiple opportunities to challenge Commission directives before they become final.[65] For example, if the directive appears in the context of a NOPR, the ERO and other entities may submit comments explaining, among other things, why the Commission's proposal is unnecessary, technically unsound, or does not enhance reliability. If the Commission decides against them, they may seek rehearing, and if necessary, judicial review. The Commission benefits from the active participation of stakeholders in these circumstances.

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[63] *Id.* P 31, 186.

[64] Thus, the ERO could conclude that the Commission's specific approach to addressing an underlying concern is not the best approach because it could pose a risk to reliability. In this circumstance, the appropriate response would be for the ERO to develop an equivalent alternative that addresses the Commission's concern in a way that does not pose the same risk, not to veto the directive in the Standards Development Process.

[65] In the example of the Commission directive discussed in the March 18 Order, Order No. 693 provided multiple opportunities for comment, first on a Commission staff assessment of the proposed NERC standards, then a NOPR, then opportunity for rehearing on a final rule. Moreover, the issue regarding FAC-008 was in fact raised by entities in their NOPR comments. Having failed to seek rehearing, NERC and stakeholders cannot refuse to respond to the Commission's final directive.

However, once a Commission directive becomes final, either because the Commission confirmed it on rehearing and no entity sought judicial review, the Court upheld the directive after a challenge, or no entity sought rehearing in the first place, the ERO must comply with the directive pursuant to the guidance set forth in Order No. 693.[66]

37. Most importantly, section 215 of the FPA does not include a mechanism that allows the ERO to register disapproval and rejection of a Commission directive through the Standards Development Process. In the absence of any express statutory language to the contrary, we read section 215 of the FPA against the backdrop of the long-established rules of administrative law codified in section 313 of the FPA,[67] as well as in the Administrative Procedure Act.[68] These rules require any party aggrieved by a Commission order to seek rehearing of the order and, failing success at that stage, judicial review. These are the only avenues through which the ERO or any other entity can attempt to reverse a Commission section 215(d)(5) directive to submit a new or modified Reliability Standard. Nothing in the legislative history or language of section 215 suggests otherwise, much less that the ERO can use its Standards Development Process in lieu of seeking rehearing and judicial review of a Commission directive.

2. The Commission's Directive Does Not Conflict With Section 215(c)(2)(D) of the FPA

a. Rehearing Requests

38. Section 215(c)(2)(D) of the FPA requires the ERO to develop Reliability Standards according to a process that provides for "reasonable notice and opportunity for public comment, due process, openness, and balance of interests." NERC claims that these requirements are the hallmarks of a consensus-based process, by which it appears to refer specifically to a consensus-based process as understood by the ANSI. According to ANSI's website, which NERC quotes: (1) a standards development process can be ANSI-certified if it meets ANSI's requirements for "'openness, balance, consensus and other due process safeguards;'" (2) "openness" "'has many elements, but basically refers to a collaborative, balanced and consensus-based approval process;'" and (3) the "hallmarks" of an ANSI-accredited process include requirements that representatives from materially affected and interested parties reach consensus and that standards are subjected to public review and comment, receive a good-faith response, and are subject to

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[66] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 184-192.

[67] 16 U.S.C. § 8251 (2006).

[68] 5 U.S.C. § 704 (2006).

appeal.[69] NERC argues that the Senate debate over the Thomas Amendment confirms that Congress intended section 215 to require a consensus-based approach to developing Reliability Standards, and it appears to suggest that Congress intended this approach to either coincide with or refer to ANSI's requirements.[70] NERC states that its current Standards Development Process is accredited by ANSI as a consensus-based process.

39. NERC acknowledges that section 215(d)(5) of the FPA authorizes the Commission to require the ERO to submit a new or modified Reliability Standard; however, NERC argues that this provision does not negate the requirements in section 215(c)(2)(D). NERC acknowledges that the Commission required NERC to develop and submit revisions to its Rules of Procedure that still allow for "reasonable notice and opportunity for public comment, due process, openness, and balance of interests," but NERC claims that:

> It is to no avail for the Commission to tell NERC that in making the required changes to its standards process, NERC must still have a process that assures reasonable notice and opportunity for pubic comment, due process, openness, and balance of interests. It is as if the Commission said, 'When dealing with our directives, you cannot use a consensus-based process, but whatever you come up with must still be a consensus-based process.'[71]

40. The Georgia Corporations approach section 215(c)(2)(D) of the FPA from the point of view of a completed Reliability Standard. They maintain that the content of each Reliability Standard must represent a balance of stakeholder interests expressed through an industry-based consensus process. They argue that the Commission's directive would circumvent NERC's balloting procedures and undercut what the Commission previously determined was a reasonable way for the ERO to balance stakeholder interests.

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[69] NERC at 5 (citing American National Standards Institute, http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1).

[70] *Id.* For example, after quoting the requirements for an ANSI-accredited consensus based process, NERC states that "During the legislative process that led to adoption of Section 215, Congress was fully aware that the standard-setting process required in Section 215 was a consensus-based process, and that is what Congress intended." *Id.*

[71] *Id.* at 6.

41. The Georgia Corporations further argue that the directive is inconsistent with how the Commission addressed the interest-balancing requirement of section 215 of the FPA in Order Nos. 672 and 672-A. They claim that the Commission appropriately recognized the requirement when it concluded that: (1) the Standards Development Process must be open to public participation and include consideration of a wide range of viewpoints;[72] (2) the ERO is responsible for establishing procedures to ensure balanced decision-making;[73] and (3) there are many ways that the ERO can provide for balanced decision-making.[74] The Georgia Corporations point out that the Commission allowed ERO candidates to propose a Standards Development Process that would include a mechanism for implementing the statute's interest-balancing requirement, and that NERC proposed and the Commission approved the current stakeholder balloting procedure. The Georgia Corporations argue that the Commission's directive in the March 18 Order conflicts with Order Nos. 672 and 672-A because it would compel a specific, Commission dictated approach to ERO governance that would not satisfy section 215's interest-balancing requirement.

b. Commission Determination

42. We deny rehearing. Most of the arguments made by NERC and the Georgia Corporations proceed from the incorrect premise that the March 18 Order abandoned Order Nos. 672 and 693 and required NERC to change its rules so that the Commission can dictate the specific content of Reliability Standards. As we discuss above, this is not the case. Thus, to the extent that NERC and the Georgia Corporations argue that the Commission's directive forecloses a consensus-based process or makes it impossible to balance interests *because it requires NERC to let the Commission dictate the specific content of Reliability Standards*, these arguments are without merit.

43. In addition to these arguments, NERC appears to suggest that Congress intended section 215(c)(2)(D) of the FPA to require a consensus-based Standards Development Process that either mirrors or coincides with ANSI's guidelines. For example, NERC seems to argue that the term "openness" in section 215(c)(2)(D) must be interpreted to refer to the definition of "openness" on ANSI's website. This definition states that "openness" "basically . . . refers to a consensus-based approval process." Thus, it seems

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[72] Georgia Corporations at 7 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 172, 258, and 417).

[73] *Id.* (citing Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 16).

[74] *Id.*

that NERC reads "openness" as the term in section 215(c)(2)(D) that requires the ERO to employ a consensus-based Standards Development Process.

44. We disagree with NERC that Congress intended to mandate a consensus-based Standards Development process that meets ANSI guidelines. The Commission has never interpreted section 215(c)(2)(D) of the FPA to require an ANSI-certified process. On the contrary, the Commission has always maintained that employing an ANSI-certified process is *one* reasonable way of satisfying the requirements in section 215(c)(2)(D).[75] We continue to maintain that it is possible for the ERO to employ a Standards Development Process that is not ANSI-certified but still provides for "reasonable notice and opportunity for public comment, due process, openness, and balance of interests."[76] NERC has not directed us to anything in the language or legislative history of section 215 to persuade us otherwise.

45. Similarly, we are not persuaded by NERC's apparent argument that "openness" in section 215(c)(2)(D) of the FPA signals that NERC must adopt an ANSI-certified consensus-based process. It is not clear to us that the term "openness" as used in the statute means "openness" as defined by ANSI. For example, the legislative history behind the National Technology Transfer and Advancement Act of 1995 suggests that "openness" in the context of a consensus-based standards development process simply means that "participation in the standards development process shall be open to all persons who are directly and materially affected by the activity in question."[77] Nothing in the March 18 Order is intended or could reasonably be read to preclude such openness.

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[75] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 269; *see also* ERO Certification Compliance Order Rehearing, 119 FERC ¶ 61,046 at P 13 (explaining that any process that provides "reasonable notice and opportunity for comment, due process, openness, and balance of interests," whether ANSI-accredited or not, could satisfy a Commission directive requiring NERC to specify the process it will use to meet a deadline established by the Commission for submitting a new or modified Reliability Standard).

[76] To be clear, we do not suggest that the ERO must or should abandon an ANSI-certified process to comply with our directive in the March 18 Order.

[77] Section 12(d) of the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 §12(d) (15 U.S.C. 272 note), requires federal agencies to use standards developed by voluntary consensus bodies as a means of carrying out policy objectives or other activities determined by the agencies, unless the use of these standards would be inconsistent with applicable law or otherwise impractical. In discussing the amendment that added this provision to the legislation, Senator Rockefeller explained that "openness" was an attribute of, rather than a synonym for, a consensus-based

(continued...)

46. Second, the Commission's directive does not conflict with section 215(c)(2)(D) of the FPA and may not conflict with ANSI's guidelines. As we have indicated, section 215(c)(2)(D) provides more flexibility for the ERO to determine the structure of the Standards Development Process than NERC appears to acknowledge on rehearing. The Commission's directive, does not impede the ERO in providing "reasonable notice and opportunity for public comment, due process, openness, and balance of interests." The Standards Development Process can satisfy each of these requirements and still provide a mechanism to guarantee that NERC can comply with a Commission directive to submit a new or modified Reliability Standard. As we discuss above, it did not require NERC to let the Commission dictate the specific content of Reliability Standards, but simply to propose revisions that would let NERC comply with final Commission directives under section 215(d)(5) of the FPA.[78] We would expect that, in most circumstances, the existing Standards Development Process would result in a new or modified Standard responsive to a Commission directive. However, in those instances where this does not happen, such as the case of Reliability Standard FAC-008-2, the Commission needs assurance that the ERO has the authority, in conjunction with or in addition to the current structure, to deliver a Standard or modification as directed.

47. Additionally, the March 18 Order was not the first time that the Commission directed revisions to NERC's ANSI-certified Standards Development Process. In the ERO Certification Order, the Commission required changes to NERC's ANSI-certified Standards Development Process once it determined that the process failed to adequately address the Commission's authority under section 215.[79] The Commission identified three shortcomings, each of which related to the Commission's authority to remand a

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process, and that openness simply means that "participation in the standards development process shall be open to all persons who are directly and materially affected by the activity in question:"

> Consensus standards are standards which are developed by voluntary, private sector, consensus standards bodies. These organizations are established explicitly for the purpose of developing such standards through a process having three characteristics—First, openness, defined as meaning that participation in the standards development process shall be open to all persons who are directly and materially affected by the activity in question[.]

142 Cong. Rec. S1,078 (1996).

[78] March 18 Order, 130 FERC ¶ 61,203 at P 26.

[79] ERO Certification Order, 116 FERC ¶ 61,062 at P 253.

Reliability Standard or otherwise require the ERO to develop a Standard, and directed NERC to develop changes similar to the revisions required by the March 18 Order in that they too were necessary to ensure that the Commission could fully exercise its authority and the ERO could adequately comply with its obligations. For example, one of the required revisions concerned NERC's lack of authority to set specific deadlines for action by standards development committees and ballot bodies, even in circumstances where the Commission mandated action on a remand by a date certain.[80] Just as the current Standards Development Process can prevent NERC from complying with its obligation to submit a new or modified Reliability Standard in response to a Commission directive, this procedural gap identified by the Commission in the ERO Certification Order could have prevented NERC from complying with its obligation to respond to a remand by a date certain. Consequently, the Commission directed NERC to develop a process that would allow it to comply with its obligation.

48. As noted above, in the ERO Certification Order, the Commission required three changes to NERC's ANSI-certified Standards Development Process. Each of these changes related to the Commission's authority to remand a Standard or otherwise require the ERO to develop a Standard. None of these changes resulted in NERC losing its ANSI-accreditation. Thus, revisions to the Standards Development Process that guarantee that NERC can comply with a Commission directive should not threaten ANSI accreditation. Similarly, it appears that the current Standards Development Process includes requirements that are not required by ANSI. For example, the Commission has previously noted that NERC's super-majority voting requirement is not required for ANSI certification.[81]

49. Finally, we reject the Georgia Corporations' assertion that the Commission's directive in the March 18 Order conflicts with Order Nos. 672 and 672-A because it would compel a specific, Commission-dictated approach to ERO governance. The Georgia Corporations misquote Order Nos. 672 and 672-A. They cite Order No. 672-A to make it appear as if the Commission disclaimed any right to influence how the ERO governs itself. This is not the case. In the paragraph they cite,[82] the Commission explained that because there are many ways that a potential ERO could provide for balanced governance and decision-making, the Commission would not, during the period when it was accepting applications for certification as the ERO, dictate any specific governance procedures. Instead, the Commission allowed ERO applicants to propose

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[80] *Id.*

[81] ERO Certification Compliance Order, 118 FERC ¶ 61,030 at P 18.

[82] Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 16.

their own procedures. This determination is not the same as the Commission stating that it will allow the ERO's procedures to essentially invalidate a final Commission directive. That said, in the March 18 Order, the Commission did not direct the ERO to adopt any specific revisions to its Rules of Procedure. On the contrary, the Commission explained that, in the first instance, NERC has discretion to develop the details of the modifications required by the Commission.[83]

3. The Commission's Directive Does Not Conflict With Section 215(d)(2) of the FPA

a. Rehearing Requests

50. Section 215(d)(2) of the FPA requires the Commission to give "due weight" to the technical expertise of the ERO with respect to the content of a new or modified Reliability Standard. NERC and the Trade Associations argue that the March 18 Order effectively precludes the ERO from exercising its technical expertise because it requires NERC to allow the Commission to dictate the content of a modified Reliability Standard. For example, the Trade Associations argue that the Commission cannot possibly give due weight to NERC's technical expertise if NERC is not permitted to deviate (with a detailed technical explanation that supports its action) from the Commission's recommendations as to the Reliability Standard's contents. NERC also claims that the March 18 Order conflicts with Order No. 693, because in that order the Commission: (1) confirmed that the ERO can exercise its technical expertise; (2) explained that the Commission cannot dictate the contents of a Reliability Standard; and (3) confirmed that the ERO can respond to a Commission directive to develop a new or modified Reliability Standard by proposing an alternative approach that produces equally effective and efficient results. NERC argues that the Commission's directive in the March 18 Order attempts to accomplish indirectly what the Commission cannot do directly.

b. Commission Determination

51. We deny rehearing. As we noted previously, the March 18 Order does not require NERC to let the Commission dictate the specific content of Reliability Standards and that the ERO remains free to develop equivalent alternatives to Commission directives. Thus, the Commission's directive does not conflict with section 215(d)(2) of the FPA or Order No. 693, because it does not foreclose the ERO from exercising its technical expertise during the Standards Development Process.

52. We also elaborate on two points of concern related to these arguments. In this way, we intend to clarify important aspects of the relationship between the Commission

[83] March 18 Order, 130 FERC ¶ 61,203 at P 1, 26.

and the ERO. First, while we respect the role of NERC as the ERO in developing and enforcing Reliability Standards, our task in reviewing proposed Reliability Standards is to ensure that they satisfy the statutory criteria for approval and provide for reliable operation of the Bulk-Power System. Thus, while the statute provides that the Commission shall give due weight to the technical expertise of the ERO with respect to the content of a proposed Reliability Standard or modification, "we will not hesitate to remand a proposed Standard if we are convinced that it is not adequate to protect reliability."[84]

53. We recognize that concerns about whether the Commission gives "due weight" to the ERO's technical expertise emerge most often in the context of Commission directives to submit new or modified Reliability Standards—specifically, in relation to whether the Commission has accorded the ERO due weight in determining whether a modification is necessary or by directing an overly prescriptive modification. Section 215 does not define "due weight," and the Commission has not provided much guidance on what it means to give "due weight" to the ERO, except to clarify that it *does not* require a rebuttable presumption that a Reliability Standard the ERO proposes is just, reasonable, not unduly discriminatory or preferential, and in the public interest.[85] Further, the Commission stated in Order No. 672 that the ERO "must justify to the Commission its contention that the proposed Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest."[86] We do not need to elaborate on the definition of "due weight" here to emphasize that the ERO must provide an adequate explanation regarding the reliability benefits and technical considerations behind a proposed Reliability Standard or modification to a Standard. In the absence of such an explanation, there will be nothing in the record for the Commission to give due weight to. By the same token, when the Commission issues a specific directive pursuant to section 215(d)(5), it should be supported by a clear technical rationale that explains how the directive is related to Bulk-Power System reliability. Further, the Commission is committed to providing, when necessary, additional procedures to develop a complete record.

54. Second, the discussion we provide with our directives is for the purpose of providing guidance to assist the ERO in exercising its technical expertise during the Standards Development Process, not for the purpose of excluding that expertise. In the final analysis, the Commission is interested in ensuring the reliability of the Bulk-Power

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[84] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 329.

[85] *Id.* P 345.

[86] *Id.*

System. As we have explained, if the Commission confirms a directive on rehearing and the ERO still disagrees, the appropriate remedy is to seek judicial review, not veto the directive through the Standards Development Process.

4. The Commission's Directive Does Not Conflict with Section 215(c)(2)(E) of the FPA

a. Rehearing Requests

55. Section 215(c)(2)(E) of the FPA requires the ERO to attempt to gain recognition in Canada and, as appropriate, in Mexico. NERC, the Trade Associations, and CEA argue that what they describe as the Commission's directive requiring NERC to allow the Commission to dictate the specific content of Reliability Standards undermines effective Canadian participation in the NERC Standards Development Process. They explain that the DOE Task Force recommended that a self-regulatory organization, rather than the Commission, develop mandatory and enforceable Reliability Standards in part because it recognized that transmission grid reliability is a North American issue that requires reliability relationships with Canada and Mexico.[87] They quote language from the DOE Task Force's 1998 report that recognizes the international nature of the transmission grid and emphasizes the need for a single entity that can represent each country while respecting jurisdictional sovereignty.[88] They also quote statements from Senator Thomas during the 2002 Senate debate over the Thomas Amendment. In his remarks, Senator Thomas raised concerns similar to those raised by the DOE Task Force and stressed the potential negative consequences of Canada and Mexico withdrawing from international reliability efforts.[89] The Trade Associations and CEA suggest that these considerations were responsible for leading at least one senator to support the Thomas Amendment.[90]

56. The Trade Associations and CEA assert that Order Nos. 672 and 693 recognized the importance of a structure that allows the ERO to operate on an international basis. They cite the Commission's assertion in Order No. 672 that, "for the ERO to be effective in maintaining Bulk-Power System reliability across national borders, it must be able to

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[87] NERC at 8; Trade Associations at 15; Canadian Electricity Association Rehearing Request (CEA) at 10.

[88] NERC at 8; Trade Associations at 15; CEA at 10.

[89] NERC at 9; Trade Associations at 18-19; CEA at 12-13.

[90] Trade Associations at 19; CEA at 13.

operate in an international arena."[91] They also cite Order No. 693, where the Commission explained that one reason supporting its conclusion that any modification to a Reliability Standard must be developed and fully vetted through the Standards Development Process is that it allows the ERO to account for the international nature of Reliability Standards and incorporate any modifications requested by the Commission's counterparts in Canada and Mexico.[92]

57. CEA also states that the Commission expressed its commitment to an international approach to reliability in 2005 when the Commission joined the Bilateral Electric Reliability Oversight Group (Bilateral Group) and agreed to Terms of Reference that recognize the importance of governmental entities on opposite sides of the border coordinating and cooperating on reliability issues related to the international transmission grid.[93] CEA further observes that in Order No. 672 the Commission relied on the statement of Bilateral Principles[94] developed by Canadian governmental entities and the United States Department of Energy to address multiple issues pertaining to the criteria for approving an ERO. CEA states that when a Reliability Standard is remanded, the Bilateral Principles provide that the ERO should notify all relevant regulatory agencies and work to ensure that their concerns are addressed before the Standard is re-submitted to the Commission or Canadian authorities. CEA argues that the Commission's March directive would prevent NERC from implementing this Bilateral Principle.[95]

58. NERC, the Trade Associations, and CEA are concerned that the changes the Commission is requiring NERC to make could seriously erode the acceptance of NERC Reliability Standards in Canada and could result in one set of Reliability Standards for the United States and a different set for Canada.[96] NERC states that it has made great progress in achieving recognition in Canada, which vests jurisdiction over electricity matters in provincial governments rather than a central authority, and that it has achieved

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[91] Trade Associations at 20; CEA at 14 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 126).

[92] Trade Associations at 21; CEA at 15 (citing Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 187).

[93] CEA at 18.

[94] *Id.* at 18-19 (discussing the *Principles for an Electric Reliability Organization that Can Function on an International Basis* (Bilateral Principles)).

[95] CEA at 18-9.

[96] NERC at 10; Trade Associations at 24; CEA at 19.

formal recognition through agreements, memoranda of understanding, and other documentation with the provinces of Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, and with the National Energy Board of Canada (which has jurisdiction limited to international power lines). NERC adds that the British Columbia Utilities Commission recently adopted all of NERC's Reliability Standards as mandatory within that province. NERC argues that the development of Reliability Standards in an international industry forum has been critical to achieving its current level of recognition in Canada. NERC is concerned that the changes directed by the Commission could undermine Canadian acceptance of NERC Reliability Standards and jeopardize NERC's status as an international ERO. NERC explains that Canadian federal and provincial officials have made clear to NERC that when they signed on to the Bilateral Principles they did not envision a process whereby the Commission could dictate the specific content of Reliability Standards.[97]

59. CEA contends that the Reliability Standard-setting model established in section 215 of the FPA allows all North American stakeholders to participate effectively in the Standards Development Process while respecting jurisdictional sovereignty. CEA credits the remand provision in section 215 with being especially important in assuring that no governmental authority has the ability to unilaterally modify Reliability Standards that would apply to the system and with giving public authorities the confidence that Reliability Standards will reflect their concerns.[98] CEA asserts that, to have an effective international ERO, government authorities must be able to trust the ERO Standards Development Process when it comes to both developing and modifying Reliability Standards. CEA argues, however, that the directive requiring NERC to allow the Commission to dictate the content of modified Reliability Standards violates the spirit of NERC's international standard-setting process.[99]

b. Commission Determination

60. We deny rehearing. The concerns raised by NERC, the Trade Associations, and CEA rely on the mistaken understanding that the Commission's directive requires NERC to let the Commission dictate the specific content of Reliability Standards. This is not the case and the ERO remains free to develop and submit to the Commission equivalent alternatives to Commission directives made pursuant to section 215(d)(5). Thus, the March 18 Order does not attempt to prevent the ERO from employing an open and balanced Standards Development Process that includes the full and voluntary

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[97] NERC at 10.

[98] CEA at 18.

[99] *Id.* at 19.

participation of Canadian and Mexican entities. Instead, the March 18 Order directs the ERO to propose revisions to its Rules of Procedure that maintain such a Standards Development Process while preventing stakeholders from vetoing Commission directives or otherwise preventing NERC from complying with its statutory obligation.

61. We understand the North American expanse of the interconnected power grid and the need for an international ERO. Thus, we reaffirm our statements in Order Nos. 672 and 693 recognizing the importance of a structure that allows the ERO to operate on an international basis. The Commission and its staff reconfirm our commitment to consult regularly with Canadian and Mexican regulators on topics of mutual interest, including the Standards Development Process through existing forums such as the reliability tri-lateral meetings and technical conferences.

5. The Commission's Directive Is Justified and Is Consistent with Section 215(f) of the FPA

a. Rehearing Request

62. In addition to the statutory arguments, NERC claims that allowing the Commission to dictate the specific content of a Reliability Standard is not justified or supported by the record in the March 18 Order. NERC observes that the Commission cited a "growing concern" that the current Standards Development Process can be used to prevent compliance with a Commission directive. NERC points out, however, that the basis for this concern is the single instance related to the Commission's directive to modify FAC-008-1. NERC argues that this single instance does not justify the Commission's directive. NERC maintains that the current Standards Development Process works and has addressed approximately 175 of the Commission's approximately 550 non-VRF/VSL related directives.[100] NERC adds that it expects a modified Reliability Standard addressing two of the Commission's three directives regarding FAC-008-1 to be approved by the NERC Board in May 2010.[101]

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[100] NERC states that over 100 non-Violation Risk Factor /Violation Severity Level directives are currently being addressed in the Standards Development Process, and that it expects work on them to be completed in 2010 or early fall 2011. NERC adds that it has also completed work on 130 VRF/VSL directives. NERC states that it has completed work on 45 percent of all Commission directives (Reliability Standard directives and VRF/VSL directives).

[101] NERC at 14. (According to the *NERC Board of Trustees Meeting Summary May 17, 2010* the trustees did approve FAC-008-2 at that meeting. *Available at* http://www.nerc.com/docs/docs/bot/NERC_BOT_Summary_5-17-10.pdf).

b. Commission Determination

63. We deny rehearing. NERC argues that the Commission's "growing concern" that the current Standards Development Process can be used to prevent compliance with a Commission directive is not justified by the single instance related to the Commission's directive to modify FAC-008-1. As we have explained, however, the Commission has been concerned about the possibility that the Standards Development Process may block improvements to reliability since raising the issue in the ERO Certification and ERO Certification Compliance Orders. The balloting down of FAC-008 is a clear example of what the Commission has long recognized as a possibility. We do not believe that it is reasonable or in the public interest to wait for more instances where NERC is unable to comply with Commission directives before the Commission takes action.

64. Moreover, the Commission's directive that NERC propose revisions to its Standards Development Process is consistent with our authority under section 215(f) of the FPA. Neither NERC nor any of the other parties that sought rehearing challenged the Commission's right under section 215(f) to propose a change to the rules of the ERO "upon its own motion or complaint."[102]

B. Reconsideration of the Directive to Modify FAC-008-1

65. In addition to directing NERC to propose revisions to its Rules of Procedure, the March 18 Order requires NERC to submit, no later than 90 days from the date the Commission issues an order on NERC's proposed rule changes, modifications to Reliability Standard FAC-008-1 that fully comply with the Commission's directive in Order No. 693. As explained in greater detail in Order No. 693, NERC must submit modifications to FAC-008-1 that require each transmission owner and generator owner to: (1) document the underlying assumptions and methods used to determine normal and emergency facility ratings; (2) develop facility ratings consistent with industry standards developed through an open, transparent and validated process; and (3) identify, for each facility, the limiting component and, for critical facilities, the resulting increase in rating if that component is no longer limiting.[103] No entity sought rehearing of this directive in Order No. 693.

66. As we have explained here and in the March 18 Order, industry opposition to identifying the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed resulted in the failure of NERC's first attempt to fully comply with the Commission's directive. At its May 2010 meeting, the NERC board of

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[102] 16 U.S.C. § 824o(f) (2006).

[103] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 755-762.

trustees approved a draft Reliability Standard that omits this modification but addresses the other required modifications.

1. Arguments for Reconsideration

67. NERC requests that the Commission reconsider its directive requiring transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed. NERC argues that the directive serves a commercial purpose rather than a reliability purpose, as evidenced by the Commission justifying the directive in terms of "transparency," which NERC claims is a market or competition term rather than a reliability term.[104] NERC does not dispute that the information required by the directive can aid the marketplace in identifying cost-effective ways to increase the available transfer capability of the system; its objection is that Reliability Standards, backed by the possibility of significant financial penalties for violations, are not the appropriate vehicles for promoting market efficiency. NERC suggests that the Commission has authority under other sections of the FPA to achieve this result.

68. Although it recognizes that the time to seek rehearing of Order No. 693 has long passed, NERC argues that the Commission should reconsider its directive because circumstances have changed since Order No. 693. NERC explains that in Order No. 729 the Commission recognized a line between reliability and markets, and stated that it would not broaden the ERO's focus beyond its statutorily prescribed focus on reliability.[105] NERC points out that the Commission rejected a NOPR proposal to direct the ERO to modify Reliability Standard MOD-001-1 to expand the availability of implementation documents associated with the Standard because it determined that expanding availability to entities beyond those "with a demonstrated reliability need to access such information" could "stretch the role of the ERO beyond ensuring the reliability of the Bulk-Power System."[106] NERC argues that requiring transmission owners and generator owners to identify the second-most limiting element and the resulting increase in capacity if the first-limiting element is removed is similar to the proposal rejected in Order No. 729 in that neither relate to reliability. NERC contends

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[104] NERC at 16.

[105] *Id.* at 15 (citing *Mandatory Reliability Standards for the Calculation of Available Transfer Capability, Capacity Benefit Margins, Transmission Reliability Margins, Total Transfer Capability, and Existing Transmission Commitments and Mandatory Reliability Standards for the Bulk-Power System*, Order No. 729 129 FERC ¶ 61,155, at P 109 (2009)).

[106] *Id.* (citing Order No. 729 129 FERC ¶ 61,155 at P 147).

that the Commission should apply the principles it developed in Order No. 729 in this proceeding and grant reconsideration.[107]

2. Commission Determination

69. We deny reconsideration. Although NERC styles its argument as a request for reconsideration, it is actually an untimely request for rehearing.[108] Therefore we reject it.[109] Additionally, as we elaborate below, NERC has not persuaded us that a change in our directive is warranted.

70. NERC attempts to portray Order No. 729 as creating a change of circumstances that distinguishes its request for reconsideration from an untimely request for rehearing. NERC argues that the Commission's decision in Order No. 729 to reject a NOPR proposal to make certain implementation documents more widely available, a proposal the Commission initially justified as advancing transparency, signals a new recognition by the Commission that there is a line between reliability and markets.

71. Contrary to NERC's claim, the Commission did not, in Order No. 729, discern for the first time a distinction between markets and competition on one hand, and reliability on the other. In Order No. 672, the Commission acknowledged the difficulties in distinguishing between reliability concerns and competition concerns and declined to adopt a generic test to balance these interests.[110] The Commission, when reviewing a proposed Reliability Standard or modification, including when it has proposed the modification, considers the relationship between reliability and competition to determine whether, on the specific facts at issue, the proposed Standard or modification actually serves a reliability goal. Order No. 729 did not introduce this analysis—the Commission examined the proposed modifications in Order No. 693 under the same criteria. One

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[107] *Id.* at 16.

[108] The Georgia Corporations also argue that the modification is overly prescriptive and places the Commission in the position of dictating the substantive content of the modified Reliability Standard. We also reject this argument as an untimely request for rehearing.

[109] The Commission routinely declines to consider requests for reconsideration that are the equivalent of an untimely request for rehearing. *See Critical Energy Infrastructure Information*, Order No. 683-A 119 FERC ¶ 61,029, at P 1, 6, n.2, n.8 (2007); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P10 (2005); and *Golden Valley Power Co.*, 114 FERC ¶ 61,212, at P6 (2006).

[110] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 376-378.

difference is that in Order No. 729, the Commission was addressing the scope of its authority to direct *audits* of available transfer capability, capacity benefit margin and transfer reliability margin implementation documents, not of its authority to direct modifications to the Reliability Standards themselves. NERC is correct that in that Order No. 729, the Commission clarified that the audits are not intended to address the competitive effects of the MOD Reliability Standards, and that the ERO's statutory functions are properly focused on the reliability of the Bulk-Power System.[111] However, the Commission did not consider, nor was it asked to consider, limiting the scope of Reliability Standards to areas that have no interaction with markets. A second difference is that in Order No. 693 the Commission determined that the FAC-008 limiting element proposal had a reliability objective, while in Order No. 729 it found that the MOD-001-1 documents proposal relating to audits did not.

72. Additionally, we are not persuaded that the limiting element directive should be reversed on the merits. Although NERC correctly observes that the directive has commercial use, the mere fact that a directive has a market-improving component does not preclude it from also having a reliability component.

73. In Order No. 693, the Commission directed NERC to modify FAC-008-1 to require that transmission owners and generator owners calculate the increase in capacity if the first-limiting element is removed only for those facilities for which thermal ratings cause: (1) an Interconnection Reliability Operating Limit; (2) a limitation of Total Transfer Capability; (3) an impediment to generation deliverability; or (4) an impediment to service to major cities or load pockets.[112] These are examples where knowledge of the first and second limiting components and their ratings are critical to ensuring the reliable transfer of power from generation sources to major areas of the country. The Commission did not require calculation and communication about next limiting elements for other facilities.

74. The directive to modify FAC-008-1 to require that transmission owners and generator owners identify the second-most limiting element, and the resulting increase in capacity if the first-limiting element is removed, as affirmed in the March 18 Order, serves important reliability goals. Accurate facility ratings (i.e., the megawatt, voltage, or stability limit of transmission lines, transformers and other transmission-related facilities) are critical to the reliable operation of the Bulk-Power System. Facility ratings are used to assess the performance of the transmission system against planned and actual loading conditions for all time frames and contingencies. These assessments allow entities to determine the appropriate reliability actions to take in a variety of time frames. Ratings

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[111] Order No. 729, 129 FERC ¶ 61,155 at P 106, 109.

[112] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 756.

information may be applied to real time, next day, and seasonal operation, and can enable pre-contingency action that will ensure continued reliable operation of the Bulk-Power System or reduce future risks to reliable operation. This is particularly true with respect to knowledge of most limiting elements (i.e., the weakest link in a chain), as well as with respect to next-limiting elements (i.e., the second weakest link in that chain).

75. As discussed in detail below, identification of the most limiting component(s) and the increase in rating if the first-most limiting component is no longer the most limiting component serves a reliability purpose by enhancing or improving: (i) operator knowledge, (ii) planning for real-time operation, (iii) information sharing and coordination, and (iv) long-term planning.

76. In order to determine facility ratings, entities must identify the most limiting component that comprises the facility,[113] based on a validated methodology that considers the specific characteristics and ratings of all of the components to determine their limits for a range of ambient conditions, including if and for what duration these limits can be exceeded.[114] This is, in part, because the limiting element upon which a facility rating is based can change under different operating conditions. For example, an underground high voltage cable may be the limiting element for continuous ratings, but a disconnect switch may be the limiting element for a four-hour emergency rating. With heavy power flows from generators through critical facilities to load, contingency conditions could reveal a thermal overload above the normal rating of the first limiting component of one of these facilities. However, that component also likely has a documented short time rating that could sustain the overload. If the second-most limiting component does not afford much increase in rating above the first, and its overload can result in the unintended removal of the facility from service (i.e., a relay or other protection system component that trips a facility out of service due to the overload), the prior identification of this second limiting component could alter the mitigation plans and avoid relay operations that trip facilities out-of-service, and thus potentially prevent a cascading event.

77. Information about the increase in rating if the first-most limiting component of a facility is removed allows operation planners to better assess the risks associated with circuit loadings and to take appropriate action prior to real time operation.[115] Operators can directly input these limiting component ratings into their real-time contingency analyses and around-the-clock monitoring, helping the operators to understand what

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[113] *Id.*

[114] *See* Blackout Report at 162.

[115] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 755.

components are causing the limits. Operators can use this information to identify appropriate measures to mitigate contingencies.[116] When a contingency does occur, operation planners and operators are required to immediately identify and assess the new worst contingencies, and make any adjustments necessary to maintain a reliable system given the new operating conditions.[117] An operator's assessment of new operating conditions is improved by identifying the next limiting component and factoring that limitation into contingency analysis and developing reliable operating plans. These adjustments may be made for real-time operations, or for whatever period the contingency is expected to exist.

78. As the Final Blackout Report recognized, there is a lack of adequate criteria for identifying critical facilities whose operating status could affect the reliability of neighboring systems, causing uncertainty about which facilities should be monitored.[118] Identifying and documenting both the second-most limiting component and the increase in rating if the first-most limiting component is removed will help reliability coordinators identify the facilities that need to be monitored by the reliability coordinator for the region in which the facility is located as well as by one or more *neighboring* reliability coordinators, across a range of ambient conditions, where the second-most limiting component's rating could affect the coordinated operation and monitoring needs of the critical facility.[119]

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[116] Numerous events can occur that are not in an entity's long range plan, such as long term forced outages of generation, droughts that threaten to limit or eliminate the output from multiple generators, or sudden transmission or generation failures or retirements. Identifying the first and second most limiting components ahead of time allows for appropriate analysis and contingency planning to be conducted either before an event, or very promptly following events that were unanticipated.

[117] Reliability entities must ensure that if a contingency occurs, the system will remain operational and safe, and where it can once again withstand the next-worst single contingency without violating thermal, voltage, or stability limits. *See* Reliability Standard TPL-002-0 (pertaining to system performance following the loss of a single bulk electric system element); *see also* Blackout Report at 9.

[118] *See* Blackout Report at 163.

[119] Several approved Reliability Standards address the communication and consideration of ratings information. Among others, FAC-009-1 requires the communication of ratings information, IRO-003-2 requires reliability coordinators to maintain wide area view including of neighboring reliability coordinator areas, and IRO-005-2 requires reliability coordinators to monitor parameters that impact their own and neighboring reliability coordinator areas.

79. In Order No. 693, the Commission stated that requiring the most limiting component(s) to be identified and the increase in rating if the first most limiting component was no longer limiting would provide additional transparency thus enhancing reliability by providing operators information that will allow them to better assess the risks associated with circuit loadings.[120] Order No. 693 further clarified that the directive is not for the purpose of requiring entities to invest in new facilities or share market information.[121] As we stated then, "When the transmission operators know which component within the transmission element is limiting they have more information to inform their decisions about how to provide for the Reliable Operation of the Bulk-Power System."[122] For example, when unanticipated seasonal needs can be met at lowest cost to preserve beneficial reliability margins, the information required to support that decision-making process (i.e., identification of the limiting component(s) and the increase in rating if the first-most limiting component is no longer the most limiting component) serves a fundamental reliability purpose.[123]

80. As we have explained here and in Order No. 693, our directive requiring NERC to modify FAC-008-1 to require that transmission owners and generator owners identify the second-most limiting component, and the resulting increase in capacity if the first-limiting component is removed, serves a reliability goal. In developing a modification to comply with this directive, the ERO has discretion, to the extent possible, to develop the modification in such a way that it efficiently and effectively achieves the reliability purposes we have described here without unnecessarily placing commercial information at risk.

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[120] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 755, 761.

[121] *Id.* P 757.

[122] *Id.*

[123] In real time or next day operations, there may be other events that cause operators in one area to become short of transmission capabilities, including any of the four reasons identified in Order No. 693. In all cases, knowledge of the limiting element and the additional capability that could be available is essential to identify plans that limit or eliminate the need to shed firm load. For example, a transmission operator may know that the first-most limiting component on a line is an easily replaceable component with a de minimis replacement cost and which will not fail even if the line is loaded above its published rating. However, if that component will suffer some reduction in strength or life of the asset as a result of being overloaded, depending on the specific circumstances, the transmission operator may still choose to operate the line above its rating to gain additional capability during a peak season; i.e., summer, and then replace the limiting component when maintenance is easier to schedule.

C. Rehearing of the Deadline to Comply with the Commission's Directive

1. Request for Rehearing

81. The Georgia Corporations request rehearing of the March 18 Order on the basis that the time limit established by the Commission for fully complying with the directive to modify FAC-008-1—no later than 90 days from the date that the Commission issues an order on NERC's proposed revisions to its Rules of Procedure—fails to provide NERC with an opportunity to meaningfully evaluate the modification or to balance stakeholder interests, as required by Order No. 672. The Georgia Corporations further argue that the deadline fails to give the appropriate deference to NERC's technical expertise, as required by section 215(d)(2) of the FPA.[124]

2. Commission Determination

82. We deny rehearing and reject the Georgia Corporations' claim that the time limit established by the Commission for fully complying with the directive to modify FAC-008-1 fails to provide NERC with an opportunity to meaningfully evaluate the modification, exercise its technical expertise, or balance stakeholder interests. The Commission required the modifications in Order No. 693, which was over three years ago. Additionally, NERC has already examined the issues involved with all three required modifications through its Standards Development Process during its attempt to comply in December 2008. That stated, in recognition of the issues that the ERO was required to consider, and of the technical conference held on July 6, 2010, the Commission extended the time to comply by a total of 180 days, so that the total time allowed for compliance with this directive is now 360 days from the date of the March 18 Order.[125]

D. Request for a Stay and Technical Conference

1. NERC's Petition

83. In the March 18 Order, the Commission directed NERC to propose changes to its Rules of Procedure and to fully comply with a previous Commission directive to modify FAC-008-1. NERC requests that the Commission stay both directives and convene a public conference to consider general issues pertaining to the Commission's prospective implementation of section 215 of the FPA and technical issues associated with the Commission's directive to modify Reliability Standard FAC-008-1.

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[124] Georgia Corporations at 12.

[125] *See North American Electric Reliability Corp.*, 131 FERC ¶ 61,237 and *Notice of Extension of Time*, Docket No. RR09-6-000, (August 19, 2010).

84. NERC claims that an outside reader of the reliability-related orders approved at the March 2010 Commission meeting would conclude that the Commission "intends a significant shift in the way it implements Section 215 and relates to NERC as the ERO."[126] NERC explains that the Commission issued orders directing fundamental changes to the Standards Development Process and the penalty assessment process, requiring NERC to complete changes to two Reliability Standards in short timeframes, proposing to remand Reliability Standards, and proposing to reject NERC's interpretation of a Reliability Standard. NERC states that there has been little discussion about the fundamental issues pertaining to how the Commission expects to relate to NERC as the ERO, and that the Commission should convene a technical conference to provide the Commission, NERC, and stakeholders with the opportunity to discuss these matters.[127] NERC states that if the Commission does not intend to work a significant shift in the way it relates to NERC, a conference would still be beneficial because it would provide an opportunity for all interested parties to reach a common understanding or at least recognize and understand their differences.[128]

85. In addition to requesting a public conference, NERC requests that the Commission stay its directives in the March 18 Order. NERC states that the test for determining whether to grant a stay is whether: (1) the moving party will suffer irreparable injury without the stay; (2) issuing the stay will substantially harm other parties; and (3) the stay is in the public interest.[129]

86. NERC claims that it will suffer irreparable injury without the stay because the Commission is "narrowly-prescribing directives that exempt any alternative means of compliance" and therefore "essentially undermining NERC's ability to serve as the ERO under Section 215." NERC adds that the Commission's directive "directly challenges NERC's authority to write standards" and could undermine the acceptance of NERC Reliability Standards in Canada.

87. NERC argues that issuing the stay will not substantially harm any other party, but will, instead, provide NERC and other parties with the opportunity to evaluate the Commission's required modification to FAC-008-1 to determine if it is in the best

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[126] NERC at 17.

[127] *Id.*

[128] *Id.* at 18. The Georgia Corporations agree with NERC's request for a public conference and suggest public workshops similar to those utilized in the Commission's development of the Penalty Guidelines as an alternative or supplement.

[129] *Id.*

interest of continent-wide reliability. NERC states that, in its technical judgment, granting the motion for a stay and agreeing to a public conference to discuss the technical issues related to the Commission's required modification will not pose a risk to Reliable Operation of the Bulk-Power System, as it is defined in section 215(a)(4) of the FPA.

88. Finally, NERC argues that granting a stay is in the public interest because the Commission's required modification to FAC-008-1 conflicts with Order No. 729 and NERC should have the opportunity to consider the modification and develop a proposal that is best for the Reliable Operation of the Bulk-Power System.

2. Commission Determination

89. NERC's request for a conference is moot as a result of the Commission's July 6, 2010 reliability technical conference in Docket No. AD10-14-000. We deny NERC's request for a stay. The Commission respects NERC's authority to develop Reliability Standards and its ability to serve as the ERO.[130] However, we are requiring that NERC ensure that it can effectively serve as the ERO by directing it to propose a mechanism designed to ensure that it can comply with Commission directives to submit a new or modified Reliability Standard pursuant to section 215(d)(5) of the FPA. Thus, we disagree with NERC's claim that it will suffer irreparable injury without a stay. We also find that NERC has not carried its burden of showing that a stay is in the public interest. As we explain above, the Commission's required modification does not conflict with Order No. 729. The Commission initially required the modifications in Order No. 693 and NERC has already examined the issues in the Standards Development Process. Additionally, the deadline for NERC to submit a proposed modification to FAC-008 is 90 days after the Commission issues an order acting on NERC's proposed revisions to the Standards Development Process. Given that NERC is first required to submit to the Commission a petition with proposed revisions to its Standards Development Process in December 2010, and such petition will be subject to notice and comment before the Commission issues an order on the petition, we are not persuaded that NERC needs more time to consider the Commission's required modifications to FAC-008-1. While we deny NERC's request for a stay, we recognize the need for a continued dialogue between NERC, the Commission, international regulators, and the industry with respect to our shared responsibilities to provide for the reliable operation of the Bulk-Power System. We commit to maintaining an open dialogue and look forward to future discussions.

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[130] Indeed, in the order on the ERO's three-year performance assessment, being issued concurrently with this order in Docket No. RR09-7-000, the Commission found that NERC continues to satisfy the statutory and regulatory criteria for ERO certification.

The Commission orders:

(A) The requests for rehearing and clarification are hereby denied.

(B) The request for a stay is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) and Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have on this 12th day of November, 2010, caused a copy of the foregoing Petition for Review and Corporate Disclosure Statement to be served by first-class mail, postage prepaid, upon all parties on the service list attached hereto as Appendix B, which was compiled by the Federal Energy Regulatory Commission in the underlying proceedings. Sufficient copies of the foregoing Petition for Review and Corporate Disclosure Statement are attached for service by the circuit clerk upon the Respondent. In addition, copies of the Petition for Review and Corporate Disclosure Statement have been served on the Respondent by the Petitioner at the following addresses:

Robert Solomon, Solicitor
Office of the Solicitor
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
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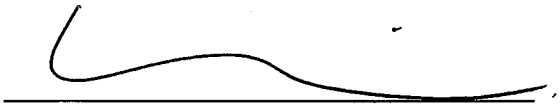

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APPENDIX B

Service List for RR09-6-000 North American Electric Reliability Corp

Party	Primary Person or Counsel of Record to be Served	Other Contact to be Served
CANADIAN ELECTRICITY ASSOCIATION	Bonnie Suchman Troutman Sanders LLP 401 9th Street Washington, DC 20004	Pierre Guimond Canadian Electricity Association 350 Sparks Street Suite 1100 Ottawa, Ontario K1R 7S8 Canada
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Dominion Resources Services, Inc.	Giuseppe Fina Bruder, Gentile & Marcoux LLP 1701 Pennsylvania Avenue NW Suite 900 Washington, DC 20006	
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Florida Reliability Coordinating Council	Sarah Rogers 1408 N. Westshore Blvd Suite 1002 Tampa, FL 33607	
Midwest Reliability Organization	Daniel Skaar 2774 Cleveland Ave N Saint Paul, MN 55113-1127	
North American Electric Reliability Corporation	Rebecca Michael North American Electric Reliability Corp 1120 G Street NW Suite 990 Washington, DC 20005-3801	
North American Electric Reliability Corporation	David Cook North American Electric Reliability Corp 116-390 Village Blvd. Princeton, NJ 08540	
Northeast Power Coordinating Council, Inc.	Edward Schwerdt Northeast Power Coordinating Council, Inc. 1515 Broadway New York, NY 10036	
ReliabilityFirst Corporation	Timothy Gallagher 320 Springside Drive Suite 300	

	Akron, OH 44333	
SERC Reliability Corporation	Thomas Galloway 2815 Coliseum Centre Dr Ste 500 Charlotte, NC 28217	
Southwest Power Pool Regional Entity	Alison Hayes 415 N. McKinley Suite 140 Little Rock, AR 72205	
Tampa Electric Company	Gregory Ramon Tampa Electric Company 702 N Franklin St Tampa, FL 33602-4418	John Daniel Skees Morgan Lewis & Bockius, LLP 1111 Pennsylvania Ave, NW Washington, DC 20004
Tampa Electric Company		Paula K Brown Tampa Electric Company PO Box 111 Tampa, FL 33601-0111
Texas Regional Entity, a division of ERCOT	Larry Grimm 2700 Via Fortuna Suite 225 Austin, TX 78744	
Western Electricity Coordinating Council	Louise McCarren Western Electricity Coordinating Council 615 Arapeen Drive Suite 210 Salt Lake City, UT	