

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability
Corp.

Docket No. RR15-2-005

**COMMENTS OF THE AMERICAN PUBLIC POWER
ASSOCIATION, ELECTRICITY CONSUMERS
RESOURCE COUNCIL, NATIONAL RURAL
ELECTRIC COOPERATIVE ASSOCIATION, AND
TRANSMISSION ACCESS POLICY STUDY GROUP**

On February 21, 2017, the North American Electric Reliability Corp. (“NERC”) submitted its Annual Compliance Monitoring and Enforcement Program Filing (“CMEP Filing”).¹ In that filing, NERC proposes two changes to its CMEP: to (a) discontinue the public posting of self-logged compliance exceptions; and (b) treat certain moderate risk noncompliance as compliance exceptions.

The American Public Power Association (“APPA”), the Electricity Consumers Resource Council (“ELCON”), the National Rural Electric Cooperative Association (“NRECA”), and the Transmission Access Policy Study Group (“TAPS”) (collectively, “Joint Commenters”), which previously have been granted intervention in the underlying proceeding,² generally support NERC’s evolution to a risk-based approach to compliance and enforcement. In particular, we support NERC’s proposal to allow certain moderate risk violations with no aggravating circumstances to be considered for treatment as compliance exceptions.

¹ *N. Am. Elec. Reliability Corp.*, North American Electric Reliability Corporation’s Annual Compliance Monitoring and Enforcement Program Filing (Feb. 21, 2017), eLibrary No. 20170221-5264.

² *N. Am. Elec. Reliability Corp.*, 150 FERC ¶ 61,108, P 25 (2015) (“February 2015 Order”).

However, we oppose NERC's proposal to discontinue public posting of self-logged compliance exceptions. We ask the Commission to adhere to its February 2015 Order requiring public posting of *all* compliance exceptions in accordance with its "consistent view with regard to transparency in compliance monitoring and enforcement matters."³

I. THE COMMISSION SHOULD GRANT NERC'S REQUEST TO EXPAND THE SCOPE OF COMPLIANCE EXCEPTIONS

Joint Commenters have generally supported the evolution of the Electric Reliability Organization ("ERO") Enterprise to a more risk-based compliance and enforcement program, to better focus the resources of NERC, its Regional Entities, and registered entities based on risk to the Bulk Electric System. As part of the continuation of that process, Joint Commenters support NERC's proposal to expand the compliance exception program to allow certain moderate risk noncompliances to be treated as a compliance exception. According to NERC's CMEP Filing at 5-6, approval for such treatment would depend on, among other things, consideration of the registered entity's internal compliance program, management practices that self-identify noncompliance, and commitment to compliance; mitigating factors during the pendency of the noncompliance; and "above and beyond" mitigation. NERC would not consider such treatment for noncompliances that have aggravating compliance history.

With continued oversight and transparency to assure consistency of application, Joint Commenters support the expansion of the compliance exception program proposed by NERC.

³ *Id.* P 38.

II. THE COMMISSION SHOULD NOT ALLOW NERC TO DEPART FROM THE REQUIREMENT TO PUBLICLY POST ALL COMPLIANCE EXCEPTIONS

The Commission should deny NERC's request that it be permitted to cease public disclosure of self-logged compliance exceptions. Experience since initiation of the compliance exception program two years ago confirms the wisdom of the Commission's February 2015 Order requiring public posting of all compliance exceptions consistent with the Commission's established policy requiring transparency in compliance and enforcement.

A. The Commission correctly determined that public posting of all compliance exceptions is necessary to educate the industry and provide oversight of NERC's CMEP

When NERC made its 2014 filing seeking approval of its compliance exception program, NERC requested that it not be required to publicly post compliance exceptions. Joint Commenters objected, arguing that greater transparency is essential to educating industry to avoid and mitigate noncompliance with reliability standards, and to maintain the credibility of NERC's compliance and enforcement regime.⁴ The Commission agreed, requiring public posting of compliance exceptions:⁵

We find arguments that publicly posting compliance exceptions is unnecessary or will discourage entities from taking advantage of the efficiencies of RAI unpersuasive. . . . Rather, we agree with Joint Commenters that transparency in compliance and enforcement matters is

⁴ *N. Am. Elec. Reliability Corp.*, Motion to Intervene and Comments of the American Public Power Association, the Electricity Consumers Resource Council, the Large Public Power Council, the National Rural Electric Cooperative Association, and the Transmission Access Policy Study Group Regarding Reliability Assurance Initiative 8-11 (Dec. 3, 2014), eLibrary No. 20141203-5129. Although Joint Commenters had requested public posting of all compliance exceptions for at least the initial two years (allowing for reassessment of the relative benefits and burdens at that time, with stakeholder input), the February 2015 Order's public posting requirement included no time limitation.

⁵ February 2015 Order, P 36.

beneficial to educate industry and provide additional oversight of the ERO Enterprise. It also serves to allow interested registered entities and other parties to measure consistency across entities, classes of entities, or Regional Entities, as well as demonstrating the quality of registered entities' internal controls programs, particularly an entity's ability to swiftly and effectively identify, assess, and correct possible instances of noncompliance.

NERC's CMEP Filing has not demonstrated that the transparency benefits identified by the Commission no longer apply. To the contrary, experience over the first two years of implementation of NERC's compliance exception program confirms the importance of continuing transparency of all compliance exceptions.

NERC's posted spreadsheets for compliance exceptions are a significant source of information to registered entities regarding the large percentage of violations that are low-risk. As described on page 6 of NERC's 2016 ERO Enterprise Compliance Monitoring and Enforcement Program Annual Report ("CMEP Annual Report"),⁶ compliance exceptions are "the dominant disposition method for noncompliance posing a minimal risk to the reliability of the BPS that does not warrant a penalty." The CMEP Annual Report shows that the 479 compliance exceptions accounted for 47% of the 1019 total noncompliances processed in 2016.⁷

Because compliance exceptions comprise such a large proportion of noncompliances, their public posting provides registered entities with valuable information on how NERC and its Regional Entities interpret what is required to comply

⁶ The CMEP Annual Report is attached to NERC's CMEP Filing.

⁷ See CMEP Annual Report at 6. See also graphs on page 4 of the CMEP Annual Report. Figure 1 shows that setting aside the Western Electricity Coordinating Council (which has more than 200 Notices of Penalty ("NOPs"), a deviation not explained in the report), compliance exceptions account for the majority of all noncompliances processed in each of the other regions.

with the various requirements in Reliability Standards and what measures are acceptable as mitigation. In addition, public posting of all compliance exceptions provides an important window to measure and assure consistency of interpretation and application among and within various regions and classes of entities.

In addition, the information included in the posted compliance exception spreadsheets can highlight requirements that merit consideration for retirement through the P 81 process initiated by the Commission in approving NERC's Find, Fix, Track and Report ("FFT") program.⁸ In that order, the Commission recognized that NERC's FFT initiative is predicated on the view that many violations of requirements included in Reliability Standards pose lesser risk to the Bulk-Power System: "If so, some current requirements likely provide little protection for Bulk-Power System reliability or may be redundant."⁹ While the effort "to identify and remove from the Commission-approved Reliability Standards unnecessary or redundant requirements"¹⁰ yielded an initial "low hanging fruit" filing,¹¹ the significant percentage of noncompliances treated as compliance exceptions due to the low risk posed highlight the potential that more can be done as part of a reinvigorated P 81 effort to reduce unnecessary compliance burdens. Public posting of all compliance exceptions could be an essential tool to inform such an effort.

⁸ *N. Am. Elec. Reliability Corp.*, 138 FERC ¶ 61,193, P 81 (2012), clarified in non-pertinent part, 139 FERC ¶ 61,168 (2012).

⁹ *Id.*

¹⁰ *Id.*

¹¹ This P 81 "Phase I" proposal to retire 34 requirements was approved by the Commission, along with the withdrawal of 41 Commission directives. *Elec. Reliability Org. Proposal to Retire Requirements in Reliability Standards*, 145 FERC ¶ 61,147 (2013).

NERC's proposal to provide annual summaries of self-logged noncompliances in the annual report (CMEP Filing at 13) is no substitute, in terms of timeliness or detail, for continued public posting of all compliance exceptions. Particularly given the importance of prompt identification and correction of noncompliances, annual summaries of self-logged noncompliances are too little too late. Nor should meaningful analysis of trends and lessons learned from compliance exceptions be viewed as an alternative to public posting of those that are self-logged. For NERC to achieve its strategic objectives,¹² NERC's annual report and educational efforts should in any case include identification and sharing of common themes in root cause and risk, and successful mitigation strategies, across *all* compliance exceptions, not just those that are self-logged.

Thus, the Commission should discount NERC's "determination that the educational value the public could derive from the review of individual logged items is limited." CMEP Filing at 12. Two years of experience confirm the correctness of the Commission's 2015 determination that public disclosure of compliance exceptions serves an essential function in educating the industry regarding what compliance with Reliability Standards means, as well as providing public accountability.

¹² For example, NERC's ERO Enterprise Strategic Plan 2016–2019 lists among its four pillars of success: "Learning – to promote learning and continuous improvement of operations and adapt to lessons learned for BES reliability." N. Am. Elec. Reliability Corp., *Electric Reliability Organization Enterprise Strategic Plan 2016-2019* 3 (2015), <http://www.nerc.com/AboutNERC/Documents/ERO%20Enterprise%20Strategic%20Plan%202016%E2%80%932019.pdf>. Transparency is listed (*id.* at 1) as a core value and principle.

B. Granting NERC's request would erode transparency and accountability, contrary to the Commission's long-standing policy

If, as NERC seems to think (CMEP Filing at 13),¹³ the prospect of non-public treatment of self-logged noncompliances will induce more registered entities to participate in the Self-Logging Program, it would significantly reduce the amount of public information regarding such compliances, and thereby undermine the important purposes of transparency described above.

The identification of low risk noncompliances subject to treatment as compliance exceptions, whether self-logged or determined by regional entities, is still a relatively new activity, and it is very important for all registered entities to understand and appreciate how that identification occurs and whether it is treated consistently. Currently, 59 registered entities participate in NERC's Self-Logging Program. To qualify for the Self-Logging Program, the entity must have had a formal review of its internal controls. See CMEP Filing at 11. As shown at page 10 of the CMEP Annual Report, only 22 Internal Control Evaluations ("ICE") examinations were completed in 2016, bringing the total ICE evaluations performed since initiation of the risk-based CMEP to only 61 of 1436 Registered Entities (as of June 2016). Even if the formal review of internal controls required for participation in the Self-Logging Program may be less exacting than a full ICE, these statistics suggest that the many registered entities that experience infrequent noncompliances would be unlikely to undergo the process to qualify for self-log

¹³ NERC's CMEP Filing is internally inconsistent on this point. Compare page 9 ("[a] significant incentive for participating in the Self-Logging Program is the presumption of CE treatment for logged noncompliance") with page 11 ("the requirement to post self-logged items publicly appears to have limited the incentives for entities participating in the program because it effectively results in treating the processing of self-logs no differently than other lesser risk issues" according to information relayed to NERC by the Regional Entities).

noncompliances. But only through public posting of self-logged compliance exceptions from these self-logging entities will the industry learn from these compliance exceptions and know that there is consistency across all compliance exceptions, whether self-logged or not.

If, as NERC touts as a basis for its proposal, non-public treatment of self-logged compliance exceptions would induce more self-loggers, and increase the portion of noncompliances self-logged, such reduction in transparency would necessarily cut back on the quantity and quality of compliance information made publicly available. The percentage of compliance exceptions that are self-logged¹⁴ would grow if non-public treatment attracted more self-loggers, as is NERC's stated intent.¹⁵ This increase would come at the cost of depriving all registered entities of the lessons that can be learned from reviewing the mitigating activities undertaken in response to those compliance exceptions.

Such reduction in transparency is contrary to Commission policy, as reflected in the February 2015 Order at P 38 (footnote omitted):

The Commission has also maintained a consistent view with regard to transparency in compliance monitoring and enforcement matters. Specifically, in an order directing NERC to make public the disposition of compliance matters through FFT, the Commission stated [(citing *N. Am. Elec. Reliability Corp.*, 138 FERC ¶ 61,193, P 68 (2012))]:

Because there may be similarly situated registered entities, public disclosure of the identity of the entity in an FFT informational filing will provide

¹⁴ According to Appendix A of the 2016 Annual Report (CMEP Annual Report at 32), 13% of the Q4 2016 compliance exceptions were self-logged.

¹⁵ CMEP Filing at 13.

industry with valuable information on compliance issues. Further, public disclosure will make the full information regarding an FFT matter available to state regulators and the public, thus, providing additional accountability and deterrence.

The February 2015 Order also noted the consistency of its public posting requirement with its 2014 Order addressing NERC's five-year assessment, which called for NERC "to continue making information publicly available concerning possible non-compliance (other than those involving physical security or cybersecurity concerns) resolved through any and all processing methods."¹⁶ Indeed, in supporting that conclusion, the 2014 Order stated:¹⁷

NERC should continue to promote transparency in its enforcement programs, *particularly as it moves forward with its Reliability Assurance Initiative*, given the value of transparency in encouraging full and adequate mitigation practices and in providing assurance to the Commission, registered entities, and the public that the program is being fairly and consistently implemented across all regions. We note that the FFT program created efficiencies in the ERO Enterprise's enforcement process, without the need to sacrifice any degree of transparency in the form of current public disclosure regarding FFT-processed violations.

NERC's argument is not bolstered by recycling (CMEP Filing at 12) its 2014 claim¹⁸ that "Public posting of self-logged noncompliance also potentially diverts the public's attention from the review of higher risk matters which are posted as Notices of Penalty." If anything, selective disclosure of noncompliance information (focused on

¹⁶ February 2015 Order, P 38, quoting *N. Am. Elec. Reliability Corp.*, 149 FERC ¶ 61,141, P 72 (2014) ("2014 Order").

¹⁷ 2014 Order, P 72 (emphasis added).

¹⁸ See February 2015 Order, P 17.

noncompliances by smaller and medium-sized entities, with less frequent violations, that do not self log) would present a distorted impression.

C. Claimed increased ERO benefits do not justify the sacrifice of essential transparency

NERC's claims of increased ERO benefits (CMEP Filing at 12) as a result of non-public treatment do not hold up to scrutiny, much less justify elimination of needed transparency.¹⁹ It remains correct, as the February 2015 Order found (at P 37), that "treating compliance exceptions in a manner similar to FFTs will provide a reasonable level of transparency with minimum effort."

NERC's CMEP Filing makes no attempt to demonstrate that continued public posting of compliance exception spreadsheets, similar to the publicly posted FFT spreadsheets that the Commission had previously found to be non-burdensome,²⁰ has suddenly become unduly burdensome. According to NERC (CMEP Filing at 13, 14), if its request were granted, NERC would include self-logged compliance exceptions in a separate confidential spreadsheet that would be provided to the Commission, similar to the non-redacted CIP violation summaries it provides. It's hard to see how preparation of confidential, as opposed to public, spreadsheets would significantly reduce the actual work burden for ERO.

Nor can NERC justify removing transparency by claiming (CMEP Filing at 12-13 n.20) that the information from self-logged noncompliances helps NERC to

¹⁹ NERC's CMEP Filing does not claim any reduction in compliance burden to self-logging registered entities.

²⁰ See February 2015 Order, P 46 ("Public disclosure of compliance exceptions would appear to require only minimal additional resources since information will be compiled monthly in a spreadsheet and provided to the Commission. Moreover, the Commission's requirement for NERC to publicly post FFTs does not appear to have been a burden on registered entities, as NERC states that since 2011, FFTs were used to process over 2,000 instances of non-compliance.").

identify trends and provides an opportunity for analysis and dialog with registered entities. Trends and patterns should be visible from compliance exceptions in any case; similarly, the opportunity to dialog with registered entities about their noncompliances is not restricted to those that self log. It is not surprising that entities with highly developed compliance programs and more frequent noncompliances analyze recurring noncompliances, but NERC has not shown that participation in the Self-Logging Program is an essential predicate for such analysis. While NERC claims processing time savings from self-logging as compared with compliance exceptions discovered through other means (CMEP Filing at 8 n.8), that difference may well be a product of factors other than self-logging (e.g., the Regional Entity may have to obtain and analyze more information to assess an individual noncompliance by an entity with which it does not have frequent contact); in any case, any such saving would not be sufficient to justify elimination of the transparency needed by registered entities and the public.

In short, NERC's limited efficiency arguments do not support the fundamental reduction in transparency that it seeks.

CONCLUSION

The Commission should permit NERC to expand its compliance exception program, but should deny its request to stop publicly posting of self-logged compliance exceptions. While (as quoted by NERC (CMEP Filing at 12 n.18)) Joint Commenters in 2014 stated that "After that initial [two-year] period, and with the benefit of preferably two RAI annual reports, the Commission, with input from the industry and other stakeholders, can assess whether that level of transparency should be continued,"

experience confirms the necessity and appropriateness of continuing public posting of all compliance exceptions, including those that are self-logged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated on this 14th day of March, 2017.

/s/ Cynthia S. Bogorad

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