

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

North American Electric Reliability)
Corporation)

Docket No. RR06-1-017

**REQUEST OF THE CANADIAN ELECTRICITY ASSOCIATION FOR
CLARIFICATION, OR IN THE ALTERNATIVE, REHEARING OF
THE COMMISSION’S DECEMBER 19, 2008 ORDER**

Introduction

The Canadian Electricity Association (“CEA”) is filing this Request for Clarification, or in the Alternative, Rehearing, with regard to an order issued by the Federal Energy Regulatory Commission (“FERC” or “Commission”) on December 19, 2008.¹ In that order, the Commission accepted the North American Electric Reliability Corporation’s (“NERC”) compliance filing submitted on July 21, 2008. The Commission, however, rejected certain language modifications proposed by CEA to NERC’s Compliance Monitoring and Enforcement Program (“CMEP”). CEA is requesting that FERC reconsider its rejection of those proposed modifications to the CMEP.

Background

On March 21, 2008, FERC issued Order Addressing Revised Delegation Agreements, in which FERC addressed, in part, modifications to NERC’s CMEP. In that order, FERC expressed concerns regarding disclosure of information from a FERC-jurisdictional entity to a foreign governmental authority. In the March 21 Order, FERC

¹ *Order Accepting Compliance Filings, Subject to Conditions*, 125 FERC ¶ 61,330 (December 19, 2008) (“December 19 Order”).

directed that the CMEP be modified to make clear that permission from FERC must be obtained first before non-public U.S. compliance information could be disclosed to a Canadian or Mexican governmental authority.

In its July 21 submission, NERC proposed to revise CMEP section 3.4 to provide that NERC will notify the Commission of any compliance violation investigation that a Canadian or Mexican Applicable Governmental Authority initiates prior to disclosure of any non-public U.S.-related compliance information regarding the matter. In addition, NERC proposed to revise section 3.4 to state that if the Commission initiates a compliance violation investigation of a non-U.S.-related matter, NERC shall notify the Canadian or Mexican authority having jurisdiction over the Registered Entity or the portion of the Bulk-Power System that is the subject of the investigation prior to NERC's disclosure to the Commission of any non-public, non-U.S.-related compliance information regarding the matter. In addition, NERC would provide information to an Applicable Governmental Authority, including FERC, only if the Applicable Governmental Authority with jurisdiction approves and subject to any applicable limitations.

On August 6, 2008, CEA submitted comments to FERC regarding NERC's filing. In that filing, CEA explained that NERC had made modifications to section 3.1.6 to address CEA's concern that FERC could be notified of all compliance measures and be provided with all related information, regardless of the legal relevance of such information to FERC. CEA had also suggested comparable changes to 3.4 and 3.4.1, step 2, which NERC accepted. Unfortunately, NERC did not make comparable changes to certain other provisions, so that those other provisions would require NERC to provide

FERC with notification of Alleged Violations, for example, even if such notification or information would not fall under FERC's jurisdiction. Thus, CEA asked that certain sections of the CMEP be modified, consistent with the changes made to sections 3.1.6, 3.4, and 3.4.1, step 2.

Statement of Issues

Pursuant to Rule 203(a)(7), 18 C.F.R. § 385.203(a)(7), CEA submits the following:

- The Commission erred in failing to direct NERC to make changes to the following sections in the CMEP: 2, 3.4.1, step 12; 5.1; 5.4; 5.6; 8.0, 2nd paragraph; and 8.0, 6th paragraph.

Argument

In the December 19 Order, FERC repeats its commitment “to work with Canadian and Mexican reliability authorities to develop procedures under which the Commission receives notice that an Applicable Governmental Authority outside the United States wishes to obtain information from or about a U.S.-based Registered Entity for purposes of conducting an investigation and, conversely, that appropriate Canadian or Mexican authorities receive notice that the Commission seeks information about an entity registered in Canada or Mexico for the same purpose.”² FERC also emphasized that the CMEP provisions only relate to the international transfer of compliance-related information from NERC, and does not prevent FERC and Canadian and Mexican reliability authorities from entering into intergovernmental agreements to exchange

² December 19 Order at P 28.

compliance-related information on a reciprocal basis.³ CEA appreciates this commitment to international mechanisms for the exchange of compliance-related information and supports the development of such mechanisms.

In terms of CEA's proposed language modifications, CEA had recommended deletion of "including FERC" from the third sentence of NERC's proposed revision to section 2.0. FERC rejected such a proposal, stating that the deletion of this phrase would not change the meaning of the sentence.⁴ FERC further maintained that, even if deletion of this phrase would preclude FERC from receiving compliance information relating to non-U.S. entities, the first sentence of the proposed insert would still enable NERC to provide U.S. compliance information to Canadian and Mexican authorities, so that section 2.0 would lose its reciprocity as between FERC and Canadian and Mexican entities.⁵

CEA's concern with section 2.0 is that, as drafted, NERC would be required to disclose non-public non-U.S. information to FERC, contrary to the requirements for disclosure with respect to FERC. In the second sentence of the fourth paragraph of the CMEP, NERC is directed not to disclose non-public U.S. compliance information to Applicable Governmental Authorities other than FERC "without first obtaining permission from FERC for such disclosures and subject to such limitations as FERC may place on such disclosures." On the other hand, the language directs NERC to provide FERC with non-U.S. information where FERC has jurisdiction over the Registered Entity

³ *Id.* at P 33.

⁴ *Id.* at P 36.

⁵ *Id.*

or the portion of the bulk power system to which the information pertains, but subject to any limitations placed on disclosure by the Applicable Governmental Authority with jurisdiction. Thus, while the language requires FERC to first consent before U.S. information can be disclosed to another Applicable Governmental Authority, the language requires no such consent before non-U.S. information can be disclosed to FERC.

A Canadian governmental authority's inability to prevent disclosure of non-public information to FERC presents two concerns. First, questions of whether the information pertains to a FERC-jurisdictional entity will be made by NERC. A Canadian utility or a Canadian Applicable Governmental Authority might not agree with a NERC conclusion that the information pertains to a FERC-jurisdictional entity, but the information will nevertheless be disclosed to FERC under this section. Second, restrictions on the disclosure of non-public, non-U.S. compliance information may not be in place at the time the information will be disclosed. FERC and Canadian governmental authorities have been in discussion on the development of intergovernmental agreements on the exchange of information, and CEA has been supportive of those efforts. CEA believes that issues relating to the disclosure of information should be addressed through these intergovernmental agreements, and should not be compromised by language contained in the CMEP.

In our comments to FERC, CEA had suggested that the fix for this issue was the deletion of the phrase "including FERC." Upon further reflection, we believe that a clearer fix would be to draft the third sentence of paragraph four of Section 2.0 to mirror

the language in the second sentence of paragraph four. Thus, the third sentence should read as follows:

“Similarly, without first obtaining permission from the Applicable Governmental Authority that has jurisdiction over the Registered Entity or the portion of the bulk power system to which non-public non-U.S. information pertains, NERC shall not disclose such non-public non-U.S. compliance information to other Applicable Governmental Authorities, and any such disclosure shall be subject to any limitations placed on such disclosure by such Applicable Governmental Authority or by other law of the applicable jurisdiction.”

In terms of CEA’s other proposed changes, FERC accepted NERC’s proposed revisions to CMEP sections 3.1.6 and 3.4, step 12, but disagreed with CEA that NERC’s proposed changes “require NERC automatically to provide the Commission with non-U.S. information about compliance matters that do not fall within the Commission’s jurisdiction.” Using section 5.1 as an example, FERC argues that “NERC may provide to the Commission a Notice of Alleged Violation issued to a Canadian entity only if the Applicable Governmental Authority with jurisdiction over the Canadian entity or the portion of the Bulk-Power System to which the notice pertains approved in advance the Commission’s receipt of the notice, subject to any limitations placed on the transfer by the applicable Canadian authority or other law of the Canadian jurisdiction.”⁶ FERC therefore concluded that CEA’s suggested changes are “not necessary to ensure that the Commission’s receipt of Canadian compliance information is subject to prior approval by the relevant Canadian reliability authority under conditions set by that authority and by applicable Canadian law.”⁷

⁶ *Id.* at P 37.

⁷ *Id.* at P 38.

CEA agrees with the Commission that the language in the CMEP should require that “international disclosure by NERC of compliance information pursuant to these revised provisions is on the condition that the information pertains to a Registered Entity or a portion of the Bulk-Power System over which the Applicable Governmental Authority that would receive the information has jurisdiction.”⁸ However, the language specifically addressing the Notice of Alleged Violations suggests that such notices may be required to be provided to FERC, regardless of relevance. As we pointed out in our Comments, as drafted, the language provides that “NERC shall forward a copy of the notice of Alleged Violation to FERC and, if the Alleged Violation pertains to a Registered Entity or to a portion of the bulk power system over which another Applicable Governmental Authority has jurisdiction, to such other Applicable Governmental Authority.” The language, on its face, requires that FERC receive all notices of Alleged Violation, even if FERC has no jurisdiction over the Registered Entity or portion of the bulk power system.

CEA is encouraged that the Commission interprets the CMEP language to provide that notices of Alleged Violations may be provided to FERC only if the Applicable Governmental Authority with jurisdiction over the Canadian entity approves in advance the receipt of that information. However, because the language in the CMEP is not as clear, CEA is concerned that the lack of clarity could present problems in the future. For example, in section 5.1, the sentence we request changed requires that FERC be provided a copy of the notice of Alleged Violation, regardless of the relevance of that notice to FERC. The proviso at the end of the sentence provides that “non-U.S. compliance

⁸ *Id.*

information” be provided to FERC only if the Applicable Governmental Authority provides permission for such disclosure. Given the difference in language in these provisions, section 5.1 could be interpreted at some future time to treat “notice of Alleged Violations” differently than “compliance information.” Similarly, under the language section 5.4, NERC is directed to report an “approved settlement of the violation” to FERC, even if the violation has no relevance to FERC, while NERC is not permitted to disclose “non-public non-U.S. compliance information” without obtaining permission of the Applicable Governmental Authority that has jurisdiction over the Registered Entity or portion of the bulk power system to which the non-public information pertains. Again, the language could be read as providing that the “approved settlement of the violation” is different than non-public non-U.S. compliance information for purposes of disclosure.

NERC made changes to sections 3.1.6, 3.4, and 3.4.1, step 2 to make clear that notices be made to FERC only if the action pertains to a Registered Entity or to a portion of the bulk power system over which FERC has jurisdiction. We ask that comparable changes be made to the other relevant sections of the CMEP to allow for this same clarity. Thus, consistent with FERC’s stated intent that the language in the CMEP limit notifications to the Applicable Governmental Authority that has jurisdiction over the particular Registered Entity or portion of the bulk-power system, CEA requests that the following changes be made to sections 2, 3.4.1, step 12; 5.1; 5.4; 5.6; 8.0, 2nd paragraph; and 8.0, 6th paragraph :

Section 2. Delete the third sentence of the fourth paragraph and replace with the following: Similarly, without first obtaining permission from the Applicable Governmental Authority that has jurisdiction over the Registered Entity or the portion of the bulk power system to which non-public non-U.S. information pertains, NERC shall not disclose such non-public non-U.S. compliance information to other Applicable Governmental Authorities, and any such disclosure shall be subject to any

limitations placed on such disclosure by such Applicable Governmental Authority or by other law of the applicable jurisdiction..

3.4.1, step 12: NERC will in turn notify FERC ~~and~~, if the investigation pertained to a Registered Entity or to a portion of the bulk power system over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the investigation pertained to a Registered Entity or to a portion of the bulk power system over which the other Applicable Governmental Authority has jurisdiction, ~~will also notify such other Applicable Governmental Authority.~~

5.1: NERC shall forward a copy of the notice of Alleged Violation to FERC ~~and~~, if the Alleged Violation pertains to a Registered Entity or to a portion of the bulk power system over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the Alleged Violation pertains to a Registered Entity or to a portion of the bulk power system over which the other Applicable Governmental Authority has jurisdiction, ~~to such other Applicable Governmental Authority...~~

5.4: NERC will report the approved settlement of the violation to FERC ~~and~~, if the settlement related to a Registered Entity or to a portion of the bulk power system over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the settlement relates to a Registered Entity or to a portion of the bulk power system over which the other Applicable Governmental Authority has jurisdiction, ~~to such other Applicable Governmental Authority...~~

5.6: NERC shall file a notice of penalty to FERC ~~and~~, if the Alleged Violation pertains to a Registered Entity or to a portion of the bulk power system over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the Alleged Violation pertains to a Registered Entity or to a portion of the bulk power system over which the other Applicable Governmental Authority has jurisdiction, ~~to such other Applicable Governmental Authority...~~

8.0 (2nd paragraph): NERC shall notify FERC ~~and~~, where the report pertains to a Registered Entity or to a portion of the bulk power system over which FERC has jurisdiction and/or to another Applicable Governmental Authority if the report pertains to a Registered Entity or to a portion of the bulk power system over which the other Applicable Governmental Authority has jurisdiction, ~~shall also notify such Applicable Governmental Authority...~~

8.0 (6th paragraph): NERC will provide reports quarterly to FERC ~~and~~, where a ~~report contains~~ with information pertaining to a Registered Entity or to a portion of the bulk power system over which FERC has jurisdiction and/or to another Applicable Governmental Authority with information pertaining to a Registered Entity or to a portion of the bulk power system over which the other Applicable Governmental Authority has jurisdiction, ~~shall also notify such Applicable Governmental Authority...~~

Conclusion

NERC operates in both the United States and Canada, and NERC's disclosure of information to a governmental authority must be performed in a manner that is respectful of the jurisdictional sovereignty of the other governmental authorities. While FERC recognizes in the December 19 Order the importance of receiving the permission of the Applicable Governmental Authority that has jurisdiction over the Registered Entity or portion of the bulk power system to which the non-public information pertains before the information should be disclosed, language in certain sections of the CMEP suggests that disclosure to FERC can occur even in the absence of such permission. We believe that such language should be modified to ensure that confusion regarding the appropriate disclosure of non-public information or information relating to a compliance matter does not occur at some later point in the future. Accordingly, for the reasons provided above, CEA respectfully requests that FERC grant clarification and/or rehearing and direct that sections 2, 3.4.1, step 12; 5.1; 5.4; 5.6; 8.0, 2nd paragraph; and 8.0, 6th paragraph be modified, as described above.

Respectfully submitted,

_____/s/_____
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