FERC and NERC Speed Processing of Electric Reliability Violations

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The North American Electric Reliability Corporation (NERC) is the organization responsible for ensuring the reliability of the bulk-power system (BPS) in the United States, Mexico, and Canada. NERC recently received approval from the Federal Energy Regulatory Commission (FERC) to streamline the process for tracking and reporting violations of electric reliability standards. On March 15, FERC issued an order conditionally approving the proposed “Find, Fix, Track, and Report” (FFTR) process to expedite the enforcement process for violations of NERC Reliability Standards that pose lesser risk to the BPS.1 In its approval of NERC’s new process, however, FERC included several conditions that narrow the range of potential violations eligible for the expedited process. FERC Chairman Jon Wellinghoff hailed the new process as “a major change in how [FERC] will enforce compliance with the Reliability Standards going forward.”2

Previous Process Caused Inordinate Delays, Focus on Minutia

In 2006, FERC certified NERC as the electric reliability organization that is charged with establishing and enforcing mandatory reliability standards for the BPS. FERC retains oversight of NERC enforcement processes and has concurrent reliability jurisdiction over the BPS.

To enforce those reliability standards, NERC had previously been required by FERC to file a Notice of Penalty (NOP) for every penalty determination that resulted from any violation of reliability standards by a registered entity. Under the previous NOP process, lesser-risk compliance issues were treated substantially the same as more serious violations. This led to a drain on NERC’s resources to process minor violations of registered entities that did not pose material risks to BPS reliability. The manner in which violations were processed without accounting for the severity of the underlying compliance issues also generated perverse consequences for many registered entities whose employees became “focused on the minutia of compliance and penalty avoidance rather than on best practices and excellence.”3

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As NERC’s compliance violation processing stagnated, its backlog of open cases grew to more than 3,300 active compliance matters awaiting action. It was widely acknowledged by FERC, NERC, and the electric industry that NERC’s enforcement process was inefficient and did not allocate reliability resources efficiently. As of
September 2011, NERC found that it would take two to three years to fully process its backlog, assuming no reports of new compliance violations, which of course continue at a rate of about 200 new compliance matters per month.4

NERC’S FFTR PROPOSAL

In recognition of NERC’s enforcement processing problems, in September 2011, NERC proposed the FFTR mechanism as a way to streamline compliance issue processing and conserve enforcement resources for more serious threats to the BPS.

In NERC’s petition to FERC, NERC proposed a three-track system to address enforcement of possible reliability violations. The first track of the proposed system preserved the current practice of NERC issuing findings of violation and filing an NOP with FERC for significant reliability violations. Under the second track, NERC proposed to submit to FERC a monthly spreadsheet of possible violations posing “lesser risk” to the BPS. For each possible lesser-risk violation—which NERC defined to include minimal and moderate risks, such as administrative, documentation, and certain maintenance or testing program implementation failures that have typically been included in Deficiency NOPs, Administrative Citation NOPs, and abbreviated NOPs5—the registered entity would certify the remediation measures it has taken, and the possible violation would count as part of the registered entity’s compliance history. However, under this track, no penalties would be assessed and no formal mitigation plans would be required, as is the case under the first track. Under the third track, NERC proposed to dismiss possible violations for which it was determined that no violation of a reliability standard actually occurred.

NERC proposed to determine the appropriate track for disposition of a particular compliance issue by examining a number of factors, including the following:

1. The underlying facts and circumstances, including what happened, why, where and when;
2. The reliability standard at issue;
3. The applicable Violation Risk Factor and Violation Severity Level;
4. The potential and actual level of risk to reliability, including mitigating factors during pendency of the Possible Violation;
5. The registered entity’s compliance program, including preventive and corrective processes and procedures, internal controls and culture of compliance;
6. The registered entity’s compliance history;
7. A Regional Entity’s (RE) determination that a penalty or sanction is warranted; and
8. The deterrence value of a penalty or sanction.6

NERC proposed to implement the FFTR process in two phases. In the first phase, NERC and RE compliance staff would make recommendations regarding which track a compliance issue should be resolved under, but enforcement staff would decide how the issue is resolved. In the second phase, both compliance and enforcement personnel have authority to resolve an issue under the FFTR process. Allowing field compliance personnel to dispose of such matters would free up enforcement staff for matters posing more serious risk to the BPS.

FERC’S MARCH 15 ORDER

In its March 15 order, FERC approved NERC’s FFTR proposal, with certain conditions that narrow the range of violations eligible for the streamlined FFTR process. In particular, FERC required the NERC risk assessment process to do the following:7

- Limit the FFTR process to possible violations posing only a minimal risk to the BPS, and exclude possible violations posing a moderate, significant, or substantial risk—taking into account FERC’s clarification that factors mitigating risk may be considered, and that a possible violation’s risk may be evaluated under the totality of the circumstances;
compliance personnel will be trained in resolving violations that do not result in a Notice of Penalty, and how NERC will ensure consistency in reliability enforcement decisions across REs. In addition, the March 15 order directed NERC to submit a 12-month report evaluating the following:

- Effectiveness of FFTR on BPS reliability,
- NERC’s compliance program and backlog,
- Ability of NERC and the REs to focus on more serious violations,
- How NERC’s risk assessment of possible violations has functioned and evolved,
- Ways in which FFTR can be improved,
- Results of any NERC audits or surveys of FFTR implementation,
- Impact of FFTR on self-reports, and
- Consistency and application of FFTR across REs.

Interestingly, the March 15 order closed by noting that reliability standards that pose “lesser risk” to the BPS may provide little protection to the BPS or be redundant. FERC then invited NERC, the REs, and other interested parties to identify reliability standards or requirements that are unnecessary, redundant, or that could be removed or revised with little effect on reliability.

**IMPLICATIONS**

The March 15 order is significant as an initial step to fix an electric reliability enforcement process that is significantly overburdened with compliance violations that do not pose a material risk to the BPS. The past system did not focus industry and NERC enforcement resources on the most serious risks to the BPS. In approving NERC’s proposal, FERC recognized the FFTR initiative as a “significant change in the paradigm for monitoring and enforcing compliance with Reliability Standards” and noted that it will consider further modifications to the FFTR process as it gathers feedback on FFTR’s efficacy in refo-cusing resources and maintaining reliability.

In their statements, several FERC commissioners expressed general support for the...
While the FFTR process is a good first step and should reduce the backlog of reliability standard violations in the processing queue, the FFTR process may not significantly reduce the compliance staffing burden for registered entities. Without further action by FERC and NERC to differentiate among nonmaterial risks to the BPS, and to allow possible violations posing only moderate risk to the BPS to be processed efficiently with a minimal amount of reporting burden, the FFTR may not get to the root of the compliance enforcement inefficiency. Expanding the scope of the FFTR process in the future may be possible after a year of experience, but without FERC action to address the more fundamental issue of registered entities having more staff than necessary dedicated to relatively immaterial compliance documentation matters, the opportunity will be missed to prioritize resources to improve the reliability of the BPS.

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NOTES
3. See Petition Requesting Approval of New Enforcement Mechanisms and Submittal of Initial Informational Filing Regarding NERC’s Efforts to Refocus Implementation of its Compliance Monitoring and Enforcement Program at 2, FERC Docket No. RC11-6-000 (September 30, 2011).
4. Ibid., at 7–8.
5. Ibid., at 21.
6. Ibid., at 1, 20–22.
7. March 15 order at pp. 44–58.
8. Ibid., at p. 81.