

Client Alert

Global Transactions Practice Group

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FERC Approves New NERC Enforcement Mechanism and Invites NERC to Consider Revising or Removing Reliability Standards and Requirements That Have Little Effect on Reliability

The Federal Energy Regulatory Commission (FERC) recently issued an **order** conditionally accepting a proposal by the North American Electric Reliability Corporation (NERC) to include “Find, Fix, Track and Report” (FFT) informational filings as a process for addressing possible Reliability Standards violations. The use of FFT filings is expected to enable NERC to process possible violations more quickly, and alleviate its backlog of approximately 3,300 active compliance matters. Given the magnitude of its backlog, without the adoption of FFT filings, NERC anticipated that it would take two to three years to process new possible violations.

Notably, FERC also invited NERC and industry participants to consider other approaches to gain efficiencies and reduce compliance backlogs, including revising or removing Reliability Standards and requirements that have little effect on reliability.

NERC Enforcement Mechanisms

With FERC’s approval of NERC’s FFT initiative, NERC and the Regional Entities now have three tracks to address possible violations: (1) Notices of Penalty (NOP); (2) FFT filings; and (3) Dismissals. The decision on whether an issue should be dispositioned in an NOP or an FFT filing is to be based on an initial review of evidence, and will turn primarily on the degree of risk the violation poses to the bulk-power system.

A. *NOPs*

NOPs generally are used for violations and possible violations that pose a moderate to substantial risk to the reliability of the bulk power system. There are two NOP formats—a relatively new, abbreviated “spreadsheet” NOP, and a “full” NOP. Spreadsheet NOPs are used for less serious violations that do not require the inclusion of an extensive record. Full NOPs are used for violations that pose the most serious risk to the bulk-power system such as when a violation involves (i) an extended outage, (ii) loss of load, (iii) cascading blackouts, (iv) vegetation contacts, (v) systematic or significant performance failures, (vi) intentional acts or omissions, or (vii) gross negligence. Full NOPs may also be used when an entity has a large number of less serious possible violations that could be indicative of a systemic issue.

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B. FFTs

As accepted by FERC, FFTs are to be used for possible (*i.e.*, unconfirmed) violations that pose a “minimal risk” to the bulk-power system, and have been remediated. Significantly, no penalties are assessed for such possible violations, although FFTs will be part of a registered entity’s compliance history.

Since NERC filed the FFT petition, it has submitted six FFT informational filings covering 428 possible violations. While FERC’s order accepted those six filings, it conditioned its acceptance of NERC’s FFT proposal. The petition requested FFT treatment for possible violations that pose a minimal or moderate risk, and identified six factors that NERC and the Regional Entities would consider in assessing the risk of a possible violation. Noting that it was not clear how the factors would be applied, or how NERC would ensure that the factors are applied consistently across its eight regions, FERC conditioned its acceptance of the FFT proposal on FFT treatment being used only for possible violations that pose a “minimal risk” to the bulk-power system. Based on the first six FFTs, FERC also provided some guidance on what constitutes “minimal risk.” For instance, FERC found that a possible violation should not be treated as having posed a minimal risk merely because it did not result in harm to the bulk-power system, and that a possible violation could not be viewed as posing a minimal risk if it reveals a serious shortcoming in a registered entity’s reliability-related processes. FERC will review its “minimal risk” condition as part of its one-year review of the program.

FERC also agreed with NERC’s proposal that FFT treatment may only apply when an issue has been remediated, and approved the requirement that registered entities certify that mitigation is complete prior to receiving FFT treatment. FERC also found that FFT filings must publicly identify the registered entity, and will become final sixty days after filing unless FERC issues a notice of intent to review within those sixty days.

The FFT initiative is to be implemented in two phases. In Phase I, NERC compliance staff will make recommendations on whether FFT treatment should apply, but NERC enforcement staff will decide how a possible violation is ultimately resolved. In Phase II, both NERC compliance and enforcement staff can determine the disposition of a possible violation. FERC permitted NERC to move forward with both Phases, but required NERC to include in a compliance filing additional details on Phase II implementation.

C. Dismissals

Dismissals of a possible violation may occur at any time following a determination that (i) a particular entity has not violated a Reliability Standard, (ii) a particular entity is not subject to the Reliability Standard at issue, or (iii) the open issue is a duplicate of one already being processed. Dismissal reports are submitted to FERC on a non-public basis.

Next Steps

A. FFT Filings

NERC was directed to make a compliance filing within sixty days explaining how it will decide whether a possible violation should be resolved through the FFT process, how NERC will achieve consistency of outcomes, and how NERC and Regional Entity personnel will be trained for Phase II implementation. NERC must also file a report on the FFT program concurrent with its compliance filing, and another report on the efficacy of the program in twelve-months. FERC will use the reports to review the initiative and to consider changes, including expanding the scope and parameters of possible violations eligible for FFT treatment. Factors FERC will consider include the effect of the FFT initiative on (i) reliability, (ii) NERC’s compliance program (including the backlogs), (iii) deployment of NERC and

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Regional Entity resources, (iv) NERC's evaluation of risk, and (v) the number of self-reports submitted. FERC will also consider the results of audits, spot checks, or random samplings by NERC or the Regional Entities regarding the implementation of the FFT initiative.

B. Revising or Removing Reliability Standards

FERC noted that there are likely some Reliability Standards and requirements that provide little protection to the reliability of the bulk-power system or are redundant. FERC is interested in whether certain Reliability Standards or specific requirements under Reliability Standards should be revised or removed. FERC has asked NERC to make specific proposals on this issue and to set forth in detail the technical basis for those proposals. FERC also invited NERC, the Regional Entities, and other interested entities to propose mechanisms to identify and remove unnecessary or redundant requirements from FERC-approved Reliability Standards. FERC did not establish a deadline for these efforts, but requested that NERC, the Regional Entities, and other interested entities submit comments concurrently.

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