Mandatory Reliability Standards FERC725A, Supplemental Statement

EPAct 2005 and Mandatory Reliability Standards

Overview

On August 8, 2005, the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAct 2005), was enacted into law.[1] EPAct 2005 added a new section 215 to the FPA, which requires a Commission-certified ERO (FERC-725) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight or the Commission can independently enforce Reliability Standards (FERC-725A).[2]

On February 3, 2006, the Commission issued Order No. 672, implementing section 215 of the FPA.[3] Pursuant to Order No. 672, the Commission certified one organization, NERC, as the ERO.[4] The ERO is required to develop Reliability Standards, which are subject to Commission review and approval. The Reliability Standards will apply to users, owners and operators of the Bulk-Power System, as set forth in each Reliability Standard.

On March 16, 2007, the Commission issued Order No. 693, a Final Rule adding part 40, a new part to the Commission's regulations. The Final Rule states that this part applies to all users, owners and operators of the Bulk-Power System within the United States (other than Alaska or Hawaii). It also requires that each Reliability Standard identify the subset of users, owners and operators to which that particular Reliability Standard applies. The new regulations also require that

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[1] Energy Policy Act of 2005, Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005), to be codified at 16 U.S.C. 824o.

[2] 16 U.S.C. 824o(e)(3).

[3] Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards, Order No. 672, 71 FR 8662 (February 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006), order on reh'g, Order No. 672-A, 71 FR 19814 (April 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

[4] North American Electric Reliability Corp., 116 FERC ¶ 61,062 (ERO Certification Order), order on reh'g & compliance, 117 FERC ¶ 61,126 (ERO Rehearing Order) (2006), order on compliance, 118 FERC ¶ 61,030 (2007) (January 2007 Compliance Order).

each Reliability Standard that is approved by the Commission will be maintained on the ERO's Internet website for public inspection.

In order that the Commission is able to perform its oversight function with regard to Reliability Standards that are proposed by the ERO and established by the Commission, it is essential that the Commission receive timely information regarding all or potential violations of Reliability Standards. While section 215 of the FPA contemplates the filing of the record of an ERO or Regional Entity enforcement action, FERC needs information regarding violations and potential violations at or near the time of occurrence. Therefore, it will work with the ERO and regional reliability organizations to be able to use the electronic filing of information so the Commission receives timely information. The new regulations also require that each Reliability Standard that is approved by the Commission will be maintained on the ERO's Internet website for public inspection.

In accordance with section 39.5 of the Commission's regulations, the ERO must file each Reliability Standard or a modification to a Reliability Standard with the Commission. The filing is to include a concise statement of the basis and purpose of the proposed Reliability Standard, either a summary of the Reliability development proceedings conducted by the ERO or a summary of the Reliability Standard development proceedings conducted by a Regional Entity together with a summary of the Reliability Standard review proceedings of the ERO and a demonstration that the proposed Reliability Standard is "just, reasonable, not unduly discriminatory or preferential, and in the public interest.

Legal Standard for Approval of Reliability Standards

In the Reliability Standards NOPR the Commission explained that section 215(d)(2) of the FPA states that the Commission may approve a Reliability Standard if it determines that it is just, reasonable, not unduly discriminatory or preferential, and in the public interest. Further, Order No. 672 laid out a series of factors it would consider when assessing whether to approve or remand a Reliability Standard.[5]

In response to NERC's suggestion that a proposed Reliability Standard developed through its open and inclusive process is assured to be "just, reasonable, and not unduly discriminatory or preferential," the NOPR explained that:

> While an open and transparent process certainly is extremely important to the overall success of implementing section 215 of the FPA, an evaluation of any proposed Reliability Standard must focus primarily on matters of substance rather than procedure. We will,

[5] Order No. 672 at P 262, 321-37.

> therefore, review each Reliability Standard in addition to the process through which it was approved by NERC to ensure that the Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.[6]

Further, with regard to NERC's "benchmarks" for evaluating a proposed Reliability Standard,[7] the Commission explained that it would not be constrained in approving or remanding a proposed Reliability Standard based on whether it satisfies the benchmarks. Rather, Order No. 672 identified factors that the Commission will consider when determining whether a proposed Reliability Standard satisfies the statutory requirements.

The Commission agrees with NERC that an open and transparent process is important in implementing section 215 of the FPA and developing proposed mandatory Reliability Standards. However, in Order No. 672, the Commission rejected the presumption that a proposed Reliability Standard developed through an ANSI-certified process automatically satisfies the statutory standard of review.[8] The Commission reiterates that simply because a proposed Reliability Standard has been developed through an adequate process does not mean that it is adequate as a substantive matter in protecting reliability. The Commission will, therefore, review each Reliability Standard to ensure that the Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest, giving due weight to the ERO.

Major Issues

Approximately 125 commenters submitted over 2,000 pages of comments in response to the Commission's October 2006 Reliability Standards NOPR. Based on Commission staff review, it has identified the following major issues raised by commenters:

Commission Options When Acting on a Reliability Standard

In the NOPR, the Commission proposed that, in the Final Rule, it would take one of four actions with regard to each proposed Reliability Standard: (1) approve; (2) approve as mandatory and enforceable; and direct modification

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[6] NOPR at P 74.

[7] Id. at P 9-12. The benchmarks are: applicability; purpose; performance requirements; measurability; technical basis in engineering and operations; completeness; consequences for noncompliance; clear language; practicality; and consistent terminology.

[8] Order No. 672 at P 338.

pursuant to section 215(d)(5); (3) request additional information; or (4) remand. In fact, the NOPR did not propose to remand any proposed Reliability Standard.[9]

With regard to the second category, the Commission explained that it would take two separate and distinct actions under the statute. First, pursuant to section 215(d)(2) of the FPA, the Commission would approve a proposed Reliability Standard, which would be mandatory and enforceable upon the effective date of the Final Rule. Second, the Commission would direct NERC to submit a modification of the Reliability Standard to address specific issues or concerns identified by the Commission pursuant to section 215(d)(5) of the FPA.

With regard to the third category, "request additional information," the NOPR explained that some Reliability Standards do not contain sufficient information to enable the Commission to propose a disposition. For those Reliability Standards, the Commission identified the needed information, and proposed not to approve or remand these Reliability Standards until all the relevant information is received. As an example, the NOPR explained that many of the fill-in-the-blank standards would not be approved or remanded until the Commission had received all the necessary information.

Most commenters generally supported the Commission's proposal to have four courses of action it may take on a Reliability Standard. However, Xcel had concerns about the legality of approving many of the proposed Reliability Standards as mandatory but, at the same time, ordering the ERO to make specific modifications to them. According to Xcel, section 215(d) does not expressly create this "approve but modify" option. To the contrary, section 215(d)(4) suggests that the Commission should remand to the ERO a standard that it disapproves "in whole or in part."

With regard to the many commenters that raised concerns about the prescriptive nature of the Commission's proposed modifications, the Commission agreed that a direction for modification should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process. However, in identifying a specific matter to be addressed in a modification to a Reliability Standard, it is important that the Commission 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. Without such direction and guidance, a Commission proposal to modify a Reliability Standard might be so vague that the ERO would not know how to adequately respond.

[9] NOPR at P 78-82.

The Commission affirmed in the Final Rule the four possible courses of action that it will take with regard to each proposed Reliability Standard: (1) approve; (2) approve as mandatory and enforceable; and direct modification pursuant to section 215(d)(5); (3) request additional information; or (4) remand. Each course of action is justified and has a sound basis in the statute. Xcel questioned the legality of the second option above, which it incorrectly equates to "conditional acceptance." Rather, as explained in the NOPR,[10] the Commission is taking two independent actions, both authorized by the statute. First, the Commission is exercising its authority, contained in section 215(d)(2) of the FPA, to approve a proposed Reliability Standard. Second, the Commission is directing the ERO to submit a modification of the Reliability Standard to address specific issues or concerns identified by the Commission, pursuant to section 215(d)(5) of the FPA.[11] Accordingly, the Commission rejected Xcel's contention and adopted the NOPR proposal in the Final Rule on this matter.

With regard to the many commenters that raised concerns about the prescriptive nature of the Commission's proposed modifications, the Commission agrees that a direction for modification should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process. However, in identifying a specific matter to be addressed in a modification to a Reliability Standard, it is important that the Commission 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. Without such direction and guidance, a Commission proposal to modify a Reliability Standard might be so vague that the ERO would not know how to adequately respond.

Thus, in some instances, while the Commission has used seemingly prescriptive language, it intends by doing so to provide useful guidance to assist in the Reliability Standards development process, not to impede it.[12] In the Final

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[10] See NOPR at P 79-80.

[11] 16 USC 824o(d)(5) ("[t]he Commission . . . may order the Electric Reliability Organization to submit to the Commission a proposed Reliability Standard or modification to a Reliability Standard that addresses a specific matter if the Commission considers such a new or modified Reliability Standard appropriate to carry out this section.").

[12] Moreover, in the NOPR, the Commission first discussed in detail its substantive concerns regarding particular proposed Reliability Standards and, to provide greater clarity regarding the Commission proposal, then summarized the proposed findings and modifications. It appears that such summaries of broader and fuller discussions led to misunderstandings of the NOPR proposals.

Rule, the Commission has considered commenters' concerns and, where it believes that a NOPR directive for modification appears to be determinative of the outcome, the Commission has provided flexibility by directing the ERO to address the underlying issue without mandating a specific change to the Reliability Standard. Further, the Commission clarified that, where the NOPR identified a concern and offered a specific approach to address the concern, the Commission will consider 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.

Consistent with section 215 of the FPA and its regulations, any modification to a Reliability Standard, including a modification that addresses a Commission directive, must be developed and fully vetted through NERC's Reliability Standard development procedure. The Commission's directives are not intended to usurp or supplant the Reliability Standard development procedure. Further, this allows the ERO to take into consideration the international nature of Reliability Standards and incorporate any modifications requested by the Commission's counterparts in Canada and Mexico. Until the Commission approves NERC's proposed modification to a Reliability Standard, the preexisting Reliability Standard will remain in effect.

The Commission agreed with NERC's suggestion that the Commission should direct NERC to address NOPR comments suggesting specific new improvements to the Reliability Standards, and the Commission has responded in the Final Rule. The Commission believes this approach will allow for a full vetting of new suggestions raised by commenters for the first time in the comments on the NOPR and will encourage interested entities to participate in the ERO Reliability Standards development process and not wait to express their views until a proposed new or modified Reliability Standard is filed with the Commission. The Final Rule's standard-by-standard analysis allowed various commenters to provide specific suggestions to improve or otherwise modify a Reliability Standard that address issues not raised in the NOPR. As a result, the Commission has directed 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.

The Commission disagreed with commenters, such as Xcel, who suggested that the Commission should not approve Reliability Standards that it requires NERC to modify. The Commission is only approving those Reliability Standards that it has determined to be just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission has determined that each

approved Reliability Standard is sufficiently clear and independently enforceable. Because it believes that these Reliability Standards are enforceable as written, the Commission will not exempt them from enforcement.

The Commission disagreed with Northern Indiana that the Reliability Standards should not be implemented in summer of 2007. Most or all users, owners and operators of the Bulk-Power System have participated in NERC's voluntary reliability regime for years and are familiar with the proposed Reliability Standards. Others have had notice of the Reliability Standards since they were filed by NERC in April 2006. The Commission is not persuaded that making reliability standards enforceable, most of which were being complied with on a voluntary basis, will require broad changes in electric system operations, procedures and protocols. Therefore, the Commission does not see any reason to further delay implementation of the mandatory Reliability Standards.

The Reliability Standards approved in the Final Rule are approved as proposed by the ERO. No changes will be made immediately based on the Commission's direction to modify those Reliability Standards. Any modifications will be developed through the ERO's Reliability Standards development process and will have a proposed effective date that will take into account any time needed for users, owners and operators of the Bulk-Power System to incorporate the necessary changes. Therefore, there is no need for any entity to make any changes based on differences between the NOPR and the Final Rule.

NRECA's assertion that the Commission should not establish timelines to resolve matters is a collateral attack on Order No. 672. In that order, the Commission adopted its regulations to provide that the Commission, when 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.[13]

Prioritizing Modifications to Reliability Standards

As discussed above, the Commission proposed to approve certain Reliability Standards and, as a separate action, proposed to direct the ERO to modify many of the same Reliability Standards pursuant to section 215(d)(5) of the FPA. In the NOPR, the Commission recognized that it is not reasonable to expect the modification of such a substantial number of Reliability Standards in a

[13] See 18 CFR 39.5(g).

short period of time. Thus, the NOPR provided guidance on the prioritization of needed modifications.[14]

The NOPR proposed that NERC first focus its resources on modifying those Reliability Standards that have the largest impact on near term Bulk-Power System reliability, including many of the proposed modifications that reflect Blackout Report recommendations. Further, the Commission identified a group of Reliability Standards that it believes should be given the highest priority by the ERO based on the above guidance.[15] The NOPR explained that the list is not meant to be exclusive or inflexible and solicited ERO and commenter input. The NOPR proposed that NERC address the "high priority" modifications within 1 year of the effective date of the Final Rule.

In addition, the NOPR proposed that the ERO promptly address certain proposed modifications that are not necessarily identified as "high priority" but may be addressed in a relatively short time frame because the proposed modifications are relatively minor or "administrative" in nature. The NOPR further proposed that the ERO develop a detailed, comprehensive work plan to address all of the modifications that are directed pursuant to a Final Rule. The work plan would take a staggered approach and complete all the proposed modifications either within two or three years from the effective date of the final rule.

0n December 1, 2006, NERC submitted its Work Plan as an informational filing. According to the Work Plan, NERC will revise the existing Reliability Standards to incorporate improvements. A total of 31 different projects will be completed over a three year period.[16] Some of the projects address revising a single Reliability Standard. The largest project includes revising 19 Reliability Standards focusing on related topics. NERC asserts that grouping the Reliability Standards in this manner will be the most efficient use of the resources and will allow consistency in requirements on related standards. NERC stated that the Work Plan incorporates modifications that were proposed in the NOPR, but it will modify its Work Plan to align with the modifications the Commission orders in the Final Rule. In addition, the Work Plan will remain dynamic as new Reliability Standards are proposed and priorities evolve. The Work Plan will be updated on an annual basis, and more frequently if needed.

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[14] NOPR at P 85-87.

[15] Id. at Appendix D (High Priority List).

[16] Some projects relate to new Reliability Standards that are not before the Commission in the instant rulemaking.

According to the Work Plan, NERC will periodically report progress and revisions to the Work Plan and timetable to the Commission. NERC's intent is to provide accountability for the revision and development of Reliability Standards, while recognizing it is impossible to have a fixed schedule when working in a consensus-driven process addressing complex technical matters.

Given the concerns raised by commenters, the Commission did not adopt the NOPR's proposal to direct some early modifications to the Reliability Standards. The Commission agrees with NERC that modifying each Reliability Standard first to address administrative concerns, then sending it back to the Reliability Standards development process to address any modifications directed by the Commission or requested by stakeholders, might lead to an unacceptable delay.

In Order No. 890, the Commission directed public utilities, working through NERC, to modify the ATC-related Reliability Standards within 270 days of publication of Order No. 890 in the Federal Register.[17] The Commission's action there affects approximately nine MOD Reliability Standards and one FAC Reliability Standard that were before the Commission in the Final Rule. The ERO was directed to submit its revised Work Plan within 90 days of the effective date of the Reliability Standards approved in the Final Rule as an informational filing to: (1) reflect modification directives contained in the Final Rule; (2) include the timeline for completion of ATC-related Reliability Standards as ordered in Order No. 890; and (3) account for the views of its stakeholders, including those raised in this proceeding.

In light of the Commission's determinations in Order No. 890, the Commission disagreed with NERC that it should not set specific delivery dates. NERC was directed to make every effort to meet the delivery dates set by the Commission. However, the Commission understands that there may be certain cases in which NERC is not able to meet a Commission's deadline. In those instances, NERC must inform the Commission of its inability to meet the specified delivery date and explain why it will not meet the deadline and when it expects to complete its work.

Trial Period (Implementation)

NERC and some commenters to the Staff Preliminary Assessment recommended that the Commission establish a "trial period" during which time the ERO would determine, but not collect, monetary penalties. In the NOPR, the

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[17] Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 FR 12266, March 15, 2007, FERC Stats. & Regs. ¶31,241 (2007) at P 223.

Commission expressed concern that a trial period that commences with the effective date of mandatory and enforceable Reliability Standards may interfere with their being made effective by summer 2007. Thus, the NOPR did not propose a trial period.[18]

However, the Commission recognized that there are entities that have not historically participated in the pre-existing voluntary reliability system (including some relatively small entities) that may not be familiar with what is required for compliance with the proposed mandatory Reliability Standards. For such entities, the NOPR proposed that the ERO and Regional Entities use their discretion in imposing penalties on such entities for the first six months the Reliability Standards are in effect. However, the Commission, the ERO and the Regional Entities would still retain the authority to impose penalties on such entities if warranted by the circumstances.

Most commenters requested that the Commission reconsider the proposal to reject a trial period during which the Reliability Standards are mandatory and enforceable but during which penalties would not be assessed for violating a Reliability Standard.[19] EEI, for example, noted that the compliance enforcement program and the delegation agreements have not yet been approved by the Commission and there may be a short time between their approval and the projected start date for enforcing the Reliability Standards. Therefore, commenters generally stated that a trial period is appropriate to ensure that the compliance monitoring and enforcement processes work as intended and that entities have time to implement new processes, such as required data systems; after June 2007, commenters generally stated that NERC and the Regional Entities would be able to require remedial actions where there is an immediate actual or potential risk to reliable interconnected operations.

Some commenters requested that the Commission grant a longer trial period in certain cases. For instance, TANC believed that for smaller entities the Commission should at minimum adopt a trial period of at least one year to provide adequate time to evaluate and comply with the new mandatory Reliability Standards. Bonneville and NPCC suggested that, for Reliability Standards that have an annual reporting requirement, the compliance cycle should start on June 2007 so that a Reliability Standard that relies on data reporting back into the prior year should have an initial compliance measurement date of June 2008. AMP-Ohio states that that the Commission's proposal did not go far enough and suggested a "ramp-up" period for entities that are new to standards, through and

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[18] Id. at P 92-93.

[19] See, e.g., EEI, APPA, TAPS, EPSA, CAISO, Bonneville, California PUC, Cleveland, Otter Tail, Northwest Requirements Utilities, TVA and SMA.

including the entity's first compliance audit or, if the Commission rejects this proposal, the Commission should extend the trial period from six to twelve months. Reliant also advocated a phase-in of penalties over six to twelve months, with an increasing scale of penalties over time.

The Commission adopted its proposal not to institute a formal trial period. As it explained in the NOPR, a trial period is inconsistent with mandatory and enforceable Reliability Standards taking effect in a timely manner.[20] The Commission's overriding concern is the reliability of the Bulk-Power System, and mandatory and enforceable Reliability Standards are essential to ensuring the reliability of the Bulk-Power System. While it is true that most commenters seek a trial period and only a minority of commenters concur that a trial period is not warranted, the Commission nevertheless agrees with the minority and the position taken by ATC, which supports implementing a mandatory reliability regime by June 2007, pointing out that it has been over three years since the August 2003 Blackout and going on two years since EPAct 2005 was enacted. Accordingly, the Commission will not adopt a formal trial period.

The Commission's overriding concern is reliability; mandatory and enforceable Reliability Standards becoming effective in a timely manner is essential to ensuring that reliability. The Commission is, however, also cognizant of commenters' concerns. In the NOPR, the Commission proposed that the ERO and Regional Entities use their enforcement discretion in imposing penalties on entities that historically had not participated in the pre-existing voluntary reliability regime, although authority to impose a penalty on such an entity would be retained "if warranted by the circumstances."[21] In light of commenters' concerns, including the fact that there are new aspects to the Reliability Standards and the proposed compliance program that will apply to all users, owners and operators of the Bulk-Power System, the Commission directed the ERO and Regional Entities to focus their resources on the most serious violations during an initial period through December 31, 2007. This use of enforcement discretion should apply to all users, owners and operators of the Bulk-Power System, and not just those new to the program as originally proposed in the NOPR. This approach allows the ERO, Regional Entities and other entities time to ensure that the compliance monitoring and enforcement processes work as intended and that all entities have time to implement new processes.

By directing the ERO and Regional Entities to focus their resources on the most serious violations through the end of 2007, the ERO will have the discretion necessary to assess penalties for such violations, while also having discretion to

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[20] NOPR at P 92.

[21] Id. at 93.

calculate a penalty without collecting the penalty if circumstances warrant. Further, even if the ERO or a Regional Entity declines to assess a monetary penalty during the initial period, they are authorized to require remedial actions where a Reliability Standard has been violated. Moreover, the Commission retains its power under section 215(e)(3) of the FPA to bring an enforcement action against a user, owner or operator of the Bulk-Power System.

The Commission believes that the goal should be to ensure that, at the outset, the ERO and Regional Entities can assess a monetary penalty in a situation where, for example, an entity's non-compliance puts Bulk-Power System reliability at risk, not to penalize every size and type of violation on day 1 of the program. Requiring the ERO and Regional Entities to focus on the most serious violations will allow the industry time to adapt to the new regime while also protecting Bulk-Power System reliability by allowing the ERO or a Regional Entity to take an enforcement action against an entity whose violation causes a significant disturbance. The Commission's approach strikes a reasonable balance in ensuring that the ERO and Regional Entities will be able to enforce mandatory Reliability Standards in a timely manner, while still allowing users, owners and operators of the Bulk-Power System time to acquaint themselves with the new requirements and enforcement program. In addition, the Commission's approach ensures that all users, owners and operators of the Bulk-Power System take seriously mandatory, enforceable reliability standards at the earliest opportunity and before the 2007 summer peak season.

Bulk-Power System v. bulk electric system:

The NOPR noted the disparity between the two definitions and proposed (at P 68), for the initial approval of reliability standards, the continued use of NERC's definition of bulk electric system (which includes facilities operating at 100 kV or higher). The NOPR then interpreted the term to apply to all transmission systems above 100 kV and any underlying systems less than 100 kV that could limit or supplement the operation of the higher voltage transmission system *and* transmission to all significant local distribution systems and load centers.

The vast majority of commenters, including all major stakeholder organizations, opposed this interpretation arguing that it would capture perhaps thousands of small entities that have no material impact on reliability; create confusion with the NERC registration process; ignore the ERO standards development process and NERC's expertise; raise jurisdictional issues; and is too much too soon. APPA and NRECA challenged the Commission's SBREFA analysis in large part because it failed to consider the expanded impact on small entities due to the Commission's interpretation of bulk electric system.

The Commission agreed with commenters that, at least initially, expanding the scope of facilities subject to the Reliability Standards could create uncertainty and might divert resources as the ERO and Regional Entities implement the newly created enforcement and compliance regime. Further, it agreed with commenters that unilaterally modifying the definition of the term bulk electric system is not an effective means to achieve our goal. For these reasons, the Commission did not adopt the proposed interpretation contained in the NOPR. Rather, for at least an initial period, the Commission will rely on the NERC definition of bulk electric system[22] and NERC's registration process to provide as much certainty as possible regarding the applicability to and the responsibility of specific entities to comply with the Reliability Standards in the start-up phase of a mandatory Reliability Standard regime.[23]

However, the Commission disagreed with NERC, APPA and NRECA that there is no intentional distinction between Bulk-Power System and bulk electric system. NRECA stated that "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."[24] In this instance, however, Congress did not borrow the term of art – bulk electric system – but instead chose to create a new term, Bulk-Power System, with a definition that is distinct from the term of art used by industry. In particular, the statutory term does not establish a voltage threshold limit of applicability or configuration as does the NERC definition of bulk electric system. Instead, section 215 of the FPA broadly defines the Bulk-Power System as "facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof) [and] electric energy from generating facilities needed to maintain transmission system reliability." Therefore, the Commission confirmed its statements in the NOPR that the Bulk-Power System reaches farther than those facilities that are included in NERC's definition of the bulk electric system.[25]

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[22] "As defined by the Regional Reliability Organization, the electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition."

[23] See Section II.C.2.,Applicability to Small Entities

[24] Citing Morissette v. United States, 342 U.S. 246, 263 (1952).

[25] NOPR at P 66. For these same reasons, the Commission rejected the position of those commenters that suggest the statutory definition of Bulk-Power System is more limited than the NERC definition of bulk electric system.

Although the Commission accepted the NERC definition of bulk electric system and NERC's registration process for now, the Commission remains concerned about the need to address the potential for gaps in coverage of facilities. For example, some current regional definitions of bulk electric system exclude facilities below 230 kV and transmission lines that serve major load centers such as Washington, DC and New York City.[26] The Commission intends to address this matter in a future proceeding. As a first step in enabling the Commission to understand the reach of the Reliability Standards, the Commission directed NERC, within 90 days of the Final Rule, to provide the Commission with an informational filing that includes a complete set of regional definitions of bulk electric system and any regional documents that identify critical facilities to which the Reliability Standards apply (i.e., facilities below a 100 kV threshold that have been identified by the regions as critical to system reliability).

The Commission believes that this satisfies concerns raised by NARUC and New York Commission that the proposal to interpret Bulk-Power System exceeds the Commission's jurisdiction. When the Commission addresses this matter in a future proceeding, it will consider NARUC's and New York Commission's comments regarding the "layer of 'area' transmission."

The Commission disagreed with commenters claiming that the ERO's definition of bulk electric system is broader than the statutory definition of Bulk-Power System. Connecticut Attorney General, Connecticut DPUC and others that argued that the ERO's definition of bulk electric system exceeds the Commission's jurisdiction by including generation that is not needed to maintain transmission system reliability and, therefore, intrudes into state jurisdiction over generation resource adequacy. First, none of the Reliability Standards submitted by the ERO set requirements for resource adequacy. Moreover, commenters have not adequately supported their claim that the "threshold" in the NERC definition of bulk electric system that includes facilities "generally operated at 100 kV or higher" is broader than the statutory phrase "electric energy from generation facilities needed to maintain transmission system reliability." As stated explicitly in the NERC definition, this is a "general" threshold and allows leeway to address specific circumstances. On its face, the NERC definition is not overbroad; as applied, it must be interpreted and applied consistent with the statutory language in section 215. Finally, as stated above, the Commission believes that the ERO definition of bulk electric system is narrower than the statutory definition of Bulk-Power System.

Small Entities:

Related, the NOPR (at P 51) disapproved of a "blanket waiver" for

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[26] See id. at P 64-65 & n.53-54.

exempting small entities below a specific (kV or MW) threshold from all standards. Rather, the Commission encouraged NERC to develop standard-specific applicability thresholds based on 'material impact' to reliability.

APPA, NRECA and TAPS wanted to preserve the status quo, with additional entities drawn in through NERC's registration process. Over 40 small munis filed separate comments asking that the Commission either develop a bright line test to exclude small entities that do not have a material impact on bulk-power system reliability or provide an individual waiver in this proceeding based on the descriptions of their particular systems. Several QFs and behind-the-meter generation entities had similar comments.

NERC, in its NOPR comments, attached its Statement of Compliance Registry Criteria (Registry Criteria) that described how NERC will identify organizations, "particularly smaller or relatively (electrically) isolated entities," that may be candidates for registration.[27] For example, NERC plans to register only those distribution providers or LSEs that have a peak load of 25 MW or greater and is directly connected to the bulk power system (i.e., 100 kV or greater) or is designated as a responsibility entity as part of a required underfrequency load shedding program or undervoltage load shedding program. For generators, NERC plans to only register individual units of 20 MVA or greater that are directly connected to the bulk power system, generating plants with an aggregate rating of 75 MVA or greater, any blackstart unit material to a restoration plan, or any generator "regardless of size, that is material to the reliability of the bulk power system."

In response to MEAG's concern that the Commission previously determined that it was not bound by the NERC compliance registry process and that there thus was uncertainty, the Commission has modified the approach proposed in the NOPR and, as noted above, will use the NERC compliance registry to determine those users, owners and operators of the Bulk-Power System that must comply with the Reliability Standards. Each individual Reliability Standard will then identify the set of users, owners and operators of the Bulk-Power System that must comply with that standard. While the Commission may take prospective action against an entity that was not previously identified as a user, owner or operator through the NERC registration process once it has been added to the registry, the Commission will not assess penalties against an entity that has not previously been put on notice, through the NERC registration process, that it must comply with particular Reliability Standards. Under this process, if there is an entity that is not registered and NERC later discovers that the entity

[27] NERC has not submitted this for Commission approval, but included it as an attachment to its NOPR comments.

should have been subject to the Reliability Standards, NERC has the ability to add the entity, and possibly other entities of a similar class, to the registration list and to direct corrective action by that entity on a going-forward basis.[28] The Commission believes that this should prevent a small entity from being subject to a penalty for violating a Reliability Standard without prior notice that it must comply with that Reliability Standard.

As stated in the NOPR, NERC has indicated that in the future it may add to a Reliability Standard limitations on applicability based on electric facility characteristics such as generator nameplate ratings.[29] While the NOPR explored this approach as a means of addressing concerns over applicability to smaller entities, the Commission believes that, until the ERO submits a Reliability Standard with such a limitation to the Commission, the NERC compliance registry process is the preferred method of determining the applicability of Reliability Standards on an entity-by-entity basis.

A number of municipalities and generation owners ask that the Commission review their particular circumstances and provide an individual waiver from compliance with the mandatory Reliability Standards. In light of the above discussion, the Commission declines to determine whether any individual municipality, generation owner or other entity is subject to a specific Reliability Standard. Rather, NERC and the Regional Entities should determine such applicability in the first instance through the registration process.

The Commission agreed with California Cogeneration that its regulations currently exempt most QFs from specific provisions of the FPA including section 215.[30] The Commission was concerned, however, whether it is appropriate to grant QFs a complete exemption from compliance with Reliability Standards that apply to other generator owners and operators. It was not clear to the Commission that for reliability purposes there is a meaningful distinction between QF and non-QF generators.

Finally, the Commission agreed that, despite the existence of a voltage or demand threshold for a particular Reliability Standard, the ERO or Regional Entity should be permitted to include an otherwise exempt facility on a facility-by-facility basis if it determines that the facility is needed for Bulk-Power System reliability. However, the Commission noted that an entity that disagrees with NERC's determination to place it in the compliance registry may submit a

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[28] See NERC Rules of Procedure, § 500.

[29] NOPR at P 49.

[30] 18 CFR 292.601(c).

challenge in writing to NERC and, if still not satisfied, may lodge an appeal with the Commission.[31] Therefore, a small entity may appeal to the Commission if it believes it should not be required to comply with the Reliability Standards.

Overly-Prescriptive Directions for Modifications:

The NOPR proposed to approve 83 reliability standards and concurrently, under separate statutory authority, direct that the ERO develop modifications to 61 of these 83 reliability standards. NERC, EEI and others commented that, while many such directives appropriately identify an issue and direct the ERO to address the issue in developing a modified standard, other directives also dictate the required outcome/modification, thereby undermining the ERO's Reliability Standards development process and limiting the range of possible ways to address an issue. They also contend that the overly-prescriptive directives exceed the Commission's authority to approve, remand or direct that the ERO develop a new or modified standard to address a specific matter.

With regard to the many commenters that raised concerns about the prescriptive nature of the Commission's proposed modifications, the Commission agreed that a direction for modification should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process. However, in identifying a specific matter to be addressed in a modification to a Reliability Standard, it is important that the Commission 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. Without such direction and guidance, a Commission proposal to modify a Reliability Standard might be so vague that the ERO would not know how to adequately respond.

Therefore, in some instances, while the Commission has used seemingly prescriptive language, it intends by doing so to provide useful guidance to assist in the Reliability Standards development process, not to impede it.[32] In the Final Rule, the Commission considered commenters' concerns and, where it believes that a NOPR directive for modification appears to be determinative of the outcome, the Commission has provided flexibility by directing the ERO to address the underlying issue without mandating a specific change to the Reliability

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[31] See ERO Certification Order at P 679.

[32] Moreover, in the NOPR, the Commission first discussed in detail its substantive concerns regarding particular proposed Reliability Standards and, to provide greater clarity regarding the Commission proposal, then summarized the proposed findings and modifications. It appears that such summaries of broader and fuller discussions led to misunderstandings of the NOPR proposals.

Standard. Further, the Commission clarifies that, where the NOPR identified a concern and offered a specific approach to address the concern, it will consider 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.

NERC Functional Model:

The NOPR (at P 44-48) explained that each proposed reliability standard identifies applicable entities based on the NERC Functional Model. The NOPR proposed to adopt this approach - and to require that the ERO submit any future revisions to the functional model that may affect the applicability of Reliability Standards.

Many commenters opposed the filing of revisions, explaining that the Functional Model is a conceptual document that does not define specific rights and responsibilities, and is still a work in progress. Rather, each reliability standard identifies the applicable entities, which should be the sole determinant of applicability. For similar reasons, other entities, including NERC, favor filing revisions to the Functional Model with the Commission for informational purposes only. Only a few commenters (ISO New England and TANC) support the filing of revisions to the Functional Model for the Commission's substantive review.

The Commission agreed with commenters that (1) the Functional Model is an evolving guidance document that is not intended to convey firm rights and responsibilities and (2) the applicability section of a particular standard as required by regulation in the Final Rule should be the determinant of applicability. There is little value in requiring NERC to file the Functional Model document with the Commission for informational purposes only. Thus, the Commission recommended that the proposal to require that NERC submit revisions to the Functional Model for Commission approval not be adopted.

Pending Standards:

The NOPR proposed not to approve or remand 24 standards because of lack of information or because they are applicable to Regional Reliability Organizations. The NOPR proposed that the reliability goal of these standards would be continued to be accomplished by either using Good Utility Practice or through the data gathering authority provided in EPAct. Some commenters would add approximately 15 more standards (that reference a pending standard) to the pending category.

The Commission believes that simply referencing a Reliability Standard

that is pending does not justify leaving another standard pending. Likewise, if a standard specifies eight Requirements and compliance with one Requirement is dependent on criteria to be developed in a fill-in-the-blank standard, there is no reason to jettison the entire standard. However, where compliance with one Reliability Standard is so intertwined and dependent on criteria or other information set forth in a "pending" standard would justify pending action on both standards.

Reporting Burden

In the NOPR, the Commission based its initial estimates on the premise that the proposed Reliability Standards have already been in effect for a substantial period of time on a voluntary basis and consequently entities would have already put them into practice. Seventy of the one hundred and twenty-five commenters express concern with the burden to be imposed by the NOPR's requirements. The majority of these comments addressed the potential impact the requirements would have on small entities but did not provide specific estimates on this impact.

After issuance of the NOPR, Commission staff held discussions with NERC and APPA on the number of entities that would be impacted by the Reliability Standards. NERC indicated they had registered 1,178 new entities under 14 functional categories. This is in addition to the 246 unique entities that were already registered under 6 different functions on their existing "Registered Entity List", a registry created during the voluntary standards regime. However, this registry of 1,424 entities was not finalized as the final rule was being drafted and so shortly prior to its issuance, the final rule was amended to include 1,439 entities.

The Commission continues to believe that the reporting requirements embedded in the Reliability Standards that are approved in the Final Rule have been implemented on a voluntary basis for many years in most instances.[33] This would not apply, however, to entities that are new to the reliability oversight. However, based on comments it received on the impact that Reliability Standards would have on all entities and in particular small entities, it revised its estimates on a sliding scale. The estimates would be based on the number of functions an entity had to perform, for example, a Transmission Owner or Operator would have more functions to perform than a Generator Owner or Operator as opposed again to a Purchase-selling entity. In addition, whether an entity voluntarily participated in a compliance program would also be a factor. For example, the estimate for the number of hours for an Investor Owner/Operator and several large municipal owners and cooperatives will be lower in contrast to smaller municipal owners and

[33] NOPR at P 1157.

cooperatives because of their advanced participation in complying with Reliability Standards. For many small municipals and cooperatives that did not voluntarily comply with the Reliability Standards, they will be starting almost from scratch and consequently the number of hours necessary to come into compliance will be greater.

The Commission believes that, at the outset of this new program, it is important to have as much certainty and stability as possible regarding which users, owners and operators of the Bulk-Power System must comply with mandatory and enforceable Reliability Standards. NERC, as the ERO, has developed an approach to accomplish this through its compliance registry process. As noted above, the Commission has previously found NERC's compliance registry process to be a reasonable means "to ensure that the proper entities are registered and that each knows which Commission-approved Reliability Standard(s) are applicable to it."[34]

The compliance registry identifies specific categories of users, owners and operators that correlate to the types of entities responsible for performing specific functions described NERC Functional Model.[35] These same functional types are also used by the ERO to identify the entities responsible for compliance with a particular Reliability Standard in the Applicability section of a given standard. Thus, each registered entity will be registered under one or more appropriate functional categories, and that registration by function will determine with which Reliability Standards – and Requirements of those Reliability Standards – the entity must comply. In other words, a user, owner or operator of the Bulk-Power System would be required to comply with each Reliability Standard that is applicable to any one of the functional types for which it is registered.

The Commission believes that NERC has set reasonable criteria for registration and, thus, the Commission approves the ERO's compliance registry process as an appropriate approach to allow the ERO, Regional Entities and, ultimately, the entities responsible for compliance with mandatory Reliability Standards to know which entities are responsible for initial implementation of and compliance with the new Reliability Standards. Further, based on supplemental comments of APPA, TAPS and NRECA, it appears that there is support among

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[34] ERO Certification Order at P 689.

[35] The Statement of Compliance Registry Criteria, as well as the Functional Model, identify, inter alia, the following functions: balancing authority, distribution provider, generator operator, generator owner, load serving entity, planning authority, purchasing-selling entity, transmission owner, transmission operator and transmission service provider. An entity may be registered under one or more of these functions.

many of the smaller entities for the NERC compliance registry process.[36] Thus, at this juncture, the Commission will rely on the NERC registration process to identify the set of entities that are responsible for compliance with particular Reliability Standards.

In sum, the ERO will identify those entities that must comply with Reliability Standards in three steps: (1) the ERO will identify and register those entities that fall under its definition of bulk electric system; (2) each registered entity will register in one or more appropriate functional categories; and (3) each registered entity will comply with those Reliability Standards applicable to the functional categories in which it is registered.

Appendix A.

Reliability Standards Development Procedure

Version 6.1 — Approved: NERC Board of Trustees

March 12, 2007

Effective: June 7, 2007

Reliability Standard Definition, Characteristics, and Elements

Definition of a Reliability Standard

A reliability standard defines certain obligations or requirements of entities that operate, plan, and use the bulk power systems of North America. The obligations or requirements must be material to reliability and measurable. Each obligation and requirement shall support one or more of the

[36] See Supplemental Comments of APPA (February 14,2007), TAPS (February 13,2007) and NRECA (February 15,2007).

stated reliability principles and shall be consistent with all of the stated reliability and market interface principles. A reliability standard is defined as follows:

> "Reliability standard" means a requirement to provide for reliable operation of the bulk power system, including without limiting the foregoing, requirements for the operation of existing bulk power system facilities, including cyber security protection, and including the design of planned additions or modifications to such facilities to the extent necessary for reliable operation of the bulk power system; but shall not include any requirement to enlarge bulk power system facilities or to construct new transmission capacity or generation capacity[1].

Characteristics of a Reliability Standard

Reliability standards include standards for the operation and planning of interconnected systems, consistent with the reliability and market interface principles. The format and process defined by this procedure applies to all reliability standards.

Although reliability standards have a common format and process, several types of reliability standards may exist, each with a different approach to measurement:

- **Technical standards** related to the provision, maintenance, operation, or state of bulk power systems will likely contain measures of physical parameters and will often be technical in nature.
- **Performance standards** related to the actions of entities providing for or impacting the reliability of bulk power systems will likely contain measures of the results of such actions, or the nature of the performance of such actions.
- **Preparedness standards** related to the actions of entities to be prepared for conditions that are unlikely to occur but are critical to reliability will likely contain measures of such preparations or the state of preparedness, but measurement of actual outcomes may occur infrequently or never.
- **Organization certification standards** define the essential capabilities to perform reliability functions. Such standards are used to credential organizations that have the requisite capabilities.

Elements of a Reliability Standard

A reliability standard shall consist of the elements shown in the reliability standard template. These elements are intended to apply a systematic discipline in the development and revision of reliability standards. This discipline is necessary to achieving standards that are measurable, enforceable, and consistent. The format allows a clear statement of the purpose, requirements, measures, and compliance elements associated with each standard. Version 6.1 - 6 - Board of Trustees Approved:

[1] § 39.1 Code of Federal Regulations.

All mandatory requirements of a reliability standard shall be within an element of the standard. Supporting documents to aid in the implementation of a standard may be referenced by the standard but are not part of the standard itself. Types of supporting documents are described in a later section of the procedure.

Performance Elements of a Reliability Standard

Identification Number	A unique identification number assigned in accordance with a published classification system to facilitate tracking and reference to the standards.
Title	A brief, descriptive phrase identifying the topic of the standard.
Applicability	Clear identification of the functional classes of entities responsible for complying with the standard, noting any specific additions or exceptions. If not applicable to the entire North American bulk power system, then a clear identification of the portion of the bulk power system to which the standard applies, such as a region or interconnection. Any limitation on the applicability of the standard based on electric facility requirements should be described.
Effective Date and Status	The effective date of the standard or, prior to approval of the standard by regulatory authorities, the proposed effective date. The status of the standard will be indicated as active or by reference to one of the numbered steps in the standards process.
Purpose	The purpose of the standard. The purpose shall explicitly state what outcome will be achieved by the adoption of the standard. The purpose is agreed to early in the process as a step toward obtaining approval to proceed with the development of the standard. The purpose should link the standard to the relevant principle(s).
Requirement(s)	Explicitly stated technical, performance, preparedness, or certification requirements. Each requirement identifies who is responsible and what action is to be performed or what outcome is to be achieved. Each statement in the requirements section shall be a statement for which compliance is mandatory. Any additional comments or statements for which compliance is not mandatory, such as background or explanatory information should be placed in a separate document and referenced. (See Supporting References.)

Risk Factors	The potential reliability significance of each requirement, designated as a High, Medium, or Lower Risk Factor in accordance with the criteria listed below: A High Risk Factor requirement (a) is one that, if violated, could directly cause or contribute to bulk power system instability, separation, or a cascading sequence of failures, or could place the bulk power system at an unacceptable risk of instability, separation, or cascading failures; or (b) is a requirement in a planning time frame that, if violated, could, under emergency, abnormal, or restorative conditions anticipated by the preparations, directly cause or contribute to bulk power system instability, separation, or a cascading sequence of failures, or could place the bulk power system at an unacceptable risk of instability, separation, or cascading failures, or could hinder restoration to a normal condition. A Medium Risk Factor requirement (a) is a requirement that, if violated, could

[2] While the compliance elements of a standard are developed and approved for each NERC standard, the compliance elements will not be included in any standard submitted to ANSI for approval as an American National Standard.

directly affect the electrical state or the capability of the bulk power system, or the ability to effectively monitor and control the bulk power system, but is unlikely to lead to bulk power system instability, separation, or cascading failures; or (b) is a requirement in a planning time frame that, if violated, could, under emergency, abnormal, or restorative conditions anticipated by the preparations, directly affect the electrical state or capability of the bulk power system, or the ability to effectively monitor, control, or restore the bulk power system, but is unlikely, under emergency, abnormal, or restoration conditions anticipated by the preparations, to lead to bulk power system instability, separation, or cascading failures, nor to hinder restoration to a normal condition. A Lower Risk Factor requirement is administrative in nature and (a) is a requirement that, if violated, would not be expected to affect the electrical state or capability of the bulk power system, or the ability to effectively monitor and control the bulk power system; or (b) is a requirement in a planning time frame that, if violated, would not, under the emergency, abnormal, or restorative conditions anticipated by the preparations, be expected to affect the electrical state or capability of the bulk power system, or the ability to effectively monitor, control, or restore the bulk power system.	
Measure(s)	Each requirement shall be addressed by one or more measures. Measures are used to assess performance and outcomes for the purpose of determining compliance with the requirements stated above. Each measure will identify to whom the measure applies and the expected level of performance or outcomes required to demonstrate compliance. Each measure shall be tangible, practical, and as objective as is practical. It is important to realize

	that measures are proxies to assess required performance or outcomes. Achieving the measure should be a necessary and sufficient indicator that the requirement was met. Each measure shall clearly refer to the requirement(s) to which it applies.

Glossary of Terms Used in Standards

Definitions of Terms	All defined terms used in reliability standards shall be defined in the glossary. Definitions may be approved as part of a standard action or as a separate action. All definitions must be approved in accordance with the standards process.

Compliance Elements2 of a Standard

Compliance Monitoring Process	The following compliance elements, which are part of the standard and are balloted with the standard are developed for each measure in a standard by the NERC compliance program in coordination with the standard drafting team:

	• The specific data or information that is required to measure performance or outcomes. • The entity that is responsible to provide the data or information for measuring performance or outcomes. • The process that will be used to evaluate data or information for the purpose of assessing performance or outcomes. • The entity that is responsible for evaluating data or information to assess performance or outcomes. • The time period in which performance or outcomes is measured, evaluated, and then reset. • Measurement data retention requirements and assignment of responsibility for data archiving.
Violation Severity Levels	Defines the degree to which compliance with a requirement was not achieved. The violation severity levels, are part of the standard and are balloted with the standard, and developed by the NERC compliance program in coordination with the standard drafting team.

Supporting Information Elements

Interpretations	Formally approved interpretations of the reliability standard. Interpretations are temporary, as the standard should be revised to incorporate the interpretation. Interpretations are developed and approved through a process described in the section Interpretations of Standards.
Implementation Plan	Each standard shall have an associated implementation plan describing the effective date of the standard or effective dates if there is a phased implementation. The implementation plan may also describe the implementation of the standard in the compliance program and other considerations in the initial use of the standard, such as necessary tools, training, etc. The implementation plan must be posted for at least one public comment period and is approved as part of the ballot of the standard.

Supporting References	This section will reference related documents that support implementation of the reliability standard, but are not themselves mandatory. Examples include, but are not limited to: • Developmental history of the standard and prior versions. • Notes pertaining to implementation or compliance. • Standard references. • Standard supplements. • Procedures. • Practices. • Training references. • Technical references. • White papers. • Internet links to related information.