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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 38

[Docket No. RM05-30-000]

#### Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards

September 1, 2005.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** Pursuant to Subtitle A (Reliability Standards) of the Electricity Modernization Act of 2005, which added a new section 215 to the Federal Power Act (FPA), the Commission is proposing to amend its regulations to incorporate:

(1) Criteria that an entity must satisfy in order to qualify to be the Electric Reliability Organization (ERO) that will propose and enforce Reliability Standards for the Bulk-Power System in the United States, subject to Commission approval;

(2) Procedures governing enforcement actions by the ERO and the Commission;

(3) Criteria under which the ERO may enter into an agreement to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the ERO and enforcing Reliability Standards;

(4) Procedures for the establishment of Regional Advisory Bodies that may provide advice to the Commission, the ERO or a Regional Entity on matters of governance, applicable Reliability Standards, the reasonableness of proposed fees within a region, and any other responsibilities requested by the Commission;

(5) Regulations governing the issuance of periodic reliability reports by the ERO that assess the reliability and adequacy of the Bulk-Power System in North America; and

(6) Regulations pertaining to the funding of the ERO.

**DATES:** Comments are due October 7, 2005.

**ADDRESSES:** Comments may be filed electronically via the eFiling link on the

Commission's Web site at <http://www.ferc.gov>. Commenters unable to file comments electronically must send an original and fourteen (14) copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

#### FOR FURTHER INFORMATION CONTACT:

William Longenecker (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8570.

David Miller (Technical Information), Office of Markets, Tariffs and Rates, Division of Reliability, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-6473. Jonathan First (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8529.

Christy Walsh (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-6523.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

1. Pursuant to Subtitle A (Reliability Standards) of the Electricity Modernization Act of 2005,<sup>1</sup> which added a new section 215 to the Federal Power Act (FPA), the Commission is proposing to amend its regulations to incorporate:

(1) Criteria that an entity must satisfy in order to qualify to be the Electric Reliability Organization (ERO), which the Commission will certify as the organization that will propose and enforce Reliability Standards for the Bulk-Power System in the United States, subject to Commission approval;

(2) Procedures under which the ERO may propose new or modified Reliability Standards and procedures to enforce such standards, for Commission review;

(3) Procedures governing enforcement actions by the ERO and the Commission;

(4) Criteria under which the ERO may enter into an agreement to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the ERO and enforcing Reliability Standards;

(5) Procedures for the establishment of Regional Advisory Bodies that may

provide advice to the Commission, the ERO or a Regional Entity on matters of governance, applicable Reliability Standards, the reasonableness of proposed fees within a region, and any other responsibilities requested by the Commission;

(6) Regulations governing the issuance of periodic reliability reports by the ERO that assess the reliability and adequacy of the Bulk-Power System in North America; and

(7) Regulations pertaining to the funding of the ERO.

##### II. Background

*A. Commission Reliability Activity Prior to the Electricity Modernization Act of 2005*

2. The Electricity Modernization Act of 2005 was enacted into law by President George W. Bush on August 8, 2005. Subtitle A of the Electricity Modernization Act amended the FPA by adding a new section 215, titled "Electric Reliability." Prior to enactment of section 215, the Commission had acted primarily as an economic regulator of wholesale power markets and the interstate transmission grid. In this regard, the Commission acted to promote a more reliable electric system by promoting regional coordination and planning of the interstate grid through regional independent system operators (ISOs) and regional transmission organizations (RTOs), adopting transmission pricing policies that provide price signals for the most reliable and efficient operation and expansion of the grid, and providing pricing incentives at the wholesale level for investment in grid improvements and assuring recovery of costs in wholesale transmission rates. Section 215 of the FPA buttresses the Commission's efforts to strengthen the reliability of the interstate grid through the grant of new authority which provides for a system of mandatory Reliability Standards developed by the ERO and reviewed and approved by the Commission. The ERO can initiate an enforcement action and impose penalties for the violation of Reliability Standards, subject to Commission review; or the Commission can initiate its own enforcement action.

##### *B. Voluntary Reliability Standards*

3. In the aftermath of the 1965 blackout in the northeast United States, the electric industry established the North American Electric Reliability Council (NERC), a voluntary reliability organization. Since its inception, NERC has developed Operating Policies and Planning Standards that provide

<sup>1</sup>H.R. 6, Title XII, Subtitle A, 109th Cong. (2005).

voluntary guidelines for operating and planning the North American bulk-power system. In April 2005, NERC adopted "Version 0" reliability standards that translated the NERC Operating Policies, Planning Standards and compliance requirements into a comprehensive set of measurable standards. While NERC has developed a compliance enforcement program to ensure compliance with the reliability standards it has developed, industry compliance is still voluntary and not subject to mandatory enforcement penalties. Although NERC's efforts have been important in maintaining the reliability of the nation's bulk-power system, NERC itself has recognized the need for mandatory, enforceable reliability standards and has been a proponent of legislation to establish a Commission-jurisdictional ERO that would propose and enforce mandatory reliability standards.

4. A common cause of the past three major regional blackouts was violation of NERC's then Operating Policies and Planning Standards. During July and August 1996, the west coast of the United States experienced two cascading blackouts caused by violations of voluntary Operating Policies.<sup>2</sup> In response to the outages, the Secretary of Energy convened a task force to advise the U.S. Department of Energy (DOE) on issues needed to be addressed to maintain the reliability of the bulk-power system. In a September 1998 report, the task force recommended, among other things, that federal legislation should grant more explicit authority for the Commission to approve and oversee an organization having responsibility for bulk-power reliability standards.<sup>3</sup> Further, the task force recommended that such legislation provide for Commission jurisdiction for reliability of the bulk-power system and Commission implementation of mandatory, enforceable reliability standards.

5. On August 14, 2003, a blackout affected significant portions of the Midwest and Northeast United States, and Ontario, Canada. This blackout affected an area with an estimated 50 million people and 61,800 megawatts of

electric load. A joint U.S.-Canada task force studied the causes of the August 14, 2003 blackout and determined that several entities violated NERC's then Operating Policies and Planning Standards, and those violations directly contributed to the start of the blackout.<sup>4</sup> The joint task force, in its recommendations to prevent or minimize the scope of future blackouts, identified the need for legislation to make reliability standards mandatory and enforceable, with penalties for non-compliance.<sup>5</sup>

6. In the wake of the August 14, 2003 blackout, the Commission has taken a more direct and pro-active role in transmission reliability matters. Commission staff helped to lead and conduct the joint U.S.-Canada investigation of the August 2003 blackout. In April 2004, the Commission issued a Reliability Policy Statement,<sup>6</sup> which clarified its power grid reliability policies and objectives, and completed several Commission-designated recommendations of the 2003 Task Force.

7. Also, as part of the Commission's efforts to promote grid reliability, the Commission has created a new Division of Reliability within the Office of Markets, Tariffs and Rates. One task of this new division has been to participate in NERC's Reliability Readiness Reviews of balancing authorities, transmission operators and reliability coordinators in North America to determine their readiness to maintain safe and reliable operations. The Commission also directed transmission owners to report, by June 2004, on the vegetation management practices they use for transmission lines and rights-of-way.<sup>7</sup> The Commission's Reliability Division has also engaged in studies and other activities to assess the longer-term and strategic needs and issues related to power grid reliability. The Commission

<sup>4</sup> The joint team, known as the U.S.-Canada Power System Outage Task Force, issued a *Final Report on the August 14, 2003 Blackout In the United States and Canada: Causes and Recommendations (Final Blackout Report)* on April 5, 2004, which presented an in-depth analysis of the causes of the blackout and recommendations for avoiding future blackouts.

<sup>5</sup> *Final Blackout Report*, at 140-42.

<sup>6</sup> *Policy Statement on Matters Related to Bulk Power System Reliability*, 107 FERC ¶ 61,052, order on clarification, 108 FERC ¶ 61,288 (2004).

<sup>7</sup> *Reporting By Transmission Providers on Vegetation Management Practices Related To Designated Transmission Facilities*, 107 FERC ¶ 61,053 (2004). This order was issued pursuant to FPA section 311, which authorizes the Commission to secure information necessary or appropriate as a basis for recommending legislation. The Commission submitted a report to Congress in September 2004 that set forth the Commission's findings and recommendations, including the need for mandatory, enforceable reliability rules.

has held several workshops and technical conferences to address reliability issues including transition to the NERC reliability standards, operator tools, and reactive power.

8. Stakeholders in the electric utility industry have also participated in dialogues on the international implications of the ERO and Cross-Border Regional Entities during three public bilateral workshops held in the United States and Canada. On August 9, 2005, the Federal-Provincial-Territorial (FPT) Working Group in Canada and DOE jointly submitted to the Commission "Principles for an Electric Reliability Organization that Can Function on an International Basis" (bilateral principles) based on these stakeholder dialogues.<sup>8</sup> A number of bilateral principles are incorporated into the NOPR, and the Commission asks questions and seeks comment on the bilateral principles. In this regard, we note that the Commission's proposed rule would allow the approved ERO or a Cross-Border Regional Entity to take appropriate steps to be recognized in Mexico or Canada as embedded in the principles. For example, in accordance with section 215(c)(2)(E) of the FPA, we expect the ERO and any Regional Entities to take such steps as relevant Mexican and Canadian authorities may require to have standing in those nations.<sup>9</sup>

### C. Electric Reliability Legislation

9. Electric reliability legislation was first proposed after issuance of the September 1998 task force report,<sup>10</sup> and was a common feature of comprehensive electricity bills since that time. A stand-alone electric reliability bill was passed by the Senate unanimously in 2000.<sup>11</sup> In 2001, President Bush proposed making electric Reliability Standards mandatory and enforceable as part of the National Energy Policy.<sup>12</sup> On August 8, 2005, the Electricity Modernization Act of 2005

<sup>8</sup> A copy of these principles has been placed in the public record of this docket. We invite comments on these principles.

<sup>9</sup> In addition, this proposed rule is consistent with many of the other bilateral principles, such as the requirement for the independence of the ERO's board; the requirement that all owners, users and operators of the bulk-power system must comply with approved reliability standards; and a number of the suggested Enforcement Principles. Also, the fact that the statute does not authorize the U.S. Government to appoint members to the ERO's board is consistent with the bilateral principles. Similarly, we propose to preclude Commission officials from serving on the board.

<sup>10</sup> See *supra* n. 3.

<sup>11</sup> S. 2071, 106th Cong. (2000). An identical bill, H.R. 4881, was not voted on by the House of Representatives.

<sup>12</sup> *Report of the National Energy Policy Development Group*, May 2001, at p. 7-6.

<sup>2</sup> *The Electric Power Outages in the Western United States*, July 2-3, 1996, at 76 ([ftp://www.nerc.com/pub/sys/all\\_updl/docs/pubs/doerept.pdf](ftp://www.nerc.com/pub/sys/all_updl/docs/pubs/doerept.pdf)) and *WSCC Disturbance Report, For the Power System Outage that Occurred on the Western Interconnection August 10, 1996*, at 4 ([ftp://www.nerc.com/pub/sys/all\\_updl/docs/pubs/AUG10FIN.pdf](ftp://www.nerc.com/pub/sys/all_updl/docs/pubs/AUG10FIN.pdf)).

<sup>3</sup> *Maintaining Reliability in a Competitive U.S. Electricity Industry, Final Report of the Task Force on Electric System Reliability*, Secretary of Energy Advisory Board, U.S. Department of Energy (September 1998), at 25-27, 65-67.

was enacted into law by President Bush. This important new energy legislation adds to the FPA a new provision which buttresses the Commission's efforts to strengthen the reliability of the interstate transmission grid. Specifically, the new section 215 of the FPA provides for a system of mandatory, enforceable Reliability Standards. Reliability Standards are to be developed by the ERO, subject to Commission review and approval; and, once approved, standards may be enforced by the ERO, subject to the Commission's review.

10. The statute directs the Commission to issue a final rule to implement the requirements of section 215 no later than 180 days after enactment, or by February 5, 2006. Below, we summarize the provisions of Subtitle A of the Electricity Modernization Act of 2005:

11. Section 215(a) defines relevant terms used in the Act.

12. Section 215(b) (Jurisdiction and Applicability) provides that, for purposes of approving Reliability Standards and enforcing compliance with such standards, the Commission shall have jurisdiction over the certified ERO, any Regional Entities, and all users, owners and operators of the bulk-power system, including but not limited to the public and governmental entities described in section 201(f) of the FPA.<sup>13</sup> Section 215(b)(2) requires the Commission to issue a final rule to implement the requirements of the section no later than 180 days after the date of enactment.

13. Section 215(c) (Certification) authorizes the Commission to certify a person as an ERO, provided that the applicant meets specified criteria.

14. Section 215(d) (Reliability Standards) provides the process for the ERO to propose Reliability Standards, subject to Commission review and approval. This subsection also directs the Commission to adopt rules to provide fair processes for the identification and timely resolution of any conflict between a Reliability Standard and any function, rule, order,

tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a transmission organization.

15. Section 215(e) (Enforcement) authorizes the ERO, after notice and opportunity for hearing, to impose a penalty for a violation of a Reliability Standard; subject to review by the Commission. This section also provides for enforcement initiated by the Commission on its own motion. This subsection also requires that the Commission issue regulations under which the ERO will be authorized to enter into an agreement to delegate authority to a qualified Regional Entity for the purpose of proposing Reliability Standards to the ERO and enforcing such standards. Further, section 215(e) requires that any penalty imposed shall bear a reasonable relation to the seriousness of the violation and take into consideration timely remedial efforts.

16. Section 215(f) (Changes In Electric Reliability Organization Rules) requires Commission approval of any proposed ERO rule or proposed rule change.

17. Section 215(g) (Reliability Reports) requires that the ERO conduct periodic assessments of the reliability and adequacy of the North American bulk-power system.

18. Section 215(h) (Coordination With Canada and Mexico) urges the President to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with Reliability Standards and the effectiveness of the ERO in the United States and Canada or Mexico.

19. Section 215(i) (Savings Provisions) states that the ERO shall have authority to develop and enforce compliance with Reliability Standards for only the bulk-power system and makes clear that section 215 of the FPA shall not be construed to preempt any authority of any state to take action to ensure the safety, adequacy, and reliability of electric service within that state, as long as such action is not inconsistent with any Reliability Standard.

20. Section 215(j) (Regional Advisory Bodies) requires the Commission to establish Regional Advisory Bodies upon petition of at least 2/3 of the states within a region that have more than 1/2 of their electric load served within the region; such Regional Advisory Bodies may provide advice to the ERO, a Regional Entity, or the Commission.

21. Section 215(k) (Application to Alaska and Hawaii) provides that section 215 of the FPA does not apply to Alaska or Hawaii.

22. Subtitle A of the Electricity Modernization Act of 2005 also includes

two reliability-related provisions that are not part of new section 215 of the FPA. First, section 1211(b) of the Act provides that the ERO certified by the Commission as well as Regional Entities are not departments, agencies or instrumentalities of the United States Government. Second, section 1211(c) provides that federal agencies responsible for approving access to electric transmission or distribution facilities located on lands within the United States shall, in accordance with applicable law, expedite any federal agency approvals that are necessary to allow the owners or operators of such facilities to comply with a Commission-approved Reliability Standard that pertains to vegetation management, electric service restoration, or resolution of situations that imminently endanger the reliability or safety of the facilities.

### III. Discussion

#### A. The Commission's Reliability Proposal

23. The Commission's proposed reliability regulation is entitled, *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*. The proposed regulation is generally limited to developing and implementing the processes and procedures that section 215 of the FPA directs the Commission to develop and undertake with regard to the formation and functions of the ERO and Regional Entities. Section 215(b) obligates all users, owners and operators of the bulk-power system to comply with Reliability Standards that become effective pursuant to the processes set forth in the statute. The complete text of the proposed rule is provided in the Attachment to this notice of proposed rulemaking (NOPR).

24. The proposed regulation is organized into twelve sections: Section 38.1—Definitions; Section 38.2—Jurisdiction and Applicability; Section 38.3—Electric Reliability Organization Certification; Section 38.4—Approval of Reliability Standards; Section 38.5—Enforcement of Reliability Standards; Section 38.6—Enforcement of Commission Rules and Orders; Section 38.7—Delegation of Certain Electric Reliability Organization Authority to Regional Entities; Section 38.8—Changes in Electric Reliability Organization Rules and Regional Entity Rules; Section 38.9—Process for Resolution of Conflicts With a Reliability Standard;

<sup>13</sup> Section 201(f) of the FPA, 16 U.S.C. 824(f), as modified by Subtitle H, section 1291(c) of the Energy Policy Act of 2005, states that "[n]o provision in this Part shall apply to, or be deemed to include, the United States, a state or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto."

Section 38.10—Procedures for Establishment and Recognition of Regional Advisory Bodies;  
 Section 38.11—Reliability Reports;  
 Section 38.12—Review of State Action, and  
 Section 38.13—Funding of the Electric Reliability Organization.

*B. Summary of the Commission's Reliability Rule Proposal*

1. Definitions—Section 38.1

25. Section 38.1 of the proposed regulations defines relevant terms used in the Act. Each definition is based on a corresponding definition contained in section 215 of the FPA, except as otherwise noted.

26. The term “Bulk-Power System” means 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. The term does not include facilities used in the local distribution of electric energy.

27. The term “Cross-Border Regional Entity” means a Regional Entity for which the size and scope includes a portion of Canada or Mexico.

28. The term “Cybersecurity Incident” means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communications networks including hardware, software and data that are essential to the Reliable Operation of the Bulk-Power System.

29. The term “Electric Reliability Organization” or “ERO” means the organization certified by the Commission the purpose of which is to establish and enforce Reliability Standards for the Bulk-Power System, subject to Commission review.

30. The legislation distinguishes between the terms “Reliability Standards” and “rules.” The former refers to Commission-approved, substantive standards that provide for Reliable Operation of the Bulk-Power System. In contrast, “rules” refer to the internal procedures of the ERO or any particular Regional Entity. Accordingly, to maintain this distinction, the Commission proposes the following definition of the term “ERO Rules” for purposes of this NOPR: the bylaws, rules of procedure and other organizational rules and protocols of the ERO. The Commission proposes to define the term “Regional Entity Rules” as the bylaws, rules of procedure and other organizational rules and protocols of a Regional Entity.

31. The term “Interconnection” means a geographic area in which the operation of Bulk-Power System components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain Reliable Operation of the facilities within their control.

32. The term “Regional Advisory Body” is used in the statute but not defined. For purposes of our regulations, the Commission proposes to define the term as follows: an entity established upon petition to the Commission pursuant to section 215(j) of the FPA that is organized to advise the ERO, a Regional Entity, or the Commission regarding certain reliability-related matters in accordance with section 38.9 of the proposed regulation.

33. The term “Regional Entity” means an entity having enforcement authority pursuant to section 38.6 of the proposed regulation.

34. The term “Reliable Operation” means operating the elements of the Bulk-Power System within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a Cybersecurity Incident, or unanticipated failure of system elements.

35. The term “Reliability Standard” means a requirement, approved by the Commission under the instant proposed regulation, to provide for Reliable Operation of the Bulk-Power System. The term includes requirements for the operation of existing Bulk-Power System facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for Reliable Operation of the Bulk-Power System. The term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

36. The term “Transmission Organization” means an RTO, ISO, independent transmission provider, or other Transmission Organization finally approved by the Commission for the operation of transmission facilities.

2. Jurisdiction and Applicability—Section 38.2

37. Proposed regulation section 38.2 provides for Commission jurisdiction over the ERO, any Regional Entities, and all users, owners and operators of the Bulk-Power System within the United

States (other than Alaska and Hawaii) including, but not limited to, the entities described in section 201(f) of the FPA, for the purposes of approving and enforcing Reliability Standards established by the Commission in accordance with this new regulation.

3. Electric Reliability Organization Certification—Section 38.3

38. Proposed regulation section 38.3 provides that any person may submit an application to the Commission for certification as the ERO within sixty (60) days following the issuance of a new final regulation. This provision provides for the Commission to certify one applicant as the ERO, if the Commission determines such applicant meets certain criteria. Paragraph (b)(1) of proposed section 38.3 provides that the applicant must demonstrate that it has the ability to develop and enforce Reliability Standards that provide for an adequate level of reliability of the Bulk-Power System.

39. The Commission interprets section 215 of the FPA to mean that an ERO certified by the Commission shall comply with the certification criteria on an ongoing basis, and that a violation of the certification criteria constitutes a violation of the FPA. Accordingly, as discussed below with respect to section 38.6(a) and (b), the Commission will conduct periodic compliance audits and, if it finds a violation of the ERO certification criteria, the Commission may suspend the ERO's certification or decertify the ERO and solicit new applications for ERO certification.

40. Section 38.3(b)(2) provides that the applicant must document that it has established rules that assure its independence of the users, owners and operators of the Bulk-Power System while assuring stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure. Pursuant to section 215(c)(2)(B) of the FPA, section 38.3(b)(2) also provides that such ERO rules allocate equitably reasonable dues, fees and charges among end users for all activities under this new reliability regulation. Section 38.3(b)(2) further provides that such ERO rules are to be fair and impartial procedures for enforcement of Reliability Standards through the imposition of penalties, including limitations on activities, functions or operations, or other appropriate sanctions.

41. In addition, section 38.3(b)(2) provides that such ERO rules are to provide for reasonable notice and opportunity for public comment, due process, openness, and balance of

interests in developing Reliability Standards, and otherwise exercising its duties. Paragraph (b)(2) of proposed section 38.3 provides that such ERO rules must include appropriate steps, after certification by the Commission as the ERO, to gain recognition in Canada and Mexico.

42. Paragraph (c) of section 38.3 requires an ERO certified by the Commission to periodically submit to the Commission an application to be recertified as the ERO. We seek comments on what would constitute a reasonable length of time for such periodic certification to be effective. For example, is a five-year certification period appropriate? How far in advance should an ERO be required to submit its application for recertification before its current certification period expires?

43. In addition to seeking comment on the above proposal, we seek comments on whether the term "end users" should be defined for purposes of the ERO's equitable allocation of reasonable dues, fees and charges among end users? Should "end users" be defined as customers using net energy for load? Should the term "end users" be defined in terms of those who directly or indirectly use the transmission system since "Bulk-Power System" is defined to exclude facilities used in local distribution of electric energy? Should "end users" be limited to entities transmitting electricity through the transmission facilities of others? Or, might "end users" include the transmission facility owners and operators whose businesses depend on the reliable operations of the interconnected Bulk-Power System?

#### 4. Approval of Reliability Standards—Section 38.4

44. Paragraph (a) of proposed regulation section 38.4 provides that the ERO must consider and develop Reliability Standards and modifications to be applicable to the entire Bulk-Power System or a particular region or Interconnection. The ERO shall file each Reliability Standard or modification to a Reliability Standard that it proposes to be made effective under this section with the Commission. The ERO's filing shall state the purpose of the standard and a summary of its development.

45. Section 215(d)(2) of the FPA requires that the Commission give due weight to the technical expertise of the ERO with respect to the content of a proposed Reliability Standard or modification to a Reliability Standard. Likewise, the statute requires that the Commission give due weight to the technical expertise of a Regional Entity organized on an Interconnection-wide

basis with respect to a Reliability Standard to be applicable within that Interconnection. Further, section 215(d)(3) of the FPA provides for a rebuttable presumption that a Reliability Standard or a modification to a Reliability Standard to be applicable on an Interconnection-wide basis is just, reasonable, not unduly discriminatory or preferential, and in the public interest, if such proposal is from a Regional Entity organized on an Interconnection-wide basis.

46. The statute, however, is silent regarding deference to Regional Entities not organized on an Interconnection-wide basis. Accordingly, the Commission interprets sections 215(d)(2) and (3) as not requiring the Commission to give due weight to the technical determinations of Regional Entities not organized on an Interconnection-wide basis or creating a presumption with regard to the reasonableness of any Reliability Standard proposed by such Regional Entities for consideration by the ERO. In addition, the Commission expects a greater level of uniformity among Reliability Standards approved for Regional Entities not organized on an Interconnection-wide basis.

47. Paragraph (b) provides that that the Commission may approve by rule or order a proposed Reliability Standard or a modification to a Reliability Standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission generally anticipates that it will provide notice and opportunity for hearing of any proposed Reliability Standard or a modification to a Reliability Standard. The Commission shall give due weight to the technical expertise of the ERO with respect to the content of a proposed Reliability Standard or modification to a Reliability Standard and give due weight to the technical expertise of a Regional Entity organized on an Interconnection-wide basis with respect to a Reliability Standard to be applicable within that Interconnection.

48. Proposed Section 38.4(b)(3) provides that the Commission will not defer to the ERO or a Regional Entity with respect to the effect of a Reliability Standard or modification to a Reliability Standard on competition. How should the Commission define "competition" in this context? Commenters are asked to provide examples regarding the effect of a Reliability Standard on competition.

49. Paragraph (c) provides that an approved Reliability Standard or a modification to a Reliability Standard shall take effect as approved by the

Commission. Paragraph (d) provides that the ERO shall rebuttably presume that a proposal from a Regional Entity organized on an Interconnection-wide basis for a Reliability Standard or a modification to a Reliability Standard to be applicable on an Interconnection-wide basis is just, reasonable, not unduly discriminatory or preferential, and in the public interest, if such proposal is from a Regional Entity organized on an Interconnection-wide basis.

50. Consistent with section 215(d)(4) of the FPA, paragraph (e) of proposed regulation section 38.4 provides that the Commission shall remand to the ERO for further consideration a proposed Reliability Standard or modification to a Reliability Standard that the Commission disapproves in whole or part.

51. Paragraph (f) provides that the Commission may, upon its own motion or a complaint, order the ERO to submit 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 section 215 of the FPA.

52. Paragraph (g) provides that the Commission may, upon its own motion or complaint, review a previously-approved Reliability Standard. If, after notice and opportunity for hearing, the Commission determines that the Reliability Standard, or any provision of the Reliability Standard, no longer meets the statutory (and regulatory) standard for approval of Reliability Standards, *i.e.*, it is found to be unjust or unreasonable, unduly discriminatory or preferential, or not in the public interest, the Commission may remand it to the ERO or the relevant Regional Entity. The statute allows us to order the ERO to submit a modification to a Reliability Standard, and we construe this authority as allowing a remand of a previously-approved Reliability Standard.

53. Because the Commission's options are limited by FPA section 215 to either accepting or remanding a proposed Reliability Standard, the Commission is concerned that, while a circumstance may arise where it is necessary to remand a proposed Reliability Standard to the ERO, this may result in a period of time in which there is no mandatory, enforceable standard in place for a particular area of bulk system reliability. Accordingly, to minimize this possibility, paragraph (h) provides that the Commission, when remanding a Reliability Standard, may state a deadline by which the ERO must

resubmit the proposed Reliability Standard with revisions that address the reasons for the remand. Failure to meet such a deadline would constitute a violation of the FPA.

54. In addition to seeking comment on the above proposal, the Commission seeks comment on whether the Commission has authority to void a previously-accepted Reliability Standard. If the Commission has such authority, is it beneficial to have such a provision in the Commission's regulations?

55. Section 215(d) of the FPA and proposed regulation section 38.4 provide that the Commission may approve a proposed Reliability Standard or modification to a proposed Reliability Standard if it determines that the standard is "just, reasonable, not unduly discriminatory or preferential, and in the public interest." The Commission seeks comment on how this standard should be applied in the context of reviewing proposed Reliability Standards.

56. We note that the bilateral principles specify that membership in the ERO should not be a condition for participation in the ERO's reliability development process. We seek comments on whether membership in the ERO or a Regional Entity should not be a condition for participation in the ERO's or a Regional Entity's standards development processes.

57. The Commission notes that the bilateral principles include a provision that if a standard is remanded by a regulatory authority, the ERO should notify all relevant regulatory authorities and should work to ensure that all concerns of such regulatory authorities are addressed prior to resubmission of the standard to the Commission and authorities in Canada. (1) Should the proposed rule specify this process? (2) What are the implications of the remand by a Canadian authority of a Reliability Standard that has been approved by the Commission? Also, should the ERO certification criteria specify that the number of board members representing each participating country in the ERO, and the opportunities for each country to have an equitable number of members on all committees, must be in rough proportion to total load?

#### 5. Enforcement of Reliability Standards—Section 38.5

58. Paragraph (a) of proposed regulation section 38.5 provides that the ERO or a Regional Entity meeting the requirements of section 215(e)(4)(A), (B) and (C) may impose, subject to paragraph (d), a penalty on a user, owner or operator of the Bulk-Power

System for a violation of a Reliability Standard approved by the Commission if the ERO or the Regional Entity, after notice and opportunity for hearing, finds that the user, owner or operator has violated a Reliability Standard approved by the Commission and files notice and the record of the ERO's or the Regional Entity's proceeding with the Commission.

59. Paragraph (b) provides that a Regional Entity shall file notice with the ERO of any enforcement action it takes. Paragraph (c) provides that any notice of an enforcement action, whether by the ERO or a Regional Entity, shall consist of the name of the entity against whom the action was taken, and include statements describing the enforcement action and findings of fact with respect to the act or practice that led to the enforcement action, the sanction imposed, the record of the proceeding and other relevant matters.

60. Paragraph (d) provides that a penalty imposed under paragraph (a) may take effect not earlier than the thirty-first (31st) day after the ERO files with the Commission notice of penalty and the record of the proceedings. Such penalty shall be subject to review by the Commission, either on its own motion or upon application by the user, owner or operator of the Bulk-Power System that is the subject of the penalty filed within thirty (30) days after the date such notice is filed with Commission. If the review process is not initiated during the 30-day period, the enforcement action will be confirmed by operation of law.

61. Paragraph (d) also provides that an application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty. In any proceeding to review a penalty imposed under paragraph (a), the Commission, after notice and opportunity for hearing (which hearing may consist solely of the record before the ERO and the opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside or modify the penalty and, if appropriate, remand to the ERO for further proceedings.

62. Section 215(e) of the FPA as well as proposed section 38.5 of our regulations regarding enforcement of Reliability Standards provides for public notice and opportunity for a hearing with respect to both the ERO (or Regional Entity) enforcement proceedings and proceedings before the

Commission involving review of a proposed penalty. Paragraph (d)(8) of proposed section 38.5 would provide a limited exception to this notice requirement and allow non-public proceedings for enforcement actions that involve a Cybersecurity Incident, unless the Commission determines on a case-by-case basis that such protection is not necessary. The Commission has in place procedures to prevent the disclosure of sensitive information, such as the use of protective orders and rules establishing critical energy infrastructure information (CEII). However, the Commission believes that the specific, limited area of Cybersecurity Incidents requires additional protections because it is possible that system security and reliability would be further jeopardized by the public dissemination of information involving incidents that compromise the cybersecurity system of a specific user, owner or operator of the Bulk-Power System. The specific user, owner or operator would be notified of the enforcement action and provided an opportunity for a hearing. The Commission believes that this will provide acceptable due process to the specific owner, user or operator while preventing a further compromise in reliability.

63. The Commission seeks comment on this proposal and, in addition, seeks comment on (1) whether the proposal provides sufficient due process and (2) the identification of other specific events that should be subject to non-public hearing procedures.

64. Further, section 215(e)(2) of the FPA directs the Commission to implement expedited hearing procedures for the review of penalties imposed by the ERO or Regional Entities. Accordingly, paragraph (d), subparagraphs (5) through (7), set forth expedited procedures for Commission review of penalties.

65. Paragraph (e) of proposed regulation section 38.5 provides that, on its own motion or upon complaint, the Commission may order compliance with a Reliability Standard and may impose a penalty against a user, owner or operator of the Bulk-Power System, if the Commission finds, after notice and opportunity for hearing, that the user, owner or operator of the Bulk-Power System has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a Reliability Standard.

66. Paragraph (f) provides that any penalty imposed for the violation of a Reliability Standard shall bear a reasonable relation to the seriousness of the violation and shall take into

consideration efforts of such user, owner or operator of the Bulk-Power System to remedy the violation in a timely manner. The Commission believes that the imposition of penalties should not be limited to monetary penalties and may include limitations on activities, functions, operations, or other appropriate sanctions, including the establishment of a publicly available reliability watch list composed of major violators. Monetary penalties shall be paid in a timely manner. The Commission may also consider intensive compliance audits for entities that have a high incidence of violations or whose violations are serious or the installation of Commission staff onsite to monitor entities that have a high incidence of violations or whose violations are particularly serious.

67. 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 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, the Commission needs information regarding violations and potential violations at or near the time of occurrence. Accordingly, paragraph (g) of proposed section 38.5 requires that the ERO and all Regional Entities have in place procedures to notify the Commission of all violations and potential violations of Reliability Standards when the ERO or Regional Entity first notifies the user, owner or operator of the violation or potential violation. Such procedures must be submitted to the Commission within an application for certification as the ERO or an agreement to delegate authority to a Regional Entity. The Commission intends that notices of violations and potential violations will be filed electronically. All such reports of violations and potential violations shall include the entity's name, when the violation or potential violation occurred, what standard was violated or potentially violated, and the name of a person knowledgeable about the violation or potential violation to serve as a point of contact to provide the Commission with further details on the matter, as they develop, on an ongoing basis. The Commission will provide more details on the format of such electronic filings in the final rule.

#### Enforcement and Penalty Questions for Public Comment

68. In addition to comment on the above proposed rules, the Commission seeks comment on a number of enforcement and penalty issues. The ERO's and Regional Entities' enforcement role under new section 215 of the FPA is similar in some ways to the enforcement roles of existing self-regulatory organizations (SROs). For example, the National Association of Securities Dealers (NASD) and the National Futures Association (NFA), and securities and commodities exchanges, such as the New York Stock Exchange (NYSE), New York Mercantile Exchange (NYMEX), and the Chicago Board of Trade (CBOT), are SROs in the securities and commodities industries that are experienced in the enforcement of standards, assessment of penalties, and have penalty appeal processes, as summarized below.

69. In general terms, individuals or firms doing securities business with the American public must register with NASD. Similarly, all persons and organizations that intend to do business as futures professionals must register with the NFA under the Commodity Exchange Act. The National Adjudicatory Council (NAC), the adjudicatory body of the NASD, has established the NASD Sanction Guidelines that provide direction for adjudicators in imposing sanctions consistently and fairly.<sup>14</sup> The Sanction Guidelines also provide for non-monetary sanctions including: suspensions, bars, and expulsions. The NFA Compliance Rules also provide for both monetary and non-monetary sanctions, which may be imposed at the conclusion of a disciplinary hearing or appeal.<sup>15</sup>

70. The NYSE, NYMEX, NASD, and the CBOT all have internal disciplinary procedures and rules, including the right to appeal a disciplinary decision.<sup>16</sup>

<sup>14</sup> Depending on the violation, the Sanction Guidelines provide for monetary sanctions up to \$100,000, and in certain egregious cases, the NASD may consider a monetary sanction in excess of \$100,000. Schedule A to the Sanction Guidelines specifies that violations are generally not subject to non-monetary sanctions when monetary sanctions of \$5,000 or less are imposed.

<sup>15</sup> The NFA Compliance rules provide for monetary fines not to exceed \$250,000 per violation and the following non-monetary penalties: expulsion or suspension for a specified period from NFA membership; bar or suspension for a specified period from association with an NFA Member; censure or reprimand; order to cease and desist; and any other fitting penalty or remedial action not inconsistent with the NFA Compliance rules.

<sup>16</sup> See NASD Rule 9311: Appeal by Any Party; NYSE Rule 476: Disciplinary Proceedings Involving Charges Against Members, Member Organizations, Allied Members, Approved Persons, Employees, or

Following a plenary disciplinary proceeding, the appellate processes at the above-mentioned SROs are largely the same. First, the respondent files a notice of appeal to the SRO within a specified time which stays any penalty imposed pending the outcome of the appellate review. Second the matter goes before an appellate committee of the SRO comprised of at least two disinterested parties who evaluate the decision, evidence and penalty. Third, the appellate committee renders its decision in writing. With the exception of the CBOT, this decision is the final determination of the SRO.<sup>17</sup> Fourth, the respondent may appeal the decision of the appellate committee (the Board of Directors in the case of CBOT) to the relevant federal regulatory body. The notice of appeal to the relevant regulatory body does not act as a stay of the complained of determination made by the self-regulatory organization unless the regulatory body otherwise orders. Finally, following a review by the relevant federal regulatory body, the respondent may pursue an appeal in the U.S. Courts of Appeals.

71. With the above discussion in mind, the Commission invites public comment on the following questions regarding penalties or sanctions for violations of reliability rules:

(1) What is the appropriate appeals process, if any, of an ERO or Regional Entity decision to impose a penalty? Would it be appropriate for the ERO or a Regional Entity with delegated enforcement authority to adopt enforcement, penalty and appeals processes similar to the SRO processes discussed above? Should appeals within the ERO be allowed before appeal to the Commission; should appeal of a penalty imposed by a Regional Entity be taken through the Regional Entity itself, with further appeal to the Commission; or should the appeal be through the ERO in the first instance, then to the Commission?

(2) Should the Commission approve a penalty range or guidelines before the ERO can levy any penalty or sanction for violations, and, if so, should the penalty range or guidelines for a violation be submitted for Commission approval at the same time that the corresponding Reliability Standard is submitted to the Commission for approval?

Others; NYMEX, NYMEX.com: Exchange Rule Book, Rule 8.13 Appeals; CBOT, Rules & Regulations: Chapter 5 Disciplinary Proceedings, 540.05 Appeals from a Decision of a Disciplinary Committee.

<sup>17</sup> A CBOT appellate committee's decision can be appealed to the CBOT's Board of Directors.

(3) Should a single monetary penalty be prescribed for a violation of a particular standard or should a schedule of monetary penalties be prescribed from which to select at the time of an infraction depending upon relevant circumstances such as the number of repeat offenses or length of time before adequate corrections are made to bring the violator into compliance?

(4) The Commission interprets section 316A of the FPA, as amended by Congress in the Electricity Modernization Act of 2005, as establishing limits on monetary penalties for violation of Reliability Standards that may be imposed by the ERO, Regional Entities and the Commission. The Commission seeks comment on this interpretation.

(5) Paragraph (d)(1) of proposed section 38.5 provides that the Commission will review a penalty on its own motion, or upon application of the entity that is the subject of the penalty. Should the Commission determine by rulemaking that certain categories of penalties should be automatically subject to Commission review? For example, should penalties above a certain dollar threshold automatically require Commission review?

(6) What types of nonmonetary penalties, if any, are appropriate?

(7) Who should receive, and what should be done with monies collected as monetary penalties? Should the monetary penalties collected by the ERO or Regional Entity be used to defray the cost of its enforcement program, or allocated to some other use? Would allowing the ERO or Regional Entity to use penalty money to fund an enforcement program create an appearance of impropriety?

(8) The Commission notes that the bilateral principles include a provision calling for rigorous audits by the ERO and Regional Entities to ensure the capability to comply with and actual compliance with the Reliability Standards. The bilateral principles also provide for the ERO to take steps to ensure that auditors are properly trained and that the same audit standards apply to all audits conducted by the ERO and Regional Entities. Should the proposed rule specify these audits requirements as part of the ERO certification requirements and the Regional Entity certification and delegation requirements?

(9) The Commission notes that the bilateral principles provide that RTOs and ISOs should not become Regional Entities, and that the Regional Entities should be distinct from the operators of the system, such as RTOs and ISOs. Should the proposed rule mandate this?

What are the enforcement implications of an RTO or ISO that is a Regional Entity? Are there ways for an RTO or ISO to adequately separate its enforcement function from its ownership, use or operation of the Bulk-Power System to fully ensure the independence of the enforcement unit? What process should such an enforcement unit follow to insulate itself from its RTO or ISO organization so that it may undertake any enforcement actions that become necessary against the RTO or ISO? How would this comport with the requirements of section 215 of the FPA?

(10) Paragraph (e) of proposed section 38.5 states that the Commission may order compliance with a Reliability Standard and may impose a penalty if the Commission finds that the user, owner or operator of the Bulk-Power System has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a Reliability Standard. Should the Commission clarify in the rule that, in a situation where an entity is about to engage in an act that will constitute a violation of a Reliability Standard, Commission action will be in the form of a compliance order with the goal of preventing the violation from occurring; and further clarify that an entity that has engaged in an actual violation may be subject to both penalties and a compliance order? Are there situations that may warrant penalties where an entity is about to engage in activity that would violate a Reliability Standard but the activity was ultimately averted?

(11) Paragraph (g) of proposed section 38.5 requires that the ERO and all Regional Entities have in place procedures to notify the Commission of all violations and potential violations of Reliability Standards when the ERO or Regional Entity first notifies the user, owner or operator of the violation or potential violation. We seek comment on what confidentiality protections may be needed, particularly with regard to potential violations. For example, the Commission currently maintains confidential protection of other types of enforcement-related investigations pursuant to section 1b or our regulations, 18 CFR 1b (2005). Are similar protections needed here?

72. The Commission recognizes that the Nuclear Regulatory Commission (NRC) has developed a nuclear power plant assessment program to enable it to arrive at objective conclusions about a licensee's safety performance. The NRC's assessments of plant performance are based on inspections, as well as analysis of certain performance indicators reported by the licensees.

With this information, the NRC assigns each plant to one of five categories in an Action Matrix. A plant's position in the Action Matrix determines the NRC's response, which may include actions ranging from performing supplemental inspections, to meeting with management, to ordering a plant to be shut down. A summary of the Action Matrix is posted on the NRC website and is updated quarterly. In addition, the NRC communicates its assessment of plant performance in letters to licensees, typically semi-annually. These letters are also posted on the NRC's website. The Commission seeks comment on the feasibility and appropriateness of adopting a reliability assessment program similar to the NRC's nuclear power plant assessment program. Also, should the Commission establish a reliability watch list modeled on the NRC's Action Matrix? What features of the NRC program should the Commission adopt? What other features might be added?

73. The Commission also recognizes that the nuclear electric utility industry has formed the Institute of Nuclear Power Operations (INPO). The INPO is a technical organization whose mission is to promote the highest levels of safety and reliability—to promote excellence—in the operation of nuclear electric generating plants.<sup>18</sup> All U.S. utilities that operate commercial nuclear power plants are members of the INPO. The INPO complements the regulatory role of the NRC by providing a technical forum for the industry to collectively ensure reliable and safe nuclear operations. The INPO's programs include an information sharing network, an equipment failure database, a national academy for nuclear training, events analysis, accreditation, operations evaluations, and monitoring of performance indicators. The Commission asks commenters to discuss which aspects of the INPO's programs would serve as useful models for the ERO. What lessons can be drawn from INPO's complementary role with the NRC?

#### 6. Enforcement of Commission Rules and Orders—Section 38.6

74. Paragraph (a) of section 38.6 provides that the Commission may take such action as is necessary and appropriate against the ERO or a Regional Entity to ensure compliance with a Reliability Standard or any Commission order affecting the ERO or a Regional Entity. The first clause of this provision tracks section 215(e)(5) of the FPA. In addition, paragraph (a) states

<sup>18</sup> See <http://www.eh.doe.gov/inpo/>.

that the possible remedial action taken pursuant to this provision includes, but is not limited to, suspension or rescission of the ERO's certification or a Regional Entity's delegation of authority, and violations of the FPA may mean possible imposition of civil penalties. Entities will be provided notice and opportunity for comment before the Commission takes such remedial action.

75. Paragraph (b) of proposed section 38.6 provides that the Commission will periodically audit and review the ERO's and Regional Entities' compliance with the statutory and regulatory criteria for certification and delegation of functions, respectively.

76. What mechanism of review and methods of oversight should be used to assure the Commission that the ERO or a Regional Entity is meeting its responsibilities for monitoring compliance with the Reliability Standards?

77. With respect to any monetary penalties levied directly by the Commission against the ERO or a Regional Entity for violation of the FPA, should the ERO or a Regional Entity be able to recover such penalties through dues, fees, or other charges?

78. Section 215(e)(5) of the FPA provides that, "[t]he Commission may take such action as is necessary or appropriate against the ERO or a Regional Entity to ensure compliance with a Reliability Standard or any Commission order affecting the ERO or Regional Entity." Since the ERO and Regional Entity provisions of the Electricity Modernization Act of 2005 are modeled on the SRO provisions of the securities law, and under those provisions, the Securities and Exchange Commission can impose monetary and nonmonetary penalties on SRO board members, should the Commission adopt the same approach with respect to the board members of the ERO and Regional Entities?

#### 7. Delegation of Certain Electric Reliability Organization Authority to Regional Entities—Section 38.7

79. Paragraph (a) of proposed regulation section 38.7 provides that the ERO may enter into an agreement to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the ERO and enforcing Reliability Standards under section 38.5. Paragraph (b) provides that a delegation agreement shall not be effective until it is approved by the Commission. Paragraph (c) provides that the ERO must file the delegation agreement with the Commission for approval. Such filing must also

demonstrate that: the Regional Entity is governed by an independent board, a balanced stakeholder board, or a combination independent and balanced stakeholder board; the Regional Entity otherwise satisfies the ERO certification provisions of proposed regulation section 38.3; and the agreement promotes for effective and efficient administration of Bulk-Power System reliability.

80. The Commission interprets Subtitle A as meaning the only delegated authority a Regional Entity would possess would be the authority to enforce Reliability Standards approved by the Commission in a specific region. That interpretation is consistent with section 215(a)(7). A Regional Entity may also propose Reliability Standards to the ERO, that, if ultimately approved by the Commission, would become regional variances in a specific region. Any such regional variances would be ERO variances, not Regional Entity Reliability Standards, since it would be the ERO, not the Regional Entity, that submits the proposed Reliability Standard to the Commission for its review. The Commission anticipates that any such regional variances would supplement ERO Reliability Standards, not substitute for them. The Commission seeks comment on this interpretation.

81. The Commission interprets section 215 of the FPA to mean that a Regional Entity shall comply with the relevant ERO certification and delegation criteria on an ongoing basis, and that a violation of the certification or delegation criteria constitutes a violation of the FPA. Accordingly, as the Commission explained above with respect to the ERO in section 38.6(a) and (b), it will conduct periodic compliance audits of the Regional Entities and, if it finds a violation of the relevant ERO certification as it applies to the Regional Entities or the ERO delegation criteria, the Commission may suspend a Regional Entity's certification or delegation agreement, or decertify a Regional Entity. In addition, the ERO may petition the Commission or file a complaint if it believes that a Regional Entity is no longer in compliance with the relevant ERO certification or delegation criteria.

82. Paragraph (d) provides that the Commission may modify such delegation; however, the ERO and Commission shall rebuttably presume that a proposal for delegation to a Regional Entity organized on an Interconnection-wide basis promotes effective and efficient administration of Bulk-Power System reliability and should be approved.

83. Paragraph (e) provides that, if an entity seeking to enter into a delegation agreement is unable within 180 days after proposing a delegation agreement to the ERO to reach an agreement with the ERO, and it can demonstrate that continued negotiations with the ERO would not likely result in a delegation agreement within a reasonable amount of time, such entity may request that the Commission assign the ERO's authority to enforce Reliability Standards within a region to such entity. Paragraph (f) requires that an approved Regional Entity shall periodically submit to the Commission an application to be re-approved as a Regional Entity.

84. In addition to seeking comments on the rules relating to the delegation of ERO authority to Regional Entities discussed above, the Commission seeks comment on the following related issues:

(1) Should the Commission prescribe a size, scope, or configuration requirement for the Regional Entities? And, if so, what should it be?

(2) What is the role of the Regional Entities in relationship to the ERO?

(3) Beyond enforcement and the proposal of Reliability Standards to the ERO, what, if any, additional authority should the Regional Entities be given?

(4) Should the ERO be required to submit a standardized form of delegation agreement concurrently with the ERO application that would delineate a uniform relationship between the ERO and all Regional Entities or should delegation agreements be tailored to the individual needs and circumstances of each region and the ERO and submitted for approval as they are executed by the parties?

(5) To what extent should the ERO, when delegating responsibility to Regional Entities, require uniform processes in matters including, but not limited to, governance, collection of dues and fees, compliance monitoring, and enforcement action procedures?

(6) What role, if any, should the ERO play in the approval or appeal of an enforcement action undertaken by a Regional Entity?

(7) What, if any, responsibility or involvement should the ERO have with regard to the funding of the Regional Entities?

(8) Should the certification and delegation criteria for a Cross-Border Regional Entity specify that each country represented in the region should have the opportunity to have members from the country on the board of the Regional Entity in numbers that reflect the country's approximate percentage of net energy for load in that

region, similar to that provided in the bilateral principles?

(9) Should the Commission set the standard by which Regional Entity applications to the ERO will be reviewed or should the ERO be allowed to determine this standard? Given that section 215(e)(4) of the FPA requires that the ERO and the Commission shall rebuttably presume that a proposal for a Regional Entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power reliability, should a higher standard apply to Regional Entities that are not organized on an Interconnection-wide basis? What should the higher standard specify? Should a Regional Entity not organized on an Interconnection-wide basis have the burden to demonstrate that it has appropriate regional scope and configuration to promote effective and efficient administration of Bulk-Power System reliability?

(10) Paragraph (f) of section 38.7 requires a Regional Entity approved by the Commission to periodically submit to the Commission an application to be re-approved as a Regional Entity. We seek comments on what would constitute a reasonable length of time for such periodic re-approval to be effective. For example, is a five-year approval period appropriate? How far in advance should a Regional Entity be required to submit its application for re-approval before its current approval period expires? What role, if any, should the ERO have in the re-approval process? Would the ERO have to resubmit a delegation agreement?

(11) Section 215(e)(4) of the FPA and proposed regulation section 38.7(c)(3) require that the ERO, when filing a delegation agreement, include a statement demonstrating that the agreement promotes effective and efficient administration of Bulk-Power System reliability. What standards, guidelines, measures or criteria should the Commission apply in determining whether a delegation agreement promotes effective and efficient administration of Bulk-Power System reliability? If the primary function of a Regional Entity is enforcement of Reliability Standards, in what ways will Regional Entities bring effective and efficient administration in the enforcement function?

#### 8. Changes in Electric Reliability Organization Rules and Regional Entity Rules—Section 38.8

85. Paragraph (a) of proposed regulation section 38.8 provides that the ERO shall file with the Commission for approval any proposed ERO rule or rule

change, accompanied by an explanation of its basis and purpose. It also provides that a Regional Entity shall submit a Regional Entity Rule or rule change with the ERO and, upon approval by the ERO, the ERO shall file with the Commission for approval of any proposed Regional Entity Rule or rule change accompanied by an explanation of its basis and purpose. Paragraph (b) provides that the Commission, upon its own motion or complaint, may propose changes to the rules of the ERO or a Regional Entity.

86. Paragraph (c) provides that a proposed ERO rule or rule change, or Regional Entity rule or rule change, shall take effect upon a finding by Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of section 38.3.

#### 9. Process for Resolution of Conflicts With a Reliability Standard—Section 38.9

87. Section 215(d)(6) of the FPA requires that the Commission's final rule include fair processes for the identification and timely resolution of any conflict between a Reliability Standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to a Transmission Organization. If a participant in the ERO's standards development process perceives a potential conflict, the participant should inform the ERO of the potential conflict to help assure that proposed standards do not contain any such conflicts. However, if any person believes that a proposed standard that the ERO has submitted to the Commission for approval includes such a conflict, such person should inform the Commission of such conflict by intervening and commenting in the Commission proceeding to review the proposed Reliability Standard.

88. If, after the Commission has approved a Reliability Standard, a Transmission Organization becomes aware of a conflict between a Reliability Standard and any function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission applicable to such Transmission Organization, the Transmission Organization would be required to utilize the process set forth in this proposed regulation to resolve the conflict. Specifically, paragraph (a) of proposed regulation section 38.9 provides that, if a Transmission Organization determines that a

Reliability Standard may conflict with a function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission with respect to such Transmission Organization, the Transmission Organization shall expeditiously notify the Commission, the ERO and the relevant Regional Entity of the conflict. If any person believes that an approved Reliability Standard includes such a conflict, such person should notify the Commission of such conflict.

89. Paragraph (b) provides that, unless the Commission orders otherwise, after notice and opportunity for hearing, within sixty (60) days after the date that a notice was filed, the Commission will issue an order determining whether a conflict does, in fact, exist. If the Commission finds that there is a conflict, it will seek to resolve the conflict by either directing the Transmission Organization to file a modification to the conflicting function, rule, order, tariff, rate schedule, or agreement pursuant to section 206 of the FPA (as set forth in the statute) or, if appropriate, directing the ERO to develop for Commission review a proposed modification to the conflicting Reliability Standard.

90. Paragraph (c) provides that, until a determination is made by the Commission and any ordered change becomes effective, the Transmission Organization shall continue to follow the function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission with respect to such Transmission Organization.

91. The Commission seeks examples of situations or areas of concern in which commenters believe that conflicts between reliability standards and Transmission Organization tariffs exist or may arise.

#### 10. Procedures for Establishment and Recognition of Regional Advisory Bodies—Section 38.10

92. Paragraph (a) of proposed regulation section 38.10 provides that the Commission shall consider a petition to establish a Regional Advisory Body that is submitted by at least two-thirds of the states within a region that have more than one-half of their electric load served within the region. Paragraph (b) provides that a petition shall include all organizational documents and a statement that the Regional Advisory Body is composed of one member from each state in the region, appointed by the governor of each state, and may include representatives of agencies,

states and provinces outside the United States.

93. Paragraph (c) provides that a Regional Advisory Body may provide advice to the Commission, ERO or a Regional Entity with respect to the governance of an existing or proposed Regional Entity within the same region; whether a Reliability Standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest; whether fees for all activities under this section proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest; and any other responsibilities requested by the Commission. Paragraph (d) provides that the Commission may give deference to the advice of any such Regional Advisory Body if it is organized on an Interconnection-wide basis.

94. In addition to comment on the proposed regulation discussed above, the Commission seeks comment on the scope of the term "region" as used in section 38.10. In particular, should the region represented by a Regional Advisory Body correspond to that of an existing or proposed Regional Entity?

#### 11. Reliability Reports—Section 38.11

95. Paragraph (a) of section 38.11 of the proposed regulations provides that the ERO shall conduct periodic assessments of the reliability and adequacy of the Bulk-Power System in North America. This first phrase of this subsection tracks the statutory language of section 215(g) of the FPA. In addition, this subsection would set forth the frequency of such periodic assessments and identify the entities to which the ERO must report the results of the periodic assessments, including the Commission, DOE, Regional Entities, and Regional Advisory Bodies. Paragraph (b) of this subsection would require either annual or quarterly reporting by the ERO and Regional Entities on their enforcement actions and the associated penalties assessed, in a manner to be prescribed by the Commission.

#### 12. Review of State Action—Section 38.12

96. Consistent with section 215(i)(3) of the FPA, paragraph (a) of proposed regulation section 38.12 provides that nothing in this regulation shall be construed to preempt any authority of any state to take action to ensure the safety, adequacy, and reliability of electric service within that state, as long as such action is not inconsistent with any reliability standard.

97. Paragraph (b) of proposed regulation section 38.12 provides that, where a state takes action to ensure the safety, adequacy and reliability of electric service, the ERO, a Regional Entity or other party may apply to the Commission for an order determining whether such state action is inconsistent with a Reliability Standard. The Commission will, after notice and opportunity for hearing, and taking into consideration any recommendation of the ERO, issue a final order determining the matter within ninety (90) days.

98. Paragraph (c) provides that the Commission, after consultation with the ERO and the state taking action, may stay the effectiveness of the state action, pending the Commission's issuance of a final order.

#### 13. Funding of the Electric Reliability Organization—Section 38.13

99. FPA section 215 does not contain any specific requirements regarding the mechanism for funding the ERO, other than stating that the Commission may certify an ERO if it determines that such ERO, *inter alia*, has established rules that "allocate equitably reasonable dues, fees, and other charges among end users \* \* \*" (FPA section 215(c)(2)(B)). The Commission believes that certainty regarding the funding of the ERO is essential for the stability and ultimate success of the organization. Accordingly, proposed section 38.13 provides requirements related to the funding and budget oversight of the ERO. In particular, paragraphs (a) and (b) of proposed regulation section 38.13, which are intended to make the ERO accountable to the Commission for its budget for activities within the United States, provide that the ERO must file its proposed annual budget for these activities and supporting materials in sufficient detail to justify the requested funding requirement 130 days in advance of the beginning of each fiscal year, and the Commission, after public notice and opportunity for comment, shall issue an order accepting, rejecting or remanding and modifying the proposed ERO budget no later than sixty (60) days in advance of the beginning of the ERO's fiscal year.

100. Paragraphs (c) and (d) of section 38.13 are intended to provide a Commission-approved mechanism for mandatory ERO funding. However, rather than the Commission dictating a funding mechanism, the NOPR would allow an ERO applicant the discretion to propose the funding mechanism for Commission approval. Specifically, paragraph (c) states that any person who submits an application for certification as the ERO must include a plan, formula

and/or methodology for the allocation and assessment of ERO dues, fees and charges; and the certified ERO may subsequently file with the Commission a request to modify the plan, formula and/or methodology from time-to-time in the ERO's discretion. Paragraph (d) provides that all entities within the Commission's jurisdiction as set forth in section 215(b) of the FPA are required to pay the ERO's assessment of dues, fees and charges in a timely manner reasonably designated by the ERO.

101. Finally, paragraph (e) provides that any person who submits an application for certification as the ERO may include a plan for a transitional funding mechanism that would allow such person, if certified as the ERO, to continue existing operations without interruption as it transitions from one method of funding to another. The maximum duration of any proposed transitional funding mechanism is not to exceed eighteen (18) months from the date of certification.

102. The Commission notes that NERC currently is funded based on "net energy for load," which represents the aggregate annual energy consumption of end use customers in a region, with costs of certain programs and tools which benefit only specific regions or parties billed only to the beneficiaries of the programs or tools. The Commission believes that a funding method based on net energy for load meets the standard of section 215(c)(3) of the FPA and would be appropriate for the allocation and assessment of ERO dues, fees and charges.

103. In addition to comments on the proposed ERO funding regulations, the Commission asks for comments on the following questions:

(1) Should the proposed funding requirements be extended to the Regional Entities?

(2) The Commission notes the bilateral principles include several funding principles: (a) A principle specifying that net energy for load should be the primary basis upon which the costs of the ERO are assigned and that costs for one region or entity should be directly assigned to that region or entity; (b) a principle specifying that funding mechanisms, budget direction and budget levels should reflect consultations with appropriate stakeholders and authorities in each country; and (c) a principle specifying that the appropriate authorities in each country should be responsible for approving and ensuring cost recovery by the ERO and Regional Entities within their respective jurisdictions in a timely manner. Should the proposed rule address these types of funding-related

details or should the ERO and Cross-Border Regional Entities have the discretion to address these matters at a later time?

#### 14. Other Matters

104. While the Electricity Modernization Act of 2005 can be read to suggest a two-step process in which an applicant will apply for ERO certification and then submit proposed Reliability Standards after certification as the ERO, the Commission interprets the statute as allowing an applicant to simultaneously apply for ERO certification and submit proposed Reliability Standards for Commission review. The Commission believes that a one-step process would allow for quicker implementation of Reliability Standards. Although the Commission is allowing an applicant to submit multiple Reliability Standards at the same time, the Commission interprets section 215 of the FPA as allowing the Commission to review each Reliability Standard individually, rather than as a package. Therefore, the Commission interprets section 215 as allowing it to reject or require modification of some individual Reliability Standards while at the same time affirming other individual standards submitted concurrently.

#### IV. Information Collection Statement

105. The Commission estimates the number of applicants to be recognized by the Commission under the proposed rule as the single ERO or as a Regional Entity as up to three (3) and up to eight (8), respectively. As these entities are select, special purpose entities of the new federal law and do not yet exist, it is not feasible to survey candidate organizations to project the anticipated burden of complying with the proposed rule.

##### *Title:*

*Action:* Proposed Information Collection.

*OMB Control No:* To be determined.

The applicant will not be penalized for failure to respond to this information collection unless the information collection displays a valid OMB control number or the Commission has provided justification as to why the control number should not be displayed.

*Respondents:* Non-profit service organizations.

*Necessity of the Information:* The information collected from the ERO or Regional Entities under the requirements of FERC-725 is used by the Commission to implement the statutory provisions of section 215 of the FPA and implemented by the

Commission in the Code of Federal Regulations under 18 Part 38. As noted above, prior to the enactment of section 215 of the FPA under the Electricity Modernization Act of 2005, the Commission had acted primarily as an economic regulator of wholesale power markets and the interstate transmission grid promoting a more reliable electricity system by promoting regional coordination and planning of the interstate grid through ISOs and RTOs, adopting transmission pricing policies that provide price signals for the most reliable and efficient operation and expansion of the grid, and providing pricing incentives at the wholesale level for investment in grid improvements. The Electricity Modernization Act of 2005 buttresses the Commission's efforts to strengthen the interstate transmission grid through the grant of new authority pursuant to section 215 of the FPA which provides for a system of mandatory reliability rules developed by the ERO, established by the Commission, and enforced by the Commission, subject to Commission review.

106. Section 215 of the FPA provides that all users, owners and operators of the Bulk-Power System are subject to the jurisdiction of the Commission for the purposes of approving Reliability Standards and enforcing compliance with such standards. However, the NOPR is limited to developing and implementing the processes and procedures which section 215 of the FPA directs the Commission to develop and undertake with regard to the formation and functions of the ERO and Regional Entities.

*Internal Review:* The Commission has reviewed these requirements pertaining to the certification of an ERO, the establishment of Reliability Standards and Regional Entities and has determined the proposed requirements are necessary for the Commission to meet the statutory provisions of the Electricity Modernization Act of 2005. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the bulk power system.

107. For submitting comments concerning the collection of information and the associated burden estimates, please send your comments to: (1) Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the Executive Director, Phone (202) 502-8415, fax (202) 273-0873, e-mail: [michael.miller@ferc.gov](mailto:michael.miller@ferc.gov)] and (2) the Office of Management and Budget [Attention: Desk Officer for the Federal

Energy Regulatory Commission, fax (202) 395-7285, e-mail [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov)].

#### V. Environmental Analysis

108. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.<sup>19</sup> The Commission concludes that neither an Environmental Assessment or an Environmental Impact Statement is required for this NOPR pursuant to section 380.4(a)(2)(ii) of the Commission regulations, which provides a "categorical exclusion" for rules that do not substantively change the effect of legislation.<sup>20</sup>

#### VI. Regulatory Flexibility Act Certification

109. The Regulatory Flexibility Act of 1980 (RFA)<sup>21</sup> requires that a rulemaking contain either a description and analysis of the effect that the proposed rule will have on small entities or a certification that the rule will not have a significant economic impact on a substantial number of small entities. However, the RFA does not define "significant" or "substantial" instead leaving it up to an agency to determine the impact of its regulations on small entities.

110. In drafting this rule, the Commission has followed the provisions of both the RFA and the Paperwork Reduction Act to consider the potential impact of regulations on small business and other small entities. Specifically, the RFA directs agencies to consider four regulatory alternatives to lessen the impact on small entities: Tiering or establishment of different compliance or reporting requirements for small entities; classification, consolidation, clarification or simplification of compliance and reporting requirements; performance rather than design standards; and exemptions.

111. As noted above, the Electricity Modernization Act of 2005 directs the Commission to issue a final rule to implement the requirements of section 215 of the FPA within 180 days after the date of its enactment. In accordance with this directive, the proposed rule is intended to implement section 215 of the FPA. In particular, the proposed rule implements the statutory authority and responsibilities assigned to the ERO,

<sup>19</sup> Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 *Fed. Reg.* 47,897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

<sup>20</sup> 18 CFR 380.4(a)(2)(ii) (2005).

<sup>21</sup> 5 U.S.C. 601-12 (2000).

Regional Entities, and Regional Advisory Bodies within the United States except Alaska and Hawaii. The Electricity Modernization Act specifies that the ERO and Regional Entities are not departments, agencies or instrumentalities of the United States Government.

However, the ERO and Regional Entities will not be like most other businesses, profit or not-for-profit. Congress created the concept of the ERO and Regional Entities as the select, special purpose entities that will transition the oversight of Bulk-Power System reliability from voluntary, industry organizations to independent organizations subject to Commission jurisdiction and oversight. As such, the ERO and Regional Entities should not be considered a small entity under the RFA. Accordingly, the proposed reliability rule is not likely to impact certain small entities.

#### VII. Comment Procedures

112. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due October 7, 2005. Comments must refer to Docket No. RM05-30-000, and must include the commenter's name, the organization represented, if applicable, and the commenter's address. Comments may be filed either in electronic or paper format.

113. Comments may be filed electronically via the eFiling link on the Commission's Web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and fourteen (14) copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE., Washington, DC 20426.

114. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

#### VIII. Document Availability

115. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all

interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

116. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

117. User assistance is available for eLibrary and the FERC's Web site during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at [FERCOnlineSupport@FERC.gov](mailto:FERCOnlineSupport@FERC.gov)), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov)).

#### List of Subjects in 18 CFR Part 38

Administrative practice and procedure, Electric power, Electric utilities, Reporting and recordkeeping requirements.

By direction of the Commission.

**Magalie R. Salas,**  
Secretary.

In consideration of the foregoing, the Commission proposes to amend Chapter I, Title 18, *Code of Federal Regulations*, by adding Part 38 to read as follows:

#### **PART 38—RULES CONCERNING CERTIFICATION OF THE ELECTRIC RELIABILITY ORGANIZATION; AND PROCEDURES FOR THE ESTABLISHMENT, APPROVAL, AND ENFORCEMENT OF ELECTRIC RELIABILITY STANDARDS**

Sec.

- 38.1 Definitions.
- 38.2 Jurisdiction and Applicability.
- 38.3 Electric Reliability Organization certification.
- 38.4 Approval of Reliability Standards.
- 38.5 Enforcement of Reliability Standards.
- 38.6 Enforcement of Commission Rules and Orders.
- 38.7 Delegation of certain Electric Reliability Organization Authority to Regional Entities.
- 38.8 Changes in Electric Reliability Organization Rules and Regional Entity Rules.
- 38.9 Process for Resolution of Conflicts With a Reliability Standard.

38.10 Procedures for Establishment and Recognition of Regional Advisory Bodies.

38.11 Reliability Reports.

38.12 Review of State Action.

38.13 Funding of the Electric Reliability Organization.

**Authority:** Section 215 of the Federal Power Act.

#### **§ 38.1 Definitions.**

As used in this part:

*Bulk-Power System* means 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. The term does not include facilities used in the local distribution of electric energy.

*Cross-Border Regional Entity* means a Regional Entity for which the size and scope includes a portion of Canada or Mexico.

*Cybersecurity Incident* means a malicious act or suspicious event that disrupts, or was an attempt to disrupt, the operation of those programmable electronic devices and communications networks including hardware, software and data that are essential to the Reliable Operation of the Bulk-Power System.

*Electric Reliability Organization* or "ERO" means the organization certified by the Commission under § 38.3 the purpose of which is to establish and enforce Reliability Standards for the Bulk-Power System, subject to Commission review.

*ERO Rules* means, for purposes of this section, the bylaws, rules of procedure and other organizational rules and protocols of the Electric Reliability Organization.

*Interconnection* means a geographic area in which the operation of Bulk-Power System components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain Reliable Operation of the facilities within their control.

*Regional Advisory Body* means an entity established upon petition to the Commission pursuant to section 215(j) of the FPA that is organized to advise the Electric Reliability Organization, a Regional Entity, or the Commission regarding certain matters in accordance with § 38.10.

*Regional Entity* means an entity having enforcement authority pursuant to section 38.7.

*Regional Entity Rules* means, for purposes of this Part, the bylaws, rules

of procedure and other organizational rules and protocols of a Regional Entity.

*Reliability Standard* means a requirement approved by the Commission under this section, to provide for Reliable Operation of the Bulk-Power System. The term includes requirements for the operation of existing Bulk-Power System facilities, including cybersecurity protection, and the design of planned additions or modifications to such facilities to the extent necessary to provide for Reliable Operation of the Bulk-Power System, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

*Reliable Operation* means operating the elements of the Bulk-Power System within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a Cybersecurity Incident, or unanticipated failure of system elements.

*Transmission Organization* means a regional transmission organization, independent system operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

### § 38.2 Jurisdiction and applicability.

Within the United States (other than Alaska and Hawaii), the Electric Reliability Organization, any Regional Entities, and all users, owners and operators of the Bulk-Power System, including but not limited to entities described in section 201(f) of the Federal Power Act, shall be subject to the jurisdiction of the Commission for the purposes of approving Reliability Standards established under this section and enforcing compliance with this section.

### § 38.3 Electric Reliability Organization certification.

(a) Any person may submit an application to the Commission for certification as an Electric Reliability Organization no later than sixty (60) days following Commission issuance of the final rule. Such application shall include a form of notice and an original and fourteen (14) copies of the application.

(b) The Commission may certify one such applicant as an Electric Reliability Organization, if the Commission determines such applicant:

(1) Has the ability to develop and enforce, subject to § 38.5, Reliability Standards that provide for an adequate

level of reliability of the Bulk-Power System, and

(2) Has established rules that:

(i) Assure its independence of users, owners and operators of the Bulk-Power System while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any Electric Reliability Organization committee or subordinate organizational structure;

(ii) Allocate equitably reasonable dues, fees and charges among end users for all activities under this section;

(iii) Provide fair and impartial procedures for enforcement of Reliability Standards through the imposition of penalties in accordance with § 38.5, including limitations on activities, functions, operations, or other appropriate sanctions or penalties;

(iv) Provide reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing Reliability Standards, and otherwise exercising its duties; and

(v) Provide appropriate steps, after certification by the Commission as the Electric Reliability Organization, to gain recognition in Canada and Mexico.

(c) The approved ERO is required to periodically submit an application to be recertified as the ERO, in accordance with any requirements the Commission issues in this regard.

### § 38.4 Approval of Reliability Standards.

(a) The Electric Reliability Organization must consider and develop Reliability Standards or modifications to Reliability Standards to be applicable to the entire Bulk-Power System or a particular region or Interconnection. The Electric Reliability Organization shall file each Reliability Standard or modification to a Reliability Standard that it proposes to be made effective under this section with the Commission. The filing shall include an original and fourteen (14) copies, a form of notice, a concise statement of the basis and purpose of the standard and a summary of the standard development proceedings conducted by the Electric Reliability Organization.

(b) The Commission may approve by rule or order a proposed Reliability Standard or a modification to a Reliability Standard if it determines, after notice and opportunity for public hearing, that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.

(1) The Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed

Reliability Standard or modification to a Reliability Standard,

(2) The Commission shall give due weight to the technical expertise of a Regional Entity organized on an Interconnection-wide basis with respect to a Reliability Standard to be applicable within that Interconnection, and

(3) The Commission shall not defer to the Electric Reliability Organization or a Regional Entity with respect to the effect of a Reliability Standard or modification to a Reliability Standard on competition.

(c) An approved Reliability Standard or a modification to a Reliability Standard shall take effect as approved by the Commission.

(d) The Electric Reliability Organization shall rebuttably presume that a proposal for a Reliability Standard or a modification to a Reliability Standard to be applicable on an Interconnection-wide basis is just, reasonable, not unduly discriminatory or preferential, and in the public interest, if such proposal is from a Regional Entity organized on an Interconnection-wide basis.

(e) The Commission shall remand to the Electric Reliability Organization for further consideration a proposed Reliability Standard or modification to a Reliability Standard that the Commission disapproves in whole or part.

(f) The Commission may, upon its own motion or a complaint, order the Electric Reliability Organization to submit 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.

(g) The Commission may, upon its own motion or a complaint, review a previously-approved Reliability Standard. If, after notice and opportunity for hearing, the Commission determines that the Reliability Standard, or any provision thereof, is unjust or unreasonable, unduly discriminatory or preferential, or not in the public interest, the Commission may remand the Reliability Standard to the Electric Reliability Organization.

(h) The Commission, when remanding a Reliability Standard, may state a deadline by which the Electric Reliability Organization must submit a proposed revised Reliability Standard.

### § 38.5 Enforcement of Reliability Standards.

(a) The Electric Reliability Organization, or a Regional Entity, may

impose, subject to paragraph (d) of this section, a penalty on a user, owner or operator of the Bulk-Power System for a violation of a Reliability Standard approved by the Commission under § 38.4 if the Electric Reliability Organization or the Regional Entity, after public notice and opportunity for hearing:

(1) Finds that the user, owner or operator has violated a Reliability Standard approved by the Commission under § 38.4; and

(2) Files notice and the record of the Electric Reliability Organization's or Regional Entity's proceeding with the Commission. Simultaneously with the filing of a notice with the Commission, the Electric Reliability Organization or Regional Entity shall serve a copy of the notice on the entity that is the subject of the enforcement action.

(b) A Regional Entity shall file notice with the Electric Reliability Organization of any enforcement action it takes.

(c) Any notice of an enforcement action, whether by the Electric Reliability Organization or a Regional Entity, shall consist of:

(1) The name of the entity against whom the enforcement action was taken;

(2) A statement describing the enforcement action taken;

(3) A statement setting forth findings of fact with respect to the act or practice that resulted in the enforcement action;

(4) A statement describing any sanction imposed;

(5) The record of the proceeding;

(6) A form of notice suitable for publication; and

(7) Other matters the Electric Reliability Organization or the Regional Entity, as appropriate, may find relevant.

(d) A penalty imposed under paragraph (a) of this section may take effect not earlier than the thirty-first (31st) day after the Electric Reliability Organization or Regional Entity files with the Commission notice of the penalty and the record of the proceedings.

(1) Such penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator of the Bulk-Power System that is the subject of the penalty filed within thirty (30) days after the date such notice is filed with the Commission. In the absence of the filing of an application for review or motion or other action by the Commission, the enforcement action shall be affirmed by operation of law upon the expiration of the 30-day period for filing of an application for review.

(2) Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty.

(3) In any proceeding to review a penalty imposed under paragraph (a) of this section, the Commission, after public notice and opportunity for hearing (which hearing may consist solely of the record before the Electric Reliability Organization or Regional Entity and the opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside or modify the penalty and, if appropriate, remand to the Electric Reliability Organization or Regional Entity for further proceedings.

(4) An applicant shall file an original and fourteen (14) copies of an application for review and shall comply with the requirements set forth in the Commission's Rules of Practice and Procedure, unless otherwise directed by the Commission. An application shall contain a complete and detailed explanation of the reasons why the applicant believes that the Electric Reliability Organization or Regional Entity erred when assessing the penalty, the amount of the penalty or the form of the penalty, and such application must provide any additional support for this contention that is not included in the record submitted by the Electric Reliability Organization or Regional Entity pursuant to this section.

(5) Unless otherwise ordered by the Commission, answers, interventions, and comments to an application for review of a penalty imposed under paragraph (a) of this section must be filed within twenty (20) days after the application is filed.

(6) One of the following procedures may be used to resolve application for review of a penalty imposed under paragraph (a) of this section:

(i) The Commission may issue an order on the merits to affirm, set aside, reinstate or modify the penalty and, if appropriate, remand to the Electric Reliability Organization or Regional Entity based upon the pleadings; or

(ii) The Commission may establish a hearing before an administrative law judge or initiate such further procedures as may be appropriate.

(7) Expedited review. Unless determined otherwise by the Commission on a case by case basis, the Commission shall take action on an application for review of a penalty

within sixty (60) days of the date the application is filed. Expedited procedures shall be established for any hearing before an administrative law judge on a case by case basis.

(8) Unless the Commission determines otherwise, an enforcement action pursuant to § 38.5 that involves a Cybersecurity Incident will be non-public. The user, owner or operator of the Bulk-Power System that is the subject of the enforcement action will be given timely notice and an opportunity for hearing. The public will not be notified and the public will not be allowed to participate in an enforcement action before the Electric Reliability Organization, a Regional Entity or the Commission.

(e) On its own motion or upon complaint, the Commission may order compliance with a Reliability Standard and may impose a penalty against a user, owner or operator of the Bulk-Power System, if the Commission finds, after public notice and opportunity for hearing, that the user, owner or operator of the Bulk-Power System has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a Reliability Standard.

(f) Any penalty imposed for the violation of a Reliability Standard shall bear a reasonable relation to the seriousness of the violation and shall take into consideration efforts of such user, owner or operator of the Bulk-Power System to remedy the violation in a timely manner. The imposition of penalties is not limited to monetary penalties and may include, but is not limited to, limitations on activities, functions, operations, or other appropriate sanctions, including the establishment of a reliability watch list composed of major violators. Monetary penalties shall be paid in a timely manner.

(g) Reporting of Violations and Potential Violations: The Electric Reliability Organization and all Regional Entities shall have in place procedures to immediately notify the Commission of all violations and potential violations of Reliability Standards when the Electric Reliability Organization or Regional Entity first notifies the user, owner or operator of the violation or potential violation.

(1) Any person that submits an application to the Commission for certification as an Electric Reliability Organization shall include in such application a proposal for the notification and reporting to the Commission of all violations and potential violations of Reliability Standards.

(2) Any agreement for the delegation of authority to a Regional Entity shall include a proposal for the notification and reporting to the Commission of all violations and potential violations of Reliability Standards.

(3) All reports of violations and potential violations shall include the entity's name, when the violation or potential occurred, what standard was violated or potentially violated and the name of a person knowledgeable about the violation or potential violation to serve as a point of contact to provide the Commission with further details on the matter, as they develop, on an ongoing basis.

(4) All reports of violations and potential violations shall be filed electronically with the Commission.

#### **§ 38.6 Enforcement of Commission Rules and Orders.**

(a) The Commission may take such action as is necessary and appropriate against the Electric Reliability Organization or a Regional Entity to ensure compliance with a Reliability Standard or any Commission order affecting the Electric Reliability Organization or a Regional Entity, including, but not limited to:

(1) Upon notice and opportunity for hearing, suspension or rescission of the Commission's grant of certification to the Electric Reliability Organization, if the Electric Reliability Organization no longer meets the statutory standards for certification.

(2) Upon notice and opportunity for hearing, suspension or rescission of the Commission's approval of an agreement to delegate certain Electric Reliability Organization authority to a Regional Entity.

(3) Imposition of civil penalties under the Federal Power Act.

(b) The Commission will periodically audit and review the Electric Reliability Organization's and Regional Entities' compliance with the statutory and regulatory criteria for certification and delegation of functions.

#### **§ 38.7 Delegation of certain Electric Reliability Organization authority to Regional Entities.**

(a) The Electric Reliability Organization may enter into an agreement to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the Electric Reliability Organization and enforcing Reliability Standards under § 38.5(a).

(b) A delegation agreement shall not be effective until it is approved by the Commission.

(c) The Electric Reliability Organization shall file an original and

fourteen (14) copies of a delegation agreement. In addition, such filing shall include a detailed statement demonstrating that:

(1) The Regional Entity is governed by an independent board, a balanced stakeholder board, or a combination independent and balanced stakeholder board,

(2) The Regional Entity otherwise satisfies the provisions of § 38.3, and

(3) The agreement promotes effective and efficient administration of Bulk-Power System reliability.

(d) The Commission may modify such delegation; however, the Electric Reliability Organization and Commission shall rebuttably presume that a proposal for delegation to a Regional Entity organized on an Interconnection-wide basis promotes effective and efficient administration of Bulk-Power System reliability and should be approved.

(e) If an entity seeking to enter into a delegation agreement is unable to reach an agreement with the Electric Reliability Organization within 180 days after proposing a delegation agreement to the Electric Reliability Organization, and it can demonstrate that continued negotiations with the Electric Reliability Organization would not likely result in a delegation agreement within a reasonable period of time, such entity may request that the Commission assign the Electric Reliability Organization's authority to enforce Reliability Standards within a region to such entity.

(f) An approved Regional Entity shall be required to periodically submit an application to be re-approved as a Regional Entity, in accordance with any requirements the Commission issues in this regard.

#### **§ 38.8 Changes in Electric Reliability Organization Rules and Regional Entity Rules.**

(a) The Electric Reliability Organization shall file with the Commission for approval any proposed Electric Reliability Organization Rule or rule change. A Regional Entity shall submit a Regional Entity Rule or rule change with the Electric Reliability Organization and, upon approval by the Electric Reliability Organization, the Electric Reliability Organization shall file with the Commission for approval of any proposed Regional Entity Rule or rule change. Such filing by the Electric Reliability Organization shall be accompanied by an explanation of the basis and purpose for the rule or rule change, together with a description of the proceedings conducted by the

Electric Reliability Organization or Regional Entity to develop the proposal.

(b) The Commission upon its own motion or complaint may propose changes to the Electric Reliability Organization rules or Regional Entity rules.

(c) A proposed Electric Reliability Organization rule or rule change or Regional Entity rule or rule change shall take effect upon a finding by Commission, after notice and opportunity for public comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of § 38.3.

#### **§ 38.9 Process for resolution of conflicts with a Reliability Standard.**

(a) If a Transmission Organization determines that a Reliability Standard may conflict with a function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission with respect to such Transmission Organization, the Transmission Organization shall expeditiously notify the Commission, the Electric Reliability Organization and the relevant Regional Entity of the conflict.

(b) Unless the Commission orders otherwise, after notice and opportunity for hearing, within sixty (60) days of the date that a notice was filed under paragraph (a) of this section, the Commission shall issue an order determining whether a conflict exists and, if so, resolve the conflict by directing

(i) The Transmission Organization to file a modification of the conflicting function, rule, order, tariff, rate schedule, or agreement pursuant to section 206 of the Federal Power Act or

(ii) The Electric Reliability Organization to propose a modification to the conflicting Reliability Standard pursuant to § 38.4 of the Commission's regulations.

(c) The Transmission Organization shall continue to follow the function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission until the Commission finds that a conflict exists, the Commission orders a change to such provision pursuant to section 206 of the Federal Power Act, and the ordered change becomes effective.

#### **§ 38.10 Procedures for establishment and recognition of Regional Advisory Bodies.**

(a) The Commission shall consider a petition to establish a Regional Advisory Body that is submitted by at least two-thirds of the states within a region that have more than one-half of their electric load served within the region.

(b) A petition to establish a Regional Advisory Body shall include all organizational documents and a statement that the Regional Advisory Body is composed of one member from each participating state in the region, appointed by the governor of each state, and may include representatives of agencies, states and provinces outside the United States.

(c) A Regional Advisory Body established by the Commission may provide advice to the Commission, Electric Reliability Organization or a Regional Entity with respect to:

(1) The governance of an existing or proposed Regional Entity within the same region;

(2) Whether a Reliability Standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest;

(3) Whether fees for all activities under this section proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest; and

(4) Any other responsibilities requested by the Commission.

(d) The Commission may give deference to the advice of a Regional Advisory Body established by the Commission if it is organized on an Interconnection-wide basis.

#### **§ 38.11 Reliability reports.**

(a) The Electric Reliability Organization shall conduct periodic assessments of the reliability and adequacy of the Bulk-Power System in North America and report its findings to the Commission, the Secretary of Energy, Regional Entities, and Regional Advisory Bodies annually or more frequently if so ordered by the Commission.

(b) The Electric Reliability Organization and Regional Entities shall report on their enforcement actions and associated penalties to the Commission, the Secretary of Energy, relevant Regional Entities, and relevant Regional Advisory Bodies annually or quarterly, in a manner to be prescribed by the Commission.

#### **§ 38.12 Review of state action.**

(a) Nothing in this regulation shall be construed to preempt any authority of any state to take action to ensure the safety, adequacy, and reliability of electric service within that state, as long as such action is not inconsistent with any reliability standard.

(b) Where a state takes action to ensure safety, adequacy, and reliability of electric service, the Electric

Reliability Organization, Regional Entity or other affected party may apply to the Commission for a determination of consistency with a Commission-approved Reliability Standard.

(1) The application shall:

(i) Identify the state action complained of;

(ii) Identify the Reliability Standard(s) with which the state action is claimed to be inconsistent;

(iii) State the basis for the claim that the state action is inconsistent with a Reliability Standard; and

(iv) Include a form of notice.

(2) Within ninety (90) days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for public comment, the Commission shall issue a final order determining whether the state action is inconsistent with a Reliability Standard, taking into consideration any recommendation of the Electric Reliability Organization.

(c) The Commission, after consultation with the Electric Reliability Organization and the state taking action, may stay the effectiveness of the state action, pending the Commission's issuance of a final order.

#### **§ 38.13 Funding of the Electric Reliability Organization.**

(a) The Electric Reliability Organization shall file with the Commission its proposed annual budget for activities within the United States and supporting materials in sufficient detail to justify the requested funding requirement 130 days in advance of the beginning of each fiscal year.

(b) The Commission, after public notice and opportunity for comment, shall issue an order either accepting, rejecting or remanding or modifying the proposed Electric Reliability Organization budget and business plan no later than sixty (60) days in advance of the beginning of the Electric Reliability Organization's fiscal year.

(c) Any person who submits an application for certification as the Electric Reliability Organization pursuant to the rules set forth in this section shall include in such application a plan, formula and/or methodology for the allocation and assessment of Electric Reliability Organization dues, fees and charges. The certified Electric Reliability Organization may subsequently file with the Commission a request to modify the plan, formula and/or methodology from time-to-time in the Electric Reliability Organization's discretion.

(d) All entities within the Commission's jurisdiction as set forth in section 215(b) of the Federal Power Act

are required to pay the Electric Reliability Organization's assessment of dues, fees and charges in a timely manner reasonably designated by the Electric Reliability Organization.

(e) Any person who submits an application for certification as the Electric Reliability Organization pursuant to the rules set forth in this section may include in such application a plan for a transitional funding mechanism that would allow such person, if certified as the Electric Reliability Organization, to continue existing operations without interruption as it transitions from one method of funding to another. The maximum duration of any proposed transitional funding mechanism is not to exceed eighteen (18) months from the date of certification.

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## **DEPARTMENT OF JUSTICE**

### **28 CFR Part 16**

[AAG/A Order No. 009-2005]

#### **Justice Management Division; Privacy Act of 1974; Implementation**

**AGENCY:** Justice Management Division, Justice.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Justice (DOJ), Justice Management Division (JMD), proposes to exempt from certain subsections of the Privacy Act, a new Privacy Act system of records entitled "Federal Bureau of Investigation Whistleblower Case Files, JMD-023," as described in today's notice section of the **Federal Register**. The system maintains all documents and evidence filed with the Director of the Office of Attorney Recruitment and Management (OARM), JMD, pertaining to requests for corrective action by employees of, or applicants for employment with, the Federal Bureau of Investigation (FBI) (or recommendations for corrective action by the Office of the Inspector General or Office of Professional Responsibility) brought under the FBI's whistleblower regulations.

**DATES:** Submit any comments by October 17, 2005.

**ADDRESSES:** Address all comments in writing to Mary Cahill, Management and Planning Staff, Justice Management Division, Department of Justice, Washington, DC 20530 (1400 National Place Building), Facsimile Number (202) 307-1853. To ensure proper handling, please reference the AAG/A Order No.