

March 22, 2011

## FERC Affirms Approach to Definition of Bulk Electric System

In Order No. 743-A, issued on March 17, 2011, the Federal Energy Regulatory Commission (FERC) has affirmed its requirement that the North American Electric Reliability Corporation (NERC) revise its definition of “Bulk Electric System” (BES), which is the set of electric transmission, generation and related facilities that are necessary for the reliable operation of the interconnected electric transmission network and that are subject to the requirements of NERC’s mandatory and enforceable Reliability Standards. Although Order No. 743-A largely upholds that requirement, FERC nonetheless appears to have softened its prior approach in directing NERC to revise the definition of BES.

Order No. 743-A reaffirms Order No. 743, issued on November 18, 2010, which found that the potential for “gaps” in coverage of facilities under NERC’s current BES definition may compromise reliability. Order No. 743 had directed NERC, the FERC-approved Electric Reliability Organization for the United States electric grid, to revise the definition of BES through its Reliability Standards development process to address FERC’s “policy and technical concerns.” These concerns include inconsistency in the application of the definition of BES, lack of oversight, and exclusion of facilities that are required for the reliable operation of the interconnected transmission network. While leaving the revisionary work to NERC, FERC outlined its suggested “best” approach for modifying the definition:

- Eliminate the discretion currently afforded to Regional Entities – the regional bodies charged with front-line enforcement of the Reliability Standards – to determine which facilities within their respective regions actually fall within the definition of BES;
- Establish a bright-line threshold that would include in the definition of BES all transmission facilities operating at or above 100 kV, except radial lines serving only load with one transmission source; and
- Adopt an exemption process and corresponding criteria by which facilities may be exempted from the definition of BES by a showing that they are not necessary for operating the interconnected grid.

FERC has affirmed this basic approach in Order No. 743-A.

Notwithstanding this favored approach, Order No. 743-A also preserves NERC’s ability to propose an alternative definition of BES so long as that alternative definition is “equally efficient and effective” as FERC’s suggested approach and will not impair reliability. Additionally, the two Interconnection-wide Regional Entities (in Texas and the West) may propose different, regional approaches – based on unique regional differences such as topography – that are more stringent than the continent-wide definition. While FERC benignly and repeatedly claims in Order No. 743-A that it did not mandate a 100-kV bright-line threshold in Order No. 743, in view of its stated “policy and technical concerns” it is difficult to see how NERC or the Regional Entities can avoid the bright-line threshold approach outlined in Order Nos. 743 and 743-A. NERC nonetheless has the opportunity to do so – if it can show that its alternative approach is “consistent, repeatable and verifiable with supporting technical analysis.”

Order No. 743-A also reiterates that local distribution facilities will continue to be excluded from the definition of BES because they are exempt from FERC jurisdiction under Section 215 of the Federal

© 2011 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

Power Act. FERC clarifies, however, that it intends to grant discretion to NERC, as the entity with “technical expertise,” to develop criteria to determine how to differentiate between local distribution and transmission facilities in an “objective, consistent, and transparent manner,” subject to FERC review and approval.

As was the case in Order No. 743, FERC again declines to clarify certain jurisdictional issues regarding the terms “Bulk Electric System” and “Bulk-Power System.” Under Section 215, FERC’s jurisdiction extends to the “Bulk-Power System”; in contrast, NERC uses the term “Bulk Electric System.” Commenters had sought clarification on whether Order No. 743 attempted to broaden the meaning of “Bulk Electric System” to encompass the “Bulk-Power System” or, rather, whether the two terms are synonymous. In Order No. 743-A, FERC determines that no “useful purpose” would be served by defining “Bulk-Power System” and thus declines to do so, leaving unsettled the distinction, if any, between the terms.

Ultimately, Order No. 743-A reaffirms FERC’s basic direction to NERC to revise the definition of “Bulk Electric System” along the lines outlined in Order No. 743. FERC has left the door open from Order No. 743 for NERC to propose an alternative definition, but it is not clear if there is in reality much room in which NERC can maneuver, given FERC’s stated policy and technical concerns. Although the 100-kV bright-line threshold may become the defining element of the revised definition, regulated entities will still have an opportunity to seek exemption under processes the contours of which have yet to be developed.



*If you have questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

|                        |              |  |
|------------------------|--------------|--|
| Daniel E. Frank        | 202.383.0838 | <a href="mailto:daniel.frank@sutherland.com">daniel.frank@sutherland.com</a>               |
| Alexandra D. Konieczny | 202.383.0854 | <a href="mailto:alexandra.konieczny@sutherland.com">alexandra.konieczny@sutherland.com</a> |
| Jennifer J. Kubicek    | 202.383.0822 | <a href="mailto:jj.kubicek@sutherland.com">jj.kubicek@sutherland.com</a>                   |