

November 23, 2010

FERC Directs NERC to Adopt Modified Definition of Bulk Electric System

On November 18, 2010, the Federal Energy Regulatory Commission (FERC) directed the North American Electric Reliability Corporation (NERC) to modify its definition of “Bulk Electric System,” the term used by NERC to identify the electric transmission, generation and related facilities subject to the requirements of NERC’s mandatory and enforceable Reliability Standards. FERC’s action in Order No. 743 is intended to ensure that all facilities necessary for the reliable operation of the interconnected electric transmission network are captured by a uniform definition and that exemptions are granted only through a FERC-approved process. Because NERC has one year to develop and file the modified definition or a proposed alternative – as well as a process allowing regulated entities to seek exemption from the new definition – and because several important issues remain unresolved, the full impact of FERC’s decision is unclear at this time.

Background

FERC’s decision in Order No. 743 adopts with modifications the proposal outlined in FERC’s March 18, 2010 Notice of Proposed Rulemaking (NOPR) in Docket No. RM09-18. In the NOPR, FERC had proposed that NERC, the FERC-approved Electric Reliability Organization (ERO) for the United States electric grid, revise its definition of the term “Bulk Electric System” to ensure that a uniform standard was applied in all regions in identifying facilities subject to the Reliability Standards requirements. Specifically, FERC had proposed to direct NERC to include all electric transmission facilities rated at 100 kV and above within the definition of “Bulk Electric System.” In doing so, FERC sought to eliminate potential gaps and inconsistencies in the identification of facilities subject to the Reliability Standards.

Adoption of Uniform Definition

FERC largely adopted the essential elements of its proposal in the NOPR. Thus, FERC directed NERC to modify its definition of “Bulk Electric System” to encompass all facilities deemed necessary for operating the interconnected electric transmission network. NERC must develop the modified definition through its Reliability Standards development process. But in FERC’s view, the revised definition must:

- 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 under the definition of “Bulk Electric System”;
- Create a “bright line” threshold that includes any transmission facility operating at 100 kV or higher in the definition of “Bulk Electric System,” except radial transmission facilities serving only load with one transmission source; and
- Include an exemption process and corresponding criteria by which facilities may be excluded from the definition of “Bulk Electric System.”

FERC’s proposed definition aims to eliminate gaps and improve consistency among the regions. FERC cited examples where higher-voltage facilities necessary to operation of the grid were not included within the “Bulk Electric System” (but would be under FERC’s revised definition), as well as inconsistent treatment by regions of transmission facilities. FERC does not seek to modify the portion of the “Bulk Electric System” definition that currently excludes radial lines.

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In response to comments on the NOPR, FERC clarified that the 100-kV threshold will not affect thresholds established in individual Reliability Standards (such as FAC-003, which generally applies to facilities 200 kV and higher). Additionally, NERC is not required to adopt the term “rated at” in connection with the 100-kV threshold; rather, NERC can choose to identify facilities “operated at” 100 kV and higher.

The Final Rule will become effective 60 days from the date it is published in the Federal Register. NERC’s proposal is due within one year after the effective date.

Exemption Process

In the Final Rule, FERC affirmed the adoption of an exemption process. However, in light of concerns raised by commenters about cost, timing, and other logistics, FERC declined to specify a particular process, and instead directed NERC to develop an exemption procedure via the stakeholder process and file the proposed procedure with FERC within one year of the effective date of the Final Rule. FERC provided some guidance on the contours of the procedure – for example, NERC’s proposed process should include “clear, objective, transparent, and uniformly applicable criteria for exemption of facilities that are not necessary for operating the grid.” NERC may delegate implementation of the exemption process to the Regional Entities, but must oversee the process (presumably in a manner similar to NERC’s delegation of its enforcement authority to the Regional Entities). FERC is authorized to audit the exemption process to ensure compliance and “to determine the appropriateness of a particular exemption.”

FERC limited NERC’s discretion over the development of the exemption process in certain respects. For example, FERC declined to establish any categorical exemptions, such as for industrial facilities, but NERC may consider parties’ concerns about exemption categories, which may provide NERC with an indirect method of adopting categorical exemptions. FERC also directed NERC to consider a process for including within the definition of “Bulk Electric System” any sub-100 kV “critical” facilities that are necessary to the operation of the grid. Finally, NERC must also consider adopting procedures for revoking exemptions.

Alternative Definition

Importantly, in apparent recognition of recent tensions between NERC and FERC and the statutory mandate that FERC defer to NERC’s technical expertise, the Final Rule allows NERC to propose an alternative definition of “Bulk Electric System.” Any such alternative definition must be “as effective as, or superior to, [FERC’s] proposed approach in addressing the identified technical and other concerns, and may not result in a reduction in reliability.” NERC must support its alternative proposal with a technical record that permits FERC to make an informed decision regarding the method’s effectiveness at (1) encompassing all facilities necessary to operate the interconnected transmission network within the definition; (2) preventing the inconsistencies and inaccuracies present under the current definition; (3) establishing an equivalent if not enhanced level of reliability as compared to FERC’s proposal; and (4) accurately depicting how the Regional Entities view their 100 kV and above facilities.

However, it remains to be seen what specific criteria NERC must satisfy in proposing an alternative. FERC rejected the use of a “material impact” test, specifically the test used by the Northeast Power Coordinating Council (NPCC) because it would exclude facilities that are necessary to operate the system. FERC determined there is no “consistent and comprehensive material impact test,” and thus the material impact test would lead to inconsistent results, with facilities being classified differently by different regions. FERC also appeared to reject NPCC’s test because it does not produce results that are

“accurate, consistent, and comprehensive.” Elsewhere in the Final Rule, FERC suggested that NERC’s alternative method must be “consistent, repeatable, and verifiable.” Still elsewhere, FERC noted that the method must produce results that are “consistent, repeatable, and comprehensive.” In light of these varying formulations of the standard that NERC must satisfy in proposing an acceptable alternative definition, it remains unclear whether NERC will be able to successfully propose an alternative to FERC’s definition.

Transition Plan

Along with its proposed definition, NERC must file with FERC a transition plan for entities with facilities brought under the Reliability Standards for the first time as a result of the new definition of “Bulk Electric System.” FERC anticipates that any such transition period will not exceed 18 months from the time FERC approves NERC’s revised definition and exemption process. FERC noted that NERC and the Regional Entities may exercise enforcement discretion during the transition period.

Unresolved Issues

Several issues remain unresolved in Order No. 743. For example, as discussed above, the criteria for evaluating any alternative definition proposed by NERC remain unclear.

Additionally, the Final Rule emphasizes that FERC’s reliability responsibility extends to those facilities that are “necessary for reliable operation of the system,” and states that FERC intends for the reliability rules to prevent “instability, uncontrolled separation, [and] cascading failure.” However, the facilities “necessary for reliable operation of the system” are not necessarily the same as those that would be governed by rules designed to prevent “instability, uncontrolled separation, [and] cascading failure.” Many facilities – particularly those owned and operated by smaller entities – are necessary for reliable operation of the system and thus apparently would fall under FERC’s reliability umbrella, but would not result in instability, uncontrolled separation or cascading failures if reliability problems arose on those facilities. Some of those facilities may now be brought under the Reliability Standards requirements as a result of the new definition of “Bulk Electric System” envisioned by FERC, in many cases with reliability benefits that are not readily discernible.

FERC also failed to clarify certain jurisdictional issues raised by commenters regarding the terms “Bulk Electric System” and “Bulk-Power System.” Under Section 215 of the Federal Power Act, FERC’s jurisdiction extends to the “Bulk-Power System.” In contrast, the Final Rule focuses on redefining “Bulk Electric System.” FERC declined in the Final Rule to elaborate on the precise contours of the jurisdictional boundaries between “Bulk-Power System” and “Bulk Electric System,” concluding that “more clarity and certainty is achieved . . . by focusing on whether facilities are part of the bulk electric system,” rather than plumbing the depths of its jurisdictional limits (which in FERC’s view encompass the “Bulk Electric System”).

Finally, for many generators, the Final Rule does not eliminate all uncertainty involving the applicability of the Reliability Standards to generator interconnection facilities. Concerning such facilities, FERC believes that the uniform modified version of the definition of “Bulk Electric System” will “eliminate regional discretion and ambiguity” but will not “significantly increase the scope of the present definition.” Generators with 100 kV and above interconnection facilities not presently subject to the Reliability Standards but uncertain about whether they will fall within the scope of the modified definition must apparently look for comfort in the proposed exemption process.



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

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