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FERC Spotlights NERC Compliance and Enforcement

In a series of orders last week, the Federal Energy Regulatory Commission (FERC) focused significant attention on the North American Electric Reliability Corporation (NERC), the FERC-approved Electric Reliability Organization (ERO) charged with overseeing the reliability of the Bulk Electric System in the United States. These orders signal FERC's interest in achieving full compliance with laws, regulations and policies pertaining to reliability.

FERC Proposes to Adopt Uniform Definition for Bulk Electric System

In a Notice of Proposed Rulemaking (NOPR) (FERC Docket No. RM09-18), FERC proposed to direct NERC to include all electric transmission facilities with a rating of 100 kV or above in its definition of the term "Bulk Electric System." Owners and operators of these facilities would be responsible for complying with NERC's mandatory and enforceable Reliability Standards.

NERC already defines the "Bulk Electric System" generally to include facilities that operate at 100 kV or higher, but it allows considerable discretion for the Regional Entities – those regional bodies charged with front-line enforcement of the Reliability Standards – to determine which facilities within their respective regions actually qualify. In its NOPR, FERC proposed that in the future there will be a presumption that any transmission facility operating at 100 kV or higher would be considered part of the Bulk Electric System subject to the Reliability Standards, and that Regional Entities would have to obtain approval for any proposed exemptions. Any such approval would have to be obtained from both NERC and FERC, on a facility-by-facility basis. One significant exception would be for radial transmission facilities serving only load with one transmission source, which FERC agrees generally would not be subject to the Reliability Standards.

As justification for its proposed revision, FERC cited the need for consistency among regions, NERC's historical application of a 100-kV threshold for identifying facilities comprising the Bulk Electric System, and recent significant reliability disturbances caused by facilities in the 115-kV to 138-kV range. FERC noted that of all the regions, only the Northeast Power Coordinating Council, Inc. (NPCC) currently has exclusions for a significant number of facilities above 100 kV (approximately 33) which would be affected by this new rule.

Although this proposal would not immediately impact significant numbers of entities outside of the NPCC region, it could substantially increase the amount of time and resources involved in obtaining an exclusion from the Reliability Standards in the future. To obtain such an exclusion, an entity would have to build a substantial case to support three levels of review (the Regional Entity, NERC and FERC), on a facility-by-facility basis. In addition, both the Regional Entities and NERC may be less willing to grant exceptions in light of the presumptions established by FERC in the NOPR. As a consequence, the proposed rule could ultimately result in substantial impediments to obtaining exceptions from the Reliability Standards, even for facilities that have little to no impact on the Bulk Electric System.

Moreover, the proposed rule does not eliminate all uncertainty involving the applicability of the Reliability Standards to generator interconnection facilities. The proposed rule would apply to "all electric transmission facilities with a rating of 100 kV or above." Unanswered is whether a generator interconnection line that is significant in terms of voltage rating, length or capacity size is a "transmission facility" to begin with, nor which entity or entities should register those facilities, if at all.

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Comments are due at FERC within 45 days after the NOPR is published in the *Federal Register*.

FERC Directs NERC to Make Progress on Reliability Standards Development

In three separate orders, FERC directed NERC to make progress on Reliability Standard developments. Specifically, FERC set a deadline for NERC to develop and file modifications to Reliability Standards TLP-002-0 (System Performance Following Loss of a Single Bulk Electric System), BAL-003-0 (Frequency Response and Bias), and FAC-008-1 (Facility Ratings Methodology). FERC originally approved each of these Reliability Standards in Order No. 693 (issued in March 2007), but it directed NERC to develop certain modifications to each Standard. At the time, FERC did not set deadlines for NERC to submit the modifications. In its orders here, FERC noted that three years have passed since it directed NERC to submit the modifications, and directed NERC to make progress soon. The deadlines for NERC to file modifications are June 30, 2010, for TPL-002-0 (in FERC Docket No. RM06-16-009); 90 days for FAC-008-1 (in FERC Docket No. RR09-6-000); and six months for BAL-003-0 (in FERC Docket No. RM06-16-010). It remains to be seen what will happen if these deadlines are not met.

In addition, FERC also directed NERC to revise its Standards Development Process (in FERC Docket No. RR09-6-000). FERC explained that it is concerned that NERC's current process for modifying and proposing new Reliability Standards poses a risk that NERC will be unable to comply with Section 215 of the Federal Power Act. Section 215 authorizes FERC to direct NERC to submit a new or modified Reliability Standard. Under NERC's current Standards Development Process, each new or modified Reliability Standard must be approved by two-thirds of the NERC stakeholder ballot body, then presented to the NERC Board of Trustees for approval. The new or modified Reliability Standards are drafted by a team of industry volunteers, who FERC suggested may not necessarily agree or comply with FERC's directives, and may draft non-responsive Standards. Therefore, there are various pitfalls within the NERC Standards Development Process that may prevent NERC from complying with its statutory obligation to obey FERC's directives to submit new or modified Reliability Standards. Accordingly, FERC directed NERC to submit proposed modifications to the NERC Standards Development Process eliminating the potential conflicts within 90 days.

FERC Exempts Notice of Penalty Review from New Penalty Guidelines

Finally, FERC last week issued new Penalty Guidelines modeled after the United States Sentencing Guidelines (in FERC Docket No. PL10-4-000). A complete summary of the Penalty Guidelines and FERC's accompanying Policy Statement on implementation of the Guidelines can be obtained by clicking [here](#).

The Penalty Guidelines are intended to provide consistency and transparency among the civil penalties imposed by FERC for violations of the statutes that it administers and its rules, regulations, and orders thereunder. FERC's civil penalty authority extends to violations of the Reliability Standards and other rules and regulations under Section 215 of the Federal Power Act. FERC has authority to impose civil penalties for violations of the Reliability Standards, but has authorized NERC (as the ERO) and the Regional Entities to impose monetary penalties for violations of the Reliability Standards, subject to review by FERC. Notably, in the Policy Statement on the Penalty Guidelines, FERC indicated that it will generally follow prior procedures for determining whether to review a Notice of Penalty filed by NERC for violations of the Reliability Standards, rather than strictly applying the new Penalty Guidelines. FERC also stated that it anticipates only occasionally considering the results of applying the Penalty Guidelines for an "out-of-ordinary" Notice of Penalty; and even then the Penalty Guidelines will not be determinative of

FERC's decision whether to proceed with further review. Regulated entities may have to wait until FERC applies the Penalty Guidelines in actual cases to obtain further clarity in this area.



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

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