

ClientAlert

Energy, Infrastructure and Project Finance

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Reliability Developments— FERC Rules on Compliance Registry Issues

The Federal Energy Regulatory Commission (“FERC”) recently issued two notable reliability orders regarding the Compliance Registry.

Compliance Registry Orders

FERC issued two orders addressing appeals of registration determinations made by the North American Electric Reliability Corporation (“NERC”). The first order denied the appeal of the City of Holland, Michigan Board of Public Works (“Holland”) and the second granted the appeal of the US Department of Energy, Portsmouth/Paducah Project Office (“DOE Portsmouth”). Although the orders are split, they provide useful guidance regarding FERC’s handling of challenges to NERC’s registration determinations. In addition, the dissent in Holland highlights the still unresolved question of how to differentiate between transmission and local distribution under Section 215 of the Federal Power Act (“FPA”).

Holland

The order denying Holland’s appeal upheld NERC’s determination that Holland is a transmission owner (“TO”) and transmission operator (“TOP”). Holland operates a municipal system that serves approximately 27,000 retail customers. The system includes 24 miles of 138 kV lines and seven generating units with nameplate capacities ranging from 11.5 MWs to 83 MWs. Holland interconnects with the Michigan Electric Transmission Company (“METC”) with two separate 138 kV lines. The interconnection lines are further connected via a 24-mile line, forming a loop. Holland stated that it does not sell power into the market, does not transmit power across its system, and that power only flows into its system. Accordingly, Holland argued that it is exempt from NERC registration because its facilities are only used in the local distribution of energy and as a radial facility. FERC disagreed with both assertions.

FERC determined that Holland did not qualify for the local distribution exemption. FERC noted that it has not adopted a specific methodology for determining what constitutes local distribution, but cited the description provided in Order No. 693 that transmission facilities “serve to transmit electricity in bulk from generation sources to concentrated areas of retail customers,” whereas distribution facilities “move the electricity to where these



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retail customers consume it.” FERC determined that Holland’s 138 kV facilities function as transmission facilities because they transport power at higher voltages to distribution substations where the power is stepped down for distribution to Holland’s retail load. FERC also analyzed the voltage level and configuration of Holland’s 138 kV facilities and found they supported a finding that the facilities are transmission rather than distribution.

FERC also found that Holland did not qualify as a radial facility because the facilities are not radial in nature; rather, they are looped and experience bi-directional flow under certain conditions. FERC reiterated that NERC determined that the loss of Holland’s internal generation could cause a significant increased draw from the METC system that could impact the Bulk Power System. FERC concluded that even though Holland was properly registered as a TO and TOP, that it could work with NERC to try to prove that it should not be subject to certain of the TO and TOP requirements based on the characteristics of its facilities.

In dissent, Commissioner Cheryl A. LaFleur stated that “Holland’s argument in this case raises fundamental questions about the limits of the Commission’s authority” under the FPA concerning the delineation between transmission and distribution that have not been resolved. In Order No. 743-A, FERC authorized NERC to develop a process for differentiating between transmission and distribution as part of the process of developing a revised definition of the Bulk Electric System. Commissioner LaFleur stated that FERC should have deferred consideration of whether Holland’s facilities are transmission until FERC reviews NERC’s process for differentiating between transmission and local distribution.

Commissioner LaFleur’s statements are significant because the “threshold questions” about FERC/NERC’s jurisdiction under Section 215 of the FPA are much broader than Holland’s appeal and directly linked to the still unsettled definition of the “Bulk Electric System” (“BES Definition”). In Order No. 743, as clarified in Order No 743-A, FERC directed NERC to develop and file with FERC within one year a revised BES Definition. NERC filed a revised BES Definition with FERC on January 25, 2012 (Docket No. RM12-6) in what it is calling Phase I of Project 2010-17 Definition of Bulk Electric System. That filing, however, has not been noticed by FERC for comment. In what NERC is calling “Project 2010-17 Definition of Bulk Electric System Phase II,” a Standard Authorization Request (“SAR”) was issued to address industry comments raised in Phase I that could not be addressed within the time deadlines imposed by Order No. 743. The SAR proposes to further revise the BES Definition and provide technical justifications. Notably, the SAR states that “all aspects of the Phase I Definition are open to discussion and possible revision.” Thus, the BES Definition filed with FERC on January 25, 2012 could be completely rewritten.

Because “NERC’s process for differentiating between transmission and local distribution” is inextricably linked to its development of the BES Definition, there is an imminent need for FERC to review NERC’s process. Time is of the essence because Phase II of the BES Definition could result in a tremendous waste of resources if further revisions and technical justifications to the BES Definition are not bounded by the statutory limitations of Section 215 of the FPA. Until the fundamental questions about the limits of FERC/NERC’s jurisdictional authority are answered, entities, particularly those that are not currently NERC-registered, would be well-advised to get involved in the development of the BES Definition, including the recently commenced Phase II process.

DOE Portsmouth

In contrast to Holland, FERC granted DOE Portsmouth’s appeal of its registration as a Load-Serving Entity (“LSE”) on NERC’s Compliance Registry. DOE Portsmouth owns the Portsmouth Gaseous Diffusion Plant, a uranium enrichment plant with one operational switchyard interconnected with the transmission system of the Ohio Valley Electric Corporation (“Ohio Valley”) (the “Site”). DOE Portsmouth leases the Site to the United States Enrichment Corporation (“USEC”). In support of its determination that DOE Portsmouth is an LSE, NERC stated that DOE Portsmouth serves the load of USEC and various sublessors at the Site via a power contract that it has with Ohio Valley. In rejecting NERC’s rationale, FERC stated that “the issue of who uses the power does not establish whether an entity has undertaken the responsibility” of an LSE. Rather, the Registry Criteria states that LSEs secure energy “to serve the electrical demand and energy requirements of its end-use customers.” DOE Portsmouth asserted that it does not receive a fee for providing electrical service and therefore it does not have end-use customers. FERC agreed, explaining that USEC merely reimburses DOE Portsmouth for the energy that DOE Portsmouth purchases from Ohio Valley on a *pro rata* basis to supply to USEC. FERC concluded that the arrangement was insufficient to establish that DOE Portsmouth has accepted the responsibility to serve lessees as an LSE. FERC remanded the matter to NERC for a decision consistent with the order. FERC also directed NERC to either register Ohio Valley as an LSE due to the service it provides to DOE Portsmouth, or to submit a finding within 90 days showing cause why Ohio Valley should not be registered as an LSE.

This case is significant because FERC reversed NERC's registration determination based on the record in the proceeding *as well as other publicly available information*. FERC's willingness to reach outside the record and conduct what Commissioner Norris called, in dissent, a *de novo* type review is encouraging for future challenges to NERC's registration determinations. Although it is unclear if FERC's approach will become the exception or the rule in subsequent challenges to NERC's registration determinations, it provides a glimmer of hope that FERC will not simply "rubber stamp" NERC's registry determinations and perhaps encourage NERC to look more critically at whether its determinations respect appropriate boundaries.

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