

134 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 40

[Docket No. RM09-18-001; Order No. 743-A]

Revision to Electric Reliability Organization Definition of Bulk Electric System

(Issued March 17, 2011)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Rehearing

SUMMARY: The Commission denies rehearing and otherwise reaffirms its determinations in Order No. 743. In addition, the Commission clarifies certain provisions of the Final Rule. Order No. 743 directed the Electric Reliability Organization (ERO) to revise the definition of the term “bulk electric system” through the ERO’s Reliability Standards Development Process to address the Commission’s policy and technical concerns and ensure that the definition encompasses all facilities necessary for operating an interconnected electric transmission network pursuant to section 215 of the Federal Power Act.

EFFECTIVE DATE: This order on rehearing and clarification will become effective upon publication in the **FEDERAL REGISTER**.

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SUPPLEMENTARY INFORMATION:

134 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Revision to Electric Reliability Organization Definition of Bulk Electric System Docket No. RM09-18-001

ORDER NO. 743-A

ORDER ON REHEARING

(Issued March 17, 2011)

I. Introduction

1. On November 18, 2010, the Commission issued a Final Rule (Order No. 743)¹ directing the Electric Reliability Organization (ERO), through the ERO's Reliability Standards Development Process, to revise its definition of the term "bulk electric system" to address the Commission's technical and policy concerns, including inconsistency in application, lack of oversight and exclusion of facilities that are required for the Reliable Operation of the interconnected transmission network, and ensure that the definition encompasses all facilities necessary for operating an interconnected electric transmission

¹ *Revision to Electric Reliability Organization Definition of Bulk Electric System*, Order No. 743, 75 FR 72910 (Nov. 26, 2010), 133 FERC ¶ 61,150 (2010).

network, pursuant to section 215 of the Federal Power Act (FPA).² The Commission stated that it believes the best way to accomplish these goals is to eliminate the regional discretion in the current definition, maintain a bright-line threshold that includes all facilities operated at or above 100 kV except defined radial facilities, and establish an exemption process and criteria for excluding facilities that are not necessary for operating the interconnected transmission network. However, the Final Rule allowed the ERO to develop an alternative proposal for addressing the Commission's concerns with the present definition with the understanding that any such alternative must be equally efficient and effective³ as the Commission's suggested approach in addressing the identified technical and other concerns, and may not result in a reduction in reliability.

2. In this order, we deny requests for rehearing of the Final Rule. Further, we grant in part, and deny in part, requests for clarification of the Final Rule, as discussed below.

A. Summary of Order No. 743

3. In Order No. 693, the Commission approved, with reservations, the current North American Electric Reliability Corporation (NERC) definition of the term "bulk electric system."⁴ That definition provides:

² 16 U.S.C. 824o (2006).

³ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 31 (2007), *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁴ Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 75.

As defined by the Regional Reliability Organization, the electrical generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100 kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition.⁵

4. However, the Commission noted its concern that the current “bulk electric system” definition has the potential for gaps in coverage of facilities, and indicated that it would revisit the issue.⁶ In Order No. 743, the Commission returned to the issue. The Commission identified several concerns with the current definition that may compromise reliability. The Commission indicated that Order No. 743’s aim is to eliminate inconsistencies across regions, eliminate the ambiguity created by the current discretion in NERC’s definition of bulk electric system, provide a backstop review to ensure that any variations do not compromise reliability, and ensure that facilities that could significantly affect reliability are subject to mandatory rules.⁷ Thus, Order No. 743 directed the ERO to revise the definition of “bulk electric system” through the NERC Standards Development Process to address the Commission’s concerns.⁸ Order No. 743 also directed the ERO to develop an exemption process that includes clear, objective,

⁵ *Id.* n.47 (quoting NERC’s definition of “bulk electric system”).

⁶ *Id.* P 77.

⁷ Order No. 743, 133 FERC ¶ 61,150 at P 2.

⁸ *Id.* P 16.

transparent and uniformly applicable criteria for exempting facilities that are not necessary for operating the interconnected transmission grid.⁹

5. The Commission stated that it believes the best way to address the identified concerns is to eliminate the Regional Entities' discretion to define "bulk electric system" without ERO or Commission review, maintain a bright-line threshold that includes all facilities operated at or above 100 kV except defined radial facilities, and adopt an exemption process and criteria for excluding facilities that are not necessary to operate an interconnected electric transmission network. However, the Commission specified that NERC may propose a different solution that is equally efficient and effective as the Commission's suggested approach in addressing the Commission's technical and other concerns so as to ensure that all necessary facilities are included within the scope of the definition.¹⁰

B. Requests for Rehearing

6. The following entities have filed timely requests for rehearing or for clarification of Order No. 743: American Public Power Association (APPA); Consumers Energy Company (Consumers); Edison Electric Institute (EEI); Exelon Corporation (Exelon); National Rural Electric Cooperative Association (NRECA); New York State Public Service Commission (NYPSC); Portland General Electric Company (Portland General); Public Power Council; City of Redding, California (Redding); Public Utility District

⁹ *Id.* P 112-115.

¹⁰ *Id.*

No. 1 of Snohomish County, Washington (Snohomish); Transmission Access Policy study Group (TAPS); Western Petitioners;¹¹ Wisconsin Electric Power Company (Wisconsin Electric); and Transmission Agency of Northern California (TANC).¹²

II. Discussion

A. Scope of Order No. 743 and Commission Directive

7. Section 215(d)(5) of the FPA authorizes the Commission to direct the ERO to submit to the Commission a new or revised Reliability Standard that addresses a specific matter identified by the Commission.¹³ In Order No. 743, the Commission explained that this authority also includes the authority to direct the ERO to revise the definition of a term used in a Reliability Standard.

¹¹ Blachly-Lane Electric Cooperative, Central Electric Cooperative, Inc., Central Lincoln People's Utility District, Clearwater Power Company, Consumers Power Inc., Coos-Curry Electric Cooperative, Inc., Douglas Electric Cooperative, Fall River Rural Electric Cooperative, Inc., Lane Electric Cooperative, Inc., Lincoln Electric Cooperative, Inc., Lost River Electric Cooperative, Northern Lights, Inc., Mason Public Utility District No. 3, Northwest Public Power Association, Northwest Requirements Utilities, Okanogan County Electric Cooperative, Inc., Pacific Northwest Generating Cooperative, Public Utility District No. 1 of Clallam County, Public Utility District No. 1 of Snohomish County, Raft River Rural Electric Cooperative, Inc., Salem Electric Cooperative, Salmon River Electric Cooperative, Inc., Umatilla Electric Cooperative, Utah Associated Municipal Power Systems, Washington Rural Electric Cooperative Association, and West Oregon Electric Cooperative, Inc.

¹² The California Public Utilities Commission (CPUC) filed comments on January 25, 2011. The Commission rejects the CPUC's comments as an untimely request for rehearing under Rule 713(b) of the Commission's Rules of Practice and Procedure.

¹³ Order No. 743, 133 FERC ¶ 61,150 at P 29.

8. Pursuant to this authority, the Commission directed the ERO to modify the definition of “bulk electric system” in order to address certain technical and policy concerns identified by the Commission.¹⁴ Specifically, the Commission observed that Regional Entities currently have broad discretion to define the parameters of the bulk electric system in their regions, and that the exercise of this discretion has led to inconsistencies in how facilities are classified within and among regions, to the effect that some facilities necessary to reliably operate the interconnected transmission network have been excluded from the obligation to comply with mandatory Reliability Standards. The Commission stated that one means to address its concerns is to eliminate the regional discretion in the ERO’s current definition, maintain the bright-line threshold that includes all facilities operated at or above 100 kV except defined radial facilities, and establish an exemption process and criteria for excluding facilities the ERO determines are not necessary for operating the interconnected transmission network.¹⁵ However, the Final Rule made clear, the ERO may develop an alternative proposal for addressing the Commission’s concerns with the current definition and any such alternate proposal must be equally efficient and effective as the Commission’s suggested approach for addressing the identified concerns, may not result in a reduction in reliability, and must be supported with a technical analysis that demonstrates and explains, with a technical record

¹⁴ *Id.* P 30.

¹⁵ *Id.*

sufficient for the Commission to make an informed decision, how it provides the same level of reliability as the Commission's suggested solution.¹⁶

1. Identifying the Specific Matter to be Addressed

9. NRECA requests clarification, or in the alternative rehearing, that the Commission seeks to resolve a narrow concern that ambiguity in the bulk electric system definition and lack of backstop review at NERC has permitted inconsistencies across regions, and that the Northeast Power Coordinating Council (NPCC) in particular has not made all facilities that could significantly affect reliability subject to the Reliability Standards. NRECA expresses concern that the Final Rule states in several places that NERC must address the Commission's "technical and other concerns" without specifying those concerns.¹⁷ NRECA asks that the Commission clarify the specific matter and present a clear list of technical and other concerns to assist NERC in developing appropriate and responsive solutions.

10. NRECA further seeks clarification whether NERC, in exercising its technical expertise, may choose to address the specific concerns identified by the Commission through an alternative other than an amendment to the definition of bulk electric system. NRECA points out that, while Order No. 743 sets out a "preferred solution," it also allows the ERO to develop an alternative proposal for addressing the Commission's concerns. NRECA states that it is not clear from the Final Rule if the ERO has discretion

¹⁶ *Id.* P 31, 74.

¹⁷ NRECA at 11; *citing* Order No. 743, 133 FERC ¶ 61,150 at P 16, 31 and 96.

whether and how it amends the definition of bulk electric system, or only how to amend the definition. NRECA seeks clarification, or in the alternative rehearing, that the ERO can comply with the Final Rule by filing an alternative approach that does not amend the definition, provided that the alternative addresses the Commission's concerns with inconsistency, lack of oversight and exclusion of facilities that are required for the reliable operation of the interconnected transmission network. According to NRECA, denying the ERO the ability to develop an alternative to amending the bulk electric system definition is tantamount to the Commission prescribing the text of a Reliability Standard and denies the ERO a full range of options in addressing the specific matter identified by the Commission.

Commission Determination

11. We clarify that the specific issue the Commission directed the ERO to rectify is the discretion the Regional Entities have under the current bulk electric system definition to define the parameters of the bulk electric system in their regions without any oversight from the Commission or NERC.¹⁸ As we explained in the Final Rule, NPCC's use of this discretion has resulted in an impact-based approach to defining the bulk electric system that allows significant subjectivity in application and thus creates anomalous results.¹⁹ While NPCC's use of its discretion brought the problems with the current definition to our immediate attention, the Commission's concern is potentially broader

¹⁸ Order No. 743, 133 FERC ¶ 61,150, at P 72.

¹⁹ *Id.* P 77-78.

because any region could use its discretion to define the bulk electric system in a way that leads to similar inconsistent and anomalous results.

12. We decline to provide the clarification NRECA requests regarding NERC's ability to address the specific matter through means other than revising the definition, and also deny rehearing on the issue. As noted above, our concern with the current bulk electric system definition is rooted in the unfettered discretion granted therein to Regional Entities to define the term. Contrary to NRECA's claim, it is well within our section 215(d)(5) authority to direct NERC to address the specific issue we have identified – the overly broad definition. We have not directed the ERO to revise the definition to incorporate a specified result; rather, we require that the change address our concerns.

2. Standard of Review

13. NRECA requests clarification that the Commission is not imposing a higher standard of review in the Final Rule than permitted by section 215 of the FPA. NRECA explains that the Final Rule allows the ERO to develop an alternative to the Commission's suggested approach provided that it is "as effective as, or more effective than, the Commission's proposed approach" and must not "result in a reduction in reliability."²⁰ NRECA contends that this standard of review is not in the statute and, rather, that the Commission should clarify that it will judge by the statutory provision that the proposal provides for an "adequate level of reliability." NRECA contends that this phrase connotes a range of possible solutions. NRECA claims that the Commission's

²⁰ NRECA at 38, *quoting* Order No. 743, 133 FERC ¶ 61,158 at P 141.

approach, which allows the Commission's suggested solution to serve as a benchmark for all subsequent proposals, suggests a different, higher standard than "adequate level of reliability."

Commission Determination

14. FPA section 215(d)(2) establishes the standard of review the Commission must apply to ERO submissions with respect to the content of Reliability Standards:

The Commission may approve, by rule or order, a proposed reliability standard or 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 shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard and 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, but shall not defer with respect to the effect of a standard on competition. A proposed standard or modification shall take effect upon approval by the Commission.²¹

As the statute specifies, the standard of review the Commission must utilize is whether the proposed Reliability Standard or modification to a Reliability Standard is "just, reasonable, not unduly discriminatory or preferential, and in the public interest."

15. We disagree with NRECA's assertion that section 215(c)(1) establishes a standard of review the Commission must apply to ERO submissions. Section 215(c) sets forth the criteria the Commission must consider in certifying an ERO, and section 215(c)(1) specifies that one of the considerations for certification is whether the ERO applicant

²¹ 16 U.S.C. 824o(d)(2).

“has the ability to develop and enforce ... reliability standards that provide for an adequate level of reliability of the bulk-power system.”²²

16. Certainly, whether a proposed Reliability Standard provides for an adequate level of reliability is included in the factors used in determining whether the proposal is just and reasonable, but it is not the standard of review.²³ The Commission’s statement that any alternative proposal must be “as effective as, or more effective than, the Commission’s proposed approach” and must not “result in a reduction in reliability” provides guidance regarding the Commission’s view of what is necessary to produce not only an adequate level of reliability but also a result that accords with the section 215(d)(2) review criterion.²⁴

B. Jurisdictional Issues

17. Entities claim that the Commission over-stepped its jurisdiction in three ways. First, they contend that the Commission exceeded its authority by requiring a bright-line 100 kV threshold for determining which facilities are included in the bulk electric system.

²² 16 U.S.C. 824o(c).

²³ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 320-338, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

²⁴ *See Transmission Relay Loadability Reliability Standard*, Order No. 733-A, 134 FERC ¶ 61,127, at P 24-27 (2011) (stating that the Commission’s detailed guidance on a possible approach to address its underlying concern, including a statement that any alternative approach must be “equally efficient and effective” does not establish a “rebuttable presumption” in favor of the Commission’s suggested approach).

Second, entities argue that Order No. 743 fails to recognize the statutory exclusion of facilities used in local distribution of electric energy. Third, entities claim that the Commission fails to give due weight to the ERO's technical expertise. Several requests for rehearing, such as the NYPSC, Public Power Council and Snohomish, merge these arguments together in more global claims that the Final Rule is in error and should be withdrawn.

1. 100 kV Bright-Line Threshold

18. The NYPSC and Public Power Council argue that the Commission's decision to "direct the ERO to define the bulk electric system as all facilities operated at 100 kV and above" is arbitrary and capricious.²⁵ They state that section 215(a) of the FPA explicitly excludes facilities used in local distribution of electric energy. Thus, the NYPSC reasons, "by defining the bulk-power system as all facilities operating at above 100 kV, the Commission exceeded its jurisdiction by encompassing facilities that are clearly part of the non-bulk power system...."²⁶ The NYPSC contends that the Commission incorrectly assumes that a facility is considered part of the bulk electric system simply because it is operated at or above 100 kV. The NYPSC recites evidence, presented in its Notice of Proposed Rulemaking (NOPR) comments, that facilities in New York City do not serve a bulk system function due to the high concentration of load served by those lines. While noting that the Final Rule dismissed this evidence, the NYPSC contends that

²⁵ NYPSC at 12; *see also* Public Power Council at 8-9.

²⁶ NYPSC at 13.

“it is invalid to conclude that all facilities rated at 100 kV and above support the bulk-power system based on a belief that ‘most’ of those facilities are not involved in local distribution.”²⁷ Similarly, Public Power Council and Snohomish contend that the Final Rule, by mandating a 100 kV bright-line test, will improperly classify many 115 kV distribution facilities in the Western Interconnection as bulk electric system facilities.

19. The NYPSC notes that the Final Rule explained that entities would have an opportunity to seek an exemption if they believe certain facilities should not be included in the bulk electric system. Based on this, the NYPSC claims that the Final Rule implicitly acknowledged that various non-jurisdictional facilities are included within the Commission’s “redefinition” of bulk electric system. It also claims that this approach is inappropriate, i.e., the Commission cannot assume it has jurisdiction over facilities operated above 100 kV unless and until an entity demonstrates otherwise. The NYPSC claims that the Commission also conceded that the 100 kV threshold is overly broad because “several 115 and 138 kV facilities that some entities term as ‘distribution’ may be needed to reliably operate the interconnected transmission system.”²⁸ According to the NYPSC, by stating that these facilities “may” be needed for reliability of the interconnected system, the Commission acknowledges that they may not be needed. Similarly, Portland General argues that the Commission cannot claim jurisdiction over any local distribution facilities and expresses concern that the above language from the

²⁷ NYPSC at 15.

²⁸ NYPSC at 17, *quoting* Order No. 743, 133 FERC ¶ 61,150 at P 37.

Final Rule wrongly suggests that some local distribution facilities are jurisdictional under section 215.

Commission Determination

20. At the outset, the Commission emphasizes that Order No. 743 did not mandate or direct NERC to adopt a 100 kV bright-line threshold. Order No. 743 directed NERC to undertake the process of revising the bulk electric system definition to address the Commission's concerns about the broad discretion the current definition grants to Regional Entities to modify the definition without Commission or ERO oversight, and provided a suggested solution. Specifically, the Order directed the ERO to revise the definition of bulk electric system "through the NERC Standards Development Process to address the Commission's concerns."²⁹ The Commission stated its belief that one effective way to address those concerns would be to eliminate the regional discretion contained in the current definition, which allows Regional Entities to define the term without Commission or ERO oversight; maintain the threshold contained in the current definition, which includes all facilities operated at or above 100 kV except defined radial facilities; and adopt an exemption process and criteria for excluding facilities that the ERO determines are not necessary to operate an interconnected electric transmission network. The Final Rule, however, did not mandate this approach as it further provided

²⁹ Order No. 743, 133 FERC ¶ 61,150 at P 16.

that NERC “may propose a different solution that is as effective as, or superior to, the Commission’s proposed approach.”³⁰

21. Order No. 743’s approach is entirely within the Commission’s statutory authority and properly allows the ERO to develop the revised bulk electric system definition using its technical expertise. We, therefore, reject the requests for rehearing arising from the inaccurate premise that the Commission mandated a 100 kV bright-line threshold. Beyond the concerns related to the Commission’s authority, the substance of the arguments raised by the NYPSC, Public Power Council, Snohomish and Western Petitioners relate to the term “used in local distribution” and differentiating between local distribution and transmission, which we address below.

22. Further, we disagree with the NYPSC’s claim that the Final Rule implicitly acknowledges that various non-jurisdictional facilities are included within the Commission’s “redefinition” of bulk electric system. As we clarify herein, regardless of the 100 kV threshold, facilities that are determined to be local distribution will be excluded from the bulk electric system. Further, NERC has yet to develop a modified definition, so the NYPSC’s claim is unfounded at this time.

2. Facilities Used in Local Distribution

23. Western Petitioners, Portland General, Snohomish, and Redding point out that section 215(a) of the FPA expressly exempts facilities “used in the local distribution of electric energy” and, in section 215(i), provides that the ERO “shall have authority to

³⁰ *Id.*

develop and enforce compliance with reliability standards for only the bulk-power system.” On this basis, Western Petitioners and Redding argue that the Final Rule errs by not clearly stating that the revised definition of bulk electric system must exclude all facilities that are used in local distribution. Western Petitioners suggest that the Final Rule, by emphasizing that the revised definition must include “all facilities necessary for operating an interconnected electric transmission network,” including lower voltage facilities operated in parallel and in support of higher voltage facilities, “could sweep in numerous local distribution facilities.”³¹

24. Similarly, Portland General claims that the Commission erred by failing to clearly and consistently acknowledge the statutory exclusion of facilities used in local distribution of energy. Portland General argues that the failure to clearly delineate this exclusion is inconsistent with *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003), where the court rejected the Commission’s interpretation of the phrase “used in local distribution” in section 201 of the FPA as rewriting the statute to exclude from the Commission’s jurisdiction only facilities used *exclusively* in local distribution.

Commission Determination

25. We disagree that the Final Rule is at odds with commenters’ view. In Order No. 743, the Commission acknowledged that “Congress has specifically exempted ‘facilities used in the local distribution of electric energy’” from the Bulk-Power System

³¹ Western Petitioners at 10; *see also* Public Power Council at 16.

definition.³² Since such facilities are exempted from the Bulk-Power System, they also are excluded from the bulk electric system. Therefore, the Commission agrees with Western Petitioners and others that facilities used in the local distribution of energy should be excluded from the revised bulk electric system definition.

3. Due Weight to Expertise of the ERO

26. As mentioned above, the NYPSC, Snohomish and Public Power Council characterize the Final Rule as mandating the ERO to develop a revised definition of bulk electric system that incorporates a nationally uniform, 100 kV bright-line test. Based on this understanding, they argue that the Final Rule's directive exceeds the Commission's authority under section 215(d)(5) of the FPA because it limits NERC's and the Western Electric Coordinating Council's (WECC) "substantial discretion" to develop Reliability Standards based upon their technical expertise. Public Power Council and Snohomish claim that the directive also denies the due weight to which the ERO or an Interconnection-wide Regional Entity is entitled pursuant to FPA sections 215(d)(2) and (3).

27. Public Power Council and Snohomish argue that the elimination of regional discretion directed in the Final Rule based on a desire for uniformity is unsupported. They also claim that this is inconsistent with the intent of Congress to allow for regional variation as evidenced by the provisions of section 215 that require the ERO to rebuttably presume that a WECC-developed Reliability Standard satisfies the statutory criteria for

³² Order No. 743, 133 FERC ¶ 61,150 at P 37.

approval and that the Commission give due weight to WECC's expertise. Public Power Council and Snohomish also cite to the legislative history to support their claim that Congress recognized the need for regional differences and rejected a uniform, centralized approach. Further, they argue that "due weight" equates to "substantial deference" based on court precedent and statutory analysis.³³

28. The NYPSC, Snohomish and Public Power Council claim that, while the Commission has authority under section 215(d)(5) of the FPA to require the ERO to address a specific matter, the Commission went beyond its authority pursuant to that provision by prescribing the particular content of a Reliability Standard. They contend that the ERO, in the first instance, should decide how the Commission's specific concerns are best addressed. The NYPSC acknowledges that the Commission indicated that the ERO has discretion to develop an alternative that is as effective as, or superior to, the Commission's bright-line approach, but claims that the "narrowly tailored guidance" limits the ERO's discretion and, thus, the Commission acted beyond its statutory authority. For all these reasons, according to the NYPSC and Public Power Council, the Commission abused its discretion in imposing a 100 kV bright-line rule, thereby denying NERC and WECC the opportunity to develop a different threshold or methodology based on their expertise.

³³ Snohomish at 18-19, *citing, e.g., City of Oconto Falls v. FERC*, 204 F.3d 1154 (D.C. Cir. 2000); Public Power Council at 19-20.

Commission Determination

29. As indicated previously, Order No. 743 did not mandate a specific result. Rather, the Commission determined that NERC should use its technical expertise to develop a definition that addresses the Commission's concerns with regional discretion in the current definition. The present definition contains the 100 kV reference, and the Commission did not change it in Order No. 743, other than to suggest a solution that would remove "generally" from the current definition's reference to a 100 kV threshold and eliminate unchecked regional discretion. The Commission's suggestion of one way to address the enumerated concerns does not preclude NERC from proposing an alternate solution.

30. Public Power Council and Snohomish argue that there is no evidence supporting the Commission's decision to require NERC to develop a uniform national bulk electric system definition. However, uniformity, absent a showing that the alternative is more stringent or necessitated by a physical difference, has been a hallmark of the mandatory Reliability Standards construct since its inception. In establishing the framework for developing Reliability Standards, we adopted the principle that proposed Reliability Standards should "be designed to apply throughout the interconnected North American Bulk-Power System, to the maximum extent this is achievable with a single Reliability

Standard.”³⁴ The same principle holds true for definitions contained within the Reliability Standards.

31. Moreover, we are not prohibiting the Interconnection-wide regional entities from arriving at their own regional differences. However, as we stated in Order No. 743, “[c]ommenters have not provided compelling evidence that the proposed definition should not apply to the United States portion of the Western Interconnection as a threshold matter.”³⁵ Conversely, the Commission does have a compelling concern that the subjectivity and lack of ERO and Commission oversight embodied in the current definition could result in the problems we identified in the NPCC region occurring in other regions, further supporting adoption of a uniform national definition. As Order No. 743 indicated, establishing such a uniform national definition does not preclude a region from proposing a regional difference that is more stringent than the continent-wide definition, including a regional difference that addresses matters that the continent-wide definition does not, or a regional definition that is necessitated by a physical difference in the Bulk-Power System.³⁶

32. The Commission finds that the arguments by Public Power Council and Snohomish that the Commission has failed to give due weight to NERC or an Interconnection-wide Regional Entity as required under sections 215(d)(2) and (3) are

³⁴ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 331.

³⁵ Order No. 743, 133 FERC ¶ 61,150 at P 141.

³⁶ *Id.*

premature. Once NERC has developed a proposed bulk electric system definition, the Commission will evaluate the proposal and all supporting evidence and documentation under section 215(d)(2). Similarly, should one of the two Regional Entities organized on an Interconnection-wide basis develop a proposal for a regional bulk electric system definition, the ERO must evaluate the proposal according to requirements of section 215(d)(3).

C. Challenges to Order No. 743's Technical Rationale

1. 100 kV Bright-Line Threshold

33. The NYPSC, Public Power Council, and Snohomish request rehearing, claiming that the Commission erred in directing NERC to revise the bulk electric system definition to include facilities operated at 100 kV and above where the record lacks a technical justification for a bright-line test. The NYPSC contends that, because the bright-line 100 kV threshold adopted by the Commission was not based on whether those facilities are necessary for operating the interconnected network, the Commission's decision lacked a technical justification. The NYPSC claims that the Commission's approach results in a "superficial consistency" and that Order No. 743 contains no factual analysis as to why 100 kV is the appropriate threshold. It contends that the examples identified by the Commission "that are purported to support the 100 kV bright-line were all 115 kV or higher."³⁷

³⁷ NYPSC at 19.

34. Further, the NYPSC argues that the Commission incorrectly assumes that because a facility operates at 100 kV or above in one part of the country that all facilities operated at similar voltages across the country should be treated as part of the Bulk-Power System. It objects to the Commission's reliance on events on facilities in other regions as rationale for determining that similar facilities in the NPCC region are part of the bulk electric system. According to the NYPSC, "that logic does not hold true, since there are various facilities operated at the same voltages across the country that perform different functions and interact to different degrees with the bulk system, depending on the regional differences."³⁸ The NYPSC reiterates that it presented evidence in its earlier comments that certain 138 kV facilities in New York City do not serve a bulk electric system function due to the high concentration of load served by those lines. The NYPSC contends that the Final Rule wrongfully dismissed this evidence by indicating that it does "not believe that *most* of these facilities are local distribution."³⁹ The NYPSC argues that it is invalid to conclude that all facilities rated 100 kV or above support the bulk electric system based on a belief that "most" of these facilities are not involved in local distribution.

Commission Determination

35. As noted previously, contrary to the commenters' assertions, the Commission did not direct or mandate that the bulk electric system definition include a bright-line 100 kV

³⁸ *Id.* at 14.

³⁹ *Id.* at 15, quoting Order No. 743, 133 FERC ¶ 61,150 at P 39 (emphasis added).

threshold. Instead, the Commission directed NERC to address the inconsistency, lack of oversight and exclusion of facilities that are required for the reliable operation of the interconnected transmission network, outlined by the Commission in Order No. 743 using the technical expertise available to NERC. The Commission suggested that one means to address its concerns would be to, among other things, maintain the 100 kV threshold and radial exclusion contained in the current definition, but left it to NERC's discretion and technical expertise to develop a revised definition. The Commission also supported its suggested solution.⁴⁰

36. Nonetheless, we will reiterate and expand on that discussion here. The Commission's suggested solution of a 100 kV threshold paired with an exemption process, in essence, merely clarifies the current NERC definition, which classifies facilities operating at 100 kV or above as part of the bulk electric system.

37. As discussed in Order No. 743, the NPCC material impact assessment has resulted in inconsistent classification of some facilities along and within Regional Entity borders.⁴¹ Further, Order No. 743 pointed out the failure of the NPCC test to classify facilities associated with nuclear generation as part of the bulk electric system and thus subject to NERC Reliability Standards.⁴² The suggested 100 kV threshold would maintain the current assumption, under NERC's current definition, that non-radial

⁴⁰ See, e.g., Order No. 743, 133 FERC ¶ 61,150 at P 72-73, 85.

⁴¹ Order No. 743, 133 FERC ¶ 61,150, P 80.

⁴² *Id.* P 84.

100 kV transmission facilities (not local distribution) are part of the bulk electric system unless exempted through the process NERC develops.

38. The Commission disagrees with the characterization that its suggested approach will only achieve superficial consistency – our suggested approach will require that facilities needed for the reliable operation of interconnected electrical network comply with the NERC Reliability Standards. Regardless of whether NERC adopts our suggested solution in whole or in part, or develops another approach, the bulk electric system definition and related processes that NERC ultimately produces, and the Commission approves, will significantly reduce or eliminate reliability problems arising from incomplete Reliability Standard coverage resulting from ineffective material impact assessments and inconsistent classification of facilities. The Final Rule eliminates these problems by directing the ERO to revise the definition of bulk electric system in a way that addresses the concerns outlined in the Final Rule.

39. The NYPSC argues that the Commission did not provide any evidence supporting a 100 kV threshold since all three examples in Order No. 743 involved facilities 115 kV or higher. However, as indicated in Order No. 743, the current NERC bulk electric system definition contains a general 100 kV threshold. The Commission's suggested solution simply would eliminate regional discretion that is not subject to review by the ERO or the Commission in the application of the current threshold. Additionally, the NYPSC's argument presents a distinction without a difference, since nominal voltage levels are established in industry for use in power systems but no voltage classification

exists at 100 kV.⁴³ Therefore, a 100 kV threshold will effectively capture the same facilities as a 115 kV threshold.

40. The Commission also disagrees with the NYPSC's characterization of the suggested 100 kV threshold as treating all facilities operated at similar voltages across the country as part of the bulk electric system. As we have explained, the Commission views the suggested threshold as a first step or proxy in determining which facilities are included and which are excluded or exempted from the bulk electric system. The Commission provided considerable support in the Final Rule for its belief that facilities operated at or above 100 kV are sufficiently similar throughout the continental United States to be able to use a 100 kV threshold as an initial line of demarcation, which the ERO would further refine using exclusions (such as for radial facilities serving only load with one transmission source) and exemptions.⁴⁴ Similarly, we are not persuaded by the NYPSC's contention that Order No. 743's reliance on events in several regions as support for taking action on a nationwide basis was misplaced. The facilities in the several regions are sufficiently similar to allow the Commission to draw technical justification for its actions from these events. The same configurations cited in the examples and the areas described in Order No. 743 can be found throughout the

⁴³ See, e.g., American National Standards Institute, Incorporated (ANSI) Standard C84.1, *Electrical Power Systems and Equipment-Voltage Ratings (60Hz)*.

⁴⁴ See, e.g., Order No. 743, 133 FERC ¶ 61,150 at P 73, 139-140.

country.⁴⁵ Facilities operated at 100-200 kV, in parallel with extra high voltage facilities, connect areas with generation to distant hubs and load centers.⁴⁶ As discussed in Order No. 743, failure of 100-200 kV facilities has caused cascading outages that would have been minimized or prevented if entities were in compliance with the NERC Reliability Standards.⁴⁷ For the reasons discussed above, the Commission denies the requests for rehearing.

2. Impact-Based Methodology

41. The NYPSC requests rehearing on the Commission's rejection of an impact-based test for identifying bulk electric system elements and asks that the Commission reconsider an impact-based test as a viable approach. The NYPSC asserts that "NERC and the NPCC have both determined that the NPCC's impact-based definition, coupled with its regionally tailored reliability criteria, effectively and efficiently ensures reliability."⁴⁸ It contends that, because an impact-based test identifies "facilities and control system necessary for operating an interconnected electric energy transmission

⁴⁵ The Commission reviewed transmission maps available in annual Form 715 submissions (Form 715 submissions). (Form 715 is the "Annual Transmission Planning and Evaluation Report," in which operators of integrated transmission at or above 100 kV submit to the Commission base case power flow and transmission system maps and diagrams. Submissions are considered Critical Energy Infrastructure Information (CEII) and are subject to the Commission's CEII rules.)

⁴⁶ *Id.*

⁴⁷ Order No. 743, 133 FERC ¶ 61,150, at P 87.

⁴⁸ NYPSC at 28.

network,” that test is consistent with section 215 of the FPA and obviates the Commission’s concern that a discrepancy in definitions could result in reliability gaps.⁴⁹ The NYPSC argues that the Commission dismissed the impact approach based on a single event and the stated need for a consistent and comprehensive test. In response, the NYPSC argues that Order No. 743 does not identify how inconsistencies have impacted or may impact the reliable operation of the bulk electric system. Finally, the NYPSC asserts that the Commission’s concerns may be capable of being addressed through modifications to the existing impact tests and the Commission should consider the validity of such an approach.

42. Public Power Council also expresses concern that the Commission’s discussion about material impact analysis leaves no room for a meaningful test to distinguish between facilities that are necessary for the operation of the bulk electric system and those that are not. Public Power Council criticizes the Commission’s rationale, contending that if a material impact assessment indicates that the Bulk-Power System can function properly even if a fault or operational failure occurs on a particular facility, it is not clear why the Commission can claim that that facility is nonetheless “necessary” for bulk electric system operation.

43. In a related vein, NRECA seeks clarification, or in the alternative rehearing, that the Commission’s determination regarding “material impact” does not intend for NERC to change the NERC Rules of Procedure (other than to establish a process for granting

⁴⁹ NYPSC at 28, *quoting* 16 U.S.C. 824o(a)(1)(A).

exemptions) or the NERC Statement of Compliance Registry Criteria. While NRECA acknowledges that the Final Rule does not discuss such changes to the NERC rules or Registry Criteria, NRECA explains that it raises the concern because it is unclear whether Order No. 743 only rejects the NPCC impact-based methodology or every functional impact methodology. NRECA points to various provisions of the NERC rules and Registry Criteria indicating that NERC's registry approach is based on identifying owner, operators and users of the Bulk-Power System that have a "material impact" on the Bulk-Power System.⁵⁰ Accordingly, NRECA seeks assurance that the Final Rule is not intended to "undermine the core concepts" of the NERC Rules and Registry Criteria.

Commission Determination

44. Order No. 743 did not reject all material impact assessments but, instead, took issue with particular tests and outlined general problems with the material impact tests used to determine the extent of the bulk electric system that we have seen to date. The NYPS&C incorrectly states that the Commission rejected NPCC's material impact assessment based on one event. Rather, as discussed extensively in the Final Rule and elsewhere herein, the Commission rejected NPCC's material impact assessment due to its subjective language and failure to identify facilities necessary to reliably operate the interconnected transmission system.⁵¹ These flaws include use of the amorphous term

⁵⁰ See NRECA at 14-15, quoting NERC Rules of Procedure, section 501; Registry Criteria at 1.

⁵¹ Order No. 743, 133 FERC ¶ 61,150 at P 76-78.

“local area,” which was not consistently applied throughout the NPCC region. The NYPSC does not clarify application of this term in its request for rehearing, and instead merely states that the local area is defined by “the Council members.”⁵² As Order No. 743 notes, the subjectivity of the “local area” definition, which ultimately determines whether or not a facility is classified as part of the bulk electric system, has led to varying results throughout the NPCC region.⁵³

45. The Commission does not agree that Order No. 743 did not address how inconsistencies in defining the facilities that are included in the bulk electric system may impact the operation of the interconnected transmission network. The Final Rule detailed several instances where the NERC Reliability Standards are less effective when they are not applied to all necessary facilities.⁵⁴

46. Public Power Council contends that it is not clear why the Commission can claim that a particular facility is nonetheless “necessary” for bulk electric system operation if a material impact assessment proves that the Bulk-Power System can function properly even if a fault or operational failure occurs on that facility. As we noted in Order No. 743, by this metric the facilities that caused the 2003 Blackout would not be viewed as critical since none of the individual facilities caused the outage.⁵⁵ In defining

⁵² NYPSC at 28.

⁵³ Order No. 743, 133 FERC ¶ 61,150 at P 80.

⁵⁴ *See, e.g., Id.* P 80, 83, 86, 90.

⁵⁵ *Id.* P 38.

jurisdictional facilities, section 215(a)(1) focuses on whether facilities are necessary to operate the interconnected transmission system, not solely on the consequences of unreliable operation of those facilities.⁵⁶

47. The Commission clarifies that it was not our intent to disrupt the NERC Rules of Procedure or the Statement of Compliance Registry Criteria. Nor did the Commission intend to rule out using any form of a material impact test in the reliability context that can be shown to identify facilities needed for reliable operation. However, as Order No. 743 explained, the Commission has serious concerns about NPCC's Document A-10 methodology. The Commission stated that, as a threshold matter, the material impact tests proffered by commenters did not measure whether specific system elements were necessary for operating the system, but, rather, measure the impact of losing the element.⁵⁷ The Commission's extensive discussion of the NPCC test further noted that the NPCC methodology is unduly subjective, and results in an inconsistent process that excludes facilities necessary for operating the bulk electric system from the definition. Therefore, the Commission indicated, should NERC choose to define the bulk electric system using a method other than one employing the 100 kV bright line threshold the Commission suggested, such an alternative method must be consistent, repeatable and verifiable with supporting technical analysis.⁵⁸

⁵⁶ 16 U.S.C. 824o(a)(i).

⁵⁷ Order No. 743, 133 FERC ¶ 61,150 at P 76.

⁵⁸ *Id.* P 74, 85.

3. Western Interconnection/Regional Variation

48. In Order No. 743, the Commission rejected arguments that 100-199 kV facilities in the Western Interconnection should be treated differently than facilities in the Eastern Interconnection.⁵⁹ The Commission stated that commenters had not provided an adequate explanation, supported by data and analysis, why there is a physical difference that justifies different treatment of these facilities in the West.

49. Snohomish and Public Power Council contend that, because 115 kV facilities commonly are used in the West for distribution, the Commission's "inflexible" 100 kV threshold is "unworkable" in the West. Snohomish and Public Power Council claim that the Western Interconnection is materially different from the Eastern Interconnection because the long distances between load centers, and the vast areas commonly covered by distribution systems, result in a transmission system that is largely operated at voltages of 230 kV or above, and distribution systems that are commonly operated at voltages of 115 kV. They contend that this physical difference is documented in a study performed by WECC's Bulk Electric System Definition Task Force.⁶⁰ Snohomish contends that power flow base cases examined by the Bulk Electric System Definition Task Force support their assertion that facilities rated between 100 kV and 200 kV have a small impact on transmission in the West.

⁵⁹ *Id.* P 139-140.

⁶⁰ *See* Public Power Council at 6, Snohomish at 9 *quoting* WECC Bulk Electric System Definition Task Force, Initial Proposal, attached as Exh. A to Snohomish's NOPR comments.

50. Further, Snohomish contends that Order No. 743, at most, demonstrates a problem in the NPCC region and does not provide justification for action in the West. Snohomish asserts that the Final Rule fails to identify a single reliability event in the Western Interconnection arising from the bulk electric system definition as currently applied. Snohomish argues that the Commission cannot use isolated and localized problems to justify nationwide action.⁶¹ According to Snohomish, the three disturbances discussed in the Final Rule cannot justify nationwide action or demonstrate that all facilities operated in the 100-200 kV range are part of the interconnected transmission grid.

51. Snohomish also contends that the Commission implicitly accepted the evidence that most 115 kV facilities in the West operate as distribution by failing to assert that the evidence is flawed, but, instead, responding in the Final Rule that some facilities operating in the 100-200 kV range in the West are “operationally significant and needed for reliable operation as identified by certain WECC documents.”⁶² According to Snohomish, this demonstrates the irrationality of Order No. 743’s approach because it focuses on the operating voltage of electric facilities to the exclusion of more germane factors such as how those facilities are connected and interact with the grid. Snohomish claims that the threshold approach is inconsistent with previous statements from the Commission that acknowledge that the function of facilities and how they are

⁶¹ Snohomish at 31-32, *citing Associated Gas Distributors v. FERC*, 824 F.2d 981, 1019 (D.C. Cir. 1985).

⁶² Snohomish at 11-12, *quoting* Order No. 743, 133 FERC ¶ 61,150 at P 139.

interconnected determines their significance. Public Power Council explains that, currently, most Public Power Council members that operate 115 kV distribution facilities are not classified as transmission owners or operators. Thus, according to Snohomish and Public Power Council, by taking a superficial view of the matter, Order No. 743's 100 kV threshold would sweep in a large number of facilities, including hundreds or perhaps thousands of miles of local distribution facilities, in the West.

52. Snohomish additionally raises a concern that the Final Rule could be read in a manner that would require an end to the work of the WECC Bulk Electric System Definition Task Force. Snohomish states that the Bulk Electric System Definition Task Force, which was created in 2008 partly in response to Order No. 693, has been working on developing a bulk electric system definition that is appropriate to the unique facts of the Western Interconnection.⁶³ Snohomish argues that a Commission directive "to 'eliminate the regional discretion in the ERO's current definition' of BES" would mean "that the work of the [Bulk Electric System Definition Task Force] must be terminated because it would result in a regional variation to the BES definition that FERC has forbidden."⁶⁴ This result, according to Snohomish, would violate the FPA because "Section 215(d)(2) requires FERC to accord 'due weight' to the 'technical expertise' of both NERC and WECC, and Section 215(d)(3) requires NERC to 'rebuttably presume' that reliability standards developed and approved by WECC are consistent with the

⁶³ See Snohomish at 35.

⁶⁴ Snohomish at 40-41, *quoting* Order No. 743, 133 FERC ¶ 61,150 at P 30.

FPA.”⁶⁵ Therefore, Snohomish requests clarification, or in the alternative rehearing, that the Commission’s “findings concerning the material impact assessment methodology used in NPCC apply only to the NPCC” and do not apply to the Bulk Electric System Definition Task Force efforts currently under way.⁶⁶ Snohomish further seeks clarification, or in the alternative rehearing, that the bulk electric system definition currently being developed for application in WECC “may incorporate any voltage threshold or other method of assessing the impact of lower-voltage facilities,” that the WECC bulk electric system definition “*must* exclude facilities used in the local distribution of electric energy,” and that the definition should distinguish between facilities that are or are not necessary for operating an interconnected energy transmission network.⁶⁷ Finally, Snohomish argues that the Commission should clarify that the Final Rule is not intended to stop NERC’s review of the findings of the Ad Hoc Committee for Generator Requirements and the Transmission Interface (GOTO Task Force) because such an action would be arbitrary and capricious.⁶⁸

⁶⁵ *Id.* at 41, *citing* 16 U.S.C. 824o(d)(2)-(3).

⁶⁶ *Id.* at 42.

⁶⁷ *Id.* at 43 (emphasis in original).

⁶⁸ As described in Order No. 743, NERC has undertaken an initiative (the GOTO task force) to address the special circumstances associated with generators and to determine which Reliability Standards might be inappropriate for such limited facilities. *See* Order No. 743, 133 FERC ¶ 61,150, at n.158.

Commission Determination

53. The Commission denies rehearing on these issues. As stated elsewhere, Order No. 743 did not mandate a 100 kV threshold. Rather, the Commission directed NERC to develop a revised definition that addresses our concerns with the current definition, including inconsistency, lack of oversight and exclusion of facilities that are required for the reliable operation of the interconnected transmission network. We suggested that one means to address our concerns would be to maintain the 100 kV threshold contained in the current definition, while eliminating the discretion that allows Regional Entities to interpret and apply the definition without ERO or Commission oversight.

54. Commenters contend that the majority of 115 kV facilities in the West are distribution facilities and therefore not significant to the transmission of power. First, as we have stated herein, to the extent any facility is a local distribution facility, it is exempted from the requirements of section 215.⁶⁹ However, the Commission observes that numerous 115 kV and 138 kV transmission lines in the Western Interconnection often are the only pathway available between various load centers and networked points.⁷⁰ Other network points are electrically and physically remote from each other and have the potential for parallel flows between two transmission paths, some at different voltage levels and others at the same voltage. Analyzing how the flows split during

⁶⁹ 16 U.S.C. 824o(a)(1).

⁷⁰ Form 715 submissions.

normal, outage and emergency conditions, as well as implications to system constraint, could lead to a conclusion that such facilities are improperly labeled as local distribution.

55. Snohomish argues that the Commission errs in focusing on voltage rather than the characteristics of the facilities. However, in the first instance, the Commission's suggested approach uses NERC's current definition, which includes a 100 kV threshold, as a baseline for determining which facilities are included in the bulk electric system. As discussed below, we view a voltage threshold as an initial proxy for determining where the line between local distribution and transmission lies. We agree with Snohomish that it is important to consider additional facility characteristics in order to make a final determination regarding which facilities are included in the bulk electric system.

56. The Commission notes that while the events cited in Order No. 743 occurred in the Eastern Interconnection, the underlying concerns are applicable to the nation as a whole. Currently, NERC and the Commission do not have oversight of regional bulk electric system classification decisions. If all facilities necessary for reliable operation are not subject to the Reliability Standards, the effectiveness of the Reliability Standards is undermined.

57. Snohomish's concern that Order No. 743 would put an end to the WECC Bulk Electric System Definition Task Force is unfounded. The Commission clarifies that our intent in requiring the ERO to "eliminate the regional discretion" from the current definition was to prevent the regions from modifying the regional bulk electric system definition without Commission or ERO oversight. As noted elsewhere, WECC may

petition for a regional variation, if justified, through the process outlined in Order No. 672.⁷¹

58. In response to Snohomish's question concerning local distribution, we reiterate that facilities used for local distribution are excluded from the Bulk-Power System definition under section 215, and thus are excluded from the bulk electric system. With respect to changing the 100 kV threshold in the approved definition, the Commission did not direct such a change.

59. Similarly, we reiterate that Order No. 743 does not affect the GOTO Task Force's activities; however, the task force members may submit their comments and report to NERC for its consideration as NERC develops an exemption process.

60. We understand from the Public Power Council's comments that most Public Power Council members owning or operating 115 kV facilities are not classified as transmission owners or operators due to the fact that their facilities are radial from one transmission supply and serving only load. Such facilities currently are excluded from registration and we believe would appropriately be excluded in an acceptable revised bulk electric system definition.

D. Bulk-Power System v. Bulk Electric System

61. APPA and TANC request clarification that the Commission is not now making a determination as to whether the Bulk-Power System is broader than the bulk electric system and is preserving for future proceedings the rights of parties to challenge such a

⁷¹ See Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 291.

determination. According to APPA, the Final Rule appears to track the statutory definition of Bulk-Power System, i.e., “all facilities necessary to operate the interconnected transmission network,” in framing its directive to NERC to revise the definition of bulk electric system. APPA also points to language in Order No. 743 that it believes suggests that the Commission considers that the statutory definition of Bulk-Power System may be broader than the bulk electric system.⁷² APPA states that, to preserve its legal rights on the matter, it seeks “limited clarification” that the Commission is not determining that the statutory Bulk-Power System definition extends beyond the bulk electric system definition as NERC is directed to revise it in this proceeding. In the alternative, if the Commission denies clarification, APPA seeks rehearing that “given the Final Rule’s directions to NERC to define [bulk electric system] in a manner that tracks, virtually word-for-word, the statutory [Bulk-Power System] definition, the Commission’s continued suggestion that the [Bulk-Power System] definition may reach further than the [bulk electric system] would be arbitrary and contrary to the express terms of the statute.”⁷³

62. Based on similar concerns, NRECA requests clarification, or in the alternative rehearing, that the statutory definition of Bulk-Power System and the definition of bulk electric system are synonymous. NRECA points to provisions of the NERC Rules of Procedure that reference the Bulk-Power System to demonstrate such convergence.

⁷² APPA at 5, *quoting* Order No. 743133 FERC ¶ 61,150 at P 36, 41, and 100.

⁷³ APPA at 7-8.

NRECA also contends that the language of section 215 and the statute's legislative history, and prior usage of the two terms, supports its position.

Commission Determination

63. The Commission grants APPA and TANC's requests for clarification. We do not see any useful purpose that would be served by defining the term Bulk-Power System in this proceeding, and decline to do so. Accordingly, we dismiss as premature NRECA's request for clarification, or in the alternative, rehearing.

E. Identification of Facilities Used in Local Distribution

64. In Order No. 743, the Commission recognized that the ERO would need to establish whether a particular facility is local distribution or transmission, and directed the ERO to develop a means to make such a determination.⁷⁴

Comments

65. Consumers Energy, Exelon and Portland General request clarification that NERC's evaluation of how to classify facilities should consider prior distribution classifications. Consumers Energy and Portland General seek clarification on the role of the Order No. 888 Seven Factor Test in determining whether facilities are classified as "local distribution facilities" and the impact of a prior Seven Factor Test determination.⁷⁵

⁷⁴ *Id.* P 37.

⁷⁵ See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC (continued...)

Consumers seeks clarification whether facilities in excess of 100 kV that have explicitly been found by the Commission to be local distribution under the Seven Factor Test will automatically be excluded from the bulk electric system or will they need to go through the exemption process. Consumers Energy further asks whether, if the owner of such facilities must apply for an exemption, the earlier Seven Factor finding provides a presumption that the facility should be excluded. Exelon insists that a facility can be classified as either local distribution or bulk transmission – but not both.

66. EEI and Portland General request clarification that the term “used in local distribution” does not have different meanings under sections 201(b)⁷⁶ and 215 of the FPA and that the Final Rule does not affect other determinations of what facilities are considered “used in local distribution” and thus outside of the Commission’s jurisdiction. EEI argues that since Congress used the same terminology in defining the Commission’s jurisdiction in both sections 201 and 215, it must have intended the words to have the same meaning. EEI seeks clarification that previous or future regulatory decisions regarding local distribution facilities can serve as an exemption criterion, and states that such clarification will better align jurisdictional determinations under the FPA. Portland General argues that the Commission does not have the flexibility to interpret “facilities used in local distribution” to mean two different things in two different parts of the FPA.

¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁷⁶ 16 U.S.C. 824.

Specifically, Portland General argues that the Commission “must acknowledge and give effect to established FPA Section 201(b) precedent regarding the identification of ‘local distribution’ facilities, and must recognize that Congress intended the same ‘local distribution’ facilities to be exempt from Commission jurisdiction under Sections 201(b) and 215(a) of the FPA.”⁷⁷

Commission Determination

67. Although local distribution facilities are excluded from the definition, it still is necessary to determine which facilities are local distribution, and which are transmission. Whether facilities are used in local distribution will in certain instances raise a question of fact, which the Commission has jurisdiction to determine.⁷⁸ The Commission envisioned that the process of identifying which facilities are local distribution and which are transmission likely would require more than one step. Under the methodology the Commission proffered, the 100 kV bright-line threshold would serve as the initial proxy for determining which facilities are local distribution, and which are transmission. The Final Rule provides ample support for the reasonableness of a 100 kV threshold, not the least of which is that the ERO’s definition of bulk electric system currently utilizes a

⁷⁷ Portland General at 10.

⁷⁸ See, e.g., *California Pacific Electric Company, LLC*, 133 FERC ¶ 61,018 at n.59 (2010) (“The Supreme Court has determined that whether facilities are used in local distribution is a question of fact to be decided by the Commission.”), citing *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 n.6 (1964).

general 100 kV threshold.⁷⁹ The Commission recognized, however, that it would be necessary to identify any local distribution that is improperly included, and conversely to identify any transmission that is improperly excluded, by the proxy.

68. The Commission clarifies that the statement in Order No. 743, “determining where the line between ‘transmission’ and ‘local distribution’ lies ... should be part of the exemption process the ERO develops”⁸⁰ was intended to grant discretion to the ERO, 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. This mechanism will allow the ERO to maintain an inventory of the transmission facilities subject to the mandatory Reliability Standards, and to exclude local distribution facilities from the bulk electric system definition by applying the criteria. Once NERC develops and submits its proposal to the Commission, the Commission will, as part of its evaluation of the proposal, determine whether the process developed adequately differentiates between local distribution and transmission.

69. We agree with Consumers Energy, Portland General and others that the Seven Factor Test could be relevant and possibly is a logical starting point for determining which facilities are local distribution for reliability purposes, while also allowing NERC flexibility in applying the test or developing an alternative approach as it deems necessary.

⁷⁹ See, e.g., Order No. 743, 133 FERC ¶ 61,150 at P 73, 85.

⁸⁰ Order No. 743, 133 FERC ¶ 61,150 at P 37.

70. With respect to Consumers Energy's request for clarification regarding prior Seven Factor Test determinations qualifying for automatic exclusion, the Commission reiterates that we have granted NERC discretion to develop a means to differentiate between local distribution and transmission facilities, which NERC will submit to the Commission for review and approval. Consequently, we leave to NERC in the first instance questions about if and how the Seven Factor Test should be considered in differentiating between local distribution and transmission facilities.

71. Our purpose in moving away from the proposal in the NOPR was to provide NERC with the greatest amount of flexibility to utilize its technical expertise and processes in developing an appropriate exemption process to complement a revised definition of "bulk electric system." Considerations regarding the Seven Factor Test and its usefulness in a NERC-designed exemption process are initially for NERC to decide in response to our directive in Order No. 743. As we said in Order No. 743, "allowing the ERO to develop an appropriate exemption process should provide interested stakeholders an opportunity to participate in the development of the process."⁸¹ Consumers Energy, Portland General and others can raise any concerns with respect to use of the Seven Factor Test or any other concern during the development of the exemption process. Under the exemption process the Commission ultimately approves, once a facility is classified as local distribution, the facility will be excluded from the bulk electric system unless changes to the system warrant a review of the determination.

⁸¹ Order No. 743, 133 FERC ¶ 61,150 at P 112.

72. We decline to provide the clarification EEI and Portland General request regarding the use of the term “used in local distribution” in FPA sections 201(b) and 215, as we find the request premature. Order No. 743 tasked NERC, as the entity with technical expertise, with developing a process for differentiating between local distribution and transmission facilities to apply in the reliability context. Once NERC develops and submits a proposed methodology, we will evaluate whether the proposal results in any conflicts with the statutory language.

F. Exemption Process

73. Order No. 743 directed NERC to develop a process for exempting facilities operated at or above 100 kV that are not necessary for operating the transmission grid. The Final Rule declined to dictate the substance of the exemption process, leaving this task to the ERO. This would provide interested stakeholders an opportunity to participate in developing the process. The Final Rule did identify several matters or concerns to be addressed in an acceptable exemption process. The Commission asked the ERO to develop an exemption process that includes clear, objective, transparent, and uniformly applicable criteria for exemption of facilities that are not necessary for operating the grid and any related changes to its Rules of Procedures that may be required to implement the exemption process. Numerous petitioners seek rehearing and clarification regarding the exemption process discussed in the Final Rule.⁸²

⁸² As discussed further below, the Commission uses the term “exclusion” herein when discussing facilities expressly excluded by the statute (*i.e.*, local distribution) and the term “exemption” when referring to the exemption process NERC will develop for
(continued...)

1. Exclusion of Facilities Used in Local Distribution

74. Western Petitioners and Portland General seek rehearing that the exemption process developed by the ERO should not apply to facilities used in local distribution. Western Petitioners and Portland General state that facilities used in local distribution are not subject to section 215. Thus, they argue that the ERO lacks authority to subject local distribution facilities to an exemption process. According to Western Petitioners, subjecting such facilities to an exemption process developed by the ERO, and allowing the ERO to determine “jurisdictional exemptions” for facilities not subject to section 215 would “eviscerate state jurisdiction over numerous local facilities, in direct contravention of Congress’ intent.”⁸³ For its part, Portland General argues that, by directing NERC to review facilities over 100 kV currently designated as local distribution under the Seven Factor Test and “by pushing the ERO to recognize a bright-line presumption threshold that was expressly rejected in Order No. 888, the Commission is clearly departing from its existing precedent, under which these same facilities have been determined to be ‘local distribution’ facilities exempt from regulation under Section 215.”⁸⁴

use with facilities other than local distribution that may be exempted from compliance with the mandatory Reliability Standards for other reasons.

⁸³ Western Petitioners at 12, *quoting Detroit Edison Co. v. FERC*, 334 F.3d at 54.

⁸⁴ Portland General at 14.

Commission Determination

75. As the Commission explained above, we agree that local distribution facilities are not subject to FPA section 215. However, we disagree with Western Petitioners and Portland General that it is outside our jurisdiction to determine which facilities are local distribution and therefore excluded from the bulk electric system. We have in the first instance the authority to determine the scope of our jurisdiction.⁸⁵

76. The Commission notes some confusion regarding “exclusions” versus “exemptions.” We understand that a facility that is *excluded* would not have to go through any process at NERC to determine applicability. On the other hand, where an entity applies to NERC to seek to *exempt* its facility from the bulk electric system, NERC would follow an *exemption* process. With that understanding, we clarify that, as discussed herein, we envision that the process for determining which facilities will be included under the bulk electric system will involve several steps. NERC will develop criteria for determining whether a facility that falls under the definition of bulk electric system may qualify for exclusion. If, for example, the application of the criteria clearly indicates that a facility is local distribution, the facility is excluded, and no process before

⁸⁵ See, e.g., *Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033, at P 30 & n.31 (2005), *aff'd*, 452 F.3d 822 (D.C. Cir. 2006); *accord New York v. FERC*, 535 U.S. 1, 22-23 (2002) (holding that the Commission was within its authority to establish a seven-factor test to determine which facilities are local distribution facilities that fall outside of the Commission’s jurisdiction pursuant to FPA section 201). Cf. *Western Massachusetts Electric Co.*, 61 FERC ¶ 61,182, at 61,661 (1992), *aff'd*, 165 F.3d 922, 926 (D.C. Cir. 1999) (concluding the Commission may examine contracts relating to transactions which may be subject to its jurisdiction prior to making its determination as to jurisdiction).

the ERO is required. If application of the NERC criteria does not lead to a definitive result, the entity could apply for an exemption, invoking a factual inquiry before the ERO to determine the proper categorization of facilities.

2. Maintaining a List of Excluded Facilities

77. Similarly, Western Petitioners challenge the suggestion in the Final Rule that the ERO maintain a list of excluded facilities, including local distribution facilities, arguing that the establishment of a rule to maintain such a list is beyond NERC's statutory authority. They argue that nothing in FPA section 215 vests the ERO with oversight of facilities used in distribution, even for the purpose of maintaining a list of exempt facilities.

Commission Determination

78. The Commission agrees with Western Petitioners that section 215 does not grant the ERO oversight of facilities used in local distribution. However, as the Commission has explained, we have jurisdiction to determine which facilities are local distribution, and which are transmission. In order to exercise such oversight, including the appropriate application of the ERO's exemption determinations, it is important to have an inventory of facilities.⁸⁶

79. Once the ERO develops the inventory of facilities by applying the process the Commission ultimately approves, the Commission has authority, in its ERO oversight role, to review the determinations to ensure consistent application of the process and the

⁸⁶ Order No. 743, 133 FERC ¶ 61,150 at P 117.

accuracy of the resulting inventory. Such a review necessarily includes reviewing not only the inventory of facilities ultimately classified as transmission, but also those excluded as local distribution, particularly in instances where the decision was a close call. In performing such a review, the Commission is not inappropriately overseeing local distribution facilities but, rather, is reviewing the ERO's application of the process for drawing the line between local distribution and transmission, which is within our authority under section 215 of the FPA.

3. Exemption v. Exclusion of "Radials To Load" Facilities

80. In Order No. 743, the Commission reiterated that we do not seek to modify the second part of the current NERC bulk electric system definition, which states that "[r]adial transmission facilities serving only load with one transmission source are generally not included in this definition."⁸⁷ The Commission also suggested that the ERO could also track exemptions for radial facilities.⁸⁸

Comments

81. APPA, TANC, NRECA and TAPS request clarification that radial transmission facilities serving only load, i.e., radials to load, with one transmission source may be excluded from the bulk electric system definition and entities with such facilities need not go through an exemption process. TAPS and APPA state that exclusion of radials to load, rather than inclusion subject to exemption, is consistent with section 215 of the

⁸⁷ Order No. 743, 133 FERC ¶ 61,150, at P 55.

⁸⁸ *Id.* P 119.

FPA. TAPS argues that the Final Rule makes no attempt to demonstrate that radials to load are among the “facilities necessary to operate an interconnected network” that the Commission directed NERC to include in the bulk electric system definition. APPA explains that a 20 MW distribution utility that owns a 115 kV radial to load is likely not to have any contact with NERC since the utility’s load is radial and below the threshold for NERC registration. APPA expresses concern that, pursuant to the Final Rule, such a utility could now have to incur the time and resources necessary to demonstrate that it falls within an exemption. TAPS and APPA contend that subjecting currently-excluded “radial to load” to an exemption process would create an unnecessary burden on industry, particularly small entities, as well as NERC and the Regional Entities. Likewise, NRECA seeks clarification that the Commission did not intend that the owner of every currently-excluded facility operated at above 100 kV re-apply for an exclusion or exemption and that the ERO conduct a *de novo* review of such facilities. NRECA contends that such an approach would unreasonably burden the resources of utilities, create a huge backlog that slows the exemption process, and denies the ERO the ability to exercise its judgment in the matter.

82. For the same reasons, TAPS also seeks clarification that the Commission, in suggesting that the ERO establish a mechanism for reporting and tracking exempted radial facilities, did not intend to include *excluded* radial to load. TAPS contends that the Final Rule does not support the need for such reporting and tracking, and that the burden to industry and the ERO is not justified. TAPS states that it agrees that radial facilities

outside the current bulk electric system definition, i.e., those that are not “radial transmission facilities serving only load with one transmission source,” that still warrant exclusion, would be appropriate for an exemption process and the suggested tracking.

83. Consumers Energy, noting that the current definition of bulk electric system excludes “radial transmission facilities serving only load with one transmission source,” requests clarification whether the exclusion applies to a radial line with only one transmission source that is designed to serve load, but also serves “incidental small generation.” According to Consumers, such situations are becoming more common with the interconnection of small distributed renewable generation. Consumers Energy asks how much incidental generation a line could serve and continue to meet the bulk electric system radial line exclusion.

Commission Determination

84. In Order No. 743, the Commission directed the ERO to develop an exemption process and made clear that “we will not dictate the substance or content of the exemption process....”⁸⁹ Thus, while the Commission stated that the ERO should develop an exemption process that includes “clear, objective, transparent, and uniformly applicable criteria” for determining exemptions, the Commission otherwise left it to the ERO’s discretion to develop an appropriate exemption process, which the Commission will review. Any exemption of radial facilities is not based on a statutory requirement, unlike exclusion of local distribution. However, the Commission believes that certain

⁸⁹ *Id.* P 114.

categories of radial facilities may lend themselves to an “exclusion” process as described above (i.e., once identified as belonging in a certain radial category, the facilities could be excluded without further review). For example, should the revised bulk electric system definition maintain the exclusion of radial facilities serving only load from one transmission source, these types of facilities easily could be excluded without further analysis.

85. We believe that, in general, the decision whether, and in what circumstances, to apply an exemption versus exclusion process for radial to load facilities is largely a matter of balancing between, on the one hand, administrative ease, e.g., NERC having to review thousands of exemptions for facilities outside the NPCC region that previously were excluded as radial and, on the other hand, assuring that facilities necessary for operation of an interconnected grid are not inadvertently excluded. That being said, we believe that the ERO should balance these matters when developing an appropriate process. Likewise, with regard to NRECA’s request to clarify that the Commission does not seek to require NERC or the regions to conduct a *de novo* review of all exemptions granted to date, we did not require a *de novo* review and leave an appropriate review process to the ERO.

86. The Commission clarifies that Order No. 743 granted NERC discretion to make a determination regarding whether to exclude or exempt radial facilities. One consideration in this regard is whether an exclusion process will avoid NERC having to

review thousands of exemptions for facilities outside the NPCC region that previously were excluded as radial.

87. Additionally, as the Commission noted, commenters have many ideas about what types of facilities should be considered “radial.”⁹⁰ NERC can consider whether these facilities should be candidates for exemption.⁹¹ Any expansion of the definition of radial facilities beyond the approved definition must be supported with a technical analysis.

88. With respect to Consumers’ request for clarification regarding how much incidental generation a line could serve and continue to meet the bulk electric system radial line exclusion, this is an issue that should be raised with NERC as it develops criteria for determining what is considered radial.

4. Development of Exemption Process through NERC Reliability Standards Development Process

89. While agreeing with the Commission’s directive that NERC develop revisions to the bulk electric system definition through NERC’s Reliability Standards Development Process, NRECA requests clarification, or in the alternative rehearing, that NERC also must develop criteria for exemptions through the Standards Development Process.

NRECA maintains that exemptions from the bulk electric system are as much a part of the Reliability Standards as the definition itself, as both determine the Standards’ scope and applicability. According to NRECA, the purely procedural aspects of an exemption

⁹⁰ Order No. 743, 133 FERC ¶ 61,150 at P 55.

⁹¹ *Id.*

process can be developed by NERC and included in the Rules of Procedure. However, NRECA contends that the development of exemption criteria is a “core” technical task that requires use of the Reliability Standards Development Process.

Commission Determination

90. Given that the decision as to how to proceed in response to Order No. 743 rests first with NERC, we decline to provide the clarification requested by NRECA at this time. We explained in Order No. 743 that the NERC Glossary (which includes the definition of bulk electric system) is part of the Reliability Standards, and thus changes to the Glossary should be developed through the Reliability Standards Development Process.⁹² However, although the exemption process certainly will play a role in determining which facilities are included in the bulk electric system, the process is not part of the definition, nor part of any Reliability Standard. Accordingly, the Commission leaves the decision as to how to proceed in response to its directive to NERC in the first instance. The Commission expects, as indicated in Order No. 743, that NERC will provide ample opportunity for stakeholder input into the exemption process regardless of whether NERC determines to proceed using the Reliability Standard Development Process or by amending the Rules of Procedure. Accordingly, the Commission denies NRECA’s rehearing request on this matter.

⁹² *Id.* P 29-30.

5. Compliance While an Exemption Application is Pending

91. NRECA seeks clarification that currently unregistered entities that may be required to seek an exemption for facilities under the revised bulk electric system definition will not be required to register and thereafter comply with Reliability Standards until a final decision is made to deny the application for exemption. NRECA, noting that the Commission indicated that it did not expect the Final Rule to result in many additional facilities outside of the NPCC region becoming subject to Reliability Standards,⁹³ states that this observation is particularly true for currently-exempt facilities in the other seven regions. NRECA contends that it is unreasonable to require an entity to expend the financial and staff resources needed to develop a compliance program when the ERO may ultimately determine that the facilities are exempt.

92. In a related vein, NRECA requests clarification that the ERO should have the flexibility to propose a transition process that it deems feasible and appropriate, not necessarily a hard deadline of 18 months after Commission approval.

Commission Determination

93. As the Commission indicated in the Final Rule, the transition period is intended to allow a reasonable period of time for the affected entities to achieve compliance with respect to facilities that are subject to the mandatory Reliability Standards for the first time.⁹⁴ We agree with NRECA that affected entities should not be required to take costly

⁹³ NRECA at 20-21, *citing* Order No. 743, 133 FERC ¶ 61,150 at P 131, 169.

⁹⁴ Order No. 743, 133 FERC ¶ 61,150 at P 131.

steps to comply with the Reliability Standards prior to the ERO's initial determination on an exemption request. However, as indicated in Order No. 743, "we expect that the transition periods will be long enough for exemption requests to be processed and to allow entities to bring newly-included facilities into compliance prior to the mandatory enforcement date."⁹⁵ We reiterate that we do not anticipate a large number of exemption requests arising outside NPCC.⁹⁶ Thus, our expectation remains that NERC should be able to process any exemption requests in a timely manner, allowing any entity denied an exemption to come into compliance with the relevant Reliability Standards within the transition period.

94. With respect to the length of the transition period, as discussed in the Final Rule, we based our determination to establish an 18-month transition period on ReliabilityFirst's prior experience in adopting a revised bulk electric system definition in that region, and continue to believe it is a reasonable transition period.⁹⁷ Additionally, we noted that the ERO may request a longer transition period based on a specific justification. This provides sufficient flexibility should the ERO determine that the 18-month transition period is insufficient.

⁹⁵ *Id.* P 132.

⁹⁶ *Id.* P 131.

⁹⁷ *Id.*

6. Step-Down Transformers

95. The Final Rule, in response to a ReliabilityFirst request for clarification that facilities that operate at 100 kV or above should be considered bulk electric system facilities, even if, for example, one transformer winding operates below 100 kV, stated that “we agree with [ReliabilityFirst’s] developed delineation point with regard to ‘step-down’ transformers, but note that these kinds of refinements can and should be addressed as part of the NERC exemption process.”⁹⁸

96. EEI, Consumers and Wisconsin Electric request clarification that this statement concerning the treatment of step-down transformers was offered to provide guidance and not intended to prejudge the exemption criteria to be developed by the ERO. EEI claims that many state commissions treat step-down transformers with a low-side winding below 100 kV as under state rate jurisdiction. Wisconsin Electric contends that, while the suggested approach would simplify auditing, it would impose burdens on registered entities without a commensurate enhancement to reliability.

97. Consumers Energy suggests that the characteristics of the “low side” of a facility be considered when determining whether an entire facility is considered part of the bulk electric system. Consumers states that it has facilities with a 138 kV high side voltage and a low side ranging from 46 kV to 2.5 kV, and contends that the low side provides service only for local distribution.

⁹⁸ *Id.* P 148-149.

Commission Determination

98. Order No. 743 directed the ERO to develop an exemption process, and specifically declined to “dictate the substance or content of the exemption process.”⁹⁹ However, we provided guidance, stating that the process should include clear, objective, transparent and uniformly applicable criteria for exemption of facilities that are not necessary for operating the interconnected transmission system. Accordingly, the Commission grants EEI’s, Consumers Energy’s and Wisconsin Electric’s requests for clarification that the discussion regarding which facilities should or should not be included in the bulk electric system definition was intended to provide guidance, not to prejudge what should be included in the exemption criteria. Therefore, the Commission declines to provide the specific clarifications requested regarding treatment of various types of step down transformers.

7. Process for Including Sub-100 kV Facilities

99. In the rulemaking, ERCOT commented that facilities operated below 100 kV generally are not considered part of the bulk electric system, but can be included if identified as a critical facility by a Regional Entity. ERCOT suggested that, similar to the development of an exemption process to consider applications for exemption of facilities above 100 kV, the Commission should consider imposing a process for inclusion of critical facilities below 100 kV. In Order No. 743, the Commission responded that it agrees with ERCOT’s suggestion and “it would be worthwhile for NERC to consider

⁹⁹ *Id.* P 114.

formalizing the criteria for inclusion of critical facilities operated below 100 kV in developing the exemption process.”¹⁰⁰

100. Western Petitioners state that the Commission should clarify that all local distribution facilities, including those operated at below 100 kV which may be deemed “critical” by a Regional Entity, are expressly excluded under section 215 of the FPA.

101. APPA and TANC request clarification that, in suggesting that NERC formalize the criteria for including critical facilities operated below 100 kV in developing the exemption process, the Commission was not seeking to alter NERC’s Statement of Registry Criteria (Registry Criteria) or shift the evidentiary burdens. APPA notes that the current Registry Criteria include a provision that allows the registry of entities that own critical facilities below the 100 kV threshold.¹⁰¹ APPA expresses concern that a parallel process developed in conjunction with the exemption process might be construed as a departure from the Registry Criteria, which places the burden on NERC and the Regional Entities to demonstrate the need to include facilities operated at below 100 kV as part of the bulk electric system. APPA supports a process that enhances consistency among Regional Entity determinations and ensures better due process to would-be registered entities with potentially critical facilities operated at below 100 kV facilities, and seeks clarification that this understanding of the Commission’s statement is correct.

¹⁰⁰ *Id.* P 121.

¹⁰¹ APPA at 11, *citing* Registry Criteria, section II.D.2 (providing for registration of “[a]n entity that owns/operates a transmission element below 100 kV associated with a facility that is included on a critical facilities list that is defined by the Regional Entity”).

Commission Determination

102. The Commission clarifies that Order No. 743 did not intend to alter the Registry Criteria, shift the evidentiary burden for registration, or otherwise address matters involving the Registry Criteria. Indeed, the Statement of Compliance Registry Criteria currently provides that the Regional Entities may propose registration of entities that do not meet the registry criteria if the Regional Entity believes and can reasonably demonstrate that the organization is a bulk power system owner, or operates, or uses bulk power system assets, and is material to the reliability of the bulk power system.¹⁰² However, we note that while the Registry Criteria will not change, it is possible that additional facilities may come under the revised definition and some entities may be required to register for the first time.

103. The Commission agrees with APPA that underlying our suggestion that NERC consider an inclusion process for critical facilities operated below 100 kV was a concern that Regional Entities make such determinations in an appropriate and consistent manner, according to developed criteria, which should better ensure due process.

104. We agree with Western Petitioners that, as stated elsewhere herein, the Commission does not have jurisdiction over facilities that are determined to be local distribution through the process NERC develops and we approve.

¹⁰² Statement of Registry Criteria at 10 (Note 1 to Registry Criteria).

G. Requests for Revised Regulatory Flexibility Act Analysis

105. In Order No. 743, the Commission stated that the Final Rule will not have a significant economic impact on a substantial number of small entities since most transmission owners, transmission operators and transmission service providers do not fall within the definition of small entities. Further, the Commission suggested that the ERO create an appropriate exemption process and that this process will further ensure that the Final Rule minimally affects small entities. As we noted in the NOPR, the Commission estimated that approximately four of the 33 transmission owners, transmission operators and transmission services providers identified in the U.S. portion of the NPCC region may fall within the definition of small entities.

Comments

106. APPA and NRECA request that the Commission clarify that it will perform a revised Regulatory Flexibility Act analysis once the exemption process has been developed by NERC and approved by the Commission in order to determine whether the Commission's finding that the Final Rule will not have a significant economic impact on a substantial number of small entities is arbitrary. In particular, APPA and NRECA assert that the Commission erred by certifying that the Final Rule will not have a significant economic impact on a substantial number of small entities, particularly in light of the uncertainties of an as-yet-to-be-developed exemption process to mitigate the impact of the Final Rule on small entities. APPA and NRECA argue that the Commission's reliance on the exemption process to be established by NERC to support its Regulatory Flexibility Act certification is not justified. They assert that the ability of

the exemption process to minimize the impact on small entities cannot be assessed until the exemption process is developed by NERC and approved by the Commission.

107. TANC requests clarification that the Commission has not yet finalized its Regulatory Flexibility Act analysis and will not do so until NERC has submitted a proposed exemption process.

108. Public Power Council, NYPSC and Snohomish argue that implementing the 100-kV threshold will be enormously costly. Public Power Council, for its part, argues that the Commission's rejection of evidence of such increased compliance costs was arbitrary and capricious since, *inter alia*, Public Power Council did provide specific assertions as to how the Final Rule will have a significant economic impact on small entities. The NYPSC requests rehearing on whether the Commission's decision to direct NERC to revise the bulk electric system definition to include facilities operated at 100 kV and above where the Commission failed to determine sufficient benefits in relation to the costs, resulting in the imposition of unnecessary costs without reliability benefits, was arbitrary, capricious, and an abuse of discretion. Snohomish states that it and many other entities operating in the Western Interconnection provided evidence demonstrating that imposition of the 100-kV threshold in the Western Interconnection will result of enormous compliance costs with no benefit to reliability since the 115-kV systems operated by these entities generally are used only for local distribution and their operation therefore has little or no effect on the interconnected bulk system.

Commission Determination

109. The Commission does not agree with commenters that its Regulatory Flexibility Act analysis was deficient, and we continue to believe that our suggested approach in Order No. 743 will not have a significant economic impact on a substantial number of small entities.¹⁰³ With respect to comments that we did not adequately consider the costs of implementing a 100 kV threshold, we note that the current bulk electric system definition contains a general 100 kV threshold. Thus, the burden of our suggested proposal to eliminate the regional discretion in the current definition and maintain a bright-line 100 kV threshold should be minimal in all regions except NPCC. Even within the U.S. portion of the NPCC region, the Commission estimated in the Final Rule that only four of the 33 transmission owners, transmission operators and transmission service providers may fall within the definition of small entities. We also believe that the exemption process will further ensure that the Final Rule minimally affects small entities. Finally, we have clarified on rehearing that NERC may develop criteria to identify local distribution facilities and certain categories of radial facilities that qualify for exclusion from the definition of the bulk electric system and therefore do not need to apply for exemption. For these reasons the Commission rejects the comments objecting to the Commission's determinations regarding the cost of implementing a 100 kV threshold.

110. However, the Commission will grant APPA's and NRECA's request for clarification in part. The Commission clarifies that it will perform a new Regulatory

¹⁰³ Order No. 743, 133 FERC ¶ 61,150 at P 169.

Flexibility Act analysis to determine whether the revised bulk electric system definition will have a significant economic impact on small entities when NERC submits its proposed definition, criteria for exclusion and the exemption process.¹⁰⁴ We believe that the revisions NERC will propose will be sufficiently different from the initial NOPR proposal to warrant additional review to ensure that small entities are not unduly burdened.

III. Document Availability

111. 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 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

112. From FERC's Home Page on the Internet, this information is available on 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.

¹⁰⁴ This analysis will determine if an Initial Regulatory Flexibility Analysis is required or if the Commission can certify that the revised definition will not have a significant economic impact on a substantial number of small companies.

113. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or e mail at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

By the Commission.

(S E A L)

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