

FERC Issues Orders Expanding Authority Over the Development and Enforcement of Mandatory Reliability Standards

March 26, 2010

On March 18, the Federal Energy Regulatory Commission (FERC or the Commission) issued a series of orders that represent significant modifications in the way mandatory Reliability Standards are developed and enforced by the North American Electric Reliability Corporation (NERC).

First, the Commission ordered NERC to propose modifications to its Rules of Procedure, to ensure that NERC responds to FERC-issued directives on proposed Reliability Standards and to prevent NERC stakeholders from voting against FERC-directed modifications to Reliability Standards. Second, the Commission issued orders directing modifications to three Reliability Standards by short deadlines established in those orders. Third, FERC issued a Notice of Proposed Rulemaking seeking comments on a bright-line rule that any facility rated 100 kV or above is part of the bulk-power system and thus subject to mandatory Reliability Standards.

These orders and proposed changes suggest that the Commission is exercising greater control over the development and enforcement of Reliability Standards, which will result in a corresponding limitation on the discretion that can be exercised by NERC, the Regional Entities, and industry stakeholders.

NERC to Adjust Rules of Procedure

Under the existing Reliability Standards development procedure, any new or revised Reliability Standards must be approved by the industry through the NERC stakeholder voting process and then approved by the NERC Board of Trustees before it can be approved by the Commission as mandatory and enforceable within the United States. However, in a recent vote in this stakeholder process NERC stakeholders voted down a revision to FAC-008-2 Requirement R7 that NERC had developed to comply with a FERC directive in Order No. 693, the order in which FERC had approved that Reliability Standard. In discussing this rejection, the Commission noted that the industry had raised objections to the requirement that were rejected in Order No. 693, and that the deadline for a request for rehearing had passed. As such, the Commission viewed such a rejection by NERC as a misuse of NERC processes, potentially thwarting the FPA § 215 policy of protecting the reliability of the bulk-power system.

In light of NERC's rejection of the FAC-008-2 modification, the Commission ordered NERC to modify its Rules of Procedure to ensure that NERC will comply with directives from the Commission to develop or modify a Reliability Standard. The Commission stated that it would defer to NERC to draft the necessary changes to its Rules of Procedure to ensure compliance with FERC directives, but gave

NERC only until June 16, 2010, to propose the changes.

The Commission also ordered NERC to comply with the original directive in Order No. 693 to modify Reliability Standard FAC-008-1 and to propose a revised standard by June 16, 2010.

Reliability Standards to Be Modified

In two other orders on the same day, the Commission directed NERC to modify Reliability Standards TPL-002-0 and BAL-003-0 under a short deadline given the normal pace of Reliability Standard revisions.

TPL-002-0 concerns system performance following the loss of a single bulk electric system element. The Commission directed NERC to clarify Table 1, footnote b to resolve the uncertainty surrounding the loss of nonconsequential load for a single contingency event. The clarification must be responsive to Order No. 693 where the Commission directed that “the transmission planning Reliability Standard should not allow an entity to plan for the loss of non-consequential load in the event of a single contingency.” The Commission directed NERC to submit the proposed change by June 30, 2010.

For BAL-003-0, which addresses frequency and response bias, the Commission directed NERC to modify the Standard by (1) determining the appropriate periodicity of frequency response surveys necessary to ensure BAL-003-0 is being met and (2) defining the necessary amount of frequency response needed for reliable operation for each Balancing Authority with methods of obtaining and measuring that frequency response. FERC ordered NERC to submit a modified Reliability Standard to the Commission by September 14, 2010.

Proposed Rulemaking Expands Membership in “Bulk Electric System”

Finally, the Commission issued a Notice of Proposed Rulemaking which, if enacted, sets a bright-line rule for identifying bulk electric system facilities that would be subject to compliance with mandatory Reliability Standards. In the past, each of the eight Regional Entities with delegated authority from NERC to enforce compliance with mandatory Reliability Standards has had discretion to define what “bulk electric system” means within its geographic region, and therefore identify the facilities that are considered part of the bulk electric system and so subject to mandatory Reliability Standards. The Commission proposed to direct NERC to include all transmission facilities greater than or equal to 100 kV within NERC’s definition of “bulk electric system.” The new proposed rule would require any of the Regional Entities to seek NERC and FERC approval prior to finding that any facility rated at 100 kV or above is not part of the bulk electric system and therefore exempt from Reliability Standards compliance. Comments on the proposed rule are due May 24, 2010.

Conclusion

As indicated by these orders, FERC is beginning to fundamentally change the manner in which Reliability Standards are developed by NERC and the industry and enforced by NERC and the Regional Entities by decreasing the discretion and authority of NERC and the Regions and consolidating more of the authority over Reliability Standard development and enforcement within the Commission itself.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

John D. McGrane	202.739.5621	jmcgrane@morganlewis.com
Stephen M. Spina	202.739.5958	sspina@morganlewis.com
J. Daniel Skees	202.739.5834	dskees@morganlewis.com
Casey Khan	202.739.5212	ckhan@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2010 Morgan, Lewis & Bockius LLP. All Rights Reserved.

