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PUBLIC SERVICE COMMISSION

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December 20, 2010

SENT VIA ELECTRONIC FILING  
Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. RM09-18-000 - Revision to Electric  
Reliability Organization Definition of Bulk  
Electric System

Dear Secretary Bose:

Attached, for filing, is the Request for Rehearing of the New York State Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please feel free to contact me at (518) 473-8178.

Very truly yours,

A handwritten signature in cursive script, reading 'David G. Drexler'.

David G. Drexler  
Assistant Counsel

Attachment  
cc: Service List

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Revision to Electric Reliability     )  
Organization Definition of Bulk     )     Docket No. RM09-18-000  
Electric System                     )

REQUEST FOR REHEARING  
OF THE NEW YORK STATE  
PUBLIC SERVICE COMMISSION

INTRODUCTION

Pursuant to Rule 713 of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, the New York State Public Service Commission (NYPSC) respectfully submits its Request for Rehearing of the Commission's Order No. 743.<sup>1</sup> In Order No. 743, the Commission required the North American Electric Reliability Corporation (NERC), acting as the designated Electric Reliability Organization (ERO), to revise the definition of the "Bulk Electric System" to include a "bright-line threshold that includes all facilities operated at or above 100 kV except

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<sup>1</sup> Docket No. RM09-18-000, Revision to Electric Reliability Organization Definition of Bulk Electric System, Order No. 743, 75 Fed. Reg. 72910 (Nov. 26, 2010).

defined radial facilities."<sup>2</sup> The definition of the Bulk Electric System is included in the NERC Glossary of Terms Used in Reliability Standards, and is used in determining which facilities are subject to the Commission-approved Reliability Standards. The Commission also directed the NERC to develop a proposed exemption process for "excluding facilities that are not necessary for operating the interconnected transmission network."<sup>3</sup>

While the NYPSC recognizes and shares the Commission's interest and objective in ensuring reliability, the Commission has over-broadly defined the Bulk Electric System as facilities operated at 100 kV and above. The Commission's jurisdiction to establish Reliability Standards is limited under the Federal Power Act to the Bulk Power System, which includes "facilities and control systems necessary for operating an interconnected

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<sup>2</sup> Order No 743, ¶¶1, 29. The Commission indicated the NERC "may develop an alternative proposal for addressing the Commission's concerns with the present definition with the understanding that any such alternative must be as effective as, or more effective than, the Commission's [bright-line] approach in addressing the identified technical and other concerns." Id. at ¶¶1, 31.

<sup>3</sup> Order No. 743, ¶¶1, 112.

electric energy transmission network (or any portion thereof)"<sup>4</sup>

However, the Commission has made a faulty assumption that all facilities operated at and above 100 kV across the country are "necessary" for operating an "interconnected" network in every part of the country, merely because similar voltage facilities are considered "necessary" in some parts of the country.<sup>5</sup>

Because the Commission's bright-line voltage approach encompasses various facilities that are not necessary for operating an interconnected electric energy transmission network, the Commission has impermissibly exceeded its jurisdiction. Requiring facilities that are not necessary for operating an interconnected electric energy transmission network to comply with the reliability standards will not result in any reliability benefits, yet will cost consumers hundreds of millions of dollars.<sup>6</sup>

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<sup>4</sup> 16 U.S.C. §824o(a)(1)(A) (emphasis added). The term "interconnection" is defined as "a geographic area in which the operation of bulk-power system components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain reliable operation of the facilities within their control." 16 U.S.C. §824o(a)(5).

<sup>5</sup> Order No. 743, ¶¶87-89.

<sup>6</sup> According to the NERC and the NPCC, the costs of compliance with the Commission's definition of the Bulk Electric System will exceed \$280 million for the U.S. portion of the NPCC. Docket No. RC09-3-000, Compliance Filing and Assessment of Bulk Electric System Definition Report of the NERC and NPCC (filed September 21, 2009) p. 13.

In directing the NERC to develop a proposed exemption process for excluding facilities that are not necessary for operating the interconnected transmission network, the Commission implicitly acknowledges that it has included various facilities within the definition of the Bulk Electric System that are beyond its jurisdiction. The Commission has also conceded that not all facilities operated at 100 kV and above are necessary for operating an interconnected transmission network, as evidenced by its findings that are limited to "many facilities" and the "majority of 100 kV and above facilities in the United States."<sup>7</sup>

Moreover, the Commission has not presented a technical justification and substantial evidence to support a 100 kV bright-line. The examples cited by the Commission in support of its bright-line were all 115 kV and higher.

The Commission has also exceeded its statutory authority by directing revisions to the definition of the Bulk Electric System, without the NERC utilizing its technical expertise to address the Commission's concerns. Contrary to the FERC's view, the Commission's authority to order the NERC to "submit to the Commission a proposed reliability standard or a modification to a reliability standard" is limited to the

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<sup>7</sup> Order No. 743, ¶73.

submission of a "proposed" modification to a reliability standard. This interpretation is consistent with the purpose and intent behind the Energy Policy Act of 2005, which designated the ERO as the clearing-house for developing and modifying reliability standards, subject to the Commission's oversight. The Commission impermissibly reads the term "proposed" to not apply to a modification to a reliability standard, and has thus bypassed the NERC's technical expertise by directing a modification without giving NERC an opportunity to develop a better measure that would not require a cumbersome exemption process.<sup>8</sup>

Finally, we ask that the Commission reconsider its decision to reject the material impact test as a potential methodology for designating which facilities are necessary for operating the interconnected transmission network.<sup>9</sup> An impact-based test for defining the Bulk electric System and Bulk Power System is consistent with the Federal Power Act, and the Commission's concerns regarding an impact-based test may be capable of being fully addressed through modifications to the existing impact tests.

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<sup>8</sup> 16 U.S.C. §824o(d) (5) (emphasis added).

<sup>9</sup> Order No. 743, ¶76.

Because the Commission has acted contrary to statute, prior Commission decisions, and court precedent, as discussed below, the Commission must reconsider its decision to mandate a bright-line definition of the Bulk Electric System. Upon rehearing, the Commission should look to the NERC's technical expertise to address the Commission's concerns by directing NERC to propose a modification to the definition of the Bulk Electric System. Similar to the Commission's plans to establish an "exemption process and criteria for excluding facilities that are not necessary for operating the interconnected transmission network," NERC should be charged with developing a process and criteria for identifying facilities that should be subject to the reliability standards consistent with the definition of the Bulk Power System.<sup>10</sup> This process should address the Commission's concerns and achieve the same result as the processes already in place for identifying facilities below 100 kV that are "critical to the reliability of the bulk electric system," yet avoid the overly-broad and improper designation of facilities.<sup>11</sup>

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<sup>10</sup> Order No. 743, ¶1.

<sup>11</sup> Id. at ¶121.

## STATEMENT OF ISSUES

1. Whether the Commission's decision to direct the ERO to revise the definition of the Bulk Electric System to include facilities operated at 100 kV and above was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, in excess of its statutory jurisdiction, or otherwise not in accordance with the law where the record indicates that the bright-line test encompasses facilities that are not "necessary for operating an interconnected electric energy transmission network."<sup>12</sup>
  
2. Whether the Commission's decision to direct the ERO to revise the definition of the Bulk Electric System to include facilities operated at 100 kV and above was arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence where the record lacks a technical justification for the bright-line.<sup>13</sup>
  
3. Whether the Commission's decision to direct the ERO to revise the definition of the Bulk Electric System to include facilities operated at 100 kV and above was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with case law where the Commission failed to determine sufficient benefits in relation to the costs, thus

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<sup>12</sup> 16 U.S.C. §824o. In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...; or, unsupported by substantial evidence." 5 U.S.C. §706; see also, Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004); Atlantic City Elec. Co. v. FERC, 353 U.S. App. D.C. 1, 295 F.3d 1, 8 (D.C. Cir. 2002).

<sup>13</sup> 5 U.S.C. §706. See, Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004).



resulting in the imposition of unnecessary costs without reliability benefits.<sup>14</sup>

4. Whether the Commission's decision to direct the ERO to revise the definition of the Bulk Electric System, without the NERC utilizing its technical expertise to address the Commission's concerns, was in excess of its statutory jurisdiction, inconsistent with prior Commission decisions, or otherwise not in accordance with the law.<sup>15</sup>
5. Whether the Commission decision rejecting an impact-based test for identifying the Bulk Power System was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with the law.<sup>16</sup>

#### BACKGROUND

The Energy Policy Act of 2005 amended the Federal Power Act to include authority for the Commission to certify an ERO responsible for developing "reliability standards" that provide for the "reliable operation" of the "bulk-power system."<sup>17</sup> The Bulk Power System is defined to include: "(A)

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<sup>14</sup> 5 U.S.C. §706. See, Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004); see also Illinois Commerce Commission v. Federal Energy Regulatory Commission, 576 F.3d 470 (7<sup>th</sup> Cir. 2009), (requiring the Commission to quantify the benefits of upgrades for reliability purposes in order to justify the costs).

<sup>15</sup> See, Docket No. RM06-16-000, Mandatory Reliability Standards for the Bulk-Power System, Order No. 693; see also, 5 U.S.C. §706; Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004).

<sup>16</sup> 5 U.S.C. §706. See, Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004).

<sup>17</sup> 16 U.S.C. §824o.

facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy."<sup>18</sup> "The term 'reliable operation' means operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements."<sup>19</sup>

In accordance with this authority, the Commission certified the NERC to serve as the ERO.<sup>20</sup> The NERC's Glossary of Terms indicates that the reliability standards apply to the "Bulk Electric System," which means: "[a]s defined by the Regional Reliability Organization [(RRO)], the electrical generation resources, transmission lines, interconnections with

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<sup>18</sup> 16 U.S.C. §824o(a)(1).

<sup>19</sup> 16 U.S.C. §824o(a)(4).

<sup>20</sup> Docket No. RR06-1-000, North American Electric Reliability Corporation, Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing, 116 FERC ¶61,062 (issued July 20, 2006).

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." Several Regional Reliability Organizations, such as the Northeast Power Coordinating Council, utilize specific criteria or characteristics to identify the Bulk Electric System. For example, the NPCC identifies elements of the Bulk Electric System using an impact-based methodology.

The Federal Power Act provides that upon submission by the NERC,

[t]he 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....<sup>21</sup>

If the Commission disapproves, in whole or in part, with a proposed reliability standard or a modification to a reliability standard, the Commission is required to "remand to the Electric Reliability Organization for further consideration."<sup>22</sup> The

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<sup>21</sup> 16 U.S.C. §824o(d) (2).

<sup>22</sup> 16 U.S.C. §824o(d) (4).

Commission may "upon its own motion or upon complaint, ...order the [ERO] to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out [16 U.S.C. §824o]."<sup>23</sup> Once a proposed or modified reliability standard is approved by the Commission, it becomes mandatory and enforceable, subject to any transition period for ensuring compliance with such standard.

On March 18, 2010, the Commission issued a Notice of Proposed Rulemaking proposing to revise NERC's definition of the term "Bulk Electric System" to include all electric facilities rated at 100 kV or higher, except defined radial facilities.<sup>24</sup> The Commission also proposed to allow exemptions from this definition on a specific facility-by-facility basis. On November 18, 2010, the Commission issued Order No. 743, which adopted the proposal contained in the Notice of Proposed Rulemaking, with modifications.

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<sup>23</sup> 16 U.S.C. §824o(d)(5).

<sup>24</sup> The Commission previously approved NERC's definition of the Bulk Electric System, but noted concerns with the potential for gaps in coverage of facilities. See, RM06-16-000, Mandatory Reliability Standards for the Bulk-Power System, Order No. 693 (issued March 16, 2007) reh'g, Order No. 693-A (issued July 19, 2007).

## DISCUSSION

I. The Commission's Decision To Direct The ERO To Define The Bulk Electric System As All Facilities Operated At 100 kV And Above Was Arbitrary, Capricious, An Abuse of Discretion, Unsupported By Substantial Evidence, And In Excess Of Its Statutory Authority Because The Definition Encompasses Facilities Not Necessary For Operating An Interconnected Transmission Network

In determining the extent of FERC's authority, courts look to federal law. As a federal agency, FERC is a creature of statute, having no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.<sup>25</sup> Therefore, "if there is no statute conferring authority, FERC has none."<sup>26</sup> As the Supreme Court has recognized, "an agency literally has no power to act...unless and until Congress confers power upon it."<sup>27</sup> It is therefore incumbent upon FERC to demonstrate that some statute confers upon it the power it purported to exercise ...."<sup>28</sup>

As noted above, the Energy Policy Act of 2005 authorizes the Commission to approve reliability standards for

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<sup>25</sup> Atlantic City Elec. Co. v. FERC, 353 U.S. App. D.C. 1, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting Michigan v. EPA, 348 U.S. App. D.C. 6, 348 U.S. App. D.C. 7, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (emphasis in Atlantic City Elec. Co.)).

<sup>26</sup> Id.

<sup>27</sup> La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986).

<sup>28</sup> Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004).

the "bulk-power system," which is defined to include: "(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) electric energy from generating facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy."<sup>29</sup> Because the Commission's jurisdiction over reliability standards is limited to the Bulk Power System, the facilities subject to the reliability standards must, in fact, be necessary for operating an interconnected electric energy transmission network. However, by defining the bulk-power system as all facilities operating at or above 100 kV, the Commission exceeded its jurisdiction by encompassing facilities that are clearly part of the non-bulk power system, and are not necessary for operating an interconnected transmission network.<sup>30</sup>

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<sup>29</sup> 16 U.S.C. §824o(a).

<sup>30</sup> Through years of studies and functional testing, the New York Independent System Operator, Inc. (NYISO), as well as its predecessor (i.e., the New York Power Pool), have developed a list of facilities that have the potential to cause cascading problems on the electric system. These facilities are considered part of the Bulk System in New York. In addition, the NYISO has developed a secondary list of facilities that can impact the Bulk System, but whose main function is to serve load, and, as such, are under the control of the transmission owner.

The Commission makes an incorrect assumption that merely because a facility operates at 100 kV or above and is considered part of the Bulk Electric System in one part of the country that all facilities operated at similar voltages across the country should be treated as part of the bulk system.<sup>31</sup> In particular, the Commission points to events on facilities within the regions covered by the Florida Reliability Coordinating Council and Reliability First as its rationale for why similar voltage facilities within the Northeast Power Coordinating Council should be considered part of the Bulk Electric System. However, 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 regional differences.

In our comments on the Commission's Notice of Proposed Rulemaking, the NYPSC presented evidence that:

certain 138 kV facilities in New York City operate at voltage levels above 100 kV, yet do not serve a bulk system

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<sup>31</sup> Order No. 743, ¶¶ 87-89. The Commission argues that events that occurred on facilities within the Florida Reliability Council and Reliability First regions demonstrate a need to treat similar voltage facilities in the Northeast power Coordinating Council region as part of the bulk system.

function due to the high concentration of load served by those lines.<sup>32</sup> In fact, these lines are not involved in the movement of energy on the "interconnected" bulk-power system.<sup>33</sup> As such, a loss of these lines would not have an affect on the reliable operation of the Bulk-Power System.

In general, there is a layer of "area" transmission facilities below the bulk-power system and above distribution facilities that serves to move energy within a utility service territory and toward load centers. Only a small subset of these underlying facilities assists in maintaining the reliability of the bulk system.

The Commission dismissed this evidence by indicating that it does "not believe that *most* of these facilities are local distribution..."<sup>34</sup> However, it is invalid to conclude that *all* facilities rated 100 kV and above support the bulk system based on a belief that "most" of those facilities are not involved in local distribution.

The Commission points to several events on facilities rated at 115 kV and 138 kV that have either caused or contributed to significant Bulk Electric System disturbances and cascading outages as a technical justification for the proposed

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<sup>32</sup> The majority of the 138 kV lines within New York City serve as direct feeders to the networked distribution system serving load. Although the few 138 kV facilities that can impact the bulk system are controlled by the transmission owner, any change in status must be reported to the NYISO.

<sup>33</sup> According to the Federal Power Act of 2005, the Bulk-Power System does not cover "facilities and control systems [un]necessary for operating an *interconnected* electric energy transmission network." Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat.594, 941 (2005).

<sup>34</sup> Order 743, ¶39 (emphasis added).



100 kV bright-line definition. While those facilities may have contributed to disturbances or outages on the Bulk Electric System, such limited examples do not support the proposition that all facilities rated at or above 100 kV impact the reliable operation of the bulk system. For example, the Commission observes that the New York Independent System Operator, Inc., which serves as a reliability coordinator within the NPCC, declared transmission load relief events on a flowgate that included three 115 kV transmission lines that are not defined by the NPCC as part of the Bulk Electric System.<sup>35</sup> However, the 115 kV lines constitute a minor element of this flowgate, which predominately consists of higher voltage facilities. It is important to recognize that a fault on one of these 115 kV facilities would not result in a cascading event on the bulk system.

The Commission places great emphasis on the opportunity for utilities to seek an exemption if they believe certain facilities should not be considered part of the Bulk Electric System. However, in directing the NERC to develop a proposed exemption process for excluding facilities that are not necessary for operating the interconnected transmission network,

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<sup>35</sup> A flowgate is a specified line, set of lines, or combination of lines and other facilities that link two zones in the power system over which power flows.

the Commission implicitly acknowledges that various non-jurisdictional facilities are included within the Commission's re-definition of the Bulk Electric System. While the exemption process to be developed by the NERC may ultimately result in the appropriate classification of facilities, it is an impermissible approach to exercising jurisdiction. The Commission cannot assume it has jurisdiction over all facilities operated at 100 kV and above, unless and until an entity demonstrates that the Commission does not have jurisdiction. In addition, the exemption process will likely require the expenditure of significant costs and time to pursue, without any certainty as to whether an exemption will ultimately be granted.

The Commission has also conceded that its bright-line definition is overly-broad by design to ensure it is comprehensive. For example, the Commission indicated that "several 115 and 138 kV facilities that some entities term as 'distribution' may be needed to reliably operate the interconnected transmission system."<sup>36</sup> By conceding that these facilities "may" be needed for the reliability of the interconnected system, the Commission acknowledges that these facilities *may not* be needed for system reliability. Similarly, the Commission concedes that "many facilities operated at 100 kV

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<sup>36</sup> Order No. 743, ¶37 (emphasis added).

and above have a significant effect on the overall functioning of the grid," and therefore recognizes that not all such facilities affect the grid.<sup>37</sup> Therefore, the Commission's decision to direct the ERO to revise the definition of the Bulk Electric System to include facilities operated at 100 kV and above was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and in excess of its statutory jurisdiction.

II. The Commission's Decision To Direct The ERO To Define The Bulk Electric System As All Facilities Operated At 100 kV And Above Was Arbitrary, Capricious, An Abuse of Discretion, And Unsupported By Substantial Evidence Because The Record Lacks A Technical Justification For the 100 kV Bright-Line

As discussed above, the Commission's jurisdiction to establish reliability standards over electric facilities is limited to those facilities necessary for operating an interconnected electric energy transmission network. Because the Commission's decision to adopt a bright-line of 100 kV was not based on whether those facilities are necessary for operating the interconnected transmission network, the Commission's decision lacked a technical justification and was not based on substantial evidence. Instead, it appears the Commission's bright-line approach was designed to cast a wide net over the country to ensure an approach that is consistent as

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<sup>37</sup> Order No. 743, ¶73.

to the scope of its reach (i.e., 100 kV and higher). However, this is a superficial consistency and devoid of any analysis regarding the necessity of facilities to operate an interconnected electric energy transmission network. Order No. 743 contains no factual basis for establishing why 100 kV is the appropriate place to draw the line. In fact, the examples identified by FERC that are purported to support the 100 kV bright-line were all 115kV facilities or higher. Thus, a bright-line of 100 kV is arbitrary and capricious, an abuse of discretion, and is not supported by substantial evidence.

**III. The Commission's Decision To Direct The ERO To Revise the Definition Of The Bulk Electric System Was Arbitrary, Capricious, An Abuse of Discretion, Unsupported By Substantial Evidence, And Inconsistent With Case Law Because The Commission Failed To Determine Sufficient Benefits In Relation To The Costs, And The Commission's Decision Will Result In The Imposition Of Unnecessary Costs Without Reliability Benefits**

The NYPS&C is particularly concerned that the FERC has adopted the bright-line without considering the costs and benefits of such approach. Compliance with the Commission's proposed bright-line voltage test will be costly to implement within the NPCC footprint, as utilities would be required to upgrade portions of their electric systems historically considered non-bulk facilities in order to comply with newly-applicable reliability standards. These non-bulk facilities are not necessary for the "reliable operation" of the interconnected

bulk-power system. As the NPCC noted in its Compliance Report, the estimated cost of applying the 100 kV and higher definition could exceed \$280 million.<sup>38</sup> The Commission failed to consider the costs and benefits (i.e., the alleged incremental reliability benefits) of expanding the application of the standards to facilities that have never been subject to NERC's standards.

Moreover, Order No. 743 is inconsistent with the U.S. Court of Appeals' decision in Illinois Commerce Commission v. Federal Energy Regulatory Commission, 576 F.3d 470 (7<sup>th</sup> Cir. 2009), which required the Commission to quantify the benefits of upgrades for reliability purposes in order to justify the costs. As the Court indicated, "FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members."<sup>39</sup> The Court also noted that FERC has a "duty [to] 'compar[e] the costs assessed against a party to the

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<sup>38</sup> Docket No. RC09-3-000, Compliance Filing and Assessment of Bulk Electric System Definition Report of the NERC and NPCC (filed September 21, 2009) p. 13.

<sup>39</sup> Illinois Commerce Commission, 576 F.3d at 476.

burdens imposed or benefits drawn by that party.'"<sup>40</sup> The Court ultimately found that FERC failed to make a reasoned decision based upon substantial evidence in the record.

Similar to its decision in Illinois Commerce Commission, the Commission has not made any attempt to assess the benefits of Order No. 743 in relation to the costs. Therefore, the Commission has failed to make a reasoned decision based on substantial evidence. Although the Commission's decision under Order No. 743 does not involve the approval of a pricing regime, as was the case in Illinois Commerce Commission, there are clearly cost implications of the Commission's decision as noted above. Further, the Commission recognized that affected entities will be allowed to seek and recover costs associated with complying with Order No. 743.<sup>41</sup> For these reasons, the NYPSC maintains that the Commission's decision to adopt a 100 kV and above bright-line voltage test was arbitrary,

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<sup>40</sup> Id. at 477 (citing Midwest ISO Transmission Owners v. Federal Energy Regulatory Commission, 373 F.3d 1361, 1368 (D.C. Cir. 2004)).

<sup>41</sup> Order No. 743, ¶134.

capricious, an abuse of discretion, unsupported by substantial evidence, and inconsistent with case law.<sup>42</sup>

IV. The Commission's Decision To Direct The ERO To Define The Bulk Electric System, Without The ERO Utilizing Its Technical Expertise To Address The Commission's Concerns Was In Excess Of The Commission's Statutory Jurisdiction And Inconsistent With Prior Commission Decisions

Pursuant to the Federal Power Act, upon the submission of a standard by the ERO,

[t]he 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....<sup>43</sup>

If the Commission disapproves, in whole or in part, with a proposed reliability standard or a modification to a reliability standard, the Commission is required to "remand to

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<sup>42</sup> In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...in excess of statutory jurisdiction, authority, or limitations, or short of statutory right...; or, unsupported by substantial evidence." 5 U.S.C. §706. See, Bluewater Network v. Environmental Protection Agency, 370 F.3d 1, 18 (D.C. Cir. 2004).

<sup>43</sup> 16 U.S.C. §824o(d)(2).

the Electric Reliability Organization for further consideration."<sup>44</sup> The Commission may "upon its own motion or upon complaint, ...order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out [16 U.S.C. §824o].<sup>45</sup>

The purported legal basis for the Commission to require the NERC to revise and adopt a specific definition for the Bulk Electric System is the statutory authority to order the NERC to "submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out [the Federal Power Act §215]."<sup>46</sup> However, this authority merely allows the Commission to require NERC to file a proposal to establish a new reliability standard or a proposal to amend an existing standard, in order to address specific matters identified by the Commission. In other words, the NERC, as the Electric Reliability Organization, must decide in the first

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<sup>44</sup> 16 U.S.C. §824o(d)(4).

<sup>45</sup> 16 U.S.C. §824o(d)(5).



instance how the Commission's specific concerns should best be achieved. This interpretation is consistent with the purpose and intent behind the Energy Policy Act of 2005, which designated the ERO as the clearing-house for developing and modifying reliability standards, subject to the Commission's oversight. The Commission impermissibly reads the term "proposed" to not apply to a modification to a reliability standard, and has thus bypassed the NERC's technical expertise by directing a modification.<sup>47</sup>

The Federal Power Act does not permit the Commission to prescribe how its concerns should be met and to direct the NERC to file a specific standard laid out by the Commission. To interpret the Federal Power Act to include this authority would effectively nullify the provision directing the Commission to remand to the NERC, for further consideration, any reliability standard that was disapproved by the Commission.<sup>48</sup> Moreover, such an interpretation would essentially render the NERC meaningless, as the Commission could simply direct the NERC to file whatever specific reliability standards the Commission deems appropriate.

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<sup>46</sup> 16 U.S.C. §824o(d) (5) .

<sup>47</sup> 16 U.S.C. §824o(d) (5) (emphasis added) .

<sup>48</sup> 16 U.S.C. §824o(d) (4) .

The Commission previously acknowledged concerns about the "prescriptive nature of...proposed modifications," and directed NERC to "address the underlying issue through the Reliability Standards development process without mandating a specific change to the Reliability Standard."<sup>49</sup> In directing modifications, the Commission emphasized that it was not mandating a particular outcome, but allowing the NERC to "respond with an equivalent alternative and adequate support that fully explains how the alternative produces a result that is as effective or more effective" than the Commission's directive.<sup>50</sup>

When developing reliability standards, the NERC engages in a stakeholder process that includes reasonable notice and opportunity for public comment, due process, openness, and the balancing of interests. This process should not be short-

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<sup>49</sup> Docket No. RM06-16-000, Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, ¶¶185-86 (issued March 16, 2007) (agreeing that "a direction for modification should not be so overly prescriptive as to preclude the consideration of viable alternatives in the ERO's Reliability Standards development process").

<sup>50</sup> Id. at ¶31.

circuited by the Commission's directives.<sup>51</sup> For these reasons, the Commission has also exceeded its statutory authority by directing revisions to the definition of the Bulk Electric System, without the NERC utilizing its technical expertise to address the Commission's concerns.

While the Commission indicated that "the ERO has the discretion to develop an alternative solution that is as effective as, or superior to, the Commission's [bright-line] approach,"<sup>52</sup> this approach is inconsistent with the requirement within the Federal Power Act that the Commission "shall remand to the [ERO] for further consideration a proposed reliability standard or modification to a reliability standard that the Commission disapproves in whole or in part."<sup>53</sup> Moreover, by providing narrowly tailored guidance regarding "specific matters" of concern to the Commission, and rejecting the impact-based approach discussed below, the FERC has effectively limited the discretion of the ERO to propose a modification that

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<sup>51</sup> Although the Commission emphasized that it was allowing the ERO to "develop an alternative proposal for addressing the Commission's concerns with the present definition" of the Bulk Electric System, this does not address our concerns that the Commission has acted contrary to its statutory authority over the ERO by mandating a particular modification rather than requiring the ERO to propose a modification that addresses the Commission's concerns.

<sup>52</sup> Order No. 743, ¶74.

<sup>53</sup> 16 U.S.C. §824o(d)(4).

addresses the Commission's concerns. The Commission should afford the ERO the discretion to develop modifications to the definition of the Bulk Electric System, consistent with Congress' recognition of the ERO's experience and expertise, the complexity of the transmission network, and that one size does not fit all when it comes to the reliable operation of that network.

V. The Commission's Decision Rejecting An Impact-Based Test For Identifying The Bulk Power System Was Arbitrary, Capricious, An Abuse Of Discretion, And Unsupported By Substantial Evidence

Although the Commission determined that it "does not support using the material impact tests proffered by commenters as a basis for determining a facility's importance," including the Northeast Power Coordinating Council's (NPCC) use of an impact-based approach, the Commission should reconsider this as a viable approach, with possible modifications to address the Commission's concerns.<sup>54</sup> An impact-based test for defining the Bulk Electric System and Bulk Power System is consistent with the Federal Power Act, which defines the Bulk Power System with regards to facilities that are necessary for reliably operating an interconnected electric energy transmission network (or any portion thereof).

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<sup>54</sup> Order No. 743, ¶76.

The 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. For example, the NPCC identifies facilities having an adverse impact on bulk systems by defining the bulk power system as "the interconnected electrical systems within northeastern North America comprising generation and transmission facilities on which faults or disturbances can have a significant adverse impact outside of the local area. In this context, local areas are determined by the Council members."<sup>55</sup>

Because a functional test identifies "facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof),"<sup>56</sup> it is consistent with the Energy Policy Act of 2005. By determining which facilities are necessary to reliably operate the bulk-power system, this test would obviate the Commission's concern that a discrepancy in definitions could lead to reliability gaps. Although this approach could result in the same voltage lines being classified differently, such an outcome is entirely consistent with an acknowledgement that facilities with similar voltages may or may not be part of the bulk-power

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<sup>55</sup> See, <http://www.npcc.org/publicFiles/reliability/criteriaGuidesProcedures/a-07.pdf>.

<sup>56</sup> 16 U.S.C. §824o(a)(1)(A).

system or affect such system, depending on the characteristics and configurations of regional electric systems. In fact, an impact-based test will more closely comply with the definition of the Bulk Power System than any "bright-line" test.

The Commission summarily dismissed the impact-based approach based on a single event and the Commission's stated need for a consistent and comprehensive test.<sup>57</sup> However, the Commission does not identify how any such inconsistencies have impacted or may in the future impact the reliable operation of the Bulk Power System, or why all transmission facilities in the country that are rated at or above 100 kV should be identified as part of the bulk system. Further, it does not appear that FERC gave due weight to NERC's position and technical expertise, as required under the Federal Power Act. The Commission's concerns that existing definitions are "broadly defined and [are] open to interpretation," and that the NPCC's documents do not assess whether facilities are necessary for reliable operation may be capable of being addressed through modifications to the existing impact tests and FERC should consider the validity of such approach.<sup>58</sup>

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<sup>57</sup> The Commission found that "[t]he material impact tests...appear to exclude facilities without regard to whether they are necessary to operate the system."

<sup>58</sup> Order No. 743, ¶¶77-78.

CONCLUSION

For the reasons noted above, the Commission should grant the NYPSC's Request for Rehearing, modify Order No. 743 in accordance with the above discussion, and direct the NERC to propose a modified definition of the Bulk Electric System that addresses the Commission's concerns.

Respectfully submitted,



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Dated: December 20, 2010  
Albany, New York

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: Albany, New York  
December 20, 2010



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