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January 22, 2013

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 Nos. RM12-6-000 and RM12-7-000- Revisions  
to Electric Reliability Organization Definition  
of Bulk Electric System and Rules of Procedure

Dear Secretary Bose:

For filing, please find the Request for Rehearing and Clarification 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,

David G. Drexler  
Assistant Counsel

Attachment  
cc: Service List

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Revisions to Electric Reliability	)	Docket Nos. RM12-6-000
Organization Definition of Bulk	)	RM12-7-000
Electric System and Rules of	)	
Procedure		

REQUEST FOR REHEARING AND CLARIFICATION  
OF THE NEW YORK STATE  
PUBLIC SERVICE COMMISSION

BACKGROUND

Pursuant to the Energy Policy Act of 2005, the Federal Energy Regulatory Commission (FERC or Commission) is authorized to approve "reliability standards" necessary for the "reliable operation" of the "bulk-power system."<sup>1</sup> The Commission designated the North American Electric Reliability Corporation (NERC) as the Electric Reliability Organization responsible for proposing such reliability standards, subject to FERC's review and approval.<sup>2</sup> To identify the bulk-power system, the Commission

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<sup>1</sup> 16 U.S.C. §824o(a) (1).

<sup>2</sup> Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat.594, 941 (2005). 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).

relied upon NERC's definition of the "bulk electric system."<sup>3</sup>

The Commission, however, raised concerns with potential gaps in the facilities covered under its jurisdiction given that NERC's definition provided "Regional Entities" with discretion to define the bulk electric system based on regional variations.<sup>4</sup>

On November 18, 2010, the Commission issued Order No. 743, which sought to address its concerns by mandating a bright-line approach. The Commission indicated that the definition of the bulk electric system (BES) should include all facilities operated at 100 kV or above, except radial facilities and any facilities that receive an exemption because they are not necessary for operating the interconnected transmission network.<sup>5</sup> The Commission allowed NERC to propose an alternative approach for addressing the Commission's concerns, but advised "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."<sup>6</sup>

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<sup>3</sup> Order No. 693, FERC Stats. & Regs. ¶75; Order No. 693-A, 120 FERC ¶61,053, ¶19 (leaving a determination of the extent of the Bulk-Power System to a future proceeding).

<sup>4</sup> Id. Several Regional Reliability Organizations/Regional Entities, such as the Northeast Power Coordinating Council (NPCC), 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.

<sup>5</sup> Order No. 743, 133 FERC ¶61,150, ¶¶ 1, 16, and 29.

<sup>6</sup> Id. at ¶¶1 and 31.

On January 25, 2012, NERC responded to Order 743 by filing a revised definition of the bulk electric system adopting the 100 kV bright-line definition, and listing specific items for inclusion and exclusion. In addition, NERC proposed procedures to provide a case-by-case exception process to add elements to, or remove elements from, the bulk electric system, regardless of operating voltages. On June 22, 2012, the Commission issued a Notice of Proposed Rulemaking (NOPR) seeking comments on its proposal to adopt NERC's revised definition of the bulk electric system and proposed exceptions process.

On December 20, 2012, the Commission issued Order No. 773, approving NERC's proposals, but determining that it, and not NERC, should make the ultimate determination as to whether a facility serves local distribution and is therefore excluded from the bulk electric system. The Commission also indicated that it would utilize the seven-factor test it established in Order No. 888 for distinguishing transmission from local distribution facilities.<sup>7</sup>

#### **REQUEST FOR CLARIFICATION**

The New York State Public Service Commission (NYPSC) requests clarification as to the process entities must utilize

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<sup>7</sup> 141 FERC ¶61,236, Order No. 773 (issued December 20, 2012) (Order No. 773)

to seek an exception to the definition of the BES. The Commission approved NERC's proposed process for seeking and obtaining an exception before NERC, subject to any appeals to the Commission, but also indicated that "an entity must petition the Commission seeking a determination that the facility is used in local distribution."<sup>8</sup> The Commission should clarify the relationship, if any, between NERC's exception procedures and the Commission's process. For example, must an entity go through the NERC process before filing a petition with the Commission, or should the entity file with FERC in the first instance?

The Commission should also clarify whether, in adopting the seven-factor test identified in Order No. 888, it intended to apply the other aspects of Order No. 888 that "give deference to [state] determinations as to which facilities are transmission and which are local distribution, provided that the states, in making such determinations, apply the seven

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<sup>8</sup> Order No. 773, ¶70.

criteria."<sup>9</sup> FERC indicated in Order No. 888 that it would entertain proposals by public utilities, filed under section 205 of the Federal Power Act, containing classifications for transmission and local distribution facilities. At the same time, the Commission required utilities to consult with their state regulatory authorities as a prerequisite to making such filings. If the utility's classifications were supported by the state regulatory authorities and consistent with the principles established in Order No. 888, FERC indicated that it would defer to the utility's proposals. FERC also indicated that it would consider jurisdictional recommendations that take into account technical factors that the state believes are appropriate in light of the historical uses of particular facilities.<sup>10</sup> These aspects of Order No. 888 were designed to preserve state jurisdiction over local distribution facilities, and the Commission should clarify their continued applicability to the NERC exceptions process.

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<sup>9</sup> Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶31,036, at p. 429, 61 Fed. Reg. 21,540 (1996), clarified, 76 FERC ¶61,009 and 76 FERC ¶61,347 (1996), on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶31,048, 62 Fed. Reg. 12,274, clarified, 79 FERC ¶61,182 (1997), on reh'g, Order No. 888-B, 81 FERC P 61,248, 62 Fed. Reg. 64,688 (1997), on reh'g, Order No. 888-C, 82 FERC ¶61,046 (1998), aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667, aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

<sup>10</sup> Order No. 888 at pp. 436-440.

Finally, the Commission should clarify that utilities will not be required to make capital expenditures to bring those facilities subject to the exception process into compliance with bulk electric system standards until any exception processes related to those facilities are concluded. Alternatively, the Commission should indicate that it will postpone compliance requirements until after such processes are finalized.

#### REQUEST FOR REHEARING

The NYPSC requests rehearing of certain aspects of Order No. 773, pursuant to Rule 713 of the Commission's Rules of Practice and Procedure.<sup>11</sup> As discussed more fully below, the NYPSC maintains that the Commission has exceeded its statutory authority by encompassing local distribution facilities under the bright-line definition of the bulk electric system. In adopting an exception process, the Commission recognizes that the proposed exclusions to the bright-line definition are insufficient to avoid encompassing local distribution facilities. Moreover, the exception process disregards State jurisdiction by presuming that all facilities operated at 100 kV and above are part of the bulk electric system and then failing to provide the States an effective mechanism to contest that presumption. The Commission has also failed to present a

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<sup>11</sup> 18 C.F.R. §385.713.

sufficient technical justification and substantial evidence to support the 100 kV bright-line definition for the bulk electric system. For these reasons, the Commission should grant the NYPSC's request for rehearing.

## I. STATEMENT OF ISSUES

- A. Whether FERC's decision adopting a 100 kV bright-line definition of the bulk electric system, with limited exclusions, exceeded its statutory authority by encompassing local distribution facilities.<sup>12</sup>
- B. Whether FERC's decision adopting a 100 kV bright-line definition of the bulk electric system, was arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence where the record lacks a technical justification for the bright-line definition.<sup>13</sup>
- C. Whether FERC's failure to provide for explicit state involvement in the exception process was arbitrary, capricious, inconsistent with reasoned decision-making, an abuse of discretion, or otherwise not in accordance with law.<sup>14</sup>

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<sup>12</sup> In reviewing agency determinations, courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706; Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003) (finding FERC exceeded its jurisdiction by accepting provisions that applied to local distribution facilities).

<sup>13</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,...or, unsupported by substantial evidence." 5 U.S.C. §706.

<sup>14</sup> Id.



D. Whether FERC failed to provide adequate notice and comment, as required under the law, by adopting a process and standards for seeking an exception from the bright-line definition in its final rule for the first time.<sup>15</sup>

## II. DISCUSSION

### A. The Commission Exceeded Its Statutory Authority By Defining The Bulk Electric System As All Facilities Operated At 100 kV And Above, With Limited Exclusions, And Requiring Parties To Obtain An Exception For Local Distribution Facilities

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>16</sup> Therefore, "if there is no statute conferring authority, FERC has none."<sup>17</sup> As the Supreme Court has recognized, "an agency literally has no power to act...unless and until Congress confers power upon it."<sup>18</sup> It is therefore incumbent upon FERC to demonstrate that some statute confers upon it the power it purported to exercise ...."<sup>19</sup>

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<sup>15</sup> 5 U.S.C. § 553(c); Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3<sup>rd</sup> Cir. 2011).

<sup>16</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>17</sup> Id.

<sup>18</sup> La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986).

<sup>19</sup> Cal. Indep. Sys. Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004).

As noted above, the Energy Policy Act of 2005 authorized the Commission to approve reliability standards for 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>20</sup>

Because the Commission's jurisdiction over reliability standards is limited to the bulk-power system, the facilities and control systems must, in fact, be necessary for operating an interconnected electric energy transmission network, and cannot be used in local distribution.

In attempting to avoid any gaps in applying reliability standards and to ensure consistency, the Commission over-broadly defined the bulk electric system as all facilities operated at 100 kV or above, unless modified by a certain inclusions and exclusions.<sup>21</sup>

The Commission's definition of the bulk electric system encompasses facilities that are clearly used for local distribution and are not part of the bulk-power system, and are not necessary for operating an interconnected transmission

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<sup>20</sup> 16 U.S.C. §824o(a).

<sup>21</sup> Order No. 773.

network.<sup>22</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 ignored this information in establishing a bright-line definition.

Further, the NYPSC presented evidence that:

[C]ertain 138 kV facilities in New York City operate at voltage levels above 100 kV, yet do not serve a bulk system function due to the high concentration of load served by those lines.<sup>23</sup> In fact, these lines are not involved in the movement of energy on the "interconnected" bulk-power system.<sup>24</sup> As such, a loss of these lines would not have an affect on the reliable operation of the Bulk-Power System.

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<sup>22</sup> Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003) (finding FERC exceeded its jurisdiction by accepting provisions that applied to local distribution facilities).

<sup>23</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>24</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).

As we explained, 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.<sup>25</sup> The Commission dismissed this evidence, finding that it was beyond the scope of this proceeding.<sup>26</sup>

Although the proposed BES definition also states that it "does not include facilities used in the local distribution of electric energy," the Commission effectively acknowledged that such facilities would be placed under its jurisdiction by establishing an exception process whereby entities may seek to demonstrate that the facilities are not necessary for operating the interconnected transmission network, or are used in local distribution.<sup>27</sup> The exception process 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. This approach presumes

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<sup>25</sup> Docket No. RM12-6, NYPSC Notice of Intervention and Comments, p. 6 (filed September 4, 2012).

<sup>26</sup> Order 773, ¶43.

<sup>27</sup> Order No. 773, ¶40.

FERC has jurisdiction over all facilities operated at 100 kV or above, and inappropriately shifts the legal and technical burdens on the jurisdictional issue to the entity applying for the exception, which is not likely to be the affected State.<sup>28</sup>

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 general and limited findings that "many facilities operated at 100 kV and above have a significant effect on the overall functioning of the grid and that the majority of 100 kV and above facilities in the United States operate in parallel with other high voltage and extra high voltage facilities, interconnect significant amounts of generation sources and operate as part of a defined flowgate."<sup>29</sup> However, it is invalid to conclude that all facilities operated at 100 kV and above support the bulk system based on a belief that "many" or a "majority" of those facilities serve such a role.

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<sup>28</sup> The NERC exception process states that "the burden to provide a sufficient basis for approval of an exception request in accordance with the provisions of the exception procedure is on the submitting entity." Order No. 773 at ¶261. NERC's procedures do not provide for a State to be a "submitting entity."

<sup>29</sup> Order No. 773, ¶¶41 and 67 (emphasis added).

**B. The Commission's Decision Establishing A 100 kV Bright-Line Definition Of The Bulk Electric System Was Arbitrary, Capricious, An Abuse of Discretion, And Unsupported By Substantial Evidence Because The Record Lacks A Technical Justification**

The Commission's bright-line definition of the BES is inconsistent with the Federal Power Act's definition of the bulk-power system, which recognizes a functional test is needed to determine whether a facility is truly needed for reliable operation. The term "reliable operation" is defined to mean 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>30</sup>

The Commission failed to demonstrate a sufficient technical justification that the bright-line definition only encompasses facilities needed for the reliable operation of the bulk-power system. As discussed above, the Commission's jurisdiction to establish reliability standards for the BES 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 the facilities are necessary for operating

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<sup>30</sup> 16 U.S.C. §824o(a)(4).

the interconnected transmission network, the Commission's decision lacks a sufficient technical justification. Instead, it appears the Commission's bright-line approach was designed to cast a broad net over the country to ensure an approach that is consistent and avoid gaps. However, the Commission cannot dodge the jurisdictional limitations reflected in the statute simply to ensure its concept of consistency. Order No. 773 contains no factual basis for establishing why 100 kV is the appropriate place to draw the line.

For the sake of consistency, the Commission ignored a functional test for defining the bulk-power system, such as the one that has been used historically by the NPCC to identify facilities having an adverse impact on the bulk system. For example, the NPCC has identified 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.

Because a functional test identifies "facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof),"<sup>31</sup>

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<sup>31</sup> Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat.594, 941 (2005), Energy Policy Act of 2005 §1211(a).

it is consistent with the Federal Power Act. By determining which facilities are necessary to reliably operate the bulk-power system, a functional 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 system or affect such system, depending on the characteristics and configurations of regional electric systems.

Moreover, as noted above, the Commission should not require utilities to upgrade facilities to comply with FERC-approved reliability standards where a timely request for an exception has been submitted and is still pending. Compliance and the related expenditure of ratepayer funds should not be required until after the Commission has made a final determination on the exception. This approach will ensure that the costs of compliance are not unnecessarily imposed upon ratepayers, and the Commission does not impermissibly exert jurisdiction.<sup>32</sup>

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<sup>32</sup> The Commission also erred in not adopting the other components of Order No. 888, which are discussed above under the NYPSC's Request for Clarification.



**C. The Commission Erred In Not Providing For Explicit State Involvement In the Exception Process**

Although the Commission adopted NERC's process for seeking an exception from the bulk electric system definition, the Commission did not explicitly provide for state involvement. Because the states have a unique interest and jurisdictional role, which no other party can represent, the exceptions process must allow for direct state participation. States must get notice of proposed facility designations, requested inclusions and exclusions, and requested exceptions, while utilities should be required to consult with state commissions before filing a request for an exception. In addition, states should have the right to submit comments and contribute to the development of the record prior to any preliminary or final determinations being made. To the extent the Commission is also contemplating using the seven factors identified in Order No. 888, the NERC process should reflect the opportunities identified in Order No. 888 for state participation (See above Request for Clarification).

**D. The Commission Failed To Provide Adequate Notice And Comment Regarding The Exception Process**

The Commission identified in Order No. 773, for the first time, the process for petitioning for an exception from FERC because a facility is used in local distribution, and the

role of the seven-factors identified in Order No. 888.<sup>33</sup> The Administrative Procedure Act (APA), however, requires agencies to provide notice of a proposed rule and a meaningful opportunity for parties to comment.<sup>34</sup> The Commission failed to comply with the APA in this proceeding, and should accordingly provide sufficient notice and opportunity for parties to comment. To the extent the Commission rejects this argument, the NYPSC has raised a preliminary set of issues surrounding the use of Order No. 888 (See Request for Clarification section above) that should be addressed by the Commission.

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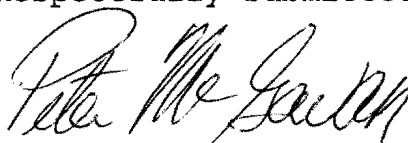
<sup>33</sup> Order No. 773, ¶70.

<sup>34</sup> Prometheus Radio Project v. FCC, 652 F.3d 431, 449 (3<sup>rd</sup> Cir. 2011).

CONCLUSION

In accordance with the foregoing discussion, the NYPSC respectfully requests that the Commission grant the foregoing Request for Rehearing and Clarification.

Respectfully submitted,



Peter McGowan  
General Counsel  
Public Service Commission  
of the State of New York

By: David G. Drexler  
Assistant Counsel  
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Dated: January 22, 2013  
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  
January 22, 2013

A handwritten signature in cursive script, appearing to read "David G. Drexler".

David G. Drexler  
Assistant Counsel  
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