Annexe A

EXTRAIT DE L'ORDONNANCE 693 DE LA FERC

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«1. Bulk-Power System v. Bulk Electric System

50. The NOPR observed that, for purposes of section 215, "Bulk-Power System" means:

(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.

51. The NERC glossary, in contrast, states that Reliability Standards apply to the "bulk electric system," which is defined by its regions in terms of a voltage threshold and configuration, as follows:

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.

52. In the NOPR, the Commission proposed that, for the initial approval of proposed Reliability Standards, the continued use of NERC's definition of bulk electric system as set forth in the NERC glossary is appropriate. However, the Commission interpreted the term "bulk electric system" to apply to: (1) all of the > 100 kV transmission systems and any underlying transmission system (< 100 kV) that could limit or supplement the operation of the higher voltage transmission systems and (2) transmission to all significant local distribution systems (but not the distribution system itself), transmission to load centers and transmission connecting generation that supplies electric energy to the system. The Commission proposed that, if a question arose concerning which underlying transmission system limits or supplements the operation of the higher voltage transmission system, the ERO would determine the matter on a case-by-case basis.

53. The Commission solicited comment on its interpretation and whether the Regional Entities should, in the future, play a role in either defining the facilities that are subject to a Reliability Standard or be allowed to determine an exception on a case-by-case basis.

54. Further, the NOPR explained that continued reliance on multiple regional interpretations of the NERC definition of bulk electric system, which omits significant portions of the transmission system component of the Bulk-Power System that serve critical load centers, is not appropriate. Thus, the NOPR proposed that, in the long run, NERC revise the current definition of bulk electric system to ensure that all facilities, control systems and electric energy from generation resources that impact system reliability are included within the scope of applicability of Reliability Standards, and that NERC's revision is consistent with the statutory term Bulk-Power System.

a. Comments

55. Most commenters, including NERC, NARUC, APPA, National Grid, EEI and Ontario IESO, believe that the Commission should only impose Reliability Standards on those entities that fall under NERC's definition of bulk electric system as it existed under the voluntary regime. They state that, by extending the definition of bulk electric system, the Commission goes beyond what is necessary to protect Bulk-Power System reliability, creates uncertainty and will divert resources from monitoring compliance of those entities that could have a material impact on Bulk-Power System reliability.

56. Entergy, however, agrees with the Commission that NERC's definition of bulk electric system is not adequate and agrees with the Commission's proposed interpretation. ISO-NE does not oppose the NOPR's approach on how to interpret the term "Bulk-Power System," but it states that this broader scope justifies a delay in the date civil penalties take effect, to January 1, 2008, to provide the industry sufficient time to review the Commission's Final Rule and to adjust to the expanded reach of the Reliability Standards.

57. NERC, APPA and NRECA maintain that there was no intentional distinction made by Congress between "Bulk-Power System" (as defined in section 215) and the "bulk electric system" (as defined by the NERC glossary). NERC asserts that recent discussions with stakeholders confirm NERC's belief that there was no distinction intended. Moreover, NERC is not aware of any documentation that suggests a distinction was intended. NRECA argues that legislative intent and prior usage do not support the Commission's approach to defining the Bulk-Power System. NRECA concedes that no conference committee report accompanied EPAct 2005, but it notes that the Congressional Research Service specifies in its manual on statutory interpretation that "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that *were attached to each borrowed word in the body of learning from which it was taken."*

58. TAPS states that the Commission cannot lawfully "interpret" the bulk electric system definition contrary to its terms. According to TAPS, the Commission cannot include facilities below 100 kV "that could limit or supplement the operation of the higher voltage transmission systems," in the bulk electric system, even if they are "necessary for operating" the bulk system, because these facilities are not included in NERC's definition of bulk electric system.

59. NERC states that the Commission's proposal that NERC's "bulk electric system" should apply to all of the equal to or greater than 100 kV transmission systems and any underlying transmission system (less than 100 kV) that could limit or supplement the operation of the higher voltage transmission systems is a significant expansion over what the industry has historically regarded as the bulk electric system, both in terms of the facilities covered and the entities involved. While NERC agrees with the Commission that Congress intended to give the Commission broad jurisdiction over the reliability of the Bulk-Power System, it does not believe this is the right time for the Commission to define the full extent of its jurisdiction or that the approach proposed in the NOPR is the right way to do so. In addition, NERC does not believe it is legally necessary for the Commission to extend its jurisdiction to the limits in a single step.

60. NERC states that the Commission should make clear in this Final Rule that its jurisdiction is at least as broad as the historic NERC definition of "bulk electric system" and that the Commission will use that definition for the near term. NERC asserts that the Commission should also make clear that it is not deciding in this docket the full scope of its jurisdiction and is reserving its right to consider a broader definition. Instead, NERC states that the Commission should focus on approving an initial set of Reliability Standards for the core set of users, owners and operators that have the most significant impact on the reliability of the Bulk-Power System. NERC maintains that this core set has been defined through its use of the terms "bulk electric system" and "responsible entities" provided in the NERC Glossary, the "Applicability" section of each Reliability Standard and substantive requirements of the standards themselves, and NERC's registration of specific entities that are responsible for compliance with the Reliability Standards.

61. NRECA argues that the definition of "Bulk-Power System" contained in section 215(a)(1) reflects Congressional intent to codify the established materiality component because Congress limited the definition of Bulk-Power System to facilities and control systems necessary for operating an interconnected electric energy transmission network and electric energy from generation facilities needed to maintain transmission system reliability. NRECA argues that these *limiting terms mean that not all transmission facilities are included. In NRECA's view, the definition of the Bulk-Power System within the meaning of section 215 cannot extend to radial facilities to "significant local distribution systems," "load centers," or local transmission facilities unless otherwise "necessary for" (i.e., material to) the reliable operation of the interconnected grid. Further, NRECA states that the definition of "Reliable Operation" in section 215(a) focuses on the reliable operation of the Bulk-Power System and not the protection of local load per se.*

62. Certain commenters assert that expanding the scope of the Commission's jurisdiction and the scope of the Reliability Standards in this proceeding would be an unanticipated expansion of the reach of the existing Reliability Standards implemented with insufficient due process and may cause jurisdictional concerns. They state that the Reliability Standards under consideration were developed and approved through NERC's Reliability Standards development process with the intention that they would apply based on the industry's historical conception of the bulk electric system and that the outcome might have been different using the Commission's proposed definition. NERC therefore argues that it would be inappropriate to assume that the requirements of the existing Reliability Standards would be relevant to an expanded set of entities or an expanded scope of facilities under a broader definition of the Bulk-Power System. NERC also asserts that there is no reasonable justification for subjecting "thousands of small entities" to the costs of compliance with the Reliability Standards when there is no reasonable justification to do so in terms of incremental benefit to the reliability of the Bulk-Power System.

63. NRECA, APPA and others argue that the Commission's interpretation would undermine, rather than promote, reliability. According to these commenters, the Commission's interpretation would require new definitions, such as one for "load center," and otherwise creates confusion. For example, Small Entities Forum states that it is concerned with the inclusion of "transmission connecting generation that supplies electric energy to the system" because that could include any transmission connected to any generation of any size.

64. APPA objects to the Commission's statement that "[t]he transmission system component of the Bulk-Power System is understood to provide for the movement of power in bulk to points of distribution for allocation to retail electricity customers." APPA states that it does not believe there is an industry "understanding" that the bulk electric system or the Bulk-Power System necessarily encompass all transmission facilities that connect major generation stations to distribution systems or that there is a bright line between transmission and distribution facilities. APPA interprets these terms as describing the backbone facilities that integrate regional transmission networks.

65. NERC's approach to moving forward with the enforcement of mandatory Reliability Standards is to register the specific entities that NERC will hold accountable for compliance with the Reliability Standards. The registration will identify all entities that are material to the reliability of the Bulk-Power System. NERC maintains its most important role is to mitigate noncompliant behavior regardless of an entity's registration. Further, NERC asserts that all that it and the Commission give up by using the registration approach is, at most, "one penalty, one time" for an entity. That is, if there is an entity that is not registered and NERC later discovers that the entity can have a material impact on the reliability of the Bulk-Power System, NERC has the ability to add the entity, and possibly other entities of a similar class, to the registration list and to direct corrective action by that entity on a going forward basis. Thereafter, of course, the entity would be subject to sanctions. APPA, TANC, AMP-Ohio and NPCC support this approach. While SoCal Edison believes that there can be no single definition of Bulk-Power System, it states that NERC's registry is a good starting point to developing general criteria for what facilities should be subject to the Reliability Standards.

66. AMP-Ohio supports NERC's proposal to include any additional entities or facilities that it believes could have a detrimental effect on the reliability of the bulk electric system on a case-by-case basis over time. Further, Ontario IESO suggests that if the Commission believes that NERC's definition of bulk electric system excludes facilities that should be subject to Reliability Standards for reasons other than preventing cascading outages, the Commission could submit a detailed request through the ERO Reliability Standards development process.

67. NERC and EEI believe that, in the long run, NERC should be directed to develop, through its Reliability Standards development process, a single process to identify the specific elements of the Bulk-Power System that must comply with Reliability Standards under section 215. According to NERC, the Commission, the states, and all other stakeholders would benefit tremendously from a deliberate dialogue on these matters. NERC asks that the Commission not directly define the outer limits of its jurisdiction under section 215, but requests that the Commission direct NERC to undertake certain activities to reconcile the definitions of bulk electric system and Bulk-Power System and report the results back to the Commission.

68. Similarly, TAPS, APPA, Duke and MidAmerican state that, if there is a problem with NERC's current definition of the bulk electric system, the Commission should require NERC to revisit it using the ANSI process to give "due weight" to NERC's technical expertise. AMP-Ohio, TANC, Georgia Operators *and Entergy state that Regional Entities should play a primary role in defining the facilities that are subject to a Reliability Standard because the Regional Entities will have more detailed system knowledge in their regions than NERC or the Commission.*

69. The Connecticut Attorney General, the Connecticut DPUC and the New England Conference of Public Utilities Commissioners maintain that NERC's definition of the "bulk electric system" exceeds the Commission's jurisdiction by including generation that is not needed to maintain transmission system reliability and therefore intrudes into state jurisdiction over generation resource adequacy matters and is unlawful. According to Connecticut DPUC, section 215(a)(1) of the FPA excludes from federal regulation (1) facilities that are used in local distribution, (2) facilities and control systems that are not necessary for operating an interconnected electric energy transmission network or part of a network and (3) electric energy from generating facilities not needed to maintain transmission system reliability. Connecticut DPUC maintains that, in contrast, NERC's definition replaces the FPA definition with criteria based on voltage thresholds for transmission facilities and electric energy from generating facilities. According to Connecticut DPUC, NERC's definition does not comply with section 215(a)(1) because it includes facilities and equipment that are neither "necessary" for operation of the transmission network nor "needed" to maintain transmission system reliability. The Connecticut Attorney General and Connecticut DPUC, therefore, urge the Commission to reject this definition.

70. Further, in Connecticut DPUC's view, because the Commission cannot adopt NERC's definition of bulk electric system, it cannot expand the boundaries of its jurisdiction farther than the bulk electric system. It maintains that Congress did not give the Commission jurisdiction to mandate and enforce all Reliability Standards, especially those related to the long-term adequacy of generation resources; therefore, the Commission may not delegate to an ERO authority that it does not have. APPA also states that the Commission expanded the definition of the bulk electric system so that it may affect facilities subject to state reliability jurisdiction, such as low-voltage transmission systems that affect only the local areas served by those facilities, which do not cause cascading outages, without explaining why it is necessary to federalize reliability responsibility for outages on these facilities.

71. NARUC and New York Commission maintain that the Commission's proposed interpretation of what facilities constitute the Bulk-Power System is inconsistent with section 215 of the FPA. They state that the ability of a facility to "limit or supplement" the transmission system does not automatically mean that a facility is necessary for operating an interconnected transmission system, as required by the FPA, or for maintaining system reliability. According to NARUC, Congress only *authorized the Commission to approve Reliability Standards necessary for operating an interconnected electric energy transmission network. Although the NOPR interpretation includes these underlying facilities, it also covers others that are not required to operate an interconnected transmission network.*

72. Moreover, NARUC and New York Commission state that the NOPR proposal to define Bulk-Power System as all facilities operating at or above 100 kV exceeds the Commission's jurisdiction. According to NARUC and New York Commission, there is generally a layer of "area" transmission facilities below the "Bulk-Power System" and above distribution facilities that move energy within a service territory and toward load centers. However, NARUC and New York Commission claim that only a small subset of these underlying facilities assists in maintaining the reliability of the Bulk-Power System

73. Several commenters, including New York Commission, NYSRC, Massachusetts DTE, NPCC, TANC and Ontario IESO, support a functional, impact-based approach to applying Reliability Standards. According to NPCC, neither NERC nor section 215 of the FPA provide a rigorous approach to determining which elements play a role in maintaining reliability of the bulk electric system. These commenters generally state that an impact-based approach would define those elements necessary for Reliable Operation and ensure that compliance and enforcement efforts concentrate on those facilities that materially affect the Reliable Operation of the interconnected Bulk-Power System, while at the same time balancing the costs imposed by mandatory Reliability Standards with the reliability improvement realized on the interconnected Bulk-Power System

74. Ontario IESO maintains that reliability impact is a process of assessing facilities to determine if, due to recognized contingencies and other test criteria, they represent a significant adverse impact beyond a local area. This assessment will be the basis of a consistent test methodology the ERO must develop to define the facilities included within the overall Bulk-Power System to which a Reliability Standard would apply. Ontario IESO states that the Commission should direct the ERO to take the lead in developing the impact assessment procedure to provide a consistent and uniform methodology that can be applied by any Regional Entity. Ontario IESO does not support the Commission's proposal to limit case-by-case determinations to underlying transmission systems operating at less than 100 kV.

b. Commission Determination

75. The Commission agrees with commenters that, at least initially, expanding the scope of facilities subject to the Reliability Standards could create uncertainty and might divert resources as the ERO and Regional Entities implement the newly created enforcement and compliance regime. Further, we agree with commenters *that unilaterally modifying the definition of the term bulk electric system is not an effective means to achieve our goal. For these reasons, the Commission is not adopting the proposed interpretation contained in the NOPR. Rather, for at least an initial period, the Commission will rely on the NERC definition of bulk electric system*[47] *and NERC's registration process to provide as much certainty as possible regarding the applicability to and the responsibility of specific entities to comply with the Reliability Standards in the start-up phase of a mandatory Reliability Standard regime.*

76. However, we disagree with NERC, APPA and NRECA that there is no intentional distinction between Bulk-Power System and bulk electric system. NRECA states that "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."[49] *In this instance, however, Congress did not borrow the term of art – bulk electric system – but instead chose to create a new term, Bulk-Power System, with a definition that is distinct from the term of art used by industry. In particular, the statutory term does not establish a voltage threshold limit of applicability or configuration as does the NERC definition of bulk electric system. Instead, section 215 of the FPA broadly defines the Bulk-Power System as "facilities and control systems necessary for operating an "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.*

77. Although we are accepting the NERC definition of bulk electric system and NERC's registration process for now, the Commission remains concerned about the need to address the potential for gaps in coverage of facilities. For example, some current regional definitions of bulk electric system exclude facilities below 230 kV and transmission lines that serve major load centers such as Washington, DC and New York City. The Commission intends to address this matter in a future proceeding. As a first step in enabling the Commission to understand the reach of the Reliability Standards, we direct the ERO, within 90 days of this Final Rule, to provide the Commission with an informational filing that includes a complete set of regional definitions of bulk electric system and any regional documents that identify critical facilities to which the Reliability Standards apply (i.e., facilities below a 100 kV threshold that have been identified by the regions as critical to system reliability).

78. The Commission believes that the above approach satisfies concerns raised by NARUC and New York Commission that the proposal to interpret Bulk-Power

System exceeds the Commission's jurisdiction. When the Commission addresses this matter in a future proceeding, it will consider NARUC's and New York Commission's comments regarding the "layer of 'area' transmission."

79. We disagree with commenters claiming that the ERO's definition of bulk electric system is broader than the statutory definition of Bulk-Power System. Connecticut Attorney General, Connecticut DPUC and others argue that the ERO's definition of bulk electric system exceeds the Commission's jurisdiction by including generation that is not needed to maintain transmission system reliability and, therefore, intrudes into state jurisdiction over generation resource adequacy. First, none of the Reliability Standards submitted by the ERO set requirements for resource adequacy. Moreover, commenters have not adequately supported their claim that the "threshold" in the NERC definition of bulk electric system that includes facilities "generally operated at 100 kV or higher" is NOPR at P 66. For these same reasons, the Commission rejects the position of those commenters that suggest the statutory definition of Bulk-Power System is more limited than the NERC definition of bulk electric system.