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## New Reliability Compliance Opportunities in 2013

The Federal Energy Regulatory Commission (FERC) closed out 2012 with several orders affecting reliability compliance. FERC adopted a revised definition of the “bulk electric system,” authorized FERC access to e-Tags used to schedule power transmission, and affirmed the authority of the North American Electric Reliability Corporation (NERC) to assess monetary penalties against federally owned utilities. Industry participants should use the New Year as an opportunity to review facilities, information-sharing processes and contracts to help ensure compliance with these new reliability requirements.

### Revised Definition of the Bulk Electric System (Docket Nos. RM12-6 and RM12-7)

In Order No. 773, FERC approved NERC’s proposed revisions to the definition of the “bulk electric system” that establishes a bright-line threshold, and eliminates regional discretion, for identifying facilities subject to NERC’s Reliability Standards. Under the new definition, all transmission facilities operated at or above 100 kV and all real and reactive power resources connected to the grid at 100 kV or higher are included; local distribution facilities are excluded. FERC also approved NERC’s proposed exception process and form by which facilities can be added or removed from the definition on a case-by-case basis. The new definition will go into effect April 1, 2013 (the first day of the second calendar quarter after FERC approval), but newly identified facilities will have 24 months to come into compliance. (For additional background on the FERC and NERC proceedings leading up to Order No. 773, see Sutherland Legal Alerts – [November 23, 2010](#), [March 22, 2011](#) and [January 31, 2012](#).)

Several categories of facilities are expressly **included** within the bulk electric system:

- Transformers with the primary terminal and at least one secondary terminal operated at 100 kV or higher;
- Generating resource(s) with a gross individual nameplate rating greater than 20 MVA or a gross plant/facility aggregate nameplate rating greater than 75 MVA, including in each case the generator terminals through the high-side of the step-up transformer(s) connected at a voltage of 100 kV or above;
- Blackstart resources identified in a transmission operator’s restoration plan, as well as cranking paths operated at or above 100 kV or necessary for bulk electric system operations;
- Dispersed power producing resources (e.g., wind and solar facilities) with aggregate capacity greater than 75 MVA utilizing a system designed primarily for aggregating capacity and solely used to deliver the aggregate capacity to the bulk electric system at 100 kV or above; and
- Static or dynamic devices (excluding generators) dedicated to supplying or absorbing reactive power that are connected at 100 kV or higher, or through a dedicated transformer with a high-side voltage of 100 kV or higher, or through a transformer meeting the criteria above.

FERC also approved four facility configurations **excluded** from the bulk electric system:

- Radial transmission systems that serve only load and/or certain smaller generating facilities (but not including tie-lines for generators otherwise falling within the definition);

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- Certain behind-the-meter generating units on the customer's side of the retail meter that serve retail load;
- Local transmission networks (not including tie-lines for covered generators); and
- Reactive power devices owned and operated by a retail customer solely for its own use.

FERC also approved a case-by-case exception process for identifying additional facilities to be included and excluded from the definition. Facility owners may initiate the process, as can FERC, NERC and the Regional Entities. The status of a facility during the exception review remains unchanged, which means that compliance obligations for an otherwise non-regulated facility do not begin until a final determination has been made.

FERC determined that it, rather than NERC, should oversee the exception process for determining whether facilities are excluded local distribution. FERC will apply Order No. 888's seven-factor test in such a determination and will consider any additional relevant facts and circumstances. FERC declined to allow facility owners to assert "in good faith" that their facilities, which would otherwise be part of the bulk electric system, are excluded local distribution facilities. Rather, facility owners unclear about whether their facilities are excluded local distribution must in the first instance seek a FERC determination.

The revised definition represents "Phase 1" of NERC's efforts to develop the appropriate scope of regulated facilities to ensure reliable grid operation without unduly burdening facilities lacking any material impact on the grid. The stakeholder process is underway for "Phase 2," which should further strengthen the revised definition and address more specific concerns, such as whether to include demand response and protection systems.

### FERC Access to E-Tag Data (Docket No. RM11-12)

FERC also moved to gain access to e-Tags, the schedules used to arrange transmission in interchange transactions that include data about the power transmitted, the injection and withdrawal points, and the parties involved in the transactions. Thus, in Order No. 771, FERC directed balancing authorities and e-Tag creators (typically purchasing-selling entities) to provide e-Tag data to FERC on a non-public and ongoing basis beginning March 15, 2013. They must also share this data with regional transmission operators (RTOs), independent system operators (ISOs), and their market monitors upon request, subject to confidentiality protections. FERC believes this information-sharing requirement will enhance its market monitoring capabilities, enable it to detect potential market manipulation, promote market efficiency, and help shape well-reasoned market policies.

Rather than requiring NERC to provide e-Tag data to FERC as FERC had originally proposed, entities must designate FERC as an addressee on the e-Tags to provide FERC with view-only rights to the information. Market participants already should be capable of designating FERC as a recipient and therefore should require no significant changes to their data collection systems to comply with the order. FERC will access the e-Tags by contracting with a commercial vendor who will provide data management services for the e-Tags. FERC has not identified which vendor it intends to use.

Order No. 771 is the most recent move by FERC in its ongoing efforts to enhance its market monitoring and strengthen its information analysis. FERC previously had established a new Office of Enforcement division focused on market surveillance, imposed more frequent market transaction reporting requirements on RTOs/ISOs, and, as reported in a [Sutherland Legal Alert](#), broadened the scope of its Electric Quarterly Report (EQR) requirement.

## Monetary Penalty Against a Federal Entity Stands (Docket No. NP11-238)

Finally, FERC affirmed its July 2012 determination that Section 215 of the Federal Power Act (FPA) authorizes NERC to impose monetary penalties against federally owned utilities that violate the NERC Reliability Standards. Specifically, FERC affirmed a \$19,500 penalty against the Southwestern Power Administration (SWPA), a federal power marketing administration (PMA). (See Sutherland Legal Alerts – [December 20, 2010](#) and [July 24, 2012](#) for additional background.)

FERC's December 20, 2012 order addressed rehearing requests filed by SWPA, the Departments of Energy and the Interior, and others. While FERC's order did not break new ground, key findings include:

- NERC's authority under FPA Section 215 to impose monetary penalties on all users, owners and operators of the bulk-power system extends to federal entities;
- The FPA's general civil penalty provision – Section 316A – does not limit NERC's penalty authority under Section 215 except to the extent FERC has adopted the Section 316A monetary cap (\$1 million per day per violation) as applied to Section 215 penalties;
- Due to Congressional oversight and the concerns of "preference power" customers, federal entities maintain a strong incentive to develop a culture of compliance to avoid monetary penalties, even where these costs may be passed through to consumers;
- While the Flood Control Act requires that federal entities serve consumers at the lowest possible rates, this service must still be consistent with sound business principles, including compliance with all regulatory obligations, such as the Reliability Standards; and
- Imposing monetary penalties on federal entities will not violate the Anti-Deficiency Act, which generally limits federal expenditures to amounts available in appropriations or funds, because appropriations are available to pay Section 215 penalties as "necessary expenses," which are not subject to the Anti-Deficiency Act limitations.

It would not be surprising if SWPA and others appeal FERC's rulings to the federal courts. In the meantime, who will ultimately pay for reliability penalties imposed on federal entities remains to be seen.

### Implications for Compliance

While facility owners should regularly review, as part of their reliability compliance programs, the facilities that may be subject to the NERC Reliability Standards, compliance officials should treat the New Year as an opportunity to review their facilities for possible inclusion or exclusion pursuant to the new bulk electric system definition. Industry participants with additional specific concerns should monitor and take part in NERC's "Phase 2" discussions.

Compliance officials of balancing authorities and purchasing-selling entities also should review and modify their e-Tag processes to ensure that they will be in compliance with the new information-sharing requirements applicable to e-Tags by the March 15, 2013 compliance date.

Finally, federal "preference power" customers should consider reviewing their power supply and other contracts with the PMAs to understand the potential for pass-through of reliability penalties. The dollars at stake in the SWPA case are not large, but future penalties could be material, even when spread among "preference power" customers.



*If you have any questions about this Legal Alert, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.*

<a href="#">Daniel E. Frank</a>	202.383.0838	<a href="mailto:daniel.frank@sutherland.com">daniel.frank@sutherland.com</a>
<a href="#">Alison C. Graab</a>	202.383.0861	<a href="mailto:alison.graab@sutherland.com">alison.graab@sutherland.com</a>
<a href="#">Meghan R. Gruebner</a>	202.383.0933	<a href="mailto:meghan.gruebner@sutherland.com">meghan.gruebner@sutherland.com</a>
<a href="#">Alexandra D. Konieczny</a>	212.389.5072	<a href="mailto:alexandra.konieczny@sutherland.com">alexandra.konieczny@sutherland.com</a>
<a href="#">Jennifer J. Kubicek</a>	202.383.0822	<a href="mailto:jj.kubicek@sutherland.com">jj.kubicek@sutherland.com</a>