Elastic FERC Jurisdiction: Reliability

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Reliability Under New FPA § 215

- Gives FERC Authority over Mandatory, Binding Reliability Standards for the Bulk-Power System
- Standards apply to 201(f) entities, including Co-ops, meaning G&Ts
- Standards to be Developed and Applied through the Electricity Reliability Organization (ERO) and Potentially Regional Entities (RE)
- FERC Faces Tight Deadline –180 days – to Establish Basic Rules for the Process
- FERC Has to Address Many Issues in Limited Time -- And Then FERC Turns to Substance

Impetus for New FPA § 215

- NERC has long had reliability standards, but they are not binding, e.g., no fines, etc. (except in WECC)
- Rules Violations and Lack of Clarity Implicated in Large Blackouts (Crisis-Driven Policy)
- Consensus Emerges in Industry and Congress that Rules Need to be Mandatory, Binding, and Enforceable
- Most Favor Having Rules Established by Industry Rather Than FERC (SMD, etc.)
- Potential Antitrust Exposure if Industry Establishes Rules on its Own

Approach Taken in FPA § 215

- The ERO is to be a Self-Regulatory Organization (SRO) that Develops and Enforces Standards
- SRO Approach Taken from Securities (NASD) and Commodities Industries
- FERC certifies the ERO and Reviews/Approves Reliability Standards and Their Enforcement
- Reliability Standards Apply to Owners, Operators, and Users of Bulk-Power System
- Extends to § 201(f) Entities, Including Co-ops
- § 215 Approach Raises Many Issues

Who will be the ERO?

- NERC and the Existing Regional Reliability Councils (as REs) are the Logical Candidates
- NERC and Industry have Invested much in Developing the Rules and Rules Process
- NERC is generally co-op sensitive, at least when co-ops assert themselves
- But Commissioners indicated frustration with NERC's current proposed standards
- Others are likely to apply to be the ERO
- ERO Certification Gives FERC Leverage

Relative Roles of FERC and ERO

- FERC certifies the ERO and Reviews/Approves Reliability Standards and Their Enforcement
- ERO Develops and Enforces Reliability Standards in the First Instance (Bottom-Up)
- FERC can Remand Rules and Require ERO to Address Matters
- Difficult Issues Arise if FERC and NERC Don't Get Along, e.g., if FERC insists on a Rule
- Similar questions arise with "FERC Lite," especially in terms of scope of remand authority

Scope of Reliability

- Standards are to Cover Reliability Only
- But Reliability Impacts Competition and Economic Regulation Matters, such as
  - Who Does What, Who Has to Do What, Who Can't Do What, Who Pays for What, and Who Charges What to Whom
- § 215 Says FERC Defers to ERO on Technical Issues, But Not on Competition
- Ample Opportunity for Conflict, Especially Where § 201(f) Entities are Involved

Coverage of Reliability Standards

- Applies to Owners, Operators, and Users of the Bulk-Power System, but not Distribution
- But Distribution/Retail Utilities (Distribution Co-ops) arguably also use Bulk-Power System
- Reliability Standards Apply to § 201(f) entities, which now include co-ops
- NRECA argued vigorously that most distribution co-ops should be excluded Because They Can’t Cause -- or Prevent -- Large-Scale Blackouts

ERO Standards Process

- § 215 Establishes Minimum Standards for Procedural Openness and Fairness
- NRECA Argued that ERO Standards Process Should be Accredited by the American National Standards Institute (ANSI) for Fairness
- Electric Utility Industry Already Uses Many Standards Developed by ANSI-Accredited Entities, including IEEE, ASTM, and NAESB.
- NERC Reliability Standards Process Already Has ANSI Accreditation

Penalties

- ERO sets Penalties Initially, Subject to Review by FERC and Courts
- EPAct increases maximum penalty per violation from $10,000 per day to $1,000,000 per day
- Limit Doesn’t Necessary Apply to § 215, although Chairman Kelliher has indicate that it would be a “perversion” if it didn’t
- Other question exist as to whether standard FERC procedural protections apply
- Concerns about Penalties as Applied to Co-ops

Penalties, cont'd.

- The Penalties are meant to be Punitive and a Deterrent
- As such, They are to be Strictly Construed
- But Penalties are not the Only Exposure
- Under Supplement to FERC's Policy Statement on Reliability, 110 FERC ¶61,096 (2005), Good Utility Practice Under OATT Includes Compliance with NERC Standards, so Potential Refunds

ERO Funding

- NERC and RRCs have Generally Used a Net-Energy-for-Load Allocation
- Method of Allocation Isn’t Necessarily the Same as Who Pays Initially, Although Costs are Likely to Flow Through
- Net-Energy for Load Avoids Double-Counting
- Concern that Funds Collected for Reliability Aren’t Used for Other Purposes

Limitation on Reliability

- ERO and FERC Not Authorized Under FPA § 215 to Order Construction of Generation and Transmission or to Enforce Standards for Adequacy or Safety of Electric Facilities or Services
- Good News for Those that Might be Ordered to Incur Expansion Costs
- But Limits the Facility Improvements Needed for Reliability and Economics

Reliability Summary

- Much Potential – and Many Pitfalls
- Reliability Entails Costs and Trade-Offs
- ERO and FERC Can Work Together, or They May Not – Iffy Initial Indications
- Penalties Mean Co-ops Must Take Reliability Standards Seriously
- Important that Rules be Limited in Terms of Scope (Reliability only) and Application (G&Ts, but not distribution coops)