



PPC believes the Final Rule cannot be squared with Section 215 because: (1) the 100-kV threshold will sweep in many 115-kV facilities across the West that are used for the local distribution of electric power, not for transmission, and therefore are beyond the Commission's Section 215 authority; (2) by insisting on a nationwide and uniform definition, the Commission is acting in contravention of Congress's determination to allow for regional flexibility in administering Section 215, and in particular to accord presumptive validity to reliability standards developed by WECC; (3) by prescribing a uniform 100-kV threshold, FERC exceeds its authority under Section 215, in which Congress denied FERC the authority to prescribe specific standards but instead required FERC to defer to the technical expertise of NERC and WECC, even if those bodies determine that a different threshold is more appropriate; and, (4) by ignoring evidence that the 100-kV threshold will impose enormous and unnecessary costs on regulated entities, especially PPC's members and others in the West.

For these reasons, PPC urges the Commission to withdraw the Final Rule and instead to allow the process currently underway in WECC to develop a comprehensive and balanced approach to defining the BES that reflects the unique history and topology of the Western Interconnection to reach a conclusion.

## STATEMENT OF ISSUES

1. *The Final Rule Violates FPA Section 215(a)(1)*: The Commission exceeds the limits on its authority contained in the Section 215(a)(1) of the FPA because Section 215(a)(1) defines “Bulk-Power System” to include only those facilities “necessary for” the operation of the bulk transmission grid and specifically excludes “facilities used in the local distribution of electric power” from the definition. Because most 115-kV facilities in the Western Interconnection are used for local distribution of electric power, rather than for bulk transmission, use of the 100-kV threshold mandated in the Final Rule improperly sweeps distribution facilities into the definition of BES and the Commission’s use of a metric that focuses on voltage rather than “use” of the facility is arbitrary and capricious and is contrary to the Commission’s own prior determinations. The Final Rule’s reasons for rejecting evidence demonstrating that most 115-kV facilities in the West operate as distribution facilities is arbitrary and capricious. *Authorities*: FPA Section 215, 16 U.S.C. § 824o; WECC BESDTF, Initial Proposal and Discussion, at pp. 11-12 (posted on May 15, 2009); FPA Section 215(a)(1), 16 U.S.C. § 824o(a)(1); Notice of Proposed Rulemaking, Mandatory Reliability Standards for the Bulk Power System, 71 FR 64,770 at P 62 (Nov. 3, 2006), FERC Stats. & Regs., Vol IV, Proposed Regulations, ¶ 32,608 (2006); Order No. 693, *Mandatory Reliability Standards for the Bulk Electric System*, 72 Fed. Reg. 16,416 (Apr. 4, 2007), FERC Stats. & Regs. ¶ 31,242 at P 23 n.20 (2007), *order on reh’g*, 120 FERC § 61,053 (2007).
2. *The Commission Relies on Factors That Do Not Meaningfully Distinguish Between Local Distribution Facilities and Transmission Facilities That Are “Necessary For” the Operation of the Interconnected Bulk System*. In discussing the reliability events that the Commission claims justify the Final Rule – all of which occurred in the Eastern Interconnection -- the Commission relies on factors such as the size of the load served by the facility, the amount of generation interconnected to the facility, the number of customers affected by an outage, and whether one set of facilities somehow affects operations on another set of facilities. FERC arbitrarily ignores the key question under the statute, which is whether the failure or misoperation of the facility would threaten “instability, uncontrolled separation, or cascading failures” on the “bulk-power system.” Worse, the factors its relies on provide no meaningful way to distinguish interconnect bulk system elements from local distribution facilities and therefore threaten to vastly overreach the Commission’s statutory authority. *Authorities*: FPA Section 215(a)(3), (a)(4) & (b), 16 U.S.C. § § 824o(a)(3), (a)(4) & (b).
3. *The Commission’s Discussion of Radial and Taps Lines Arbitrarily Ignores Whether Such Lines Meet the Statutory Test*. The Commission suggests that radial facilities such as tap lines and radials with a normally open switch may be classified as BES facilities if those facilities interact with the bulk interconnected system. But the Commission’s discussion ignores the critical statutory tests, which are whether the facility is “necessary for” operation of the bulk interconnected system and whether the facility is “used in the local distribution of electric power.” The tests suggested in the Commission’s discussion would effectively sweep most radial facilities – and nearly every part of the nation’s electric system -- into the BES, and is therefore arbitrary, capricious, and contrary to the

FPA. *Authorities:* FPA Section 215, 16 U.S.C. § 824o.

4. *The Final Rule's Mandate to Eliminate Regional Discretion and Regionally-Appropriate Variations From a Nationally-Uniform Standard Is Contrary to the Plain Language of the FPA and Congress's Determination To Create An Industry-Centered, Regionally-Diverse Reliability System.* The Final Rule eliminates regional diversity to vary from the nationally-uniform 100-kV threshold adopted by the Commission. The Commission's determination violates the plain language of FPA Section 215 which requires FERC to defer to the technical expertise of NERC and WECC; the legislative history of Section 215, which confirms that Congress intended to create an industry-centered reliability system and to allow for WECC to develop regionally-appropriate standards; and, the Commission's own prior determinations that it lacks the authority under Section 215 to impose prescriptive requirements such as the 100-kV threshold. *Authorities:* FPA Section 215, 16 U.S.C. § 824o; *North American Electric Reliability Corp.*, 132 FERC ¶ 61,218 at P 27 (2010); Statement of Sen. Gordon Smith, Congressional Record – Senate, March 14, 2002, at p.S1877; Statement of Sen. Craig Thomas, Congressional Record – Senate, March 14, 2002, at p.S1873; *City of Oconto Falls v. FERC*, 204 F.3d 1154 (D.C. Cir. 2000); *Tolbert v. Page*, 182 F.3d 677, 690 (9<sup>th</sup> Cir. 1999); *Dawavendewa v. Salt River Project Ag. Imp. & Irr. Dist.*, 154 F.3d 1117, 1121 (9<sup>th</sup> Cir. 1998), *cert. denied*, 123 S.Ct. 843 (2000); *Trustees of California State Univ. v. Riley*, 74 F.3d 960, 964-65 (9<sup>th</sup> Cir. 1996); *United Mine Workers v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989); *North American Electric Reliability Corp.*, 132 FERC ¶ 61,218 at P 27 (2010).
5. *As a Matter of Sound Public Policy, FERC Should Defer to NERC and WECC To Allow Those Entities To Develop a Technically Sound and Regionally Appropriate BES Definition.* The Commission should abandon its course of confrontation with NERC, WECC, and the industry, and should instead take advantage of the vast expertise available in the industry by allowing NERC and WECC to develop standards in the first instance and approving those standards if they are adequately justified, even if FERC would have reached a different result. FERC can start this process now by removing the prescriptive mandate for a nationally-uniform, 100-kV threshold from the Final Rule. If FERC does not offer greater deference to NERC and confine itself to a policy-making and guidance role, the reliability of the nation's electric system will suffer. *Authorities:* John S. Moot, *When Should the FERC Defer to the NERC?* 31 **Energy L. J.** 317 (2010).
6. *The Final Rule Arbitrarily and Capriciously Ignores Substantial Evidence Demonstrating That Adoption of the Final Rule Will Impose Substantial Burdens on Many Small Entities and the Final Rule Therefore Violates the Regulatory Flexibility Act.* The Commission arbitrarily dismisses voluminous evidence submitted by PPC, its members, and others demonstrating that the Final Rule, and especially the adoption of a 100-kV threshold BES definition, will impose substantial compliance costs on many small entities, especially those operating 115-kV distribution systems in rural areas of the Western Interconnection. The Commission's conclusion that the Final Rule will not impose substantial burdens on a significant number of small entities is therefore arbitrary and capricious, and the Final Rule violates the Regulatory Flexibility Act. *Authorities:* Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. §§ 601 *et seq.*

## ARGUMENT

### I. FACTUAL BACKGROUND

#### A. PPC'S Interest in This Proceeding

Public Power Council (PPC) is a non-profit membership organization that represents the common interests of more than 100 consumer-owned electric utilities in the Pacific Northwest that are requirements power and transmission customers of the Bonneville Power Administration (BPA). PPC's members are located and serve retail customers in Washington, Oregon, Idaho, Montana and Nevada, and they use the interconnected transmission system to wheel power to their distribution systems. PPC is a member of the North American Electric Reliability Corporation ("NERC") and the Western Electric Coordination Council ("WECC"), as are many of PPC's members.

Many PPC members are "small entities" within the meaning of the Regulatory Flexibility Act.<sup>3</sup> As an approximation, PPC believes that, based on volume of electricity sales, more than 90 percent of its members are small entities. In addition, many PPC members own and operate 115-kV facilities used for local distribution of electric power in their service territories and therefore would be directly and adversely affected by any BES definition containing a 100-kV definition.

#### B. In the Western Interconnection, Distribution Facilities Commonly Operate at 115-kV

Much of the West is characterized by sparse, widely distributed load centers of small size. Especially for utilities serving sparsely-populated rural areas, including a number of PPC members, a utility's service territory and distribution system may cover an area of over 1,000

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<sup>3</sup> 5 U.S.C. § 601(6).

square miles. Because of the vast physical distances between population centers that characterizes the West, higher voltages are required to move power efficiently even though the facilities are not used for bulk transmission.<sup>4</sup>

The physical differences in the Western Interconnection that have arisen from the need to serve the vast areas of the West have been documented by WECC's Bulk Electric System Definition Task Force ("BESDTF"), which has been working to develop a definition of BES covering the West since March 2009, and is now nearing the completion of this process.<sup>5</sup> As the BESDTF has documented, Western utilities typically rely on generation that is located far from load centers. "Due to the relatively long distances from remote resources to the load, entities recognized a need for higher voltage transmission lines and adopted 230 kV, 345 kV, and 500 kV as typical bulk transmission voltages."<sup>6</sup>

By contrast, facilities operating at voltages below 230 kV in the West are typically used for local distribution rather than the transfer of bulk power:

These 100-200 kV facilities . . . are, in almost all cases, configured in such a way as to serve as a sub-transmission delivery system to a geographically and electrically confined distribution system. They are typically operated as local area loops to provide supply redundancy to the distribution stations which they serve, but in general do not carry bulk system transfers between systems or between Balancing Authority Areas.<sup>7</sup>

These 115-kV distribution facilities "do not carry any appreciable portion of bulk power

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<sup>4</sup> In WECC the bulk transmission system is composed of predominately 230 kV and 500 kV facilities with some 115 kV. The West typically does not use facilities rated between 115 kV and 230 kV.

<sup>5</sup> See WECC BESDTF page at <http://www.wecc.biz/Standards/Development/BES/default.aspx>.

<sup>6</sup> WECC BESDTF, Initial Proposal and Discussion, at pp. 11-12 (posted on May 15, 2009) available at: <http://www.wecc.biz/Standards/Development/Lists/Request%20Form/DispForm.aspx?ID=21&Source=/Standards/Development>.

<sup>7</sup> *Id.* at 12.

transfers across Balancing Authority Areas or between Balancing Authority Areas.”<sup>8</sup>

In contrast to the Eastern Interconnection, where bulk transmission commonly operates at 115 kV, bulk transmission in the West generally involves facilities at the 230 kV level and higher. The application of the brightline 100-kV threshold the Commission requires to 115-kV distribution facilities operating in the Western Interconnection will cause these facilities to be improperly classified as BES even though the facilities are unquestionably used for the distribution of electric power and are radial in nature so cannot affect the reliability of the backbone transmission system.

## **II. FERC GROSSLY OVERSTEPS ITS STATUTORY AUTHORITY BY IMPOSING A STANDARD THAT WILL IMPROPERLY CLASSIFY HUNDREDS OF MILES OF 115-kV DISTRIBUTION FACILITIES IN THE WESTERN INTERCONNECTION AS “BULK ELECTRIC SYSTEM”**

### **A. The Final Rule Violates the Federal Power Act By Sweeping 115-kV Distribution Facilities Into the BES**

Section 215 of the FPA includes clear limits on the Commission’s reliability authority which the Final Rule fails to observe. From PPC’s perspective, the most important limitations are contained in the definition of “bulk-power system”:<sup>9</sup>

- (1) The term ‘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 generated from generation facilities *needed to maintain* transmission system reliability.

*The term does not include facilities used in the local distribution of electric power.*<sup>10</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> For purposes of this request for rehearing, we assume, as the Commission has, that the term “Bulk Electric System” is synonymous with the statutory term “bulk-power system.” PPC strongly objects to the Commission’s continued refusal to determine definitively whether the statutory “bulk-power system” is different from or more extensive than the traditional industry term of art, “Bulk Electric System.” *See* Final Rule at P 36. The issue continues to hang like a Sword of Damocles over the industry. If the Commission were in the future to assert broader power than is conferred under the NERC BES definition, it is difficult to overstate the level of disruption that would ensue.

<sup>10</sup> FPA Section 215(a)(1), 16 U.S.C. § 824o(a)(1).

Because most 115-kV facilities in the Western Interconnection are used for local distribution of electric power, rather than for bulk transmission, use of the 100-kV brightline mandated in the Final Rule improperly sweeps distribution facilities into the definition of BES. These 115-kV facilities are explicitly excluded from the statutory definition and are, by virtue of the fact that they generally do not carry bulk power, do not interconnect systems, and do not carry power between Balancing Authority Areas, not “necessary for” the operation of the bulk system. The Commission therefore overreaches its authority by using a brightline definition that improperly classifies hundreds, perhaps thousands, of miles 115-kV distribution facilities in the West as BES facilities. The key question under the statute is how the facilities are “used,” not their voltage, and the Commission therefore violates the statute by relying on purely voltage-based standard that ignores how facilities are used.

In fact, the Commission itself has previously concluded that the critical question for purposes of classifying facilities under the statute is how they are used, not their operating voltage. As the Commission stated, “the statutory definition of Bulk-Power System does not establish voltage threshold limits on applicable transmission facilities or electric energy from generating facilities. It does, however, explicitly exclude facilities used in the local distribution of electricity.”<sup>11</sup> The critical distinction between transmission and distribution facilities is, according to the Commission, one of function, not voltage level:

The transmission 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. Essentially, transmission lines and other parts of the transmission system, including control facilities, serve to transmit electricity in bulk from generation sources to concentrated areas of retail customers, while the distribution system moves the electricity

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<sup>11</sup> Notice of Proposed Rulemaking, Mandatory Reliability Standards for the Bulk Power System, 71 FR 64,770 at P 62 (Nov. 3, 2006), FERC Stats. & Regs., Vol IV, Proposed Regulations, ¶ 32,608 (2006).

to where these retail customers consume it at a home or business.<sup>12</sup>

FERC arbitrarily departs from its own understanding in the Final Rule by classifying all facilities above the specified voltage threshold as BES transmission facilities regardless whether those facilities transmit bulk power across the interconnected transmission system or merely distribute power in concentrated areas of retail customers. The Commission's insistence on a bright-line voltage threshold is therefore arbitrary and capricious because it departs without explanation from the Commission's prior determinations.

In drafting the statute, Congress repeatedly incorporated the defined term "bulk-power system" into the substantive terms of Section 215, thereby weaving the limitations contained in that definition into the heart of the Commission's reliability authority. For example, the fundamental requirement imposed by Section 215 is that "[a]ll users, owners and operators of the *bulk-power system*" comply with "reliability standards" adopted under Section 215.<sup>13</sup> And the statute defines "reliability standard" to mean a rule providing for the "reliable operation of the *bulk-power system*"<sup>14</sup> and "reliable operation" to mean "operating elements of the *bulk-power system*" to avoid instability, uncontrolled separation, and cascading failures on that system.<sup>15</sup>

Any doubt that Congress intended the Commission's authority to be limited to protecting the "bulk-power system" is dispelled by examining the "Savings Provisions" of Section 215.

Those provisions emphasize that FERC has "authority to develop and enforce compliance with

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<sup>12</sup> Order No. 693, *Mandatory Reliability Standards for the Bulk Electric System*, 72 Fed. Reg. 16,416 (Apr. 4, 2007), FERC Stats. & Regs. ¶ 31,242 at P 23 n.20 (2007), *order on reh'g*, 120 FERC § 61,053 (2007). *See also* Notice of Proposed Rulemaking, *Mandatory Reliability Standards for the Bulk Power System*, 71 FR 64,770 at P 60 (Nov. 3, 2006), FERC Stats. & Regs., Vol IV, Proposed Regulations, ¶ 32,608 (2006).

<sup>13</sup> 16 U.S.C. § 824o(b)(emph. added).

<sup>14</sup> 16 U.S.C. § 824o(a)(3)(emph. added).

<sup>15</sup> 16 U.S.C. § 824o(a)(4)(emph. added).

reliability standards for *only the bulk-power system.*”<sup>16</sup> By overstepping the limits Congress placed in the definition of “bulk-power system,” the Commission is violating one of the fundamental limits imposed on its authority by Congress.

**B. The Commission’s Reasons for Rejecting Evidence That Most 115-kV Lines In the West Are Used For Local Distribution Are Arbitrary and Capricious**

The Commission never comes to terms with the evidence demonstrating that most 115-kV facilities in the West are used for local distribution and are not necessary for the operation of the bulk transmission system. The Commission asserts that some Western Interconnection facilities operating in the range of 100- to 200-kV are included in some WECC Rated Paths which makes them “operationally significant and needed for reliable operation as identified by certain WECC documents.”<sup>17</sup>

This is true enough as far as it goes, but it ignores the central problem with application of the 100-kV threshold in the West: using that threshold will sweep in a huge number of facilities operated at 115-kV that are, in fact, distribution facilities, not bulk transmission facilities. While FERC is correct that some 115-kV facilities in the West are included in WECC Rated Paths, the evidence is unequivocal that the vast majority of such facilities are not Rated Paths or otherwise necessary for the operation of the bulk transmission system. And, in any event, WECC has always regulated Rated Path facilities as part of the BES, an approach that would continue under the BES definition currently proposed by the WECC BESDTF.

In response to this evidence, the Commission also states that the critical factor is not the voltage of the facilities, but “how the lines below 200-kV are interconnected with higher voltage

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<sup>16</sup> 16 U.S.C. § 824o(i)(1)-(2)(emph. added).

<sup>17</sup> Final Rule at P 139.

facilities that determines their significance.”<sup>18</sup> PPC agrees with the Commission’s observation, but points out that the Commission’s single-minded focus on the operating voltage of facilities completely ignores how those facilities are interconnected with higher voltage facilities. The Commission therefore abuses its discretion and violates the limits on its statutory authority by insisting that all facilities operated above 100-kV be included in the BES regardless of how those lower-voltage facilities interact with higher-voltage facilities, and whether, as the statute requires, those facilities are “necessary for” operating the interconnected transmission grid.<sup>19</sup>

The Commission also claims that Western entities have not “provided adequate explanation . . . supported by data and analysis” of why there is a physical difference in the Western Interconnection justifying a different BES standard.<sup>20</sup> This is simply untrue. As discussed above, the Western Interconnection is characterized by generation that is often separated from load by hundreds of miles, which results in the necessity of using 230-kV and higher facilities for transmission of power. The West is also characterized by the necessity to deliver power to retail loads that are often scattered over vast distances, requiring the common use of 115-kV lines for the distribution of power within local distribution systems. The problem is not the failure of commenters to provide such evidence, but the Commission’s inability to provide any reasoned explanation for rejecting that evidence.

Finally, the Commission asserts that WECC now uses a 100-kV threshold in its definition.<sup>21</sup> While this may be true, the Commission concedes the BES definition has been applied flexibly by WECC to reflect the unique conditions of the Western Interconnection. The

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<sup>18</sup> Final Rule at P 139.

<sup>19</sup> Section 215(a)(1)(A), 16 U.S.C. § 824o(a)(1)(A).

<sup>20</sup> Final Rule at P 140.

<sup>21</sup> Final Rule at P 140.

simple fact is that, until the advent of Section 215, most PPC members who operate 115-kV distribution facilities were not classified as “Transmission Operators,” “Transmission Owners,” or “Transmission Planners” by WECC because all of those definitions apply only to owners or operators of BES facilities, and were therefore not subject to standards that are appropriate for transmission utilities operating bulk facilities, but not for distribution-only utilities. The Final Rule’s determination that the flexibility accorded to WECC should be eliminated therefore represents a serious threat to Western distribution utilities, including many PPC members.

### **C. The Factors Cited By The Commission For Identifying BES Facilities Would Improperly Sweep In Distribution Facilities**

PPC is deeply concerned that the Final Rule provides no meaningful guidance to the industry as to how the Commission would distinguish local distribution facilities, which by statute cannot be classified as part of the BES, from bulk transmission facilities, which may properly be considered BES facilities.

This is manifest in the Commission’s discussion of the three reliability events its uses to justify the Final Rule. For example, in its discussion of the Astoria West event, the Commission cites factors such as the number of interconnections between the local distribution network and the bulk transmission grid, the number of customers that were affected by the outage, the amount of generation affected by the outage, and the amount of load lost.<sup>22</sup> Similar figures are cited for the ReliabilityFirst event.<sup>23</sup> Even the Commission’s discussion of the February 26, 2008, FRCC event, which unquestionably seriously threatened bulk system reliability, barely mentions the possibility of a “wide-scale cascading outage” as a justification for Commission action.<sup>24</sup>

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<sup>22</sup> Final Rule at P 39, 89.

<sup>23</sup> Final Rule at P 88.

<sup>24</sup> And, since the FRCC event took place on facilities that were already classified as part of the BES, it provides no

But none of the factors cited by the Commission, apart from the threat of cascading outages, can meaningfully distinguish between a local distribution facility and a bulk transmission facility. On the contrary, the amount of load and generation lost in these events signifies nothing more than that they affected large local distribution networks. And the number of interconnections is not a meaningful indicator since local distribution networks are commonly connected to the high-voltage transmission grid at multiple points. In short, none of the factors cited by the Commission are relevant to the statutory questions that must be answered, namely whether the facilities are “necessary for” the operation of the bulk system, and whether the facilities are “used in the local distribution of electric energy.”<sup>25</sup>

Nor do these factors address the problems the Commission is required by statute to address, namely “instability, uncontrolled separation, or cascading failures” on the bulk system.<sup>26</sup> On the contrary, the factors cited by the Commission, especially the load loss figures, are relevant only to “standards for adequacy” of service, and the Commission is explicitly prohibited from regulating in this area.<sup>27</sup>

PPC is similarly concerned that the Commission’s discussion about material impact analysis leaves no room for a meaningful test to distinguish between facilities that are “necessary for” the operation of the BES and those that are not. The Commission criticizes the NPCC material impact assessment methodology, concluding that it may not adequately identify “facilities necessary to operate the interconnected transmission system.”<sup>28</sup> But the Commission’s

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basis for the Commission’s determination to change the BES definition.

<sup>25</sup> 16 U.S.C. § 824o(a)(1).

<sup>26</sup> 16 U.S.C. § 824o(a)(4).

<sup>27</sup> 16 U.S.C. § 824o(i)(2).

<sup>28</sup> Final Rule at P 38.

logic appears to be faulty. If a material impact assessment demonstrates that the bulk transmission system can function properly even if fault or operational failure occurs on a particular facility, it is not clear how the Commission can claim the facility is nonetheless “necessary for” the operation of the bulk system.

The only common element in the Commission’s discussion appears to be that lower voltage facilities often “affect and depend on” with higher voltage facilities.<sup>29</sup> But whether one set of electrical facilities “affects” bulk transmission facilities cannot, by itself, be sufficient to bring all interacting facilities into the BES. On the contrary, every electric device connected to the grid, from the computer on which this pleading is being typed to the large hydroelectric dams that supply power to the computer, affects the grid in some manner because the entire electric system is electromagnetically interlocked. The Commission therefore cannot seriously suggest that the electrical interaction between facilities by itself is a meaningful basis upon which to determine whether they should be included in the BES. Such a test would not exclude anything and therefore is useless.

In short, the discussion in the Final Rule suggests that the Commission intends to rely upon factors that provide no meaningful distinction between local distribution and interconnected bulk transmission facilities, and also provide no meaningful method for distinguishing facilities that are “necessary for” operation of the interconnected bulk grid from those that are not. On the contrary, the factors and tests suggested by the Commission appear to sweep in nearly every element of the nation’s electric system. This result, of course, vastly exceeds the Commission’s power under Section 215 and therefore violates the statute.

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<sup>29</sup> *E.g.*, Final Rule at P 40. *See also, e.g., id.* at PP 38, 39, 55.

**D. The Commission Improperly Concludes That Radial Facilities Employing a Normally Open Switch Are Part of the BES.**

While the Commission professes that it does not intend to modify the portion of NERC's BES definition exempting radial facilities, the Commission nonetheless opines that tap lines and secondary feeds via a normally open switch should not be included in the exemption for radials.<sup>30</sup> The Commission also states "when the normally 'open' line is 'closed,' it becomes part of the transmission network and therefore should be subject to mandatory Reliability Standards."<sup>31</sup> The Commission's statement only underscores PPC's fears that the Commission intends to greatly overstep the bounds of its Section 215 authority to the substantial detriment of the many PPC members who operate radial distribution facilities, tap lines, and secondary feeds.

The Commission's statement is astonishing in that it is completely divorced from the statutory standards that limit the Commission's authority. To start with, a radial facility that is used in local distribution of electric energy cannot, as the Commission suggests, suddenly become a transmission facility simply because a normally open switch is closed. On the contrary, the normally open switch is just a device to improve the level of service on the radial line and if that switch is closed, the use of the facility for local distribution does not change. Nor can the Commission explain how a change in the switching for such a facility suddenly renders the facility "necessary for" the operation of the interconnected transmission grid.

The Commission should withdraw this statement and allow technical questions of this kind to be addressed in the first instance by NERC, WECC, and others involved in the reliability standards process. If the Commission does not do so, PPC hereby seeks rehearing of the Commission's determinations on this issue.

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<sup>30</sup> Final Rule at P 55.

<sup>31</sup> *Id.*

### **III. FERC GROSSLY OVERSTEPS ITS STATUTORY AUTHORITY BY MANDATING A NATIONALLY-UNIFORM, 100-kV BRIGHTLINE STANDARD TO DEFINE THE BES**

The Final Rule mandates that the reliability standards developed in accordance with FERC’s order incorporate a 100-kV threshold and “eliminate” the flexibility accorded by the statute to WECC, NERC, and other REs to develop regionally-diverse standards. The Commission’s prescriptive approach exceeds its authority under Section 215 of the FPA and violates its statutory duty to defer to the technical expertise of NERC and WECC.

#### **A. FERC Is Without Authority To Mandate Uniform Reliability Standards**

In the Final Rule, FERC purports to be acting under its authority to initiate the standards development process under FPA Section 215(d)(5) in order to seek a change to NERC’s definition of BES.<sup>32</sup> But the language of Section 215 and its legislative history make clear that Congress intended both NERC and WECC to have substantial discretion to develop reliability standards based upon the technical expertise of those entities.

Specifically, FPA Section 215(d)(3) requires that NERC must “rebuttably presume” that standards developed by “a regional entity organized on an Interconnection-wide basis” – a formulation that can only refer to WECC – meets the statutory standard for FERC approval.<sup>33</sup> And, under Section 215(d)(2), when reviewing standards developed by NERC and WECC,<sup>34</sup> FERC is required to give “due weight to the technical expertise” of both NERC and WECC when determining whether a proposed reliability standard is “just, reasonable, not unduly

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<sup>32</sup> Final Rule at P 17. *See also* Order No. 693 at PP 1893-98 (requiring that changes to the NERC definitions follow the reliability standards development process).

<sup>33</sup> 16 U.S.C. § 824o(e)(4).

<sup>34</sup> Section 215(d)(2) requires FERC to give “due weight” to the “technical expertise of a regional entity organized on an Interconnection-wide basis.” 16 U.S.C. § 824o(d)(2). This provisions refers to WECC, which is organized to cover the entire Western Interconnection.

discriminatory or preferential, and in the public interest.”<sup>35</sup> Therefore, under the plain language of Section 215, FERC must defer to the technical expertise of WECC and the other regional entities in developing reliability standards, including a definition of the BES.

FERC repeatedly asserts that the discretion of WECC and the other REs should be eliminated based on the unsupported assertion that uniformity is a desirable attribute for reliability standards. But the language of Section 215 requiring WECC-developed standards to be “rebuttably presumed” to meet the statutory standard, and the further language requiring the Commission to give “due weight” to WECC’s technical expertise in such matters makes clear that Congress has already rejected the concept that reliability standards should be nationally uniform.

Any doubt about Congress’s intent in this regard can be eliminated by examining the legislative history of Section 215. As the Commission recently noted,<sup>36</sup> the current structure of Section 215 originated with the 2002 Thomas Amendment, which replaced the FERC-dominated model proposed by Senator Daschle with an industry-centered model relying primarily on the existing NERC reliability standards process and limiting FERC’s role to that of oversight and enforcement.

One reason that Congress adopted the Thomas Amendment and rejected the approach proposed by Sen. Daschle is that the industry-centered model encapsulated in the Thomas Amendment preserved the authority of WECC to develop standards appropriate to the Western Interconnection. As Senator Gordon Smith of Oregon argued:

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<sup>35</sup> FPA Section 215(d)(2), 16 U.S.C. § 824o(d)(2).

<sup>36</sup> *North American Electric Reliability Corp.*, 132 FERC ¶ 61,218 at P 27 (2010).

[I]t really boils down to this: should all power over power be vested within the beltway or should we trust regional organizations that know their areas, that know their systems, to manage these systems? . . . This [Thomas] amendment would ensure that a self-regulating organization would be given the authority to establish and enforce reliability standards.<sup>37</sup>

Similarly, as Senator Thomas himself argued:

Another key problem with the Daschle bill is that it does not recognize regional differences in electrical systems due to the geography, the market design, the economics, and the operational factors. Many fear that FERC does not have the sensitivity to the regional differences that are so critically important, and I suppose you could say particularly in the West, in that the West has moved a little more quickly to this, but the rest of the country will be moving necessarily soon.

Regional differences are best taken into account by those who are closest to the problem and those who understand what needs to be done, and that, unfortunately, is not FERC.<sup>38</sup>

Because Congress consciously rejected uniformity of regulation in favor of a regionally-diverse regulatory system, FERC is powerless to reverse that deliberate choice merely by invoking the supposed value of “uniformity” and “consistency.” Rather, where WECC develops reliability rules that are adapted to take into account the unique characteristics of the system that WECC regulates, Section 215 requires FERC to defer to WECC. FERC simply has no authority to reject WECC-developed solutions to regional problems in favor of “uniform” and “consistent” solutions forced on the RROs by FERC.

FERC therefore abuses its discretion by attempting to reverse the plainly expressed view of Congress that reliability standards development should reflect regional diversity rather than uniformity. Similarly, FERC’s attempt to impose a 100-kV brightline standard on NERC and WECC cannot be squared with the statutory obligation to defer to the technical expertise of NERC and WECC because these entities might, employing their technical expertise, determine

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<sup>37</sup> Statement of Sen. Smith, Congressional Record – Senate, March 14, 2002, at p.S1877.

<sup>38</sup> Cong. Rec., S1873 (Mar. 14, 2002).

that a different threshold, or some other methodology, is better suited to addressing the problems identified by the Commission. FERC’s approach is improper because it essentially eliminates this discretion at the outset, requiring NERC and WECC to adopt a predetermined prescription regardless whether that prescription squares with their technical judgment.

The Commission suggests that the statute’s use of the term “due weight” allows FERC to override NERC and WECC technical conclusions at will.<sup>39</sup> This assertion is incorrect for at least three reasons. First, in interpreting the FPA and other agency-related statutes, the courts have concluded that Congress’s use of the term “due weight” equates with “substantial deference.” For example, in *City of Oconto Falls v. FERC*,<sup>40</sup> the D.C. Circuit concluded that the provision in Section 10(j) of the FPA requiring the Commission to give “due weight” to the findings of expert state agencies on fisheries protection matters requires FERC to accord “substantial deference” to those agencies.<sup>41</sup> Courts examining the term “due weight” when used in analogous statutory contexts have consistently reached the same result.<sup>42</sup> Nothing in the statutory text suggests that Congress intended the term “due weight” to be given anything other than this ordinary legal meaning.

Second, an examination of Section 215(d)(2)’s language demonstrates that Congress intended “due weight” to be synonymous with “deference.” This is manifest from the fact that, while Section 215(d)(2) requires FERC to accord “due weight” to NERC’s technical expertise in

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<sup>39</sup> Final Rule at P 35.

<sup>40</sup> 204 F.3d 1154 (D.C. Cir. 2000).

<sup>41</sup> 204 F.3d at 1160.

<sup>42</sup> *E.g.*, *Tolbert v. Page*, 182 F.3d 667, 690 (9<sup>th</sup> Cir. 1999) (equating “due weight” with “deference”); *Dawavendewa v. Salt River Project Ag. Imp. & Irr. Dist.*, 154 F.3d 1117, 1121 (9<sup>th</sup> Cir. 1998) (giving “due weight” to EEOC guidelines means giving “deference”), *cert. denied*, 123 S.Ct. 843 (2000); *Trustees of California State Univ. v. Riley*, 74 F.3d 960, 964-65 (9<sup>th</sup> Cir. 1996) (equating “due weight” with *Chevron* deference); *United Mine Workers v. NLRB*, 879 F.2d 939, 944 (D.C. Cir. 1989) (treating “due weight” and “deference” as synonyms).

developing reliability standards, it commands that FERC “shall not defer” with respect to whether a standard affects competition.<sup>43</sup> Hence, the statute draws a distinction between the requirement to accord “due weight” to NERC’s technical findings, and the requirement that it “shall not defer” to NERC’s findings concerning competition. The contradistinction makes clear that Congress could not have understood giving “due weight” to NERC to mean anything other than according it discretion, because otherwise the requirement that FERC “shall not defer” to NERC on the competition question makes no sense. Put another way, the statutory proviso that FERC “shall not defer with respect to the effect of a standard on competition”<sup>44</sup> can only mean that FERC is required to defer to NERC’s technical expertise in every other relevant respect.

Third, in light of the legislative history discussed above, it is clear that Congress intended FERC to accord substantial discretion to both NERC and WECC to develop regionally-appropriate reliability standards.

**B. FERC Is Without Authority To Mandate Particularized Terms and Conditions of Reliability Standards and the Final Rule’s Mandate That Reliability Standards Contain a Nationally-Uniform 100-kV Threshold Therefore Violates the Statutory Limits On FERC’s Authority**

Under Section 215, FERC lacks authority to prescribe specific requirements in a Reliability Standards process. FERC violates the statute ordering that the BES definition developed in the reliability standards process it has initiated contain a specific 100-kV threshold and that the threshold be nationally uniform.

FERC has no authority to promulgate reliability standards or to prescribe the particular terms of reliability standards. On the contrary, the statute accords FERC authority only “for purposes of *approving* reliability standards approved under this section and *enforcing*

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<sup>43</sup> 16 U.S.C. § 824o(d)(2).

<sup>44</sup> 16 U.S.C. § 824o(d)(2).

*compliance with this section.*”<sup>45</sup> Notably absent from this language is any authority for FERC to promulgate or create standards. Instead, the statute confers authority on *NERC* to promulgate reliability standards,<sup>46</sup> and directs the Commission to allow NERC to delegate this authority to RROs, including WECC.<sup>47</sup> The Commission’s only role in the standards-setting process is to approve reliability standards proposed by NERC or the RROs “if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.”<sup>48</sup> Even if the Commission rejects a standard, it has no authority to promulgate a new standard or prescribe the terms of a new standard. Rather, if a standard is rejected, FERC must remand the standard to NERC or the RRO.<sup>49</sup>

To be sure, Section 215(d)(5) authorizes the Commission to initiate a Reliability Standards development process that “addresses a specific matter.”<sup>50</sup> But that language falls far short of providing the Commission with the authority it has under, for example, Section 206 of the FPA, to “fix. . . by order” rates, terms, or conditions of wholesale electric service it finds to be unjust or unreasonable, and to require its order “to be thereafter observed.”<sup>51</sup> Rather, the specifics of any reliability standard must be developed in the first instance by NERC and the REs in the industry-centered process mandated by Sections 215(d)(2) and (d)(3), and the limit of the Commission’s authority is specified in Section 215(d)(4), which allows the Commission to

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<sup>45</sup> 16 U.S.C. § 824o(b)(emphasis added).

<sup>46</sup> 16 U.S.C. § 824o(d).

<sup>47</sup> 16 U.S.C. § 824o(e)(4).

<sup>48</sup> 16 U.S.C. § 824o(d)(2).

<sup>49</sup> 16 U.S.C. § 824o(d)(4).

<sup>50</sup> 16 U.S.C. § 824o(d)(5).

<sup>51</sup> 16 U.S.C. § 824e(a).

remand rules developed by NERC or the REs, but withholds the authority to impose specific standards.

In fact, as the Commission recently observed, it “lacks authority to prescribe the specific content of a Reliability Standard”<sup>52</sup> under Section 215. Even where the Commission determines that a reliability standard must be remanded to NERC because it does not meet the statutory standard, NERC retains “the freedom and flexibility to develop an equally efficient and effective approach.”<sup>53</sup>

The Commission therefore exceeds its statutory authority by prescribing that the Reliability Standards developed in accordance with the Final Rule contain a nationally-uniform 100-kV threshold.

**C. As A Matter of Sound Policy, FERC Must Defer To NERC and WECC In Order to Take Advantage of the Industry’s Vast Expertise; Attempting To Centralize Control At FERC Will Be Counterproductive**

In a recently-published article, former FERC General Counsel John Moot, who played an important role in promulgating Order No. 693 and other orders laying the administrative groundwork for the mandatory reliability regime, argues that FERC should, as a matter of public policy, step back from the confrontational posture it has recently assumed, and offer greater deference to NERC.<sup>54</sup> PPC agrees with Mr. Moot’s observations and believes that the Final Rule is not only beyond FERC’s statutory authority, but represents an unwise foray into an area where the industry’s technical expertise can offer workable, sensible and regionally-appropriate solutions that a FERC-dominated reliability regime is unlikely to capture. We further believe

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<sup>52</sup> *North American Electric Reliability Corp.*, 132 FERC ¶ 61,218 at P 27 (2010).

<sup>53</sup> *North American Electric Reliability Corp.*, 132 FERC ¶ 61,218 at P 27 (2010).

<sup>54</sup> John S. Moot, *When Should the FERC Defer to the NERC?* 31 **Energy L. J.** 317 (2010).

that, unless FERC withdraws the most objectionable elements of the Final Rule, the reliability regime is likely to be bogged down by years of litigation and the uncertainty and disruption that entails.

As Mr. Moot points out, the model of industry-centered regulation encapsulated in FPA Section 215 has a long and successful history in other industries, including securities, commodity trading, and energy.<sup>55</sup> The enormous body of technical expertise available in the electric industry counsels in favor of that model for developing reliability standards, which clearly depend upon technical expertise to be effective. Accordingly, we agree with Mr. Moot's recommendation that FERC should use its Section 215 authority "primarily to guide overall policy direction on matters of fundamental national importance,"<sup>56</sup> and that FERC should therefore provide greater deference to the technical decisions of NERC and WECC, which requires FERC to approve standards that are supported by adequate technical justification, even if FERC itself might have reached a different conclusion.<sup>57</sup>

FERC can begin that process here by withdrawing the prescriptive elements of its proposal, allowing current efforts to develop a workable BES definition to reach their conclusion without undue interference by the Commission (this would include, particularly, the ongoing WECC BESDTF process), and approving the standards developed in those processes so long as they are adequately justified technically.

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<sup>55</sup> *Id.* at 324-28.

<sup>56</sup> *Id.* at 332.

<sup>57</sup> *Id.* at 333-34.

**IV. THE COMMISSION ARBITRARILY IGNORES EVIDENCE THAT THE 100-kV THRESHOLD WILL IMPOSE ENORMOUS COSTS ON SMALL ENTITIES AND ITS REGULATORY FLEXIBILITY ACT ANALYSIS IS THEREFORE INVALID**

**A. Implementation of the 100-kV Threshold Will Be Enormously Costly To PPC's Members and Many Other Utilities**

In its comments, PPC documented the substantial additional costs that its members will be subject to if a 100-kV threshold is adopted and they are forced to implement standards that are not appropriate for local distribution systems.<sup>58</sup> As facilities are added to the BES as a result of broader reach of a definition based on a hard-and-fast 100-kV threshold, registered utilities will have to register more equipment and register for more functions. Some currently unregistered utilities will be required to register. As a result, utilities will be required to spend even more money on record-keeping and audit assistance to meet the paperwork requirements of the reliability standards. PPC member Snohomish County PUD specifically documented hundreds of thousands of dollars in costs arising from the improper classification of its 115-kV distribution facilities as BES, with no demonstrable benefits to improved bulk system reliability.<sup>59</sup> Other commenters, such as the Wyoming Public Service Commission, submitted similar evidence demonstrating that small entities such a rural utilities serving large areas but small populations, will face hundreds of thousands of dollars in new compliance costs as a result of application of a 100-kV threshold.<sup>60</sup>

The Commission's asserted reasons for rejecting this evidence are arbitrary and capricious. First, the Commission claims, the entities commenting on the NOPR did not make

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<sup>58</sup> Comments of the Public Power Council, submitted in this docket on May 10, 2010, at pp. 7-8.

<sup>59</sup> Comments of Public Utility District No. 1 of Snohomish County, Washington Concerning the Commission's Proposed 100-kV Threshold Methodology for Defining the "Bulk Electric System," submitted in this docket on May 10, 2010, at pp. 11-15.

<sup>60</sup> Comments of the Wyoming Public Service Commission filed in this docket on Apr. 14, 2010.

“specific assertions” demonstrating how “the Final Rule will have a significant economic impact on a substantial number of small entities.”<sup>61</sup> This is simply incorrect, as a review of the above-referenced comments demonstrates.

Second, the Commission asserts, “most transmission owners, transmission operators, and transmission service providers do not fall within the definition of small entities.”<sup>62</sup> While that may have been true prior to the passage of Section 215, the experience of PPC’s smaller members demonstrates that application of the 100-kV threshold will cause their 115-kV distribution facilities to be classified as BES and therefore force them to register as transmission owners, transmission operators, or transmission service providers although, in truth, their 115-kV facilities do not provide transmission service of any kind. Further, there is no doubt that many of these affected PPC members are “small entities” subject to the protections of the Regulatory Flexibility Act.<sup>63</sup>

Third, FERC contends that the ability of REs to “identify ‘critical’ facilities, operated at less than 100 kV, and require these facilities to comply with mandatory Reliability Facilities [sic] is not new.”<sup>64</sup> That is true enough, but, as demonstrated above, very few facilities operating at 115-kV in the West are “critical,” or even form part of a transmission flow path, and WECC has not traditionally required those 115-kV facilities to be treated as part of the BES. Imposing a brightline 100-kV threshold on these facilities therefore threatens to force them into complying with new or additional reliability standards at substantial cost but with little or no benefit to the reliability of the interconnected bulk transmission system.

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<sup>61</sup> Final Rule at P 169.

<sup>62</sup> *Id.*

<sup>63</sup> See 5 U.S.C. § 601(6) (defining “small entity”).

<sup>64</sup> Final Rule at P 169.

FERC’s conclusion that the Final Rule “will not have a significant impact on a substantial number of small entities”<sup>65</sup> is therefore incorrect and its conclusion that no further analysis is needed under the Regulatory Flexibility Act is therefore faulty. The Commission should either withdraw the Final Rule or else conduct a new analysis under the Regulatory Flexibility Act that accurately reflects the impact of the analysis on small entities and also sets forth alternatives to the Final Rule that would be less burdensome for small entities.<sup>66</sup> These alternatives should include, but are not limited to: (1) limiting the scope of the Final Rule to the NPCC or Eastern Interconnection because the Commission has yet to identify a single reliability issue arising from application of the current BES definition in the Western Interconnection; (2) adoption of the structure recommended by the current WECC BESDTF proposal, which would exempt radial facilities and local distribution networks operating under 200 kV in the absence of a demonstration that those facilities have a material impact on the bulk transmission system.

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<sup>65</sup> Final Rule at P 169.

<sup>66</sup> *See* 5 U.S.C. § 604(a)(5) (requiring the agency to consider alternatives which are less burdensome to small entities).



