

FERC Denies Appeal of NERC Registration of Generator as Transmission Owner and Transmission Operator, Declines to Establish General Precedent

On May 16, the Federal Energy Regulatory Commission (FERC) denied an appeal by New Harquahala Generating Co., LLC (Harquahala) of the North American Electric Reliability Corporation's (NERC) decision to register Harquahala as a transmission owner and transmission operator (TO/TOP) for purposes of compliance with NERC's mandatory reliability standards. FERC found - based on the specific facts of the case - that the reliable operation and maintenance of Harquahala's interconnection facilities are necessary to the reliability of the Bulk-Power System. In upholding NERC's registration, FERC did not adopt a bright line test to decide whether generator owners or operators must be registered as a TO/TOP. Indeed, FERC specifically declined to go beyond the facts of this particular case to establish a precedent. Rather, FERC indicated that NERC registrations of this type will be determined on a case-by-case basis.

June 16, 2008 is the deadline for filing requests for rehearing.

BACKGROUND AND KEY ISSUES

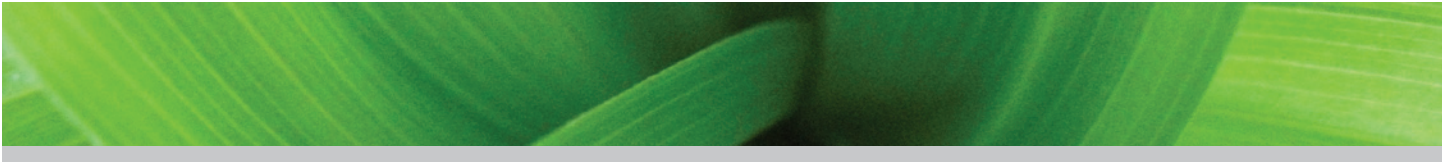
Harquahala owns and operates a 1,100 MW generating facility, a 26-mile, 500 kV generator interconnection tie-line, and substation facilities located in Arizona. Harquahala's generation facility is interconnected to the Hassayampa substation (Hassayampa), which serves as a common bus with the substation that connects the Palo Verde nuclear power plant. In a decision issued on January 14, 2008, NERC found that Harquahala's sole-use, radial interconnection facilities were an "integrated transmission element associated with the bulk power system," and therefore determined that Harquahala owns and operates transmission facilities. As a result, NERC registered Harquahala as a TO/TOP and required Harquahala to comply with the additional mandatory reliability standards applicable to TOs/TOPs. On February 4, 2008, Harquahala appealed NERC's determination to FERC.

In its order denying Harquahala's appeal, FERC found that Harquahala's interconnection facilities are necessary to the reliability of the Bulk-Power System and therefore require Harquahala's registration as a TO/TOP. Specifically, FERC determined that the configuration of Harquahala's interconnection facilities creates the potential for a loss or failure of these facilities to have an adverse affect on Hassayampa, the transmission network, the Palo Verde facility or other interconnected facilities. FERC agreed with NERC that a potential reliability gap would exist if Harquahala was not registered as a TO/TOP.

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FERC stated that recent events demonstrated that a fault event on Harquahala’s interconnection facilities may result in an adverse impact on Hassayampa.

FERC’s decision to uphold NERC’s registration is limited to the particular facts of this case. For instance, FERC did not address the further question of interpreting the NERC Registry Requirements definition of “intergraded transmission element.” FERC also ruled that compliance issues arising out of its affirmation of NERC’s determination could be addressed after registration, and directed NERC and Harquahala to negotiate whether some TO/TOP reliability standards may not apply to Harquahala.

IMPLICATIONS

This order and NERC’s decision to register Harquahala as a TO/TOP indicates that registrations for other generator-owned high voltage interconnection facilities will be determined on a case-by-case basis. It does not, however, set a precedent applicable to every generator, or signal that a generator owning high-voltage interconnection facilities will automatically be registered as a TO/TOP. FERC expressly stated that its “decision to affirm the registration decision of WECC and NERC is not a finding that all tie-line owners and operators should be registered as transmission owners and operators, and thus Harquahala is not a ‘test case.’” Rather, FERC’s review of registration decisions will remain on a case-by-case basis.

It is possible that regional reliability entities will decide to register other generators as TOs/TOPs depending on whether such generators: (1) have facilities that are interconnected to critical substations similar to Hassayampa; and (2) are interconnected in such a way that an event resulting in a loss of the interconnection facilities would have repercussions beyond the loss of the directly interconnected generation. A generator may perform a self-evaluation to determine if the operation and maintenance of its interconnection facilities are necessary to the reliability of the Bulk-Power System.

Generators that become registered as TOs/TOPs would be required to be in compliance with as many as 26 additional mandatory reliability standards and up to 248 additional requirements that are applicable to TOs/TOPs and do not typically apply to generator owners or operators, unless they are able to negotiate with NERC or a regional reliability entity regarding the applicability of certain reliability standards. Generators may also be required to have NERC-certified transmission operators operate the interconnection facilities. Compliance with such standards is likely to result in additional costs and increased regulatory risk for generators. Violations of mandatory reliability standards may result in the imposition of sanctions by NERC and FERC, including civil penalties of up to \$1 million per day, per violation.

FOR ADDITIONAL INFORMATION

Van Ness Feldman counsels generators, investor-owned utilities, municipal utilities, and power marketers on compliance with mandatory reliability standards and has assisted clients in disputes regarding NERC registration. For assistance or additional information, please contact Gary Bachman, Andrew Art, Vincenzo Franco or any other member of Van Ness Feldman’s Electric Practice at 202.298.1800.

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