



## FERC Grants First Motion to Intervene in a Reliability Enforcement Hearing

On June 10, 2011, the Federal Energy Regulatory Commission (the “Commission” or “FERC”) issued an order (the “Order”) granting certain FirstEnergy Corp. utilities (“FirstEnergy”) the authority to intervene in an enforcement hearing conducted by the ReliabilityFirst Corporation (“RFC”). This is the first time any entity has petitioned for such authority, and thus, the first time the Commission has granted it.

PJM Interconnection, L.L.C. (“PJM”) and FirstEnergy jointly submitted the petition (the “Petition”) on May 13, 2011 in FERC Docket No. RC11-3-000. PJM is the subject of an investigation by RFC for the violation of certain reliability standards. While most investigations eventually lead to settlement, the instant one, in which PJM disputes RFC’s allegations, transitioned to a “short-form” enforcement hearing (the “Enforcement Hearing”) before the RFC Hearing Body. The Enforcement Hearing is subject to the Hearing Procedures located in Appendix 4C, Attachment 2 to the North American Electric Reliability Corporation’s (“NERC’s”) Rules of Procedure. In a section entitled “Interventions are not Permitted,” the Hearing Procedures prohibit third-parties from intervening in enforcement hearings. Specifically, the procedures state that the “Respondent(s) and Staff shall be Participants to the proceeding. Unless otherwise authorized by FERC, no other Persons shall be permitted to intervene

or otherwise become a Participant to the proceeding” (emphasis added). The Hearing Procedures provide no other guidance as to how a party may obtain such authorization from the FERC.

According to the Petition, PJM notified FirstEnergy by letter that RFC had issued a Notice of Alleged Violation and Proposed Penalty against PJM for alleged violations of certain reliability standards (“PJM Letter”). PJM informed FirstEnergy that it may be implicated in the enforcement action as contributing to the alleged violations. PJM’s notification to FirstEnergy (a PJM Member) is consistent with the framework contained in Schedule 11 to PJM’s Amended and Restated Operating Agreement which permits PJM to directly allocate penalty costs associated with PJM Members whose conduct contributed to the reliability standard violation(s). Notably, Schedule 11 requires that the Member receive an “an opportunity to fully participate” in the Enforcement Hearing, as well as a finding that the Member contributed, either in whole or in part, to the reliability standard violation(s), before PJM may propose an allocation against it.

The Commission issued an Order granting FirstEnergy the authority to intervene in the Enforcement Hearing over a protest filed by RFC. The Commission concluded that FirstEnergy adequately established that it represents an interest that may be directly affected by the outcome

of the Enforcement Hearing. This fact was established by the letter from PJM notifying FirstEnergy that it may be the subject of a direct assignment of any monetary penalties resulting from the Enforcement Hearing. The Commission also relied on the fact that PJM's alleged violations and FirstEnergy's action (or inactions) share a common set of facts.

If PJM is found to have violated the reliability standards at issue, and there is a finding that FirstEnergy contributed to that violation, either in whole or in part, PJM may propose to directly allocate a penalty amount

against FirstEnergy. According to Schedule 11, and prior FERC orders, the proposed penalty allocation must be submitted to the Commission as a Federal Power Act, section 205 filing. Such a 205 proceeding would be limited to the question of whether the proposed penalty costs should be assigned to FirstEnergy. Thus, the Order reinforces prior Commission guidance that an Enforcement Hearing is the appropriate venue for the consideration of reliability standard culpability. The proposed allocation of a penalty by an ISO or RTO against a member is properly subject to a section 205 proceeding.

**If you have questions concerning the material contained in this alert,  
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