

FMEA LEGAL SEMINAR

# FERC vs NERC: Reliability Lost?

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# Where we came from

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- 1965 Blackout
- North American Electric Reliability Council (NERC) formed to promote nationwide reliability
- Compliance with reliability criteria was voluntary
- Reliability strained by increased competition

# Competing Drivers

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- Need for mandatory standards enforceable by penalties
- Industry-consensus standards
- North American Grid - International Organization
- Regions versus NERC
- Constitution - FERC Oversight

# Reliability Legislation

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- “Consensus” reliability legislation negotiated and adopted by NERC in 1998-99
- Boost with August 2003 blackout
- Section 215 of Federal Power Act enacted as part of the Energy Policy Act of 2005

# Unique Regulatory Scheme

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- Electric Reliability Organization (ERO) to develop and enforce standards, subject to FERC oversight
- ERO and FERC have authority to enforce standards through penalties (up to \$1 million/violation/day)

# Role of Regions

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- ERO delegates enforcement to regional entities (e.g., FRCC) subject to ERO and FERC review
- Regions may also propose standards to ERO, subject to ERO and FERC review

# Expanded Jurisdiction Over Munis

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- No blanket exclusion
- For purposes of approving and enforcing reliability standards, FERC has jurisdiction over ALL users, owners and operators of the bulk power system
- Implemented with limitations through Registry Criteria

# Inherent FERC-NERC Tension

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- 215(c)(2)(D): ERO develops standards through process providing notice and opportunity for public comment, due process, openness, and balance of interests
- 215(d)(1): NERC submits reliability standard to FERC that it proposes be made effective

# FERC to review but not rewrite standards (215(d)(2) and (4))

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- Must give due weight to the technical expertise of the ERO with respect to the content of a proposed reliability standard
- Approve if just, reasonable, not unduly discriminatory or preferential, and in the public interest
- Remand if it disapproves

# FERC Directives 215(d)(5)

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- FERC may order ERO to submit a proposed reliability standard or modification that addresses a specific matter if FERC considers such a new or modified reliability standard appropriate to carry out this section
- FERC treats as key provision

# Section 215 authority more limited than Sections 205/206

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206: “Whenever the Commission, after a hearing . . ., shall find that any rate . . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall *determine* the just and reasonable rate . . . to be thereafter observed . . . and shall *fix the same* by order.”

# Early Implementation 2006-2007

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- FERC approves NERC as ERO
- NERC submits “Version Zero” standards, recognized as works in progress
- FERC Order 693 approves 83, with hundreds of 215(d)(5) directives

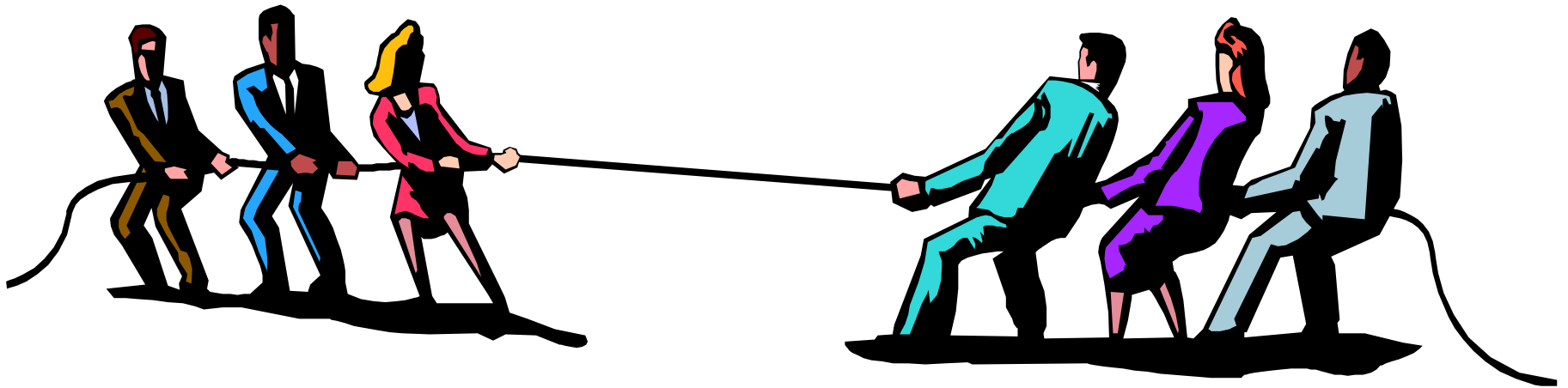
# Increasing Tension

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- Highly prescriptive directives mount as new standards are reviewed
- NERC can't ignore FERC directive to “*address . . . a specific matter*” but only NERC can develop standards
- What does “due weight to the technical expertise of the ERO” mean?

# March 18, 2010 Orders

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# March 18, 2010 Orders

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- When we snap, you jump, and we'll tell you how high
- Evince mistrust of NERC
- Heavy handed, very costly, prescriptive directives
- Proposes “bright line” 100 kV Bulk Electric System definition; only FERC may exempt

# March 18, 2010 Orders

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- FERC penalty guidelines modeled on US Sentencing Guidelines; covers reliability, but at odds with NERC sanctions guidelines
- Directs NERC to change its rules so standards developed to comply with FERC directives can't be "balloted down"

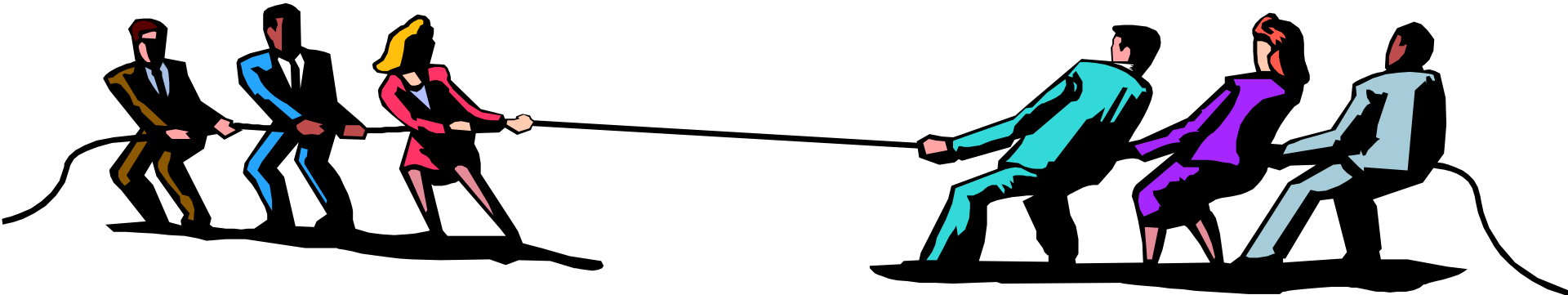
# Backlash

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- Public outcry
- Industry-wide pleadings
- 11<sup>th</sup> Floor recognizes FERC went too far

# Backlash

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# Enhanced Communications

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- FERC Commissioners and Advisors attend NERC Board Meetings
- Reliability group at Office of General Counsel
- Technical conferences at FERC
- Dialog on priorities — if everything's high priority nothing is

# “Kinder, Gentler” Approach?

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- At least more polite
- BES: NERC allowed opportunity to craft definition and exemption process
- Revised Penalty Guidelines: Reduce “multiplier” for reliability violations; apply NERC sanctions guidelines to review NERC-imposed penalties

# New approaches to FERC review?

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- Looking for alternatives to prescriptive directives
- FERC data requests to NERC, but harshly drafted
- Technical conferences rather than directives

# But FERC hasn't really backed down

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- Substance of several very costly March 18, 2010 orders not altered
  - Transmission relay loadability directives costing \$10 billion harm reliability; reconsideration?
  - Proposal to reverse TPL-002 interpretation that balloted 99%; NOPR would cost \$24 billion; compromise?

# Continued tensions: “balloting down”

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- NERC compliance filing provided new avenues to approve standards complying with FERC directives, leaving open potential to submit draft standard recommending it *not* be made effective
- FERC asserts authority to approve such standard
- Appeal dismissed without prejudice

# Former FERC General Counsel urges more hands-off approach

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“focus . . . primarily on setting broad policy objectives for the reliability issues of greatest importance to the nation, rather than continuing to order hundreds of individual changes to standards.”

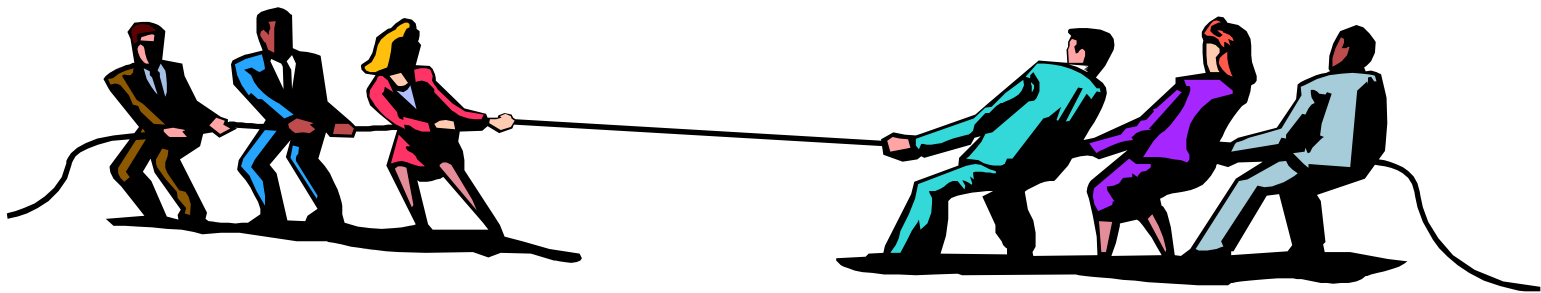
“defer to the NERC if it has provided a rational basis for a proposed standard, even if the FERC would have reached a different outcome . . . de novo”

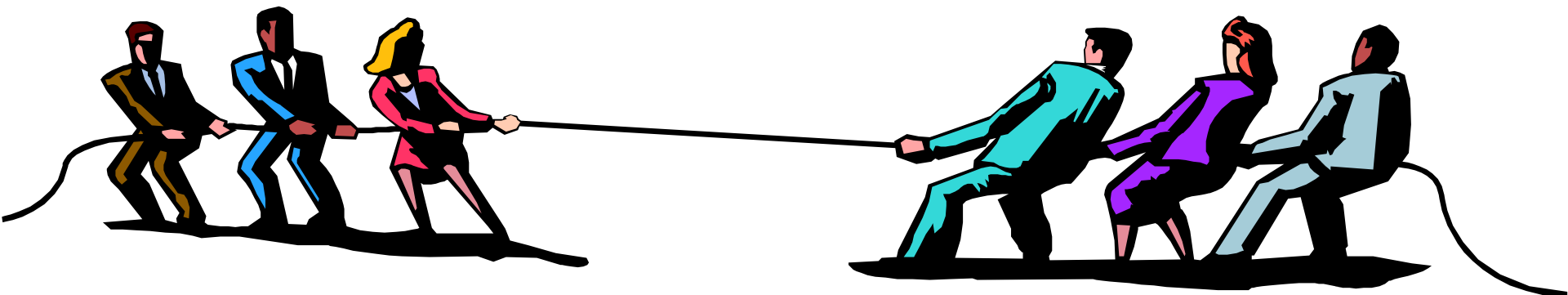
John S. Moot, [When Shall the FERC Defer to the NERC?](http://www.felj.org/docs/elj312/16_317_when_should_the_ferc_defer_to_the_nerc.pdf), *Energy Law Journal* (2010),  
[http://www.felj.org/docs/elj312/16\\_317\\_when\\_should\\_the\\_ferc\\_defer\\_to\\_the\\_nerc.pdf](http://www.felj.org/docs/elj312/16_317_when_should_the_ferc_defer_to_the_nerc.pdf)

# FERC-NERC Tug of War Continues

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- We're not there yet
- FERC is more aware and trying, although conflicted
- Your efforts at NERC and FRCC matter





## FOR MORE INFORMATION

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