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United States General Accounting Office
Washington, DC 20548

B- 360241

March 18, 2003

The Honorable Joe Barton
Chair, Subcommittee on Energy and Air Quality
Committee on Energy and Commerce
House of Representatives

Subject: Draft Legislation Concerning an Electric Reliability Organization

Dear Chairman Barton:

This responds to your request of March 13, 2003, confirmed in your letter of March 17, 2003, for our opinion concerning Title VII, Subtitle C, of a March 17 draft "Energy Policy Act of 2003."[1] Subtitle C would amend the Federal Power Act to authorize a private organization certified by the Federal Energy Regulatory Commission (FERC) to establish and enforce reliability standards for the bulk-power electricity transmission system. You have asked whether this provision would be deemed a constitutional delegation of congressional authority. Due to the time constraints under which the Subcommittee is operating, it has not been possible for us to solicit the views of affected agencies (in this case, FERC), as is our normal practice in preparing legal opinions. We note also that we have not reviewed provisions of the draft bill beyond Subtitle C, and thus our opinion is explicitly based on the assumption that the other provisions do not affect or relate to the issues you have raised regarding Subtitle C.

For the reasons discussed below, we conclude that Subtitle C would comply with the limitations contained in applicable case law concerning permissible delegations of congressional authority. The general proposition of the delegation doctrine is that Congress may delegate authority to a government agency where there are intelligible principles to govern its implementation. In the context of delegations of rulemaking and enforcement authority to private entities, courts have required that the private entity's implementation be subject to limiting standards as well as to agency review and control. Based on our analysis of the draft bill, the authority delegated in Subtitle C would comply with these limitations and thus would be constitutional.

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[1] For clarity, we have enclosed a copy of Subtitle C of the March 17, 2003 Committee Print. The March 17 draft is materially identical to the draft we received from your staff on March 13. Citations herein to "Draft Bill § ___" refer to the draft's proposed new Federal Power Act sections.

BACKGROUND AND SUMMARY OF DRAFT PROVISIONS

We understand that the genesis of proposed Subtitle C is a recommendation by the Electric System Reliability Task Force for Congress to enact legislation clarifying authorities currently exercised by the North American Electric Reliability Council (NERC). The Task Force has proposed that Congress authorize FERC to approve the establishment and enforcement of electric reliability standards by a national self-regulatory organization (SRO). The Task Force has suggested that such new legislation be based on existing legislation authorizing the Securities and Exchange Commission (SEC) to register the National Association of Securities Dealers (NASD) as a "national securities association" with authority to regulate securities broker-dealers.[2]

Along these same lines, Subtitle C of the draft bill, entitled "Reliability," would amend Part II of the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, to authorize FERC to certify a private organization to be known as an Electric Reliability Organization (ERO).[3] The ERO would establish and enforce electricity transmission reliability standards for the bulk-power system, subject to FERC review.[4] Specifically, FERC could certify one ERO if the agency determined that the ERO was able to develop and enforce bulk-power reliability standards and that the ERO had established rules ensuring that it: (1) is independent from users, owners and operators of the bulk-power system; (2) will equitably allocate reasonable dues, fees and other charges among end users for all activities; (3) will provide procedures for enforcement of reliability standards through imposition of penalties; (4) will provide for notice and comment, due process, openness, and balance of interests in exercising its duties; and (5) will take appropriate steps, after it is certified by FERC, to gain recognition in Mexico and Canada. Draft Bill § 217(c)(2)(A)-(E).

The ERO's proposed reliability standards would take effect only upon approval by FERC, which would be based on whether the standards were "just, reasonable, not unduly discriminatory or preferential, and in the public interest." Draft Bill § 217(d)(2). In making this determination, FERC would be required to give "due weight" to the technical expertise of the ERO with respect to certain subjects, but FERC explicitly would "not defer" to the ERO with respect to the effect of a proposed

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[2] *See* "Maintaining Bulk-Power Reliability Through Use of a Self-Regulating Organization: Position Paper," available March 13, 2003 at www.nerc.com/download/doe_srro.html.

[3] The court in *Enron Power Marketing, Inc. v. FERC*, 296 F.3d 1148 (D.C. Cir. 2002), commented on a related issue, namely, whether FERC could sub-delegate its congressionally delegated authority to NERC. Draft Subtitle C would moot this issue, by delegating congressional authority directly to the ERO.

[4] A "reliability standard" is defined in the bill as a requirement, approved by FERC, to provide for reliable operation of the bulk-power system, including requirements for operation of existing bulk-power system facilities and the design of planned additions or modifications to such facilities to the extent necessary to provide for reliable operation of the bulk-power system. The term does not include any requirement to enlarge such facilities or to construct new transmission or generation capacity. Draft Bill § 217(a)(3). A "bulk-power system" is defined in the bill as the facilities and control systems necessary for operating an interconnected electric energy transmission network and electric energy from generation facilities needed to maintain transmission reliability. Draft Bill § 217(a)(1)(A).

standard on competition. *Id.* The bill provides further that FERC may order the ERO to submit a proposed reliability standard that addresses a specific matter, if FERC considers such standard appropriate. Draft Bill § 217(d)(5). All users, owners and operators of the bulk-power system would have to comply with the reliability standards,[5] and FERC would have jurisdiction over the ERO, any regional entities, and all users, owners and operators of the bulk-power system in the United States. Draft Bill § 217(b)(1).

With respect to enforcement, the bill would authorize the ERO to assess penalties on a user, owner or operator of the bulk-power system for violation of a reliability standard if, after notice and opportunity for a hearing, the ERO finds that the standard has been violated and files notice and a record of the proceeding with FERC. Draft Bill § 217(e)(1). The penalty would be subject to review by FERC, on its own motion or upon application by the user, owner or operator, Draft Bill § 217(e)(2), and, in any proceeding to review a penalty, FERC could, after notice and opportunity for a hearing, affirm, set aside, reinstate or modify the penalty, with possible remand to the ERO. *Id.* The FERC hearing could consist solely of the record before the ERO and an opportunity for the presentation of supporting reasons to modify the penalty, *id.,* and the penalty assessment also presumably would be subject to judicial review, for example, under the Federal Power Act's provision for judicial review of FERC orders, 16 U.S.C. § 825*l*(b), or under the Administrative Procedure Act, 5 U.S.C. § 702.[6]

Finally, the bill would require FERC to establish regulations authorizing the ERO, by agreement, to sub-delegate its delegated authority to a regional entity. Draft Bill § 217(e)(4). The regional entity could propose reliability standards to the ERO as well as enforce the standards, provided that the regional entity is governed by an independent board, balanced stakeholder board, or a combination independent/balanced stakeholder board; the agreement promotes effective and efficient administration of the bulk-power system's reliability; and the regional entity otherwise satisfies the ERO certification standards. Draft Bill § 217(e)(4)(A)-(C). The regional entity must satisfy the standards that apply to certification of EROs. Draft Bill § 217(e)(4). FERC could modify the sub-delegation to the regional entity, but both the ERO and FERC must indulge a rebuttable presumption that a request for delegation to a regional entity organized on an interconnection-wide basis meets the effective/efficient standard and therefore should be approved. Draft Bill § 217(e)(4). The bill also provides that FERC's regulations may allow FERC to assign the ERO's authority to enforce reliability standards directly to a regional entity. Draft Bill

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[5] We understand this would include both private entities and federal entities (such as the Tennessee Valley Authority, the Bonneville Power Administration, and other federal power marketing agencies), among others. *See* Draft Bill § 217(b)(1)("The Commission shall have jurisdiction . . . over the ERO certified by the Commission under subsection (c), any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 201(f) . . .." The entities described in Section 201(f), 16 U.S.C. § 824(f), are "the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty . . ..").

[6] The Subcommittee may wish to clarify the bill on this point.

§ 217(e)(4). We presume that as with the ERO, a regional entity's assessment of penalties would be subject to review by FERC and ultimately by a court.[7]

DISCUSSION

The Delegation Doctrine

The delegation doctrine is a manifestation of separation of powers concerns, which in turn are grounded in the Constitution's division of the federal government into three branches and the assignment of a distinct role to each branch. Under this structure, Congress cannot assign to itself fundamentally non-legislative authority, nor can it impede the ability of another branch to perform its assigned functions. *See, e.g., Wayman v. Southard*, 23 U.S. 1 (1825). It is in this context that concerns arise about whether certain congressional grants of authority constitute improper delegations of legislative authority, because under the Constitution's Vesting Clause, all "legislative" power of the federal government is to reside with the Congress.[8] It is widely recognized under this Clause that Congress may not delegate its fundamental Article I legislative power to another branch or entity. *See, e.g, United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932); *Field v. Clark*, 143 U.S. 649, 692 (1892). The Supreme Court has distinguished between this non-delegable core lawmaking function and delegable ancillary rulemaking and other authorities, and has recognized that Congress must have the ability to delegate authority to federal entities under broad, general guidelines. *See Mistretta v. United States*, 488 U.S. 361 (1989).

The delegation doctrine has been applied in the context of delegations to public entities in a variety of situations, and the Supreme Court has consistently upheld grants of authority to these entities. *See, e.g., Loving v. United States*, 517 U.S. 748 (1996) (delegation to President to determine when court martial could impose death penalty); *Touby v. United States*, 500 U.S. 160 (1991) (delegation to Attorney General to determine element of a crime by designating a controlled substance); *Mistretta v. United States* (see above)(power of agency to determine sentencing guidelines binding on the courts). Most recently, in *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), the Court found that the Clean Air Act, which requires the Environmental Protection Agency (EPA) to promulgate national ambient air quality standards for certain air pollutants, did not impermissibly delegate legislative power to EPA. The Clean Air Act instructs EPA to set standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). In determining whether this provision violated the delegation doctrine, the Court stated that, "when Congress confers decision-making authority upon agencies, Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman*, 531 U.S. at 472, citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). The Court found that the Clean Air Act contained such principles. According to the Court, "even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a

[7] The Subcommittee may wish to clarify the bill on this point.

[8] The Vesting Clause provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. Const., Art. I, § 1.

'determinate criterion' of 'saying how much of the regulated harm is too much' . . . ." 531 U.S. at 475, quoting *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999). Rather, Congress may give agencies discretion to establish specific implementing standards, and in this case, the scope of discretion provided to EPA by the Clean Air Act was well within the delegation doctrine's permissible limits as previously announced by the Court.

Grants of Authority to Private Entities in General

The delegation doctrine establishes stricter limits when Congress wishes to assign authority to private or other non-federal entities. In two cases where the Court has struck down such delegations, it expressed concern that the interests of the regulated entities might be adverse to those regulating them, thus raising due process concerns. First, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Court disapproved the delegation of authority to an industrial trade association to draft a code of fair competition for the poultry industry. Although the Court noted that Congress may leave "to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply," *id.* at 530, the Court found that in this case, Congress had supplied only a legislative preface of broad generalities, rather than standards, to guide this fair-competition rulemaking. Although the association's draft rules would be submitted to the President for review, the Court was nevertheless concerned about delegation of legislative authority to industrial associations in a way that would empower them to enact laws they deem wise and beneficial for their own private interests.

Next, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court invalidated a delegation to a private party under the Bituminous Coal Conservation Act of 1935, which permitted a majority of miners and producers of coal to establish the minimum wage that would be binding on the entire group. The Court expressed concern about the statutory scheme because it authorized private persons whose interests were adverse to others in the regulated group to set the standards for the entire group, potentially depriving, without due process of law, the property of those who were not represented. [9]

Four years later, however, in *Sunshine Anthracite Coal v. Adkins*, 310 U.S. 381 (1940), the Court upheld a provision of the Bituminous Coal Act of 1937, which provided for regulation of the sale and distribution of bituminous coal by the National Bituminous Coal Commission with the cooperation of the coal industry. The Act provided that the coal producers would be members of a private industry association, the Bituminous Coal Code, which was to propose minimum prices pursuant to prescribed

[9] The Court stated, "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . [O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment that it is unnecessary to do more than refer to decision of this court which forecloses the question." 298 U.S. at 311 (citing *Schechter Poultry,* discussed above, and two earlier decisions).

statutory standards. The proposed prices could be approved, disapproved or modified by the Commission as the basis for the coordination of minimum prices. According to the Court, because the industry association was subject to the "pervasive surveillance and authority of the Commission," the statute did not constitute an unconstitutional delegation of legislative authority, as the industry members functioned subordinately to the Commission. "Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid." 310 U.S. at 399.[10]

The courts have also upheld congressional directives to private entities to carry out federal programs. In *Frame v. United States*, 885 F.2d 1119 (3rd Cir. 1989), for example, the Third Circuit upheld the Beef Promotion and Research Act of 1985, which required cattle producers and importers to finance a national beef promotional campaign conducted by statutorily designated organizations composed of industry representatives. The statute detailed provisions for selecting the membership of the organizations, the Cattlemen's Beef Promotion and Research Board and a Beef Promotion Operating Committee. Under the supervision of the Secretary of Agriculture, the organizations were to take the initiative in implementing the promotional campaign. The court applied the standards in *Sunshine Anthracite Coal* (see above) to determine whether Congress had unlawfully delegated its legislative authority to members of the beef industry, on the grounds that members of the Cattlemen's Board were authorized to collect assessments and take the initiative in planning how those funds were spent. The court found that the delegation was permissible because the Board's actions were subject to the pervasive surveillance and authority of the Secretary of Agriculture.

Grants of Authority to Self-Regulatory Organizations In Particular

Of particular relevance to the draft energy bill's Subtitle C provisions is the regulation of securities broker-dealers by the SEC. The SEC accomplishes most of this regulation through its oversight of the activities of a self-regulatory organization, the NASD. Section 15A of the Securities Exchange Act, 15 U.S.C. § 78*o*-3, added by the Maloney Act of 1938, Pub. L. No. 75-719, 52 Stat. 1070 (1938), authorized the establishment of "national securities associations" to be registered with the SEC. A "national securities association" must promulgate rules designed to "prevent fraudulent and manipulative practices and to promote just and equitable principles of trade" in transactions in the over-the-counter markets, *see* 15 U.S.C. § 78*o*-3(b)(6), and the NASD has been established as such an association. By virtue of the Maloney Act, a broker-dealer cannot do business in over-the-counter securities markets unless

[10] The courts have long upheld delegation of authority to private entities to set regulatory standards. See, e.g., *St. Louis, Iron Mt. & So. Railway v. Taylor*, 210 U.S. 281 (1908) (upholding delegation to American Railway Association to determine standard height of draw bars for freight cars; Interstate Commerce Commission was required to accept the figure); *Jackson v. Roby*, 109 U.S. 440 (1883) (upholding delegation to local miners to issue rules governing mining claims on public lands); *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905) (same). The courts also have upheld legislation conditioning the exercise of a federal official's authority on the approval of a private entity. *See, e.g., Currin v. Wallace*, 306 U.S. 1 (1939)(upholding statute authorizing Secretary of Agriculture to promulgate regulations pertaining to tobacco growers if the regulations are approved by two-thirds of growers); *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939)(upholding statute allowing milk cooperatives to approve or disapprove of Secretary of Agriculture's marketing order).

it becomes a member of the NASD, and it then must comply with the substantive NASD rules. 15 U.S.C. § 78*o*-3(b)(8). In addition to rulemaking authority, NASD also has broad investigatory and disciplinary powers. The SEC has oversight responsibility over all of these activities, and aggrieved broker-dealers can seek judicial review of the SEC's review of NASD's actions. 15 U.S.C. § 78*y*(a)(1).

Three Circuit Courts of Appeals have examined whether the Maloney Act constituted a permissible delegation of legislative power, and all three courts have upheld the statute. First, in 1952, the Second Circuit, in *R.H. Johnson v. Securities and Exchange Commission*, 198 F. 2d 690 (2d Cir. 1952), reviewed an SEC order that failed to set aside a penalty fixed by NASD suspending the defendant broker-dealer from membership. Citing *Sunshine Anthracite Coal*, discussed above, the Second Circuit found that, in light of the statutory provisions vesting the SEC with power to approve or disapprove NASD's rules according to reasonably fixed statutory standards, and the fact that NASD disciplinary actions are subject to SEC review, there was "no merit in the contention that the Maloney Act unconstitutionally delegates power to the NASD." 198 F.2d at 695.

Next, in 1977, the Third Circuit, in *Todd & Co. v. Securities and Exchange Commission*, 557 F.2d 1008 (3rd Cir. 1977), likewise upheld the constitutionality of the Maloney Act, concluding that the Act did not unconstitutionally delegate legislative power to a private institution. The *Todd* court articulated three critical factors that kept the Maloney Act within constitutional bounds. *First,* the SEC had the power, according to reasonably fixed statutory standards, to approve or disapprove NASD's rules before they could go into effect. *Second*, all NASD judgments of rule violations or penalty assessments were subject to SEC review. *Third,* all NASD adjudications were subject to a *de novo* (non-deferential) standard of review by the SEC, which could be aided by additional evidence, if necessary. *Id.* at 1012. Based on these factors, the court found that "[NASD's] rules and its disciplinary actions were subject to full review by the SEC, a wholly public body, which must base its decision on its own findings" and thus that the statutory scheme was constitutional. *Id.* at 1012-13.

The Third Circuit applied the same three-part *Todd* test in *First Jersey Securities v. Bergen,* 605 F.2d 690 (1979), and again upheld the Maloney Act. The court discussed a 1975 amendment to the Maloney Act. As the court explained:

> "Prior to 1975, the review provision of the statute called for the SEC to render its decision 'upon the consideration of the record before the association and such other evidence as it deems relevant. . . .' 15 U.S.C. § 78*o*-3(h)(1)(1970). The statute now provides that the SEC hearing 'may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, [or] set aside the sanction. . . .' 15 U.S.C. § 78*s*(e)(1) (1976)." 605 F.2d at 697.

The court therefore found that:

> "[W]e need not now decide whether this statutory change effects a significant alteration in the SEC's power to review NASD disciplinary

proceedings. It suffices to say that to the extent the amendment restricts the ability to receive additional evidence not presented below, this does not alter our conclusion in *Todd* that there is no unconstitutional delegation of legislative authority." *Id.*

It seems clear that the court in *First Jersey* determined that the presence of the new statutory language modifying the SEC review provision would not change its conclusion that the statute was constitutional.

Finally, in 1982, the Ninth Circuit considered the constitutionality of Congress' delegation to NASD in *Sorrel v. Securities and Exchange Commission*, 679 F. 2d 1323 (9th Cir. 1982). *Sorrel* followed *R.H. Johnson*, *Todd* and *First Jersey* in holding that because the SEC reviews NASD rules according to reasonably fixed standards, and the SEC can review any NASD disciplinary action, the Maloney Act does not impermissibly delegate power to NASD.

Application of the Case Law Standards to the Draft ERO Provisions

The draft Subtitle C provisions delegating authority to an ERO appear to comply with the standards established in the courts' SRO-related holdings in *R.H. Johnson, Todd, First Jersey* and *Sorrel*, as well as the more general delegation principles enunciated in *Sunshine Anthracite Coal*. Applying the first part of the test articulated by the courts, FERC would have the power, according to reasonably fixed statutory standards, to approve or disapprove the ERO's rules. As discussed above, the draft legislation provides that FERC must review all proposed reliability standards and approve those it determines to be just, reasonable, not unduly discriminatory or preferential, and in the public interest, and a proposed standard or modification would take effect only upon approval by FERC. *See* Draft Bill § 217(d)(2).

Further, while the bill directs FERC to give due weight to the technical expertise of the ERO with respect to the content of a proposed or modified reliability standard, the bill specifically instructs FERC not to defer with respect to the effect of a standard on competition. *See* Draft Bill § 217(d)(2). Additionally, on its own motion or upon complaint, FERC may order the ERO to submit a proposed reliability standard or modification to a reliability standard, *see* Draft Bill § 217(d)(5), and final rules are to include fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule or agreement accepted by FERC. *See* Draft Bill § 217(d)(6).

The bill also meets the second factor of concern to the courts. As the courts found significant in *Todd* and *First Jersey*, all ERO determinations of penalties would be subject to review by FERC, on its own motion or upon timely application by the adversely affected user, owner or operator. Draft Bill § 217(e)(2). Again, the penalty assessment presumably would be subject to judicial review.

Finally, the bill meets the courts' third factor of concern, as applied in *First Jersey*. The *First Jersey* court held that this factor – having *de novo* agency review of the SRO's findings with authority to receive additional evidence – was satisfied by statutory language virtually identical to that in § 217(e)(2) of the draft energy bill. As

in Draft Bill §217(e)(2), the language at issue in *First Jersey*, added to the Securities Exchange Act in 1975, provides for review by the SEC "after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the SRO and opportunity for the presentation of supporting reasons to affirm, modify or set aside the sanction)."

In sum, we conclude that the provisions in Subtitle C of the draft energy bill would be deemed a constitutional delegation of congressional authority.

The Appointments Clause

We also have considered whether the delegation of authority to the ERO under Subtitle C raises any difficulties under the Appointments Clause of the Constitution. The Appointments Clause, Article II, Section 2, Clause 2, provides that the President shall appoint "all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . ." Persons "who are not appointed. . . and who therefore cannot be considered 'Officers of the United States' may not discharge functions that are properly discharged only by officers." *United States ex. rel. Kelly v. Boeing*, 9 F.3d 743,757 (9th Cir. 1993).

The test applied by the Supreme Court to assess whether appointees are exercising authority that can only properly belong to appointed officers is whether they " exercis[e] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). In *Buckley,* the Supreme Court examined a separation-of-powers challenge to the authority and composition of the Federal Election Commission (FEC), whose voting membership consisted primarily of congressional appointees. The Court held that statutory provisions vesting the FEC with "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights" violated the Appointments Clause because these functions could only be performed by duly appointed officers. *Id.* at 140.

In recent years, the courts have addressed *Buckley's* test for identifying when an individual, by virtue of the exercise of "significant authority" under federal law, must be appointed as an officer. In a recent case, *Confederated Tribes of Siletz Indians v. United States,* 110 F.3d 688 (9th Cir. 1997), the Ninth Circuit rejected an Appointments Clause challenge to a federal statute under which the Secretary of Interior—before placing lands in trust for Indian gaming operations—would have to seek the concurrence of the governor of the state where the land was located. While the state governors could take actions (concurrence or non-concurrence) that would affect federal interests pursuant to federal law, the court found that the ultimate authority for enforcing the law and protecting federal interests remained in the hands of the Secretary of Interior, a duly appointed officer of the United States. The court therefore concluded that the governors did not exercise "significant authority" sufficient to trigger application of the Appointments Clause. 110 F.3d at 696-99.[11]

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[11] *See also Seattle Master Builders v. Pacific N.W. Elec. Power,* 786 F.2d 1359 (9th Cir. 1986) (members of interstate compact council created with congressional consent did not have to be appointed pursuant to the Appointments Clause because the Council was carrying out state functions). In *Seattle Master Builders*, the court also rejected arguments that the interstate council was operating as a federal agency because its activities would have a direct effect on a federal entity, the Bonneville

In line with the rationale in *Confederated Tribes,* the proposed legislation vests in the federal government (specifically FERC) substantial oversight and review authority over the actions of the ERO, thus ensuring that the ultimate authority for enforcing the law rests with duly appointed federal officers. Furthermore, as the Justice Department's Office of Legal Counsel (OLC) has observed, in the context of delegations to non-federal actors, the Supreme Court and other courts that have addressed the constitutionality of such delegations have focused on the delegation doctrine, discussed above, without identifying the Appointments Clause as a second source of constitutional concern.[12] According to a 1995 OLC opinion, the Appointments Clause is not mentioned by the courts in analyzing delegation issues because "what limits exist on the ability to delegate governmental authority to private actors are encompassed within the non-delegation doctrine."[13] Given these considerations, and our conclusion that Subtitle C would be deemed to involve a constitutionally permissible delegation, we do not believe that this subtitle would present a problem under the Appointments Clause.

CONCLUSION

In summary, we conclude that the provisions of draft Subtitle C would not constitute an impermissible delegation of congressional authority under the existing case law, nor would they implicate concerns under the Appointments Clause. If you would like to discuss this matter further, please contact Lynn H. Gibson, Managing Associate General Counsel, Susan D. Sawtelle, Associate General Counsel, or Rachel M. DeMarcus, Senior Attorney, at (202) 512-5400.

Sincerely yours,

Anthony H. Gamboa
General Counsel

Enclosure

Power Administration. In this regard, the court noted that, "there is no bar against federal agencies following policies set by nonfederal agencies." 786 F.2d at 1363-64.

[12] While past opinions of the Justice Department's Office of Legal Counsel (OLC) suggested that legislative delegations of authority to non-federal actors could violate the Appointments Clause, *see, e.g.*, 13 Op. Off. Legal Counsel 207 (1989) (*qui tam* suits by private parties under False Claims Act violate Appointments Clause because private parties exercise "significant governmental power"), OLC reversed this position in the mid-1990's, concluding that the Appointments Clause is only implicated when there has been an appointment of an individual to an office within the federal government. *See Memorandum for the General Counsels of the Federal Government*, 1996 OLC LEXIS 60; *Memorandum for John Schmidt, Associate Attorney General: Constitutional Limitations on Federal Government Participation on Binding Arbitration*, 1995 OLC LEXIS 17.

[13] *See* Memorandum for John Schmidt, note 12 above.

(ii) authorize abrogation of any contract or treaty obligation.

Subtitle C—Reliability

SEC. 7031. ELECTRIC RELIABILITY STANDARDS.

Part II of the Federal Power Act (16 U.S.C 824 et seq.) is amended by inserting the following new section at the end thereof:

"SEC. 217. ELECTRIC RELIABILITY.

"(a) DEFINITIONS.—For purposes of this section—

"(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 from generation facilities needed to maintain transmission system reliability.

The term does not include facilities used in the local distribution of electric energy.

"(2) The terms 'Electric Reliability Organization' and 'ERO' mean the organization certified by the Commission under subsection (c) the purpose of which is to establish and enforce reliability standards for the bulk-power system, subject to Commission review.

"(3) The term 'reliability standard' means a requirement, approved by the Commission under this section, to provide for reliable operation of the bulk-power system. The term includes requirements for the operation of existing bulk-power system facilities and the design of planned additions or modifications to such facilities to the extent necessary to provide for reliable operation of the bulk-power system, but the term does not include any requirement to enlarge such facilities or to construct new transmission capacity or generation capacity.

"(4) The term 'reliable operation' means operating the elements of the bulk-power system within equipment and electric system thermal, voltage, and stability limits so that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance or unanticipated failure of system elements.

"(5) The term 'Interconnection' means a geographic area in which the operation of bulk-power system components is synchronized such that the failure of one or more of such components may adversely affect the ability of the operators of other components within the system to maintain reliable operation of the facilities within their control.

"(6) The term 'transmission organization' means a regional transmission organization, independent system operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

"(7) The term 'regional entity' means an entity having enforcement authority pursuant to subsection (e)(4).

"(b) JURISDICTION AND APPLICABILITY.—(1) The Commission shall have jurisdiction, within the United States, over the ERO certified by the Commission under subsection (c), any regional entities, and all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 201(f), for purposes of approving reliability standards established under this section and enforcing compliance with this section. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.

"(2) The Commission shall issue a final rule to implement the requirements of this section not later than 180 days after the date of enactment of this section.

"(c) CERTIFICATION.—Following the issuance of a Commission rule under subsection (b)(2), any person may

submit an application to the Commission for certification as the Electric Reliability Organization (ERO). The Commission may certify one such ERO if the Commission determines that such ERO—

"(1) has the ability to develop and enforce, subject to subsection (e)(2), reliability standards that provide for an adequate level of reliability of the bulk-power system;

"(2) has established rules that—

"(A) assure its independence of the users and owners and operators of the bulk-power system, while assuring fair stakeholder representation in the selection of its directors and balanced decisionmaking in any ERO committee or subordinate organizational structure;

"(B) allocate equitably reasonable dues, fees, and other charges among end users for all activities under this section;

"(C) provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) (including limitations on activities, functions, or operations, or other appropriate sanctions);

"(D) provide for reasonable notice and opportunity for public comment, due process, openness, and balance of interests in developing reliability standards and otherwise exercising its duties; and

"(E) provide for taking, after certification, appropriate steps to gain recognition in Canada and Mexico.

"(d) RELIABILITY STANDARDS.—(1) The Electric Reliability Organization shall file each reliability standard or modification to a reliability standard that it proposes to be made effective under this section with the Commission.

"(2) The Commission may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection, but shall not defer with respect to the effect of a standard

on competition. A proposed standard or modification shall take effect upon approval by the Commission.

"(3) The Electric Reliability Organization shall rebuttably presume that a proposal from a regional entity organized on an Interconnection-wide basis for a reliability standard or modification to a reliability standard to be applicable on an Interconnection-wide basis is just, reasonable, and not unduly discriminatory or preferential, and in the public interest.

"(4) The Commission shall remand to the Electric Reliability Organization for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part.

"(5) The Commission, upon its own motion or upon complaint, may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.

"(6) The final rule adopted under subsection (b)(2) shall include fair processes for the identification and timely resolution of any conflict between a reliability standard and any function, rule, order, tariff, rate schedule, or

agreement accepted, approved, or ordered by the Commission applicable to a transmission organization. Such transmission organization shall continue to comply with such function, rule, order, tariff, rate schedule or agreement accepted approved, or ordered by the Commission until—

"(A) the Commission finds a conflict exists between a reliability standard and any such provision;

"(B) the Commission orders a change to such provision pursuant to section 206 of this part; and

"(C) the ordered change becomes effective under this part.

If the Commission determines that a reliability standard needs to be changed as a result of such a conflict, it shall order the ERO to develop and file with the Commission a modified reliability standard under paragraph (4) or (5) of this subsection.

"(e) ENFORCEMENT.—(1) The ERO may impose, subject to paragraph (2), a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission under subsection (d) if the ERO, after notice and an opportunity for a hearing—

"(A) finds that the user or owner or operator has violated a reliability standard approved by the Commission under subsection (d); and

"(B) files notice and the record of the proceeding with the Commission.

"(2) A penalty imposed under paragraph (1) may take effect not earlier than the 31st day after the electric reliability organization files with the Commission notice of the penalty and the record of proceedings. Such penalty shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty filed within 30 days after the date such notice is filed with the Commission. Application to the Commission for review, or the initiation of review by the Commission on its own motion, shall not operate as a stay of such penalty unless the Commission otherwise orders upon its own motion or upon application by the user, owner or operator that is the subject of such penalty. In any proceeding to review a penalty imposed under paragraph (1), the Commission, after notice and opportunity for hearing (which hearing may consist solely of the record before the electric reliability organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the penalty), shall by order affirm, set aside, reinstate, or modify the penalty, and, if appropriate, remand to the electric reliability organization for further proceedings. The Commission shall implement expedited procedures for such hearings.

"(3) On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system, if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.

"(4) The Commission shall establish regulations authorizing the ERO to enter into an agreement to delegate authority to a regional entity for the purpose of proposing reliability standards to the ERO and enforcing reliability standards under paragraph (1) if—

"(A) the regional entity is governed by—

"(i) an independent board;

"(ii) a balanced stakeholder board; or

"(iii) a combination independent and balanced stakeholder board."

"(B) the regional entity otherwise satisfies the provisions of subsection (c)(1) and (2); and

"(C) the agreement promotes effective and efficient administration of bulk-power system reliability.

The Commission may modify such delegation. The ERO and the Commission shall rebuttably presume that a pro-

posal for delegation to a regional entity organized on an Interconnection-wide basis promotes effective and efficient administration of bulk-power system reliability and should be approved. Such regulation may provide that the Commission may assign the ERO's authority to enforce reliability standards under paragraph (1) directly to a regional entity consistent with the requirements of this paragraph.

"(5) The Commission may take such action as is necessary or appropriate against the ERO or a regional entity to ensure compliance with a reliability standard or any Commission order affecting the ERO or a regional entity.

"(6) Any penalty imposed under this section shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.

"(f) CHANGES IN ELECTRICITY RELIABILITY ORGANIZATION RULES.—The Electric Reliability Organization shall file with the Commission for approval any proposed rule or proposed rule change, accompanied by an explanation of its basis and purpose. The Commission, upon its own motion or complaint, may propose a change to the rules of the Electric Reliability Organization. A proposed rule or proposed rule change shall take effect upon a find-

ing by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential, is in the public interest, and satisfies the requirements of subsection (c).

"(g) RELIABILITY REPORTS.—The Electric Reliability Organization shall conduct periodic assessments of the reliability and adequacy of the bulk-power system in North America.

"(h) COORDINATION WITH CANADA AND MEXICO.—The President is urged to negotiate international agreements with the governments of Canada and Mexico to provide for effective compliance with reliability standards and the effectiveness of the Electric Reliability Organization in the United States and Canada or Mexico.

"(i) SAVINGS PROVISIONS.—(1) The Electric Reliability Organization shall have authority to develop and enforce compliance with reliability standards for only the bulk-power system.

"(2) This section does not authorize the Electric Reliability Organization or the Commission to order the construction of additional generation or transmission capacity or to set and enforce compliance with standards for adequacy or safety of electric facilities or services.

"(3) Nothing in this section shall be construed to preempt any authority of any State to take action to ensure

the safety, adequacy, and reliability of electric service within that State, as long as such action is not inconsistent with any reliability standard, except that the State of New York may establish rules that result in greater reliability within that State, as long as such action does not result in lesser reliability outside the State than that provided by the reliability standards.

"(4) Within 90 days of the application of the Electric Reliability Organization or other affected party, and after notice and opportunity for comment, the Commission shall issue a final order determining whether a State action is inconsistent with a reliability standard, taking into consideration any recommendation of the Electric Reliability Organization.

"(5) The Commission, after consultation with the Electric Reliability Organization and the State taking action, may stay the effectiveness of any State action, pending the Commission's issuance of a final order.

"(j) REGIONAL ADVISORY BODIES.—The Commission shall establish a regional advisory body on the petition of at least two-thirds of the States within a region that have more than one-half of their electric load served within the region. A regional advisory body shall be composed or of one member from each participating State in the region, appointed by the Governor of each State, and may include

representatives of agencies, States, and provinces outside the United States. A regional advisory body may provide advice to the Electric Reliability Organization, a regional entity, or the Commission regarding the governance of an existing or proposed regional entity within the same region, whether a standard proposed to apply within the region is just, reasonable, not unduly discriminatory or preferential, and in the public interest, whether fees proposed to be assessed within the region are just, reasonable, not unduly discriminatory or preferential, and in the public interest and any other responsibilities requested by the Commission. The Commission may give deference to the advice of any such regional advisory body if that body is organized on an Interconnection-wide basis.

"(k) APPLICATION TO ALASKA AND HAWAII.—The provisions of this section do not apply to Alaska or Hawaii.".

Subtitle D—PUHCA Amendments

SEC. 7041. SHORT TITLE.

This subtitle may be cited as the "Public Utility Holding Company Act of 2003".

SEC. 7042. DEFINITIONS.

For purposes of this subtitle:

(1) The term "affiliate" of a company means any company, 5 percent or more of the outstanding