

137 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

North American Electric Reliability Corporation

Docket No. NP10-160-001

ORDER DENYING REHEARING

(Issued October 20, 2011)

1. On December 16, 2010, the Commission issued an order¹ affirming that the United States Army Corps of Engineers-Tulsa District (Corps or Corps-Tulsa District), and any other federal entity that uses, owns, or operates the Bulk-Power System, must comply with mandatory Reliability Standards adopted under section 215 of the Federal Power Act (FPA).² The Corps submitted a request for rehearing on January 14, 2011, asserting that the Commission erred (1) in failing to find that federal entities are not subject to the requirements of FPA section 215 under established doctrines of sovereign immunity, and (2) in failing to refer the matter to the Department of Justice, Office of Legal Counsel for resolution. We hereby deny the Corps' request for rehearing and affirm our previous rulings requiring federal entities to adhere to mandatory Reliability Standards under FPA section 215.

I. Background

A. Notice of Penalty Process and the Corps' Request for Review of the Proposed Zero-Dollar Penalty

2. Section 215 of the FPA provides the Commission with authority to certify and oversee an electric reliability organization (ERO), responsible for developing and enforcing mandatory Reliability Standards for all users, owners, and operators of the Bulk-Power System.³ Exercising this statutory authority, the Commission certified the

¹ *North American Electric Reliability Corp.*, 133 FERC ¶ 61,214 (2010). (December 2010 Jurisdictional Order).

² 16 U.S.C. § 824o (2006).

³ 16 U.S.C. § 824o(c).

North American Reliability Corporation (NERC) as the ERO in July 2006,⁴ and approved an initial set of 83 Reliability Standards in Order No. 693 in 2007.⁵ As permitted under section 215(e)(4) of the FPA,⁶ NERC has delegated certain of its authorities to eight Regional Entities to oversee enforcement of Reliability Standards within each region.⁷ Two of the Regional Entities, Texas Reliability Entity, Inc. (TRE)⁸ and the Southwest Power Pool Regional Entity (SPP RE), have delegated authority over facilities owned or operated by the Corps-Tulsa District.

3. Under the statute and the Commission's rules governing enforcement for violations of a Reliability Standard, NERC must file a Notice of Penalty with the Commission before a penalty assessed by NERC or a Regional Entity for violation of a Reliability Standard can take effect.⁹ Each such penalty determination is subject to Commission review, either on its own motion or by application for review by the recipient of a penalty, within thirty days from the date NERC files the applicable Notice of Penalty.¹⁰ In the absence of an application for review of a penalty or other action by the Commission, each penalty filed by NERC is affirmed by operation of law upon the expiration of the applicable thirty-day period.

⁴ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,190, *order on reh'g* 119 FERC ¶ 61,046 (2007), *aff'd sub nom., Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

⁵ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁶ 16 U.S.C. § 824o(e)(4).

⁷ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

⁸ On July 1, 2010, TRE took over all responsibilities previously performed by Texas Regional Entity, which was a functionally independent division of the Electric Reliability Council of Texas, Inc. (ERCOT).

⁹ See *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 506, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

¹⁰ 16 U.S.C. § 824o(e)(2).

4. Pursuant to this process, NERC submitted a batch of Notices of Penalty on September 13, 2010. NERC's filing included two Notices of Penalty against the Corps-Tulsa District, one involving fourteen violations of Reliability Standards in the SPP RE region¹¹ and the other involving three violations in the TRE region.¹² NERC proposed a zero-dollar penalty for the Corps-Tulsa District, and required the Corps-Tulsa District to undertake a mitigation plan, which was completed prior to the filing of the September 13, 2010 Notices of Penalty.¹³

5. On October 13, 2010, the Corps requested that the Commission review NERC's Notice of Penalty filing. The Corps did not challenge the underlying facts regarding the Reliability Standard violations at issue, or its own status as a user, owner, or operator of the Bulk-Power System.¹⁴ Instead, the Corps asked the Commission to reconsider and reverse its prior determination, in Docket No. NP09-26-000, that FPA section 215 applies

¹¹ The violations in the SPP RE region relate to the following nine Reliability Standards: CIP-001-1 (requirements for procedures for the communication of information related to sabotage on certain critical infrastructure); EOP-004-1 (requirements for adoption of policies requiring prompt analysis of disturbances on the bulk electric system); FAC-008-1 (requirements for adoption of a facility ratings methodology); PRC-001-1 (requirements for notification of relay or equipment failures); PRC-004-1 (requirements for development of a corrective action plan for generator protection system misoperations); PRC-005-1 (requirements for protection system maintenance and testing programs); TOP-002-2 (procedures for use of uniform line identifiers in communications with certain entities); and VAR-002-1 (requirements for generators operating in automatic voltage control mode). *See* NERC Notice of Penalty Filing, Att. A.

¹² The violations in the TRE region all relate to FAC-008-1 (requirements for development and inspection of a facility ratings methodology). *See* NERC Notice of Penalty Filing, Att. A.

¹³ The Corps-Tulsa District entered into an Expedited Disposition Agreement with each of SPP RE and TRE, in which the parties agreed that a zero dollar penalty would be assessed. The NERC Expedited Disposition Process is available for disposition of violations that (1) do not pose a serious risk to the reliability of the bulk electric system; (2) were discovered prior to July 3, 2008; and (3) have been fully mitigated.

¹⁴ The Corps stated in its October 13, 2010 Answer to NERC Omnibus II Notice of Penalty (October 13, 2010 Request for Review) that the Corps is a federal agency involved in a wide range of public works in the United States, including providing services and support for dams, canals and flood protection. The Corps operates 75 hydropower plants within the U.S., which account for 3 percent of the nation's total electric capacity.

to federal agencies,¹⁵ or in the alternative, to determine that federal agencies are not subject to monetary penalties for violations of the section 215 Reliability Standards.

B. December 2010 Jurisdictional Order

6. In our December 2010 Jurisdictional Order, the Commission affirmed its prior findings in Docket No. NP09-26-000 that federal entities that use, own or operate the Bulk-Power System must comply with mandatory Reliability Standards pursuant to section 215 of the FPA. The Commission found no error in its prior statutory analysis, and again concluded that section 215(b)(1) and 215(b)(2) of the FPA explicitly require entities such as the Corps, which would otherwise be exempt from some FPA requirements under FPA section 201(f), to comply with mandatory Reliability Standards under FPA section 215.¹⁶ The Commission rejected arguments that an ambiguity exists in the grant of jurisdiction under FPA section 215 over the kinds of federal entities otherwise exempt from FPA requirements under FPA section 201(f), when FPA section 201(f) itself recognizes that jurisdiction can be conferred over “201(f) entities” under specific provisions of the FPA.¹⁷

7. The Commission also rejected the Corps’ claims that the strictures of the Anti-Deficiency Act are inconsistent with an interpretation of FPA section 215 that requires federal entities to comply with mandatory Reliability Standards. As the Commission noted, the Anti-Deficiency Act provides that an “officer or employee of the United States Government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.”¹⁸ Thus, we found that the Anti-Deficiency Act merely prohibits making an expenditure in excess of amounts available to cover that expenditure, and does not prevent the Corps-Tulsa District or any other federal entity from making expenditures as needed to comply with mandatory Reliability Standards if the funds are available from existing appropriations.

¹⁵ That proceeding also involved a zero-dollar penalty for violation of a Reliability Standard by the Corps-Tulsa District. *See North American Electric Reliability Corp.*, 129 FERC ¶ 61,033 (2009) (October 2009 Jurisdictional Order) (finding that federal entities that use, own, or operate the Bulk-Power System must comply with mandatory Reliability Standards); *order on reh’g*, 130 FERC ¶ 61,002 (2010) (January 2010 Order on Rehearing) (rejecting the Corps’ request for rehearing as untimely, while explaining that the request would have failed on the merits in any case).

¹⁶ December 2010 Jurisdictional Order, 133 FERC ¶ 61,214 at P 32, 33.

¹⁷ *Id.* P 35.

¹⁸ *Id.* P 34 (citing 31 U.S.C. § 1341(a)(1)(A)).

8. Finally, the Commission elected to defer the question of whether a federal entity can be subject to a monetary penalty for violation of a section 215 Reliability Standard, as the issue was not directly raised by the zero-dollar penalty proposed for the Corps' violation.¹⁹

C. Request for Rehearing

9. On January 14, 2011, the Corps filed a request for rehearing of the December 2010 Jurisdictional Order, asking the Commission to reconsider its decision on the applicability of FPA section 215 Reliability Standards to federal entities. The Corps argues that principles of sovereign immunity apply to this situation, and that the language the Commission relied on as conferring jurisdiction over federal entities in FPA section 215 does not provide the required explicit waiver of that immunity.²⁰

10. The Corps also maintains that the proper forum for resolution of a dispute between federal agencies is the Department of Justice's Office of Legal Counsel, and that FERC is not permitted to determine the scope of its own jurisdiction over other federal entities.²¹ Moreover, the Corps asserts that it did not have an opportunity to contest the applicability or relevance of cases on which FERC relied to make its jurisdictional determinations. Accordingly, the Corps asks the Commission to stay this proceeding and allow the federal agencies "potentially affected" by the Commission's position to seek resolution of the jurisdictional issue before the Department of Justice's Office of Legal Counsel.²²

II. Discussion

11. The Corps' request for rehearing is hereby denied, and the Commission reaffirms its previous findings that federal entities are obligated to adhere to the requirements of duly adopted and approved Reliability Standards under FPA section 215. We find no error in our reading of the statute with respect to the applicability of FPA section 215

¹⁹ *Id.* P 36.

²⁰ Corps Request for Rehearing at 2-3. The Corps cites *Dugan v. Rank*, 372 U.S. 609, 620 (1963) for the proposition that sovereign immunity bars any action against the United States if the result "would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act," *id.* at 2, but does not otherwise address how or why the doctrine applies here.

²¹ Corps Request for Rehearing at 2.

²² *Id.* at 3-4.

requirements to federal entities, and, to the extent that sovereign immunity principles apply, find that the statute explicitly waives immunity for federal entities that qualify as users, owners, or operators of the Bulk-Power System. In addition, the Commission reaffirms that it has the authority to make an initial determination as to the scope of its jurisdiction over federal entities, and that the Corps has been afforded all due procedural protections through its opportunity to participate (and actual participation) in this proceeding.

12. With respect to the Corps' arguments based on the doctrine of sovereign immunity, we note that we rejected, on several grounds, almost identical arguments in response to the Corps' request for rehearing in Docket No. NP09-26-000. First, we found that the principle of sovereign immunity did not apply in that case, as it did not involve a suit by a private third party against the sovereign and instead involved an action by one agency to require another agency's or federal instrumentality's compliance with duly adopted federal rules.²³ Moreover, we noted that the case did not involve a monetary penalty, and therefore did not raise the concerns typically protected under the doctrine of sovereign immunity.²⁴

13. Despite these findings, the Corps maintains that the doctrine of sovereign immunity applies here, citing to *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992), for the proposition that sovereign immunity principles apply to administrative adjudications and not just to federal court suits. However, we point out that *Nordic Village* involved a suit by a third-party (i.e., a private entity) against the IRS and a claim for the return of monies that already had been paid into the Treasury. By contrast, this case does not involve the payment of a monetary penalty by the Corps, and involves two sister federal agencies or entities.

14. More critically, we have previously determined and reaffirm here, that even if the doctrine of sovereign immunity were applicable, the statutory language conferring jurisdiction over federal agencies for purposes of FPA section 215 constitutes an explicit waiver of any such immunity. FPA section 215(b)(1) clearly gives the Commission jurisdiction over the kinds of entities described in section 201(f) of the FPA, as follows:

The Commission shall have jurisdiction over . . . 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

²³ January 2010 Order on Rehearing, 130 FERC ¶ 61,002 at P 25.

²⁴ *Id.* (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (a suit is against the sovereign when the judgment sought would be paid out of the public treasury)).

this section and enforcing compliance with [section 215]. All users, owners, and operators of the bulk-power system shall comply with reliability standards that take effect under this section.²⁵

FPA section 201(f), in turn, lists the kinds of entities that are generally exempt from the provisions of Part II of the FPA, including agencies and instrumentalities of the federal government like the Corps.

15. Moreover, FPA section 201(b)(2) reinforces this reading of the statute, which states in relevant part:

Notwithstanding section 201(f), the provisions of section[]
... 215 ... shall apply to the entities described in such
provisions, and such entities shall be subject to the
jurisdiction of the Commission for purposes of carrying out
such provisions and for purposes of applying the enforcement
authorities of this Act with respect to such provisions.

As we have explained, this subsection of the FPA was substantially altered as part of the Energy Policy Act of 2005, when the reliability provisions of FPA section 215 were first enacted. At that time, section 201(b)(2) was modified to include section 215 among the provisions for which jurisdiction is governed by the terms of the particular section, and was further modified to include the phrase “[n]otwithstanding section 201(f).”²⁶ The Corps has not suggested, and we cannot find, any explanation for these changes unless Congress clearly intended for federal entities like the Corps to be subject to the mandatory Reliability Standards of FPA section 215.

16. As we have repeatedly found, FPA section 215(b)(1) explicitly makes federal and other governmental entities, as described in section 201(f), subject to the requirements of FPA section 215 to the extent that they are users, owners, and operators of the Bulk-Power System, and the Corps has provided no alternative interpretation of the statute in its request for rehearing to suggest otherwise. We accordingly re-affirm our prior findings that federal entities such as the Corps, that are users, owners, or operators of the Bulk-Power System, must comply with the mandatory Reliability Standards under FPA section 215.

²⁵ 16 U.S.C. § 824o(b)(1) (emphasis added).

²⁶ October 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 35.

17. Similarly, we find no error in our December 2010 Jurisdictional Order with respect to process, and reject the Corps' claim that it has not been given the opportunity to contest the applicability or relevance of cases we relied on in deciding the legal issues regarding our jurisdiction over the Corps under FPA section 215. The Corps argues that the *Nine Mile Point* case we relied on in the October 2009 Jurisdictional Order²⁷ did not involve the issue of sovereign immunity, and therefore cannot support the premise that the Commission is authorized to make an initial determination as to its own jurisdiction over a federal entity. First, we note that we cited *Nine Mile Point* in that prior order solely for the proposition that the Commission has the authority to initially determine the scope of its jurisdiction over an entity that opposes the exercise of that jurisdiction. The Corps does not cite to any case where the Commission's decision to rule on jurisdictional issues related to federal agencies was found to be beyond the scope of its authority, and in fact, the Commission regularly makes initial determinations about the scope of its own jurisdiction, including in matters involving federal or other "non-jurisdictional" entities.²⁸

18. The Corps essentially makes the same due process argument it raised in NP09-26-000, claiming that it was not allowed an opportunity to contest the relevance of cases relied on by FERC in deciding the legal issue.²⁹ We again reject that claim, as the Corps has had full notice and opportunity to participate in this proceeding and to advance any arguments or cases it believes will support its position. We further note that the Corps has fully participated in this proceeding, through its October 13, 2010 Request for Review as well as its January 14, 2011 Request for Rehearing, and has had multiple opportunities to challenge the applicability of cases on which we have relied, both in this proceeding and in Docket No. NP09-26-000.

²⁷ October 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 31 & n.28 (citing *Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033, at P 30 & n.31 (2005), *aff'd*, *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) (*Nine Mile Point*)).

²⁸ See, e.g., *Bonneville Power Administration*, 112 FERC ¶ 61,012 (2005) (addressing (1) whether Grid West would be considered a jurisdictional "public utility" under the FPA, and (2) changes in the scope of the Commission's jurisdiction over Bonneville Power Administration, a federal power marketing agency that FPA section 201(f) generally exempts from Commission jurisdiction, due to BPA's proposed participation in Grid West). See also *New York v. FERC*, 535 U.S. 1, 22-23 (2002) (holding that the Commission was within its authority to establish a seven-factor test to determine which facilities are local distribution facilities that fall outside of the Commission's jurisdiction pursuant to FPA section 201).

²⁹ See January 2010 Order on Rehearing, 130 FERC ¶ 61,002 at P 18.

The Commission orders:

The Corps' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.