UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION	**)** **)** **)**	**Docket No. NP10-160-000**

JOINT MOTION FOR LEAVE TO FILE ANSWER OF THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION, SOUTHWEST POWER POOL REGIONAL ENTITY AND TEXAS RELIABILITY ENTITY, INC.

AND
ANSWER TO CERTAIN PARTIES' COMMENTS ON NERC FILING PARTIES' ANSWER TO THE UNITED STATES ARMY CORPS OF ENGINEERS TULSA DISTRICT'S ANSWER TO NOTICES OF PENALTY

I. INTRODUCTION

The North American Electric Reliability Corporation ("NERC"), Southwest Power Pool Regional Entity ("SPP RE") and Texas Reliability Entity, Inc. ("Texas RE") (collectively as "NERC Filing Parties"), pursuant to 18 C.F.R. §385.212 and §385.213, respectfully submit this Motion for Leave to File Answer and Answer to certain parties' Comments on NERC Filing Parties' Answer to the United States Army Corps of Engineers – Tulsa District's ("USACE-Tulsa") Answer to Notices of Penalty in this docket.[1] Specifically, NERC Filing Parties request leave to answer the Comments filed by (1) the United States Department of Energy ("DOE"), (2) the United States Department of the Interior ("Interior"), and (3) the Southwestern Power Resources Association ("SRPA").[2]

[1] The Omnibus II Notices of Penalty ("NOP") were filed on September 13, 2010. The USACE-Tulsa Answer was dated October 12, 2010. The NERC Filing Parties' Answer was filed on October 28, 2010. The Comments to which NERC Filing Parties seek leave to reply were filed on November 2, 2010.

[2] *Notice of Intervention and Comments of the United States Department of Energy* ("DOE Comments"); *Combined Notice of Intervention and Comments by the United States Department of the Interior* ("Interior Comments"); *Motion to Intervene and Comments of Southwestern Power Resources Association* ("SRPA Comments"), all dated November 2, 2010.

II. MOTION FOR LEAVE TO FILE ANSWER TO CERTAIN COMMENTS

The Federal Energy Regulatory Commission's ("Commission") rules do not provide for the filing of answers to comments in the circumstances of this docket. In the analogous context of answers to protests to petitions, however (*see* 18 C.F.R. §385.213(a)(2) (2010)), the Commission has granted motions for leave to file answers if they will clarify the issues in dispute, ensure a complete and accurate record, or otherwise provide information that will assist the Commission in its decision-making process.[3] In addition, certain of the Comments to which NERC Filing Parties request leave to respond, raise or rely on matters not raised or relied on in the USACE-Tulsa Answer, and therefore NERC Filing Parties have not had an opportunity to respond. Accordingly, to ensure that the Commission has a complete and accurate record upon which to make a decision in this docket, NERC Filing Parties request leave to submit this Answer to the DOE Comments, the Interior Comments and the SRPA Comments.

[3] *See, e.g., San Diego Gas & Electric v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,219, at P 14, n. 7 (2004) (answer was accepted as it "provided information that assisted [the Commission in its] decision-making process"); *Michigan Electric Transmission Co.*, 106 FERC ¶ 61,064, at P 3 (2004) (the permitted answer "provides information that clarifies the issues"); *North American Electric Reliability Corporation, Order Certifying NERC as the Electric Reliability Organization and Ordering Compliance Filing*, 116 FERC ¶ 61,062, at P 24 (2006) (reply comments of NERC and others accepted "because they have provided information that assisted us in our decisionmaking process"); *North American Electric Reliability Corporation, Order Conditionally Accepting 2007 Business Plan and Budget of the North American Electric Reliability Corporation, Approving Assessments to Fund Budgets and Ordering Compliance Filings*, 117 FERC ¶ 61,091, at P 18 (2006) (same); *North American Electric Reliability Corporation, Order on Compliance Filing*, 119 FERC ¶ 61,248, at P 6 (2007) (same); *North American Electric Reliability Corporation, Order on Compliance Filing*, 127 FERC ¶ 61,209 (2009), at P 5 (same).

III. ANSWER TO CERTAIN PARTIES' COMMENTS

Before specifically addressing the DOE Comments, Interior Comments and SPRA Comments, NERC Filing Parties, for context, reiterate their position on the issues raised by the USACE-Tulsa Answer:

(1) The Commission's conclusion in Docket No. NP09-26-000 that federal entities such as USACE-Tulsa that are registered by the Electric Reliability Organization ("ERO") as users, owners, and operators of the bulk-power system must comply with mandatory reliability standards as to facilities that fall within the bulk-power system is correct;[4] assuming the Commission "reconsiders" this conclusion in this docket, that conclusion does not need to be altered.

(2) Because, in this case, the Regional Entities (SPP RE and Texas RE) and NERC have assessed no penalties to USACE-Tulsa for the alleged violations that are the subject of the two NOPs, the Commission should decline to address in this docket whether a monetary penalty may be assessed against a federal entity such as USACE-Tulsa for a violation of an applicable reliability standard.

(3) However, if the Commission decides to address this question, the Commission's analysis in the *October 15, 2009 Order* compels the conclusion that the ERO may assess a monetary penalty against a federal entity such as USACE-Tulsa for violation of an applicable reliability standard.

In answer to the DOE Comments, the Interior Comments and the SRPA Comments, NERC Filing Parties offer the following points:

1. DOE and Interior argue that §316 and §316A of the Federal Power Act ("FPA") constitute the Commission's authority to levy penalties under Part II of the FPA, that under these sections federal entities are not subject to monetary penalties, and that nothing in §215 of the FPA waives or overrides the prohibition on imposing penalties on federal entities, in the context of violations of reliability standards. DOE also argues that the Commission has already ruled that the limitation on penalties in §316A to $1 million per day applies to penalties assessed by

[4] *Order Addressing Applicability of Section 215 of the Federal Power Act to Federal Entities*, 129 FERC ¶ 61,033 (2009) ("*October 15, 2009 Order*"), at P 38.

the ERO and therefore that the purported prohibition in §316A on imposing penalties on federal entities also applies to the ERO under §215.[5] These arguments are not well-founded.

NERC Filing Parties acknowledge that, in Order No. 672, the Commission ruled that the $1 million per day limit on penalties in FPA §316A should be applied to penalties assessed by the ERO for violations of reliability standards.[6] From NERC's perspective as the ERO, however, the limitation on penalties for violation of reliability standards to $1 million per day is one imposed by Commission Order and rules, not by §316A. NERC's authority to enforce mandatory reliability standards and to impose penalties for violations is based solely on §215 of the FPA and on the Commission's implementing regulations and orders adopted pursuant to the authority granted to the Commission by §215.[7]

Further, contrary to the logic advanced in the DOE Comments and the Interior Comments, the fact that the Commission has concluded that the $1 million per day limit on penalties specified in FPA §316A should apply to penalties imposed by the ERO for violations of reliability standards does not lead to the conclusion that the entirety of §316A, including any purported preclusion of assessment of penalties to federal entities, applies to the ERO's

[5] DOE Comments at 2-5; Interior Comments at 7-11.

[6] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 114 FERC ¶ 61,104 (2006), at P 575. NERC Filing Parties respectfully notes that at P 575 of Order No. 672, the Commission stated simply and without analysis or explanation that "The Commission confirms its interpretation that section 316A of the FPA establishes a limit on a monetary penalty for a violation of a Reliability Standard that may be imposed by the Commission, the ERO, or a Regional Entity pursuant to FPA section 215." In confirming its interpretation, the Commission was referring to its statement in P 71 of its Notice of Proposed Rulemaking in Docket No. RM05-30-000 that "The Commission interprets section 316A of the FPA, as amended by Congress in the Electricity Modernization Act of 2005, as establishing limits on monetary penalties for violation of Reliability Standards that may be imposed by the ERO, Regional Entities and the Commission. The Commission seeks comment on this interpretation." That statement was also unaccompanied by any analysis or explanation. *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, 112 FERC ¶ 61,239 (2005), at P 71.

[7] NERC Filing Parties reiterate that under the enforcement scheme established by §215(e)(1) and (2), the Commission's regulations, and NERC's Commission-approved Rules of Procedure, penalties for violations of reliability standards are imposed by the ERO and the Regional Entities, not by the Commission. The Commission does have authority under §215(e)(3) to impose penalties for violations of reliability standards, but that authority (and the related procedural processes) are separate from the authority of and procedural processes for the ERO to impose penalties for violations of reliability standards under §215(e)(1) and (2).

enforcement of mandatory reliability standards under §215.[8] As the Commission concluded in the *October 15, 2009 Order* and as discussed at pages 5-7 of the NERC Filing Parties' Answer:

- FPA §215(b)(1) gives the Commission jurisdiction and authority over all users, owners and operators of the bulk-power system, "including the entities described in section 201(f), for the purposes of approving reliability standards established under this section [§215] and enforcing compliance with this section."

- The "entities described in section 201(f)" include "the United States . . . or any agency, authority or instrumentality;" §201(f) specifies that no provision in Part II of the FPA shall apply to "the United States . . . or any agency, authority or instrumentality . . . **unless such provision makes specific reference thereto**" (emphasis added), which §215(b) clearly does.

- Further, FPA §201(b)(2), which was amended by the same legislation[9] that enacted §215, expressly states that "**Notwithstanding subsection (f) of this section**, the provisions of sections . . . 824o [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 the enforcement of this chapter with respect to such provisions."** (Emphasis added.)

Contrary to the arguments of DOE and Interior,[10] these statutory provisions constitute a "clear statement" that federal entities that are users, owners, or operators of the bulk-power system are subject to imposition of penalties by the ERO (or the Commission) for violations of reliability standards under §215, and easily overcome DOE's and Interior's inferential argument based on FPA §316A and the definition of "person" in FPA §3(4). Further, contrary to the arguments of Interior,[11] Congress, having clearly expressed in §201(b) and §215(b)(1) (as amended and added, respectively, by the Energy Policy Act of 215) that the federal entities described in §201(f) that are users, owners and operators of the bulk-power system are subject to the enforcement

[8] FPA §316A does not state that penalties may not be levied against federal entities under Part II of the FPA. FPA §316A states that "Any person who violates any provision of subchapter II or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 per day for each day that such violation continues." DOE's and Interior's argument is that because FPA §3(4) defines a "person" as an "individual or corporation," federal entities are not subject to monetary penalties under §316A. Notably, however, despite the categorical argument that this definition excludes federal entities, no Commission or court decisions have been cited holding that FPA §316A prohibits the imposition of penalties under Part II of the FPA on federal entities.

[9] The Energy Policy Act of 2005.

[10] DOE Comments at 5-7; Interior Comments at 9-11.

[11] Interior Comments at 11.

provisions of §215, had no need to also amend §316A or §3(4) of the FPA to change the definition of "person" or to provide that such federal entities are subject to imposition of penalties under §215.

NERC Filing Parties agree with the Interior Comments that "[W]hen Congress wanted a provision of FPA Chapter II to apply to governmental entities, it knew how to so specify",[12] but Congress has clearly "so specified" in FPA §215(b)(1) and §201(b)(2). The clear statement of Congressional intent to bring municipal utilities within the Commission's rate and refund authority despite §201(f)'s exclusion of these entities from Part II of the FPA that the Ninth Circuit, in *Bonneville*, found lacking in FPA §§205-206, is present in FPA §201(b)(2) and 215(b)(1) so as to bring the United States and its agencies, authorities and instrumentalities – "the entities described in section 201(f)" – within the jurisdiction and enforcement authority of FPA §215.

2. The Interior Comments cite the Commission's *Order Rejecting Rehearing Request* in Docket NP09-26 and argue that the Commission there incorrectly concluded that the provisions of FPA §215(b)(1) and §201(b) constitute an explicit waiver by Congress of sovereign immunity (assuming sovereign immunity were applicable and such a waiver were necessary), thereby making federal entities that are users, owners and operators of the bulk-power system subject to penalties for violations of reliability standards.[13] The *Order Rejecting Rehearing Request* was not cited or discussed in the USACE-Tulsa Answer, and therefore was not addressed in the NERC Filing Parties' Answer.[14] However, although the Commission's

[12] Interior Comments at 11, quoting *Bonneville Power Admin. v. FERC*, 422 F. 3d 908, 916 (9 Cir. 2005), *cert. denied*, 128 S. Ct. 864 (2007).
[13] *Order Rejecting Rehearing Request*, 130 FERC ¶ 61,002 (2010), at PP 25-28.
[14] NERC Filing Parties assume that the USACE-Tulsa Answer did not cite, or request reconsideration of, the Commission's discussion of the sovereign immunity point in the *Order Rejecting Rehearing Request* because that discussion was essentially *dicta*. The Commission rejected the rehearing request in Docket NP09-26 on the grounds

analysis and conclusion on this point was *dicta* in the context of the *Order Rejecting Rehearing Request*, that analysis and conclusion were correct. As the Commission correctly pointed out in the *Order Rejecting Rehearing Request*:

> [T]he principle of sovereign immunity is inapplicable here. Sovereign immunity is the doctrine that the United States is immune from suit except where it consents thereto.[48] A suit is against the sovereign when the judgment sought would be paid out of the public treasury. The instant proceeding involves a dispute between two federal entities, both subordinate to Congress, one of which has been explicitly granted statutory authority to enforce mandatory Reliability Standards. [footnote omitted] There is no suit by a third party against the sovereign; nor is there an effort by a third party to make the *sovereign* act.[15]
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> [48] *See United States v. Dalm*, 494 U.S. 596, 608 (1990); *Honda v. Clark*, 386 U.S. 484, 501 (1967); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

Further, in the *Order Rejecting Rehearing Request*, the Commission correctly pointed out that:

> [A] conclusion that sovereign immunity protects federal entities such as the Corps from enforcement of Congressionally-authorized mandatory Reliability Standards renders meaningless Congress' inclusion in FPA section 215 of the language "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 [section 215]."[16]

Finally, the Commission correctly concluded that "Even if, however, our ruling implicates sovereign immunity, **it is clear that the same statutory provisions that establish jurisdiction also provide an explicit waiver of sovereign immunity**."[17]

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that it was untimely filed more than 30 days following the order for which rehearing was sought, and thereby the Commission had no jurisdiction to consider it. *Order Rejecting Reconsideration Request* at PP 12 and 30.

[15] *Order Rejecting Rehearing Request* at P 25. The authorities cited in the Interior Comments in support of the argument that a waiver of sovereign immunity must be unequivocally expressed by Congressional statutory language all involved lawsuits against the government in federal district court for monetary compensation. *Dep't of the Army v. Blue Fox*, 525 U.S. 255 (1999); *Lane v. Pena*, 518 U.S. 187 (1996); *Dep't of Energy v. Ohio*, 503 U.S. 607 (1992); *United States v. Nordic Village*, 503 U.S. 30 (1992); *United States v. Williams*, 514 U.S. 527 (1995).

[16] *Order Rejecting Rehearing Request* at P 25 (emphasis added).

[17] *Order Rejecting Rehearing Request* at P 26.

3. Interior's argument that the language of §215 is insufficient to authorize imposition of monetary penalties against federal entities that are users, owners or operators of the bulk-power system for violations of reliability standards, because FPA §215(e) authorizes the ERO to impose "a penalty on a user, owner, or operator of a bulk-power system for a violation of a reliability standard," but does not expressly refer to a monetary penalty, proves too much.[18] If this argument were correct, the ERO would lack authority to impose monetary penalties on any user, owner or operator of the bulk-power system for violations of reliability standards, not just on users, owners or operators that are federal entities. After more than three years of operation under mandatory reliability standard during which the ERO and the Regional Entities have assessed monetary penalties to numerous registered entities for violations of the reliability standards, with no suggestion of which NERC Filing Parties are aware that there is a lack of authority to do so, this outcome, in short, is implausible.

4. In their Answer, NERC Filing Parties noted that there are factual issues involved in determining whether a federal entity against which a penalty is assessed for violating a reliability standard "has [as USACE-Tulsa represents] no funds which can be used to comply with requirements established under the FPA other than appropriations provided by Congress."[19] This point is buttressed by the Interior Comments and the SRPA Comments. Interior states that its Bureau of Reclamation, against which notices of alleged violation are pending, "is the largest wholesaler of water in the country, bringing water to one out of five western farmers," and "is the second largest producer of hydroelectric power in the United States, serving millions of customers."[20] These factual assertions suggest that the Bureau of Reclamation has substantial

[18] Interior Comments at 8.
[19] NERC Filing Parties' Answer at 9, footnote 13, quoting USACE-Tulsa Answer at 2.
[20] Interior Comments at 2.

revenue sources, other than budgeted Congressional appropriations, from which any penalties for violating reliability standards in the course of its activities could be paid.

Similarly, the SRPA Comments states that SRPA's member rural electric cooperatives, municipal electric utilities and public power agencies purchase hydro-electric power generated from projects operated and maintained by USACE-Tulsa, that this power is marketed to the members of SPRA by the Southwestern Power Administration, a power marketing agency within the DOE, and that "it is unclear to SRPA whether potential penalties assessed by NERC and the Commission against Federal agencies may become subsumed in the costs passed to SRPA's members."[21] Again, these statements suggest that USACE-Tulsa has substantial revenue sources, other than budgeted Congressional appropriations, from which any penalties for violating reliability standards in the course of its activities could be paid, and that USACE-Tulsa may have the ability to "recover" the costs of any penalties in the revenues it receives from the hydroelectric power it sells.

In summary, NERC Filing Parties reiterate that an assertion by a federal entity that it has no source of funds to pay a penalty for violation of a reliability standard other than funds budgeted and appropriated by Congress, and that assessment of a penalty against the federal entity implicates the Anti-Deficiency Act,[22] should not be accepted without a factual investigation of the federal entity's actual funding and revenue sources.

[21] SRPA Comments at PP 3-5.
[22] 31 U.S.C. §1341(a)(1)(A).

IV. CONCLUSION

NERC Filing Parties (1) respectfully request that the Commission grant them leave to file this Answer; and (2) state that the Commission should (i) rule, as it correctly concluded in the *October 15, 2009 Order*, that federal entities such as USACE-Tulsa that are registered by the ERO as users, owners, and operators of the bulk-power system must comply with applicable mandatory reliability standards as to facilities that fall within the bulk-power system; and (ii) decline to rule on USACE-Tulsa's contention that monetary penalties may not be assessed by the ERO pursuant to §215 of the FPA against federal entities such as USACE-Tulsa, as no penalty has been assessed against USACE-Tulsa in the NOPs that are the subject of this docket. However, if the Commission decides to address this question, the Commission should conclude that the ERO may assess a monetary penalty against a federal entity such as USACE-Tulsa, pursuant to §215 of the FPA, for violation of an applicable reliability standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 17th day of November, 2010.

/s/ Rebecca J. Michael
Rebecca J. Michael

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