

UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

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

JOINT ANSWER OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION, SOUTHWEST
POWER POOL REGIONAL ENTITY AND TEXAS RELIABILITY ENTITY, INC.
TO 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”) submit this answer to the “United States Army Corps of Engineers Tulsa District’s [“USACE-Tulsa”] Answer to NERC Omnibus II Notice of Penalty,” filed October 13, 2010¹ in this docket (“USACE-Tulsa Answer”). The USACE-Tulsa Answer relates to Notices of Penalty (“NOPs”) filed by NERC on September 13, 2010, concerning 14 violations of mandatory Reliability Standards by USACE-Tulsa identified by SPP RE and three violations of mandatory Reliability Standards by USACE-Tulsa identified by Texas RE.² On October 13, 2010, the Federal Energy Regulatory Commission (“Commission”), in response to the USACE-Tulsa Answer, issued an “Order Initiating Review of Notice of Penalty” establishing a filing deadline for any answers, interventions or comments of November 2, 2010.³

¹ The USACE-Tulsa Answer was dated October 12, 2010.

² The NOPs concerning the violations by USACE-Tulsa were part of an “Omnibus” NOP filing made by NERC on September 13, 2010.

³ *Order Initiating Review of Notice of Penalty*, 133 FERC ¶ 61,037 (2010) . The Commission’s Notice states that “The Commission is not initiating a review of other penalties proposed against other registered entities in Docket No. NP10-160-000.” *Id.* at note 3.

NERC Filing Parties' positions on the issues raised by the USACE-Tulsa Answer are as follows:

- (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 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.⁵

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.

⁵ As discussed in §IV.B of this Answer, the question of whether a financial penalty can be assessed against USACE-Tulsa for violation of a reliability standard should be distinguished from the question of whether USACE-Tulsa has the ability to pay the penalty.

II. NOTICES AND COMMUNICATIONS

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III. BACKGROUND

SPP RE issued notices of alleged violations that USACE-Tulsa had violated a total of 14 requirements of applicable reliability standards. Texas RE issued notices of alleged violations that USACE-Tulsa had violated a total of three requirements of reliability standards.⁶ USACE-Tulsa entered into “expedited disposition agreements” concerning these alleged violations with SPP RE and Texas RE.⁷ The expedited disposition agreements provided for “the assessment of no penalties for such Violations.” Each expedited disposition agreement also specified that USACE-Tulsa’s acceptance of the agreement shall not be considered a waiver of USACE-Tulsa’s right, as a subdivision of the Federal Government, to contest USACE’s registration in the NERC Compliance Registry and/or jurisdiction of SPP RE or Texas RE (as applicable), NERC or the Commission over USACE-Tulsa as to its compliance and/or enforcement of the NERC reliability standards.

The NERC Board of Trustees Compliance Committee approved the expedited disposition agreements between USACE-Tulsa and SPP RE and between USACE-Tulsa and Texas RE, and NERC filed the NOPs with the Commission on September 13, 2010, as part of an “Omnibus” NOP filing. On October 13, 2010, USACE-Tulsa filed the USACE-Tulsa Answer with the Commission. The USACE-Tulsa Answer asks the Commission (1) “to revisit and reverse its determination that Section 215 of the FPA [Federal Power Act] applies to federal agencies,” and (2) should the Commission choose not to reverse this determination, to “conclude federal agencies are not subject to monetary penalties for violation of reliability standards.”⁸ USACE-Tulsa has not contested that it violated the reliability standards as identified by SPP RE and

⁶ The reliability standard requirements allegedly violated by USACE-Tulsa are listed in the NOPs.

⁷ Copies of the expedited disposition agreements are included in the NOPs.

⁸ USACE-Tulsa Answer at 1.

Texas RE. USACE-Tulsa also has not contested that, as a factual matter, it is a user, owner, or operator of the bulk-power system.

IV. NERC FILING PARTIES' POSITION

A. Whether Section 215 Applies to Federal Agencies

Normally, the Commission's response to USACE-Tulsa's request that the Commission "revisit and reverse" its determination in the *October 15, 2009 Order* would be that USACE-Tulsa failed to appeal the *October 15, 2009 Order*, and therefore the request is an impermissible collateral attack on the Commission's prior order. Here, however, NERC Filing Parties acknowledge that USACE-Tulsa's request raises a question as to the Commission's jurisdiction and authority.

Nonetheless, the Commission's analysis and conclusion in the *October 15, 2009 Order* on the question of whether a federal entity such as USACE-Tulsa that is a user, owner, or operator of the bulk-power system must comply with mandatory reliability standards was completely correct, and there is no reason to "reverse" it. That analysis and conclusion was set forth in PP 33-38 of the *October 15, 2009 Order*. As the Commission explained there, Section 201(f) of the FPA states, in relevant part:

No provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or political subdivision of a state, . . . or any agency, authority, or instrumentality of any one or more of the foregoing . . . **unless such provision makes specific reference thereto.** (Emphasis added.)

However, Section 215(b)(1) and (2) of the FPA, which establish the Commission's jurisdiction over reliability matters, state:

(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. (Emphasis added.)

Additionally, as the Commission noted in the *October 15, 2009 Order*, Section 201(b)(2) of the FPA was amended by the Energy Policy Act of 2005 (which enacted Section 215) to state:

Notwithstanding section 201(f), the provisions of sections . . . 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.** (Emphasis added.)

Thus, as the Commission stated in PP 34 and 35 of the *October 15, 2009 Order*, Sections 215(b) and 201(b)(2) of the FPA are clear that the Commission has jurisdiction over the entities described in Section 201(f) – which include the United States and any of its agencies, authorities or instrumentalities – that are users, owners or operators of the bulk-power system, for purposes of approving reliability standards established under Section 215 and enforcing compliance with Section 215. USACE-Tulsa’s assertion that Section 215 does not include a specific reference to federal entities that would remove the “blanket exemption” for federal agencies in Section 201(f)⁹ is manifestly wrong.

Most of USACE-Tulsa’s argument on this issue consists of discussion of general principles of “sovereign immunity” and of what is required to waive it; other than the bald and incorrect assertion noted above, the USACE-Tulsa Answer fails to address the specific text of Sections 201(f), 201(b)(2) and 215(b) of the FPA.¹⁰ But the question of whether Congress has given the Commission jurisdiction and authority over federal entities that are users, owners and operators of the bulk-power system for purposes of applying and enforcing compliance with mandatory reliability standards must be resolved by analysis of the specific statutory text in the

⁹ USACE-Tulsa Answer at 2.

¹⁰ *See id.*

FPA, not by consideration of general principles from a few isolated cases involving other laws. The Commission's analysis in the *October 15, 2009 Order* correctly focused on the specific text of Sections 201(f), 201(b)(2) and 215(b) of the FPA, and USACE-Tulsa has provided no grounds to conclude that the Commission's analysis was incorrect.

Further, as the Commission noted in P 36 of the *October 15, 2009 Order*, not only the plain language of Sections 215(b) and 201(b)(2) of the FPA, but also the legislative history, shows that Congress intended Section 215 to require that *all* users, owners and operators of the bulk-power system, including those that are federal entities, comply with Commission-approved reliability standards. In enacting the Energy Policy Act of 2005, Congress *knowingly* provided that the Commission would have jurisdiction over federal entities that were users, owners and operators of the bulk-power system (notwithstanding the exclusion in Section 201(f)) for purposes of implementing and enforcing compliance with mandatory reliability standards, and that such entities would be required to comply with reliability standards approved by the Commission under Section 215.

Finally, as the Commission explained in P 37 of the *October 15, 2009 Order*, the legislative history of Section 215 shows Congress recognized that mandatory reliability standards would have to apply to, and be complied with by, *all* users, owners and operators of the bulk-power system, including federal entities, in order to accomplish the objective of the statute to protect against cascading blackouts and maintain reliability. The interconnected grids (Eastern, Western and Texas) are each an inter-related whole, and actions by one user, owner or operator within the interconnection in derogation of reliability can result in operating conditions that lead to outages and cascading blackouts that adversely impact other users, owners and

operators within the interconnection as well as the electricity-consuming public at large.¹¹ Further, although the USACE-Tulsa Answer states that “USACE’s best efforts to comply with Section 215 of the FPA are therefore voluntary,”¹² Congress, in enacting Section 215 of the FPA, recognized that the then-existing voluntary industry efforts to maintain the reliability of the bulk-power system were not sufficient to achieve the objective of avoiding cascading blackouts and maintaining reliability.

Accordingly, there is no reason to “reverse” or modify the Commission’s analysis and conclusion at PP 33-38 of the *October 15, 2009 Order* that Section 215 applies to federal entities, such as USACE-Tulsa, that are users, owners and operators of the bulk-power system.

B. Whether Federal Entities are Subject to Penalties for Violation of Reliability Standards

The Commission should decline to rule in this docket on whether federal entities such as USACE-Tulsa are subject to penalties for violations of reliability standards, because in the NOPs that are the subject of this docket, SPP RE, Texas RE and NERC have not proposed to assess penalties against USACE-Tulsa. To the contrary, the expedited disposition agreements entered into by USACE-Tulsa with SPP RE and with Texas RE, and approved by NERC, provide for the assessment of no penalties for the 14 violations of reliability standards allegedly committed by USACE-Tulsa in the SPP RE region and the three violations of reliability standards allegedly committed by USACE-Tulsa in the Texas RE region. Therefore, the question of whether federal entities such as USACE-Tulsa are subject to penalties for violations of reliability standards is not presented by the facts underlying these two NOPs and is not properly resolved here. Further,

¹¹ It is for this same reason that Congress specified in Section 215(c)(2) of the FPA that in order to certify an applicant as the ERO, the Commission must find, among other things, that the applicant has established rules that provide for taking appropriate steps to gain recognition in Canada and Mexico. Congress recognized that to be effective in maintaining reliability of the bulk-power system, the ERO’s reliability standards must be applicable to and enforceable in the portions of the interconnected grid that extend into Canada and Mexico.

¹² USACE-Tulsa Answer at 2.

whether a penalty for violations of reliability standards will *ever* be assessed against USACE-Tulsa is unknown. USACE-Tulsa can avoid being assessed penalties for violations of reliability standards simply by complying with the requirements of the reliability standards that are applicable to the reliability functions for which it is registered.

However, if the Commission does undertake in this docket to address the substantive issue raised by USACE-Tulsa on assessment of penalties, the Commission should conclude that a federal entity such as USACE-Tulsa is subject to the assessment of penalties for violations of applicable reliability standards.¹³ Although the Commission stated in the *October 15, 2009 Order* that it was not there addressing the issue of whether federal entities are subject to monetary penalties for violations of mandatory reliability standards,¹⁴ the same analysis presented at PP 33-38 of the *October 15, 2009 Order* compels the conclusion that federal entities such as USACE-Tulsa that are users, owners or operators of the bulk-power system **are** subject to assessment of penalties for violations of applicable mandatory reliability standards. Section 215(b)(1) of the FPA (quoted above in §IV.A of this Answer) states that “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**

¹³ USACE-Tulsa represents that “Unlike other power producers, USACE has no funds which can be used to comply with requirements established under the FPA other than appropriations provided by Congress” (USACE-Tulsa Answer at 2; *see also id.* at 4). Accepting this representation as true, USACE-Tulsa is different from other federal entities that are users, owners or operators of the bulk-power system that may receive revenues from the sale of electricity, or that may have contractual arrangements requiring third parties to reimburse the federal entity for its costs including monetary penalties that may be incurred in the course of operations. The analysis of this issue potentially could be different for such other federal entities, and therefore any determination of the question in this docket should be limited to USACE-Tulsa and similarly-situated entities.

¹⁴ *October 15, 2009 Order* at P 32.

this section.” (Emphasis added.) Additionally, Section 201(b) of the FPA, as amended by the Energy Policy Act of 2005, states:

Notwithstanding section 201(f), the provisions of sections . . . 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.** (Emphasis added.)

Section 215(e) of the FPA, the “Enforcement” provision of Section 215, states that “[t]he 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 follows the procedural steps specified in Section 215(e).¹⁵ As stated in Section 215(b)(1), “users, owners and operators of the bulk-power system” includes “the entities described in section 201(f),” which in turn include “the United States . . . or any agency, authority, or instrumentality of” the United States.”

Accordingly, under Sections 215 and 201(b) of the FPA, federal entities such as USACE-Tulsa are subject to the assessment of penalties by the ERO for violations of applicable reliability standards that the Commission has approved under Section 215. Contrary to USACE-Tulsa’s argument, the statutory language is by no means ambiguous. USACE-Tulsa’s only attempt to overcome the clear statutory language and expression of Congressional intent is to assert that “No definition of penalty is provided in Section 215.”¹⁶ However, no definition in the statute is necessary, as the commonly-understood plain meaning of “penalty” includes the

¹⁵ USACE-Tulsa has not contended that the Regional Entities or NERC failed to follow the procedural steps set forth in Section 215(e). In fact, in filing its Answer in response to NERC’s filing of the NOPs with the Commission, USACE-Tulsa utilized the procedure specified in Section 215(e)(2)(B)(ii).

¹⁶ USACE-Tulsa Answer at 3.

assessment of an amount of money for a violation or for a failure to fulfill an obligation created by law.¹⁷

USACE-Tulsa also argues that it is not subject to civil monetary penalties under Section 316A of the FPA.¹⁸ However, the applicable provision is not Section 316A – which authorizes the Commission to assess penalties of up to \$1 million per day for violations of subchapter II of the FPA or of any rule or order issued thereunder – but rather Section 215(e). If a penalty had been assessed against USACE-Tulsa for the violations of reliability standards that are the subject of the NOPs in this case (and, as noted earlier, no penalty has been assessed), it would have been assessed by the ERO, not by the Commission. Penalties assessed by the ERO as specified in NOPs filed by NERC with the Commission become effective 31 days after the NOP is filed with the Commission, with no action by the Commission needed for the penalty assessment to become effective. Section 215(e)(2) of the FPA.¹⁹

USACE-Tulsa’s discussions of the purported lack of a waiver of sovereign immunity, and of an opinion of the Department of Justice’s Office of Legal Counsel (“OLC”) concerning a claim for payment of back wages by alien physicians hired under the H-1B Visa Program,²⁰ are completely irrelevant because they fail to take into account the specific statutory text of Sections 201(b), 201(f) and 215(b)(1) and (2) of the FPA.

¹⁷ The definition of “penalty” provided in Dictionary.com includes “a punishment imposed or incurred for a violation of law or rule,” “a loss, forfeiture, suffering, or the like, to which one subjects oneself by nonfulfillment of some obligation,” and “something that is forfeited, as a sum of money.” [Http://dictionary.reference.com/browse/penalty](http://dictionary.reference.com/browse/penalty) (last visited on October 18, 2010). The definition for “penalty” in the New Webster’s Dictionary and Thesaurus of the English Language (1992) includes “a fine, forfeit etc., incurred when some condition is not observed, some undertaking not fulfilled, etc.”

¹⁸ USACE-Tulsa Answer at 3. Section 316A of the FPA is 16 U.S.C. §825o-1.

¹⁹ Separately, Section 215(e)(3) of the FPA gives the Commission authority, on its own motion or on complaint, to impose a penalty on a user, owner or operator of the bulk-power system for a violation of a reliability standard. However, that provision is not involved in the NOPs that are the subject of this docket.

²⁰ USACE-Tulsa Answer at 3-4.

Finally, USACE-Tulsa's argument based on the Anti-Deficiency Act²¹ confuses the **authority of the ERO to assess a penalty** under Section 215 of the FPA on a federal entity that is a user, owner or operator of the bulk-power system for violating a reliability standard, with the **ability of the federal entity to pay the penalty**. NERC Filing Parties acknowledge that the Anti-Deficiency Act states that "An officer or employee of the United States Government . . . may not (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation," and that therefore were the ERO to assess a penalty against USACE-Tulsa for violation of a reliability standard (which the ERO has not done in the instant case), USACE-Tulsa may not have funds authorized and available in its budget, appropriations or funds for the current fiscal year to pay the amount of the penalty.²² This does not mean the ERO lacks authority to assess the penalty. One important purpose served by the assessment of penalties is to signal the relative seriousness of a particular violation. Further, in such a hypothetical situation, NERC Filing Parties would expect USACE-Tulsa, as a responsible user, owner or operator of the bulk-power system, to request that funds be budgeted and appropriated in the subsequent fiscal period to enable USACE-Tulsa to pay the outstanding penalty.

²¹ 31 U.S.C. §1341(a)(1)(A).

²² However, USACE-Tulsa's contention that "USACE is unable to make or authorize an expenditure or obligation without express authorization from Congress" is not an accurate characterization of the text of 31 U.S.C. §1341(a)(1)(A). Rather, all that is required under the Anti-Deficiency Act for payment of an expenditure or obligation to be permissible is that the expenditure or obligation in question not exceed the amounts available in an appropriation or fund for the expenditure or obligation. Further, although no actual monetary penalty is at issue in this docket, USACE-Tulsa has not actually demonstrated that there is no appropriation or fund from which a monetary penalty assessed by the ERO could be paid.

V. CONCLUSION

For the reasons set forth in this Answer, the Commission should (1) 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 (2) decline to rule on USACE-Tulsa's contention that monetary penalties may not be assessed by the ERO pursuant to Section 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 Section 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 28th day of October, 2010.

/s/ Rebecca J. Michael
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