
**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

NORTH AMERICAN ELECTRIC) Docket No. NP09-26-000
RELIABILITY CORPORATION)

**MOTION FOR LEAVE TO FILE REPLY COMMENTS AND
REPLY COMMENTS OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
REGARDING NERC NOTICE OF PENALTY, U.S. ARMY
CORPS OF ENGINEERS—TULSA DISTRICT**

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September 8, 2009

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I. INTRODUCTION

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.213 (2009), and the Commission’s June 26, 2009 “Notice of Filing Regarding Notice of Penalty and Request for Decision on Jurisdiction Issue” (“June 26 Notice of Filing”), the North American Electric Reliability Corporation (“NERC”) hereby submits this Motion for Leave to File Reply Comments and Reply Comments in the above captioned proceeding. NERC is filing these Reply Comments in response to comments received from Interveners in FERC Docket No. NP09-26-000. In that docket, NERC submitted a Notice of Penalty, pursuant to NERC’s authority under Section 215 of the Federal Power Act (“FPA”) as the designated electric reliability organization (“ERO”),¹ requesting Commission approval of a Notice of Penalty involving the U.S. Army Corps of Engineers – Tulsa District (“COE – Tulsa District”). In its comments, the COE – Tulsa District and

¹ The Federal Energy Regulatory Commission (“FERC”) certified NERC as the electric reliability organization in its order issued on July 20, 2006 in Docket No. RR06-1-000. *North American Electric Reliability Corporation*, “Order Certifying North American Electric Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing,” 116 FERC ¶ 61,062 (July 20, 2006).

other Interveners argue that Section 215 of the Federal Power Act² does not grant FERC or NERC jurisdiction over Federal entities because Congress has not explicitly waived sovereign immunity for these entities. Additionally, Interveners argue that NERC does not have the authority to issue monetary penalties against Federal entities pursuant to Section 215 of the FPA. NERC hereby provides these Reply Comments to address arguments presented by certain of the Interveners in this proceeding.

II. NOTICES AND COMMUNICATIONS

Notices and communications with respect to this filing may be addressed to the following:

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III. MOTION FOR LEAVE TO FILE REPLY COMMENTS

FERC rules permit responsive filings to motions in which parties seek substantive relief. The Commission's rules generally do not permit the filing of reply comments unless otherwise permitted by the Commission.³ However, the Commission has granted

² 16 U.S.C. § 824o.

³ See 18 C.F.R. §385.213(a)(2).

motions for leave to file such responses if they will clarify issues in dispute, ensure a complete and accurate record, or otherwise provide information to assist the Commission in its decision-making process.⁴ NERC's Reply Comments will help clarify certain matters regarding the jurisdictional issue now before the Commission in this docket and the comments that were raised by Interveners. Additionally, NERC's Reply Comments will provide information that will assist the Commission in its decision-making process. Therefore, NERC requests permission to submit these Reply Comments.

IV. REPLY

A. Background

On June 24, 2009, NERC filed a Notice of Penalty concerning a confirmed violation of NERC Reliability Standard PRC-005-1 Requirement (R) 1.1 by the COE – Tulsa District.⁵ In that Notice of Penalty, NERC requested that the Commission approve the violations of NERC Reliability Standard PRC-005-1, R 1.1 against the COE – Tulsa District for its alleged non-compliance with this standard. Although the COE – Tulsa District did not contest the factual assertions in this case, it did challenge NERC's jurisdiction (and therefore that of the Commission) under Section 215 of the FPA. Accordingly, NERC requested in the Notice of Penalty that the Commission issue a decision in this case clearly deciding the jurisdictional issue presented.

⁴*San Diego Gas & Electric v. Sellers of Energy and Ancillary Services*, 108 FERC ¶ 61,219, at P14, n. 7 (2004) (answer was accepted as it “provided information that assisted [FERC in its] decision-making process”); *see also 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*, 119 FERC ¶ 61,248 (2007) at P 6 (same).

⁵ NERC Notice of Penalty Regarding U.S. Army Corps of Engineers – Tulsa District, FERC Docket No. NP09-26-000 (June 24, 2009).

In response, the Commission issued a Notice of Filing requesting public comment regarding the applicability of mandatory Reliability Standards under Section 215 of the FPA to the Corps and other Federal agencies.⁶ The Commission requested that comments be submitted by July 24, 2009.⁷ On July 22, 2009, the COE – Tulsa District filed a Motion for Enlargement of Time to Respond to the Notice of Penalty in Docket No. NP09-26-000. The Commission granted the COE – Tulsa District’s motion on July 24, 2009, extending the due date for public comments to be filed in this docket until August 24, 2009.⁸

In response to the Commission’s request for comments on the jurisdiction issue, fifteen entities submitted comments addressing two primary issues: 1) whether NERC has jurisdiction over Federal entities under Section 215 of the Federal Power Act to enforce NERC Reliability Standards; and 2) whether Federal entities are subject to penalties for non-compliance with NERC Reliability Standards. Because many of the arguments made by Interveners are similar, NERC has focused its Reply Comments on the comments by the United States Army Corps of Engineers (“USACE”), filed in this docket on August 24, 2009.

The USACE collapses several issues in its comments which NERC addresses below. Proper resolution of this case requires that these issues be addressed separately. Additionally, while the USACE asserts that this is the wrong case to be dealing with the question of whether Federal entities are immune from Section 215 of the FPA, NERC

⁶ See Notice of Filing Regarding Notice of Penalty and Request for Decision on Jurisdiction Issue, Docket No. NP09-26-000, June 26, 2009 (“Notice of Filing”).

⁷ Note that the Commission, in its June 26 Notice of Filing, requested that public comments be submitted by July 20, 2009. The Commission subsequently issued a Notice Rescinding the Notice of Filing on June 30, 2009, and issued an Errata Notice on June 30, 2009, changing the date that public comments should be submitted to July 24, 2009.

⁸ See Notice of Extension of Time, Docket No. NP09-26-000 (July 24, 2009).

disagrees with that assertion. This is the appropriate case to be dealing with the jurisdictional issue because the COE – Tulsa District squarely raised the jurisdictional issue, both as discussed below and before the Commission in Docket No. NP09-26-000.

Facts of the Case:

On October 3, 2007, the COE – Tulsa District self-certified non-compliance with NERC Reliability Standard PRC-005-1, R1.1 and R2 for its Denison Project Generator. The Texas Regional Entity (“Texas RE”) issued a Notice of Confirmed Violation (“NOCV”) to the COE – Tulsa District confirming the violation of PRC-005-1, R1.1, but dismissing the violation of PRC-005-1, R2 after determining that there was no violation of this requirement. NERC Reliability Standard PRC-005-1, R1 and specifically R1.1, requires:

Each Transmission Owner and any Distribution Provider that owns a transmission Protection System and each Generator Owner that owns a generation Protection System shall have a Protection System maintenance and testing program for Protection Systems that affect the reliability of the BES [bulk electric system]. The program shall include: (R1.1) Maintenance and testing intervals and their basis, and (R1.2) Summary of maintenance and testing procedures.

In this case, Texas RE determined that COE – Tulsa District’s violation was a documentation issue because, although the protective systems were tested and maintained at regular intervals, COE – Tulsa District was unsure if documentation was available to serve as a basis for the testing intervals.

Because Texas RE determined that the violation did not pose a serious or substantial risk to the reliable operation of the bulk power system, Texas RE determined that a zero dollar penalty (*i.e.*, no monetary penalty) was warranted in the circumstances. COE – Tulsa District submitted a Mitigation Plan to Texas RE to mitigate the violation,

agreeing to place the completed basis for the testing interval on file and update it as new equipment is installed. COE – Tulsa District also stated that it would determine a suitable recommendation for the equipment that did not have a manufacturer’s recommendation. COE – Tulsa District completed its Mitigation Plan on February 23, 2009, thereby mitigating the violation and bringing COE – Tulsa District into compliance with the PRC-005-1 R1.1 Reliability Standard.

Upon consideration of this Notice of Penalty by the NERC Board of Trustees Compliance Committee (“BOTCC”), the BOTCC affirmed Texas RE’s determination in all respects. In its arguments to NERC on appeal from Texas RE, the COE – Tulsa District raised no factual issues that were specific to COE – Tulsa District. Instead, COE – Tulsa District raised only the legal argument that, as a facility owned and operated by the USACE, COE – Tulsa District was exempt from Section 215 of the FPA and the NERC mandatory Reliability Standards adopted pursuant to Section 215. COE – Tulsa District further asserted that its self-report in this case was provided on a voluntary basis and that its submission did not constitute entity registration or a recognition of jurisdiction by the USACE. The COE – Tulsa District asserted that it was only voluntarily complying with the NERC Reliability Standards to the extent that its current appropriations would allow. In fact, the COE – Tulsa District was listed on the NERC Compliance Registry as a Registered Entity as of June 28, 2007.⁹

In NERC’s Notice of Penalty, NERC addressed the legal arguments raised by the COE – Tulsa District and determined that the USACE is subject to Section 215 of the Federal Power Act and to NERC mandatory Reliability Standards adopted in accordance

⁹ The COE—Tulsa District is registered on the NERC Compliance Registry as of June 28, 2007 as a Generator Owner. Its NERC ID Number is NCR04156.

with Section 215, for the reasons stated in the Notice of Penalty filed in this docket. On July 27, 2009, the Commission issued a notice permitting NERC's Notice of Penalty to take effect by operation of law, subject to resolution of the jurisdiction issue raised in this docket.¹⁰

The decision regarding the jurisdictional issue presented in this case could significantly impact the reliability of the bulk power system. As noted in its comments, the USACE alone operates 75 hydropower plants nationwide, which account for three percent of the nation's total electrical capacity.¹¹ Many of the USACE facilities are large, and exempting USACE facilities that form part of the bulk power system could significantly affect reliability of the bulk power system. If a decision exempting USACE facilities from Section 215 were extended to other federal entities that also own and operate facilities that form part of the bulk power system, it would compound the impact.

B. COE – Tulsa District's Arguments

The COE – Tulsa District raises five distinct questions in its comments. Each of these questions is addressed below.

1. Whether the USACE is Subject to the Jurisdiction of NERC and the Commission under Section 215 of the FPA and to Mandatory Reliability Standards Adopted under Section 215 of the FPA.

In its August 24, 2009 filing, the USACE asserts that Section 215 of the FPA does not grant FERC or NERC jurisdiction over Corps-owned hydroelectric generating facilities at its Civil Works projects.¹² The USACE, in arguing that it is immune from Section 215 of the FPA, states that “[w]aiver of sovereign immunity must be explicit,” and that “[t]he FPA does not contain a clear statement of Congress's intent to allow the

¹⁰ See the Commission's Notice issued July 27, 2009 in Docket Nos. NP09-26-000 and NP09-27-000.

¹¹ USACE August 24, 2009 Comments (USACE Comments) at p. 1.

¹² *Id.* at p. 3.

assessment of civil penalties against Federal entities.”¹³ The question of jurisdiction under Section 215 over bulk power system facilities owned and operated by the USACE is a separate question from whether FERC can impose civil penalties on USACE.

USACE is clearly subject to Section 215 of the FPA and mandatory Reliability Standards adopted under Section 215, as is fully demonstrated in the discussion of this issue in the Notice of Penalty filed in the case. NERC will summarize those arguments here. Section 215(b)(1) of the FPA provides, in pertinent part, that “[t]he 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 this section and enforcing compliance with this section.” The entities described in Section 215 (all users, owners and operators of the bulk-power system) include the entities described in Section 201(f), which are: “the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 [] or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing.” Accordingly, because they are described in Section 201(f), agencies or instrumentalities of the United States are expressly included within the term “users, owners, and operators of the bulk-power system” in Section 215 and made subject to the Commission’s jurisdiction to both approve and enforce Reliability Standards.

The same legislation that added Section 215 to the Federal Power Act also amended Section 201(b)(2) of the Federal Power Act to add Section 215 to the list of

¹³ *Id.*

provisions of the Act that apply more broadly than the Commission's jurisdiction under Sections 205 and 206.¹⁴

Section 215 provides that Commission has 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 compliance with Section 215. The requirement in FPA Section 215(b)(1) that all users, owners and operators of the bulk-power system must comply with Reliability Standards that take effect under Section 215 thus applies to Federal entities.¹⁵

The USACE has offered nothing to suggest a different conclusion. Tellingly, both the Department of Energy ("DOE") and the Department of the Interior ("DOI") agree that Federal agencies and instrumentalities are subject to Section 215 and NERC's mandatory Reliability Standards. In its comments filed in this proceeding, DOE notes that:

“[t]he Commission's jurisdiction to approve and enforce reliability standards under § 215(b) extends to ‘all users, owners and operators of the bulk-power system,’ including federal entities specified by FPA § 201(f): the United States and its agencies and instrumentalities. 16 U.S.C. § 824o(b).¹⁶

¹⁴ See Energy Policy Act of 2005 at Section 1295, “Conforming Amendments.”

¹⁵ Additionally, FERC has issued Orders upholding the registration and inclusion of agencies or instrumentalities of the United States on NERC's compliance registry. See *Order On Appeal of Electric Reliability Organization Compliance Registry Determination*, 124 FERC ¶ 61,072 (July 21, 2008), wherein the Commission affirmed that NERC properly included the U.S. Department of Energy, Portsmouth/Paducah Project Office on the NERC Compliance Registry as a Transmission Owner, Transmission Operator and Distribution Provider. See also *Order Upholding Electric Reliability Organization Compliance Registry Determination and Conditionally Directing Additional Registration*, 125 FERC ¶ 61,294 (December 18, 2008), wherein the Commission affirmed NERC's decision to register the Southeastern Power Administration on the NERC Compliance Registry as a Transmission Owner. The Commission also directed NERC to co-register the U.S. Army Corps of Engineers (Corps) within the SERC Reliability Corporation Region as a Transmission Operator to address a potential reliability gap, unless the Corps demonstrates why it should not be registered. No filings contesting such registration were submitted by the Corps in this docket since the issuance of the December 18, 2008 Order.

¹⁶ See Notice of Intervention and Comments of Department of Energy at p. 3, Docket No. NP09-26-000 (July 24, 2009).

Similarly, DOI, in its comments filed in this proceeding, notes that:

“Interior recognizes that the FPA, by its terms, subjects Interior to FERC jurisdiction, electricity reliability standards, and enforcement mechanisms, but the FPA does not authorize FERC to enforce such reliability standards through monetary penalties against federal entities.”¹⁷

Section 215 of the FPA provides a clear mandate that Federal entities that are users, owners or operators of the bulk-power system are subject to Section 215 and the Reliability Standards promulgated thereunder. Accordingly, NERC respectfully requests that the Commission issue an Order in this case clearly deciding the jurisdictional issue presented.

2. Whether the Commission or NERC May Impose a Financial Penalty on the USACE for a Violation of a Mandatory Reliability Standard Adopted Under Section 215.

In its comments, the USACE argues that the Commission and NERC do not have the authority to impose a financial penalty on the USACE for violations of mandatory Reliability Standards adopted under Section 215 of the Federal Power Act.¹⁸ The USACE asserts that assessment of a penalty requires a waiver of sovereign immunity, which “bars ‘any action’ against the United States if ‘the judgment sought 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.’”¹⁹ Therefore, the USACE argues that because a waiver of sovereign immunity is not explicit in the FPA, the Commission and NERC do not have authority to issue penalties against Federal entities.²⁰

¹⁷ See Motion for Stay of Proceedings, Or, In the Alternative, Remand to the North American Electric Reliability Corporation at p.8, Docket No. NP09-26-000 (July 24, 2009).

¹⁸ USACE Comments at p. 3.

¹⁹ *Id.*

²⁰ *Id.*

First, NERC notes that no penalty was imposed in this case. As acknowledged by the USACE in its comments, Texas RE and NERC determined that the alleged violation in this case warranted no monetary penalty.²¹ While this Notice of Penalty is a method of presenting the jurisdiction issue to the Commission for resolution, it is not a case where NERC or the Regional Entity exercised authority to impose a financial penalty – thus, the case may not be ripe for a resolution of this issue.

The Commission may, however, choose to reach that issue in this case. Several Interveners argue that FERC’s specific power to assess monetary penalties is found in Section 316A of the FPA. Without debating the merits of whether FERC could, in the first instance, impose a financial penalty on another Federal agency under Section 316A, that is not the question presented when NERC or a Regional Entity imposes a financial penalty. Rather, the question is whether NERC, operating under the authority of Section 215 of the FPA, can impose a financial penalty on a user, owner or operator of the bulk power system that is also a Federal agency or instrumentality.

NERC’s authority to impose a penalty does not depend upon Section 316A. Section 215 is self-contained. Section 215(e), not Section 316A, grants the ERO the authority to impose penalties:

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 standard²²

(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.²³

²¹ *Id.* at p. 2.

²² *See* FPA § 215(e)(1).

²³ *See* FPA, § 215(e)(6).

Section 215(e) does not make distinctions as to which types of users, owners and operators of the bulk power system may be subjected to penalties. The authority, procedures, and limitations for NERC or a Regional Entity to impose a penalty are all prescribed in Section 215(e). Arguments about what FERC might do under Section 316A do not affect what NERC or a Regional Entity may do under Section 215 regarding a user, owner or operator of the bulk power system. As the discussion of the first question clearly shows, Congress very intentionally included federal agencies and instrumentalities within the class of users, owners and operators of the bulk power system.

3. Whether NERC Is, By This Notice of Penalty Action, Asserting That All USACE Facilities are Subject to Mandatory Reliability Standards Adopted under Section 215 of the Federal Power Act.

In its comments, the USACE asserts that NERC's Notice of Penalty appears to ask FERC to find jurisdiction over every U.S. Army Corps of Engineers hydropower project (and possibly every Federal entity allegedly subject to the mandatory Reliability Standards), based upon the facts alleged in a single Notice of Penalty, and issued to a single hydropower project.²⁴ USACE argues that NERC's analysis of this issue is flawed because in order to fully respond to the jurisdiction question, USACE must be provided an opportunity to address the unique configurations of each of its facilities.²⁵

Through this Notice of Penalty regarding COE – Tulsa District, NERC has not asserted jurisdiction over all USACE facilities. The only generic issue being addressed in this proceeding is whether the USACE is exempt from the jurisdiction of NERC and the Commission under Section 215 of the FPA and to the mandatory Reliability Standards

²⁴ USACE Comments at p. 3.

²⁵ *Id.*

adopted pursuant to Section 215. Once a determination is made to this question – that is, that the USACE is not exempt from Section 215 because of its status as a Federal agency or instrumentality – a determination must still be made regarding whether a particular USACE facility meets the criteria for registration on NERC’s Compliance Registry.

NERC’s Compliance Registry delineates the selection criteria employed by NERC and the Regional Entities to determine which organizations should be registered as users, owners and operators of the bulk power system because they are material to the reliability of the bulk power system. NERC’s *Statement of Compliance Registry Criteria*²⁶ specifically describes how NERC will identify organizations that may be candidates for registration and assigned to the compliance registry. The Compliance Registry does not, in itself, register particular facilities unless the facility meets specific criteria for registration. That is, an entity is registered on NERC’s Compliance Registry only after an appropriate assessment has been conducted by either NERC or the Regional Entity to determine whether an entity meets the criteria for registration. Even in cases where an entity is registered involuntarily by NERC, that entity has an opportunity to timely appeal its registration status in accordance with Rule 504 and Appendix 5 to NERC’s Rules of Procedure.

COE – Tulsa District is properly registered on the NERC Compliance Registry.²⁷ In fact, there are twelve USACE entities registered on the NERC Compliance Registry, and none of them appealed their registration status to NERC. Each of these USACE entities was provided notice of its inclusion on the NERC Compliance Registry. They

²⁶ See NERC’s *Statement of Compliance Registry Criteria*, available at http://www.nerc.com/files/Statement_Compliance_Registry_Criteria-V5-0.pdf.

²⁷ The COE – Tulsa District has been registered on NERC’s compliance registry since June 28, 2007. The NERC Compliance Registry is publicly available and can be found at <http://www.nerc.com/page.php?cid=3|25>.

also were provided an opportunity to challenge that registration based on whether they met the NERC Registration Criteria. By virtue of their failure to challenge their registration, they have conceded that they meet the criteria for registration (*i.e.* that they are a user, owner or operator of the bulk power system that satisfies one or more of the criteria for registration).

Whether other USACE facilities are or should be registered depends on whether each facility alone meets the criteria for registration on the NERC Compliance Registry. Accordingly, the USACE's assertion that NERC, by this Notice of Penalty action, is asserting that all USACE facilities are subject to mandatory Reliability Standards under Section 215 of the FPA, is incorrect.

4. Whether This Notice of Penalty Case is the Proper Forum to Decide Whether the USACE is Subject to Section 215 Jurisdiction.

In its comments, USACE argues that this is not the appropriate forum to decide whether the USACE is subject to Section 215 jurisdiction because this is a legal dispute between two executive agencies.²⁸ The USACE argues that when two executive agencies are unable to resolve a legal dispute between them, each agency is encouraged to submit the dispute to the Attorney General for resolution, and the dispute should not be addressed through the public comment mechanism required by FERC in its July 27, 2009 Notice.²⁹

Texas RE found that COE – Tulsa District violated certain Reliability Standards. In its review, the NERC BOTCC affirmed that finding. As required by Section 215(e) of the FPA and the Commission's regulations, before the finding of violation can take

²⁸ USACE Comments at p. 3.

²⁹ *Id.* The USACE is referring to FERC's June 26, 2009 Notice requesting comments regarding the applicability of mandatory Reliability Standards under Section 215 of the Federal Power Act to the USACE and other federal agencies.

effect, NERC must file the Notice of Penalty with the Commission. Under Section 215(e) of the FPA, the Commission may review the matter on its own motion, allow the Notice of Penalty to take effect by operation of law upon the passage of 30 days with no Commission action, or decide the case if it is appealed by the entity found in violation.

The question of jurisdiction is foundational to whether NERC, in the first instance, or the Commission on appeal, can find COE – Tulsa District in violation of Reliability Standards properly adopted under Section 215. It was COE – Tulsa District that asserted in its comments filed in this proceeding that NERC (and by inference, the Commission) had no jurisdiction under Section 215 over USACE. NERC, however, determined that it had jurisdiction over COE – Tulsa District. USACE challenged that assertion of jurisdiction in this Notice of Penalty proceeding. Thus, this case is the only forum where this issue can properly be decided.

Although USACE suggests that “[w]henver two Executive agencies are unable to resolve a legal dispute between them, each agency is encouraged to submit the dispute to the Attorney General,”³⁰ that is not the case here. FERC is an independent Commission, not an Executive Agency. Moreover, USACE’s proposed course of action leaves NERC, which has primary responsibility for developing and enforcing Reliability Standards for the bulk power system in the United States, out of the picture entirely. More importantly, it would leave undecided for an indeterminate period of time the question of whether or not the USACE facilities that are properly registered as users, owners or operators of the bulk power system must comply with mandatory Reliability Standards.

³⁰ *Id.* at p. 3.

5. Whether Deciding the Question of the USACE's Jurisdictional Status Under Section 215 in this Notice of Penalty Case Violates USACE's Due Process Rights.

In its comments, the USACE argues that addressing the question regarding applicability of mandatory Reliability Standards under Section 215 of the FPA to the USACE and other Federal agencies in this Notice of Penalty violates the USACE's due process rights because only one of the Corps' generators is implicated.³¹ USACE points to nothing to suggest that its due process rights would be violated by deciding the question of NERC's jurisdiction over COE – Tulsa District in this case. COE – Tulsa District was placed on the NERC Compliance Registry on June 28, 2007, and COE – Tulsa District was duly noticed of that event. That notice also informed COE – Tulsa District that it had the right to challenge that registration under Rule 504 and Appendix 5 of NERC's Rules of Procedure. COE – Tulsa District did not appeal its registration.

The COE – Tulsa District challenged the finding of violation imposed by Texas RE, but it did so on jurisdictional grounds only. It raised no factual issues with the finding of violation. Texas RE decided the only issue presented to it, namely the jurisdictional one. On appeal to NERC, the COE – Tulsa District again challenged NERC's jurisdiction under Section 215. For the reasons stated in the Notice of Penalty, NERC determined that it has jurisdiction over the COE – Tulsa District.

NERC filed the Notice of Penalty with FERC, as required by the Commission's regulations. As required by NERC's Rules of Procedure, NERC served the Notice of Penalty on the COE – Tulsa District. This proceeding followed. Again, the COE – Tulsa District in its intervention in this proceeding raises only the jurisdictional issue. Once the Commission decides the jurisdictional question, the USACE will have the right to seek

³¹ *Id.*

rehearing of the Commission's decision and judicial review under Section 313(b) of the FPA.³² The USACE's rights have been fully protected throughout this proceeding, demonstrated by the fact that the COE – Tulsa District was clearly able to raise the jurisdictional issue at multiple stages during this proceeding.

V. CONCLUSION

For the forgoing reasons, NERC respectfully requests that the Commission enter an order confirming that COE – Tulsa District is subject to the jurisdiction of NERC and the Commission under Section 215 of the FPA and to the mandatory and enforceable Reliability Standards adopted under Section 215, and that the USACE is not exempt from Section 215 of the FPA.

Respectfully submitted,

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³² 16 U.S.C. § 8251.

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 8th day of September, 2009.

/s/ Holly A. Hawkins
Holly A. Hawkins

*Attorney for North American Electric
Reliability Corporation*