



## Department of Energy

Washington, DC 20585

October 7, 2009

Kimberly D. Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

Re: North American Electric Reliability Corporation  
FERC Docket No. NP09-26-000

Dear Secretary Bose:

Enclosed for electronic filing with the Commission is the United States Department of Energy's Motion for Leave to Respond and Response of the United States Department of Energy to Reply Comments of The North American Electric Reliability Corporation in the above-referenced docket. A copy of this notice has been sent electronically to each person on the Commission's service list in this docket. Thank you for your attention in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "S. A. Porter".

Steven A. Porter  
Assistant General Counsel  
Electricity & Fossil Energy  
United States Department of Energy

Enclosure



Printed with soy ink on recycled paper

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

**North American Electric                                    )**     **Docket No. NP09-26-000**  
**Reliability Corporation                                    )**

**MOTION FOR LEAVE TO RESPOND AND RESPONSE OF  
THE UNITED STATES DEPARTMENT OF ENERGY TO REPLY COMMENTS OF  
THE NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION**

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212-.213, the United States Department of Energy (DOE) hereby requests leave to respond and, if leave is granted, files this response to the Reply Comments of the North American Electric Reliability Corporation (NERC) dated September 8, 2009.

**MOTION FOR LEAVE TO RESPOND TO REPLY COMMENTS**

Under FERC rules, the Commission’s permission is required for a party to file responsive comments. 18 C.F.R. §§ 385.213(a)(2). FERC has permitted such responses if they “clarify the issues under consideration,” 117 F.E.R.C. ¶ 61,005, 61,037 (2006), “assist . . . in understanding the parties’ positions,” 53 F.E.R.C. ¶ 61,097, 61,282 (1990), or if they are “helpful to [FERC] in reaching its decision.” 99 F.E.R.C. ¶ 61,229, 61,950 (2002). *See* 18 C.F.R. 385.101(e) (“[T]he Commission may, for good cause, waive any provision of this part or prescribe any alternative procedures that it determines to be appropriate.”). Because DOE’s response will help clarify the issues under consideration and correct errors of law contained in NERC’s Reply Comments, we request leave to file the following response.

## RESPONSE TO REPLY COMMENTS

No party in this proceeding has submitted even a marginally persuasive argument supporting NERC's key contention that FERC, the Electric Reliability Organization ("ERO"), or the Regional Entities have statutory authority to impose civil fines on the federal government.<sup>1</sup> Perhaps recognizing this, NERC has reversed course to argue that this issue is not ripe for decision. NERC has gotten this wrong too.

Contrary to NERC's Reply Comments, the scope of NERC's authority to enforce electric reliability standards is an issue ripe for resolution. **First**, *NERC itself requested a clarification of this issue* in its June 24, 2009 Petition. **Second**, this issue—raised in this proceeding and at least 50 other concurrent reliability enforcement proceedings in which Regional Entities are attempting to impose at least \$804,480 in civil fines on DOE entities—is obviously neither hypothetical nor speculative. *See* U.S. Department of Energy's Motion for Stay of Certain Regional Entity Enforcement Proceedings, October 7, 2009. The Commission is well positioned, and well within its authority, to resolve this issue now.

Substantively, NERC's assertion that its enforcement authority "does not depend on FPA [Federal Power Act] § 316A" misapprehends the relevance of that section for purposes of statutory construction.<sup>2</sup> That Congress clearly and specifically authorized FERC to impose monetary civil penalties under § 316A, compels the conclusion that such authority is lacking in § 215(e), where the statute makes only an abbreviated reference to "penalty."

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<sup>1</sup> The Federal Power Act defines a "Regional Entity" as an entity having enforcement authority pursuant to a delegation from an Electric Reliability Organization or FERC for the purpose of proposing and enforcing reliability standards. 16 U.S.C. §§ 824o(a), (e).

<sup>2</sup> NERC Reply Comments at 11.

## I. The Issue of Civil Fines is Ripe for Commission Decision

Somewhat surprisingly, NERC asserts in its Reply Comments that the extent of the Commission's enforcement jurisdiction may not be ripe for resolution. In its June 24, 2009 Petition, NERC specifically asked the Commission to issue a decision "on the *scope* of NERC's and the Commission's jurisdiction under Section 215."<sup>3</sup> And in addressing the scope of its jurisdiction, NERC specifically raised questions about its enforcement authority, noting that U.S. agencies and instrumentalities are users, owners, and operators of the bulk-power system and are therefore "made subject to the Commission's jurisdiction to both approve and *enforce* Reliability Standards."<sup>4</sup> NERC further asserted that Congress had intended to replace the prior system of voluntary reliability standards with a mandatory, enforceable system.<sup>5</sup> Thus, NERC requested that the Commission render a decision in this case "clearly deciding the jurisdictional issue presented," even if the U.S. Army Corps of Engineers-Tulsa District did not itself seek review of the penalties imposed by NERC.<sup>6</sup>

Although NERC now claims that the issue of its authority to impose civil fines is not ripe, NERC's initial request for a clear decision on the scope of its § 215 jurisdiction over federal entities necessarily implied a request for clarification of the nature of its enforcement authority. Indeed, as NERC's own Petition reflects, an essential element of the Commission's FPA § 215 jurisdiction is its ability to enforce the FPA's mandatory electric reliability standards.<sup>7</sup> Moreover, an order simply stating that the Commission's electric reliability rules apply to § 201(f) entities would not dispose of the issues raised in

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<sup>3</sup> NERC Petition at 8, emphasis added.

<sup>4</sup> *Id.* at 4-5, emphasis added.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.*

this case. As discussed in detail in our Notice of Intervention, DOE agrees with NERC that the FPA reliability standards apply to Department entities, in accordance with the clear language of the statute and with Congress's intent to ensure reliability nationwide. See 16 U.S.C. §§ 824o(b)(1), (f). We simply dispute that NERC's enforcement powers under § 215(e) include the authority to impose monetary penalties on federal entities.

Notwithstanding its own Petition, NERC now has claimed, without reference to any ripeness standard for support, that the enforcement question is not ripe because the Regional Entity imposed a \$0 penalty.<sup>8</sup> Contrary to NERC's claim, however, the relevant provisions of the Administrative Procedure Act (APA) and the Commission's own procedural rules indicate that a prompt resolution of the civil fines issue is particularly appropriate at this juncture. When deciding whether to hear a case, FERC is bound only to the requirements of the APA, which provides that an agency "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(c). This standard is also reflected in the Commission's own Procedural Rule 207, allowing a person to file a pleading when seeking "[a] declaratory order or rule to terminate a controversy or remove uncertainty." 18 C.F.R. § 385.207. In this case, a declaratory order delineating the scope of NERC's enforcement authority would eliminate a critical area of uncertainty in the instant case, as well as in numerous other *currently pending* reliability enforcement proceedings involving U.S. Government entities.

Thus, in spite of NERC's unsupported assertion of a lack of ripeness, FERC has ample discretion to hear the critical civil fine issue raised in this case. As evidenced by the sizeable number of pending penalty proceedings listed in the Department's Motion to

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<sup>8</sup> NERC Reply Comments at 11.

Stay, filed contemporaneously with this Response, this proceeding is only one of many in which NERC or a Regional Entity has purported to exercise FPA § 215 authority to impose monetary civil fines on federal entities. And although NERC imposed a \$0 penalty in this case, the possibility of enforcement with civil fines is far from hypothetical: the aggregate amount of fines imposed in the cases we know about is \$804,480. In some cases, Department of Energy entities are provided only 24 hours to respond to penalty notices. Understandably, Department entities have been anxious to resolve these important penalty cases in an efficient and expeditious manner, but it is impossible to do so until the threshold question of NERC's enforcement authority is clarified.

In sum, this matter is ripe because NERC itself specifically asked the Commission to determine the scope of its jurisdiction to enforce reliability standards against federal entities—a determination that necessarily encompasses NERC's authority to impose monetary civil fines under FPA § 215(e). Furthermore, pursuant to the APA and the Commission's Procedural Rule 207, FERC may properly exercise its discretion to decide NERC's authority to fine federal entities, so as to remove critical uncertainty in the instant case, and in the dozens of concurrent proceedings in which Regional Entities are attempting to punish Department of Energy entities for reliability violations through the imposition of hundreds of thousands of dollars in fines. A decision by the Commission on the scope of NERC's enforcement authority in this case is not only timely and appropriate—it is imperative.

## II. Section 316A Governs the Commission's Power to Impose Civil Fines for Violation of Electric Reliability Rules

The narrow basis of NERC's enforcement authority over federal entities cannot be understood by reading § 215(e) of the Federal Power Act in isolation. In its Reply Comments, NERC points to § 215(e) for its authority to impose monetary penalties on federal entities, but incorrectly declares that such authority "does not depend upon Section 316A."<sup>9</sup> Essentially, NERC urges that its interpretation of the scope of its authority to enforce reliability standards under § 215(e) need not be read in harmony with other sections of the FPA, such as § 316A. The theory that § 316A, and presumably other enforcement sections of the Federal Power Act, may be ignored when it comes to enforcing reliability standards is inconsistent with basic rules of statutory interpretation.

Section 215(e) simply provides that the certified ERO may impose "a penalty on a user or owner or operator of the bulk-power system" for reliability violations. 16 U.S.C. § 824o(e). It does not define the term "penalty" with sufficient specificity to support the imposition of civil fines on federal entities.<sup>10</sup> Penal statutes must be strictly construed, and "one is not to be subject to a penalty unless the words of the statute plainly impose it," *Comm'r v. Acker*, 361 U.S. 87, 91 (1959), especially when the penalties are monetary in nature and are asserted against the federal government. *See Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 1997 OLC LEXIS 29 at \*3 (July 16, 1997). Applying the Office of Legal Counsel's standard, one must

<sup>9</sup> NERC Reply Comments at 11.

<sup>10</sup> The only description of penalties available to the Commission under § 215(e), unaddressed by NERC, is found in § 215c(2)C wherein the ERO, once certified, is required to establish rules that "provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) (including limitations on activities, functions, or operations, or other appropriate sanctions)."

conclude that a clear statement of authority to fine federal entities simply does not exist in § 215.

The conclusion that § 215(e) lacks specificity is supported by a harmonious reading with those sections of the FPA that *do* specifically authorize the imposition of monetary civil fines—namely, § 316A. FERC went for decades without congressional authority to levy civil fines for violations under Subchapter II of the FPA. When Congress amended § 316A in the 2005 Energy Policy Act, it carefully noted that FERC could impose “a civil penalty of not more than \$1,000,000 for each day that a violation [of subchapter II of the FPA] continues,” 16 U.S.C. § 825o-1, but continued to limit the application of those penalties against “person[s],” a defined term that does not include federal entities. Again, we do not dispute the Commission’s power to impose non-monetary penalties on DOE entities under § 215(e) as described above. It is quite a stretch, however, to suggest that § 215(e) allows for unrestricted civil fine authority against federal entities, when that authority is defined specifically for limited application against non-federal entities in § 316A. NERC may not take action that conflicts with the plain language of other sections of the FPA. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (concluding that FERC’s general regulatory authority under FPA §§ 205 and 206 was not sufficient basis for FERC to order Bonneville Power Administration (BPA) to issue refunds when specific refund authority did not apply to BPA).



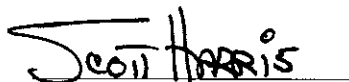
### III. Conclusion

The scope of FERC's § 215 jurisdiction to enforce violations of electric reliability rules against federal entities is an issue raised in NERC's petition. It is an important, relevant question, ripe for adjudication. A declaratory order resolving this question would not only remove a substantial source of uncertainty in this case, but also in dozens of enforcement proceedings pending wherein Regional Entities are proposing to assess hundreds of thousands of dollars in civil fines against the federal government. The legal conclusion reached by NERC that § 215 enforcement measures should be read in isolation from the rest of the enforcement section of the Federal Power Act is untenable. Any enforcement action undertaken by FERC must conform to all provisions of the FPA. The Department does not dispute that administrative sanctions described in § 215(c)(2)(C) are available to enforce the standards against federal entities. But the Commission lacks the authority to exercise enforcement tools available under §§ 314, 315, and 316, including the imposition of civil fines, against the federal government.

For these reasons, the United States Department of Energy urges the Commission to issue an order declaring:

1. Applicable DOE entities are subject to mandatory electric reliability standards under FPA § 215;
2. The Commission may enforce those standards only through the imposition of non-monetary penalties described in its existing rules; and
3. Sections 316A of the FPA, which authorizes FERC to levy civil monetary fines, specifically limits that authority to violations involving a "person," and not DOE entities.

Respectfully submitted,

Handwritten signature of Scott Harris in black ink, with a horizontal line underneath the name.

Scott Blake Harris  
General Counsel  
United States Department of Energy  
1000 Independence Ave. SW  
Washington, DC 20585  
scott.harris@hq.doe.gov  
(202) 586-5281

Robert H. Edwards, Jr.  
Deputy General Counsel for Energy Policy  
United States Department of Energy  
1000 Independence Ave. SW  
Washington, DC 20585

Steven A. Porter  
Assistant General Counsel  
Electricity and Fossil Energy  
United States Department of Energy  
1000 Independence Ave. SW  
Washington, DC 20585  
steven.porter@hq.doe.gov  
phone: (202) 586-4219  
fax: (202) 586-7479

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