

130 FERC ¶ 61,002  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer and Philip D. Moeller.

North American Electric Reliability Corporation

Docket No. NP09-26-001

ORDER REJECTING REHEARING REQUEST

(Issued January 5, 2010)

1. On October 15, 2009, the Commission issued an order affirming that, pursuant to section 215 of the Federal Power Act (FPA), the U.S. Army Corps of Engineers (Corps)-Tulsa District and other federal entities that use, own, or operate the Bulk-Power System must comply with mandatory Reliability Standards.<sup>1</sup> The Corps submitted a request for rehearing in this proceeding by e-filing at 5:47:28 p.m. on November 16, 2009. Pursuant to Rule 2001(a)(2) of the Commission's Rules of Practice and Procedure,<sup>2</sup> any document received after regular business hours is deemed to have been filed on the next regular business day.<sup>3</sup> Therefore, the request for rehearing was filed on November 17, 2009. The Corps also filed an amended request for rehearing on November 25, 2009.

2. Pursuant to section 313(a) of the FPA,<sup>4</sup> and the Commission's Rules of Practice and Procedure,<sup>5</sup> an aggrieved party must file a request for rehearing within thirty days after the issuance of the Commission's order. The Commission and the courts have established that the 30-day time period cannot be waived. In this case, that time period

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<sup>1</sup> *North American Electric Reliability Corp.*, 129 FERC ¶ 61,033 (2009) (October 15, 2009 Order).

<sup>2</sup> 18 C.F.R. § 385.2001(a)(2) (2009).

<sup>3</sup> The Commission's regular business hours end at 5:00 p.m., U.S. Eastern Time. 18 C.F.R. § 375.101(c) (2009).

<sup>4</sup> 16 U.S.C. § 825l(a) (2006).

<sup>5</sup> 18 C.F.R. § 385.713(b) (2009).

was no later than November 16, 2009. Accordingly, the Corps' request for rehearing, and its amended request, must be rejected as untimely.<sup>6</sup>

3. Further, even if the Corps had timely filed its request for rehearing, the request would have failed on the merits, as discussed below.

### **Background**

4. Section 215 of the FPA authorizes the Commission to certify and oversee an electric reliability organization (ERO) responsible for developing and enforcing mandatory Reliability Standards that are applicable to owners, users, and operators of the Bulk-Power System.<sup>7</sup> Exercising this statutory authority, the Commission certified the North American Reliability Corporation (NERC) as the ERO<sup>8</sup> and initially approved 83 Reliability Standards.<sup>9</sup> NERC as the ERO delegated to eight Regional Entities, including Texas Regional Entity,<sup>10</sup> authority to, *inter alia*, enforce mandatory Reliability Standards.<sup>11</sup>

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<sup>6</sup> We note that, even if the original request for rehearing had been timely, the amended request would have been rejected. Parties seeking rehearing are not permitted to file later, supplemental pleadings that amend and/or supplement their requests for rehearing. *Texas-New Mexico Power Company*, 107 FERC ¶ 61,316, at P 22 (2004); *Houlton Water Company v. Maine Public Service Company*, 60 FERC ¶ 61,141, at 61,511 & n.8 (1992); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,623 (1991); *Public Service Company of New Hampshire*, 56 FERC ¶ 61,105, at 61,403 (1991);

<sup>7</sup> 16 U.S.C. § 824o(c) (2006).

<sup>8</sup> *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,190, *order on reh'g* 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

<sup>9</sup> *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

<sup>10</sup> Texas Regional Entity is an independent division of the Electric Reliability Council of Texas, Inc. (ERCOT).

<sup>11</sup> *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

5. Section 215(e) of the FPA authorizes the ERO to impose a penalty on a user, owner or operator of the Bulk-Power System for a violation of a Reliability Standard, provided that the ERO files a “notice of penalty” with the Commission. The entity that is the subject of the penalty has 30 days to seek Commission review of the penalty. If the entity does not seek review (or the Commission does not seek review on its own motion) within 30 days, the penalty is affirmed by operation of law.<sup>12</sup>

6. The Corps-Tulsa District owns a hydropower project called the Denison Project Generator, located on the Red River in Bryan County, Oklahoma and Grayson County, Texas. The Denison project has two main generators with a maximum plant capacity of 80 megawatts. Pursuant to NERC’s compliance registry process,<sup>13</sup> Texas Regional Entity registered the Corps-Tulsa District in June 2007 as a generator owner. According to NERC, the Corps-Tulsa District was provided notice of the registration and did not appeal its registration status.

7. On June 24, 2009, NERC submitted a Notice of Penalty incorporating the findings and justifications set forth in a Notice of Confirmed Violation and Proposed Penalty or Sanction issued on February 20, 2008, by the Texas Regional Entity. Texas Regional Entity proposed a zero dollar penalty. According to NERC, the Corps-Tulsa District self-certified on October 3, 2007, non-compliance with Reliability Standard PRC-005-1 Requirements R1.1 and R2 for its Denison Project Generator.<sup>14</sup> NERC states that, in the self-certification, the Corps-Tulsa District argued that, as a governmental entity, it was not required to comply with section 215 of the FPA. According to NERC, the Corps stated that because of this uncertainty it was not in a position to register with the Regional Entity, but that it would strive to meet the electric Reliability Standards established pursuant to section 215 of the FPA, subject to the availability of funds appropriated by Congress and project operation requirements. In its filing, NERC requested that the

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<sup>12</sup> See 18 C.F.R. § 39.7(e)(1) (2009).

<sup>13</sup> Section 500 of NERC’s Commission-approved Rules of Procedure sets forth a process for registering users, owners and operators of the Bulk-Power System that must comply with Reliability Standards.

<sup>14</sup> Reliability Standard PRC-005-1 requires that all generation protection systems affecting the reliability of the Bulk Power System be maintained and tested. Requirement R1 requires each generator owner that owns a generation protection system to have a protection system maintenance and testing program for protection systems that affect the reliability of the Bulk-Power System. Requirement R1.1 requires that this program include maintenance and testing intervals and their basis. Texas Regional Entity subsequently determined that the Corp-Tulsa District did not violate PRC-005-1, Requirement R2 and it dismissed that violation.

Commission issue a decision on the scope of NERC's and the Commission's jurisdiction under section 215 of the FPA. The Commission issued a notice, published in the *Federal Register*, and provided an opportunity to comment on the jurisdictional issue.

8. The zero-dollar penalty became effective by operation of law on July 27, 2009, and the Commission issued a notice to that effect. In that notice, the Commission stated that the jurisdictional issue would be addressed separately.<sup>15</sup>

### **October 15, 2009 Order**

9. In the October 15, 2009 Order, the Commission found that, pursuant to section 215 of the FPA, federal entities such as the Corps-Tulsa District that are users, owners, or operators of the Bulk-Power System must comply with mandatory Reliability Standards. In response to comments suggesting that the Commission's process is the incorrect forum for determining the implementation of section 215, or that the proceeding should be stayed to allow for interagency resolution, the Commission stated that it has in the first instance the authority to determine the scope of its jurisdiction and that its authority is not dependent on the ultimate outcome of the determination.<sup>16</sup> In support of its finding that federal entities such as the Corps-Tulsa District that are users, owners, or operators of the Bulk-Power System<sup>17</sup> must comply with mandatory Reliability Standards, the Commission pointed to FPA section 215(b). The Commission explained that section 215(b) identifies the entities within the Commission's section 215 jurisdiction as "including but not limited to the entities described in section 201(f)." In turn, section 201(f) specifically refers to "the United States, a State or any political subdivision of a

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<sup>15</sup> *North American Electric Reliability Corp.*, 128 FERC ¶ 61,088 (2009).

<sup>16</sup> October 15, 2009 Order, 129 FERC ¶ 61,033 at P 31 & n.28, *citing Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033, at P 30 & n.31 (2005), *aff'd*, 452 F.3d 822 (D.C. Cir. 2006); *accord New York v. FERC*, 535 U.S. 1, 22-23 (2002) (holding the Commission was within its authority to establish a seven-factor test to determine which facilities are local distribution facilities that fall outside of the Commission's jurisdiction pursuant to FPA section 201). *Cf. Western Massachusetts Electric Co.*, 61 FERC ¶ 61,182, at 61,661 (1992), *aff'd*, 165 F.3d 922, 926 (D.C. Cir. 1999) (concluding the Commission may examine contracts relating to transactions which may be subject to its jurisdiction prior to making its determination as to jurisdiction).

<sup>17</sup> Section 215 defines the Bulk-Power System as "(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) the electric energy from generation facilities needed to maintain transmission system reliability." 16 U.S.C. § 824o(a)(1) (2006). *See* October 15, 2009 Order, 129 FERC ¶ 61,033 at P 33-35.

state, . . . or any agency, authority, or instrumentality of any one or more of the foregoing.” The Commission concluded that FPA section 215(b) is clear that the Commission shall have jurisdiction over those described entities “for purposes of approving reliability standards established under this section and enforcing compliance with this section.”<sup>18</sup>

10. The Commission also stated that section 201(b)(2) adds additional weight to the argument that Congress intended to include federal entities under the Commission’s jurisdiction.<sup>19</sup> This section, as amended by the Energy Policy Act of 2005, states under the heading “Declaration of Policy; Application of Part”:

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.<sup>20</sup>

11. Finally the Commission cited the legislative history of FPA section 215 as support for the conclusion that Congress intended FPA section 215 to require that *all* users, owners, and operators of the Bulk-Power System, including federal entities, comply with Commission-approved Reliability Standards.<sup>21</sup>

### **Discussion**

12. The Corps’ request for rehearing is rejected as untimely. The Corps submitted its request at 5:47:28 p.m. on November 16, 2009. Pursuant to Rule 2001(a)(2) of the Commission’s Rules of Practice and Procedure,<sup>22</sup> any document received after regular business hours is deemed to have been filed on the next regular business day. Accordingly, the request for rehearing was filed on November 17, 2009. Pursuant to

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<sup>18</sup> *Id.* P 34.

<sup>19</sup> *Id.* P 35.

<sup>20</sup> 16 U.S.C. § 824(b)(2) (2006) (emphasis added).

<sup>21</sup> October 15, 2009 Order, 129 FERC ¶ 61,033 at P 36–37. The Commission stated that FPA section 215 can be traced to the Thomas amendment and Senator Thomas, the author of that amendment stated that “mandatory reliability rules will apply to all users of the transmission grid. There are no loopholes. No one is exempt.” *Id.* P 36.

<sup>22</sup> 18 C.F.R. § 385.2001(a)(2) (2009).

section 313(a) of the FPA,<sup>23</sup> and the Commission's Rules of Practice and Procedure,<sup>24</sup> an aggrieved party must file a request for rehearing within thirty days after the issuance of the Commission's order. The Commission and the courts have established that the 30-day time period cannot be waived.<sup>25</sup> In this case, that time period was no later than November 16, 2009. Accordingly, the Corps' request for rehearing, and its amended request, must be rejected as untimely.<sup>26</sup> Nonetheless, even if the Corps had timely filed its request for rehearing, the request would have failed on the merits, for the reasons discussed below.

13. In its request for rehearing, the Corps makes three arguments: (1) the October 15, 2009 Order is procedurally defective because the Commission's Rules of Practice and Procedure do not provide for a declaratory judgment in a Notice of Penalty proceeding; (2) the U.S. Department of Justice, Office of Legal Counsel is the proper forum to decide a disagreement between federal agencies; and (3) neither the Corps, nor Congress has explicitly or tacitly waived the Corps' sovereign immunity.<sup>27</sup> The Corps states that the Commission should deny NERC's request for declaratory judgment under

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<sup>23</sup> 16 U.S.C. § 825l(a) (2006).

<sup>24</sup> 18 C.F.R. § 385.713(b) (2009).

<sup>25</sup> *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of the [FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-98, 979 (1st Cir. 1978) (describing identical rehearing provision of Natural Gas Act as "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion."); *Louisiana Energy and Power Authority*, 117 FERC ¶ 61,258 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P 10 (2005); *Texas-New Mexico Power Company*, 107 FERC ¶ 61,316, at P 22 (2004); *California Independent System Operator Corporation*, 105 FERC ¶ 61,322, at P 9 (2003); *American Electric Power Service Corporation*, 95 FERC ¶ 61,130, at 61,411-12 (2001).

<sup>26</sup> We note that, even if the original request for rehearing had been timely, the amended request would have been rejected. Parties seeking rehearing are not permitted to file later, supplemental pleadings that amend and/or supplement their requests for rehearing. *Texas-New Mexico Power Company*, 107 FERC ¶ 61,316, at P 22 (2004); *Houlton Water Company v. Maine Public Service Company*, 60 FERC ¶ 61,141, at 61,511 & n.8 (1992); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,623 (1991); *Public Service Company of New Hampshire*, 56 FERC ¶ 61,105, at 61,403 (1991);

<sup>27</sup> The Commission only discusses here the Corps' first untimely request for  
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the Notice of Penalty procedures, or if the Commission does not dismiss NERC's request, it should grant rehearing and allow the Corps an opportunity to present evidence and argument on the issues involved. In the alternative, the Corps contends that the Commission should stay this proceeding and allow the federal agencies potentially affected by the Notice of Penalty to attempt to resolve the jurisdictional issues raised in this matter.

### **Procedural Arguments**

14. The Corps asserts that the October 15, 2009 Order is procedurally defective because the instant matter was initiated as a Notice of Penalty procedure and the Commission's Rules of Practice and Procedure do not provide for a declaratory judgment in a Notice of Penalty proceeding. The Corps adds that, although a final order<sup>28</sup> was issued addressing the penalty in this matter, and no appeal was taken, the Commission continued to address the jurisdictional issue, which was unrelated to the penalty, in the same proceeding. The Corps contends that a declaratory order or rule to terminate a controversy or remove uncertainty must be filed under 18 C.F.R. § 385.207 (2009), and this regulation is only applicable to matters brought under subparts I, J, or K of the Commission's Rules of Practice and Procedure. According to the Corps, a Notice of Penalty proceeding is not properly brought under subparts I, J, or K and, because the Commission has failed to follow its own regulations, the final order is procedurally defective and a nullity.

15. Contrary to the Corps' assertion, the October 15, 2009 Order was not a declaratory order. NERC's notice of penalty raised a specific issue relevant to the immediate proceeding, namely, whether the Corps must comply with mandatory Reliability Standards. Since the notice of penalty pertained to the Corps-Tulsa District, and the Corps had questioned the applicability of mandatory Reliability Standards to the Corps as a federal entity,<sup>29</sup> the Commission's order addressed a matter relevant to the petition before the Commission in this proceeding.

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rehearing. The Corps' amended request for rehearing, filed eight days after the statutory deadline for submitting a request for rehearing, is also an untimely request for rehearing. *See supra* note 6.

<sup>28</sup> *North American Electric Reliability Corp.*, 128 FERC ¶ 61,088 (2009) (notice stating the Commission would not further review certain Notices of Penalty, which it had allowed to become effective by operation of law on July 24, 2009).

<sup>29</sup> United States Army Corps of Engineers, August 24, 2009 Comments at 3; United States Army Corps of Engineers, July 22, 2009 Filing at 1; Assistant Secretary of the Army (Civil Works), July 20, 2009 Memorandum at 1; Assistant Secretary of the

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16. Further, regardless of whether the October 15, 2009 Order is viewed as a declaratory order, there is no fatal procedural error. While a Rule 207 petition is an appropriate avenue for NERC to seek a resolution of uncertainty with regard to its authority, Rule 207 does not state that this is the only avenue for the Commission to resolve uncertainty. Indeed, nothing prohibits the Commission from making such a ruling in a case-specific proceeding where the issue is raised or even *sua sponte*. The identification of the proper procedures for resolving this uncertainty is subject to the Commission's discretion.<sup>30</sup> In this case, NERC proposed a penalty (albeit a zero dollar penalty) and the Commission issued a Notice that the penalty would take effect by operation of law. The Notice stated that the Corps-Tulsa District had challenged the applicability of mandatory Reliability Standards under section 215 of the FPA, that NERC had requested a Commission decision on this jurisdictional issue, that the Commission had sought comments on this issue, and that it would be addressed separately.<sup>31</sup> Separately, the Commission issued a notice, published in the *Federal Register*, which solicited public comment on the applicability of mandatory Reliability Standards to federal entities such as the Corps. The Commission's action in this proceeding is consistent with the well-established principle that it has discretion to tailor its processes to suit its needs, within the bounds of due process.<sup>32</sup>

17. The Corps raises a second related argument, noting that on October 15, 2009, the Commission held a public meeting in which it decided that, pursuant to section 215 of the FPA, federal entities that use, own, or operate the Bulk-Power System must comply with mandatory Reliability Standards. The Corps contends that it was denied due process because the Corps did not receive notice of the meeting and did not participate.

18. Contrary to the Corps' assertions, the Corps was not denied due process. The Corps contends that it was not given notice of the Commission meeting at which the October 15, 2009 Order was issued, but the October 15, 2009 Order was, in fact, approved at the Commission's regularly scheduled public meeting. Public notice of the meeting was issued by the Secretary of the Commission on October 8, 2009, in

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Army (Civil Works), May 11, 2007 Letter at 1.

<sup>30</sup> See, e.g., *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544-46 (1978) (agencies have broad discretion over the formulation of their procedures); *Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1778-79 (1992).

<sup>31</sup> *North American Electric Reliability Corp.*, 128 FERC ¶ 61,088 at P 1 & note 1.

<sup>32</sup> See *supra* note 33.

accordance with the Government in the Sunshine Act<sup>33</sup> and the Commission's Rules of Practice and Procedure.<sup>34</sup> Moreover, all parties to the proceeding had an opportunity to be heard and were, in fact, heard through their pleadings. The Commission provided public notice and an opportunity to comment. Both the Corps and its parent organization, Department of the Army, Office of the Assistant Secretary for Civil Works, filed comments. And those comments went precisely to the jurisdictional issue, i.e., to the applicability of Reliability Standards under section 215 of the FPA to the Corps. Under these circumstances the Corps cannot legitimately claim inadequate notice.

### **Proper Forum Argument**

19. The Corps also asserts that the Department of Justice's Office of Legal Counsel is the proper forum for resolving disagreement among federal agencies. The Corps argues that the case cited by the Commission in the October 15, 2009 Order, *Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corporation*,<sup>35</sup> does not involve an issue of sovereign immunity and thus is not applicable with respect to the issue regarding the proper forum for resolving disputes within the executive branch. In addition, the Corps argues that it was not allowed an opportunity to contest the applicability or relevance of any cases the Commission relied upon in resolving the legal issues raised in the Notice of Penalty. The Corps contends that the jurisdictional issues raised in the Notice of Penalty should be submitted to the Attorney General and not addressed through the public comment mechanism required by the Commission.<sup>36</sup>

20. The Commission addressed this argument in the October 15, 2009 Order, stating that the Commission has in the first instance the authority to determine the scope of its jurisdiction and that the Commission's authority to make this determination is not dependent on the ultimate outcome of the determination.<sup>37</sup> The Corps challenges the applicability of the cases the Commission cites (contrary to its assertion that it lacks such an opportunity). While the Corps accurately states that the cases cited do not involve governmental entities and claims of sovereign immunity, the Commission believes that the holding in these cases, with respect to the Commission's authority to determine the

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<sup>33</sup> 5 U.S.C. § 552(b) (2006).

<sup>34</sup> 18 C.F.R. § 375.204(a) (2009).

<sup>35</sup> 110 FERC ¶ 61,033, at P 30 & n.31 (2005), *aff'd*, 452 F.3d 822 (D.C. Cir. 2006); *accord New York v. FERC*, 535 U.S. 1, 22-23 (2002).

<sup>36</sup> *Citing* Exec. Order No. 12146, 44 Fed. Reg. 42657 (July 18, 1979).

<sup>37</sup> October 15, 2009 Order, 129 FERC ¶ 61,033 at P 31.

scope of its jurisdiction, holds true even if the entity in question is a governmental entity.<sup>38</sup> Both in the cases cited and in this one, the issue is whether the Commission has the power, i.e., the jurisdiction, to take the action it took. We conclude that it does.

21. The Corps, citing Executive Order No. 12146, argues that the authority in this instance lies with the Attorney General. The Corps is mistaken in its application of Executive Order No. 12146 to the Commission. Section 1-402, the relevant language in Executive Order No. 12146, which applies to interagency legal disputes, states in relevant part:

1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.<sup>39</sup>

In the instant circumstances, the Executive Order is not applicable because “there is specific statutory vesting of responsibility for a resolution elsewhere.” Specifically, section 215(b) of the FPA provides that the Commission shall have jurisdiction, within the United States, “over all users, owners and operators of the bulk-power system, including but not limited to those entities described in section 201(f)....” In turn, section 201(f) of the FPA specifically references “the United States .... or any agency, authority, or instrumentality of the foregoing.” Thus, the Commission is vested with responsibility for determining which entities, including federal governmental entities, are subject to mandatory Reliability Standards pursuant to section 215 of the FPA. And review of Commission orders is expressly vested in the United States Court of Appeals.<sup>40</sup>

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<sup>38</sup> Moreover, as described in greater detail below, the Commission is an independent regulatory agency and not a Cabinet department.

<sup>39</sup> Exec. Order No. 12146, section 1-402. Separately, section 1-401 provides:

Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

This provision contemplates that there will be agencies not subject to section 1-401, which nonetheless may voluntarily ask the Attorney General to resolve disputes, but it is voluntary and only “encourages” such action.

<sup>40</sup> 16 U.S.C. § 825l(b) (2006).

22. Moreover, because the “heads,” i.e., the five members or Commissioners, that compose the Commission do not serve at the pleasure of the President, section 1-402 of the Executive Order is inapplicable in this instance. The Commission is an independent regulatory agency whose heads, i.e., the Commissioners, are appointed by the President with the advice and consent of the Senate for five year terms and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.<sup>41</sup> While the President designates one Commissioner as the Chairman of the Commission, with responsibility for the executive and administrative operation of the Commission, the Chairman serves as a Commissioner on the same basis as the other four Commissioners.<sup>42</sup> Accordingly, the Commission’s decision to address the jurisdictional issue is consistent with relevant precedent and does not contradict the Executive Order referenced by the Corps.

### **Sovereign Immunity Argument**

23. The Corps argues that sovereign immunity 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.”<sup>43</sup> The Corps adds that the reason for this rule is to prevent undermining the powers of Congress to set spending levels for federal programs. The Corps argues that, since Congress has the sole authority to set terms of any waiver, an administrative agency has no more authority to prosecute or adjudicate a claim against the federal government than does a federal court. According to the Corps, federal courts have applied the same sovereign immunity principles in reviewing administrative adjudications as they have in federal court suits<sup>44</sup> and waivers of sovereign immunity must be explicit.<sup>45</sup> The Corps states that the FPA does not contain a clear statement of Congress’ intent to waive the Corps’ sovereign immunity. The Corps adds that the October 15, 2009 Order fails to address the Corps’ sovereign immunity argument.

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<sup>41</sup> See 42 U.S.C. § 7171(b)(1) (2006). See also 44 U.S.C. § 3502(5) (2006) (defining the term “independent regulatory agency” as including the Federal Energy Regulatory Commission).

<sup>42</sup> 42 U.S.C. § 7171(c).

<sup>43</sup> Request for rehearing at 6. The Corps did not cite any legal precedent supporting this proposition.

<sup>44</sup> Citing *U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

<sup>45</sup> Citing *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999).

24. We reject the Corps' arguments on this issue. First, we note that the October 15, 2009 Order was limited to whether federal entities such as the Corps must comply with mandatory Reliability Standards. It did not address whether NERC or the Commission has a right to bring a civil or administrative action against the Corps, no actual monetary penalty is at issue here, and we explicitly stated that we were not addressing the subject of monetary penalties for non-compliance with a Reliability Standard.<sup>46</sup>

25. As the Corps notes, we did not address sovereign immunity in the underlying order because we did not determine that a monetary penalty could be applied to the Corps.<sup>47</sup> Rather, we were ruling on a jurisdictional issue regarding the application of Reliability Standards under FPA section 215 to federal entities such as the Corps. At the outset, we note that the 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.<sup>48</sup> 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.<sup>49</sup> 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. Rather it is a proceeding to require one sister agency to comply with Reliability Standards enacted under statutory authority by another sister agency which is no less sovereign. Further, no *monetary* penalty is at issue. In addition, 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]."

26. 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

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<sup>46</sup> October 15, 2009 Order, 129 FERC ¶ 61,033 at P 32.

<sup>47</sup> *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (a suit is against the sovereign when the judgment sought would be paid out of the public treasury).

<sup>48</sup> 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).

<sup>49</sup> See *supra* P 9-11.

sovereign immunity. As explained in the underlying order,<sup>50</sup> section 215(b)(1) of the FPA provides that:

(1) The Commission shall have jurisdiction . . . over . . . all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 201(f), for purposes of approving reliability standards established under this section and enforcing compliance with [section 215]. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.

27. FPA section 201(f) 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 any 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.

28. This language constitutes an explicit waiver of sovereign immunity.<sup>51</sup> A conclusion to the contrary, i.e. that sovereign immunity protects federal entities such as the Corps from enforcement of Congressionally-authorized mandatory Reliability Standards, as we explain above, 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]." And we note that the Corps in its pleadings does not allege that the Notice of Penalty proceeding or compliance with mandatory Reliability Standards will result in an expenditure of the public treasury; indeed, the Corps commits to voluntary compliance.<sup>52</sup>

29. The Corps argues that the reason for the sovereign immunity doctrine is to "prevent undermining the powers of Congress to set spending levels for federal programs." Accepting the Corps' argument that sovereign immunity applies in this case, where no monetary penalties are implicated, would be an expansion of that doctrine and would instead undermine the power of Congress to mandate compliance with Reliability Standards.

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<sup>50</sup> October 15, 2009 Order, 129 FERC ¶ 61,033 at P 33–35.

<sup>51</sup> The Commission is not expressing any position at this time regarding the waiver of sovereign immunity with regard to mandatory penalties.

<sup>52</sup> See October 15, 2009 Order, 129 FERC ¶ 61,033 at P 7.

**Conclusion**

30. Accordingly, we reject the Corps request for rehearing as untimely, but, even if the Corps had timely filed its request for rehearing, the request would have been denied on the merits.

**The Commission orders:**

The Corps' request for rehearing is rejected as untimely.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

Document Content(s)

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