

140 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

North American Electric Reliability Corporation

Docket No. NP11-238-000

ORDER ON REVIEW OF NOTICE OF PENALTY

(Issued July 19, 2012)

1. On July 28, 2011, the North American Electric Reliability Corporation (NERC) submitted a Notice of Penalty filing to the Commission, assessing a \$19,500 penalty against the Southwestern Power Administration (SWPA) for violations of certain Reliability Standards under section 215(e) of the Federal Power Act (FPA).¹ The Department of Energy (DOE), together with SWPA, an organizational entity within DOE, filed an application with the Commission for review of the Notice of Penalty on August 26, 2011. DOE/SWPA ask the Commission to find that NERC has no authority to assess a monetary penalty against a federal agency under FPA section 215, and, accordingly, to dismiss the Notice of Penalty assessing a \$19,500 penalty against SWPA.

2. In this Order, the Commission finds that section 215 of the FPA authorizes the imposition of a monetary penalty against a federal agency for violation of a mandatory Reliability Standard and, accordingly, allows the \$19,500 penalty as assessed by NERC to go into effect.

I. Background

A. Statutory Framework

3. 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 users, owners and operators of the

¹ 16 U.S.C. § 824o(e) (2006).

Bulk-Power System.² Exercising this statutory authority, the Commission certified NERC as the ERO in 2006,³ and has since approved over one hundred national Reliability Standards as mandatory and enforceable, pursuant to FPA section 215(d).⁴ As contemplated under FPA section 215(e)(4), NERC has delegated certain oversight and enforcement authority to eight Regional Entities,⁵ including the Southwest Power Pool Regional Entity (SPP Regional Entity), which has enforcement and oversight responsibility for SWPA.

4. Section 215(b)(1), titled “Jurisdiction and Applicability,” describes the Commission’s reliability jurisdiction as follows:

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 [FPA section 215]. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.⁶

Section 201(f) of the FPA provides:

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

² 16 U.S.C. § 824o(c).

³ *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).

⁴ 16 U.S.C. § 824o(d); *see, e.g., Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. and Regs. ¶ 31,242, *order or reh’g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

⁵ *See North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh’g*, 120 FERC ¶ 61,260 (2007).

⁶ 16 U.S.C. § 824o(b)(1). Section 201(f) of the FPA generally provides that Part II of the FPA does not apply to, *inter alia*, federal agencies.

instrumentality of any one or more of the foregoing . . . unless such provision makes specific reference thereto.

5. Pursuant to FPA section 215(e)(1), NERC as the ERO has the authority to “impose . . . 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,” subject to certain due process and review requirements.⁷ NERC, as well as the Regional Entities to which NERC delegated compliance and enforcement authority, identify potential violations using various compliance tools, including audits, spot checks, investigations, required self-certifications, and voluntary self-reporting.

6. Under the statute and its implementing regulations, NERC must file a Notice of Penalty with the Commission before a penalty NERC or a Regional Entity assesses for violation of a Reliability Standard can take effect.⁸ Each such penalty determination is subject to Commission review, either on its own motion or by application for review by the recipient of a penalty, within thirty days from the date NERC files the applicable Notice of Penalty.⁹ In the absence of an application for review of a penalty or other action by the Commission, each penalty filed by NERC is affirmed by operation of law upon the expiration of the applicable thirty-day period.¹⁰

B. Prior Jurisdictional Orders

7. In two prior proceedings, the Commission has held that a federal entity that uses, owns or operates the Bulk-Power System must comply with mandatory Reliability Standards.¹¹ Each case involved the finding that a division of the U.S. Army Corps of Engineers (Corps) violated certain Reliability Standards. While the Corps was required

⁷ 16 U.S.C. § 824o(e)(1).

⁸ 16 U.S.C. § 824o(e)(1) and (2); *see also Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 506, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁹ 16 U.S.C. § 824o(e)(2).

¹⁰ *Id.*

¹¹ *North American Electric Reliability Corp.*, 129 FERC ¶ 61,033 (2009) (2009 Jurisdictional Order), *reh’g denied*, 130 FERC ¶ 61,002 (2010); *North American Electric Reliability Corp.*, 133 FERC ¶ 61,214 (2010), *reh’g denied*, 137 FERC ¶ 61,044 (2011).

to mitigate the violations, neither Notice included the assessment of a monetary penalty. In each proceeding, the Corps argued that federal agencies are exempt from the requirements of FPA section 215, including the requirement to comply with mandatory Reliability Standards.

8. The Commission rejected the Corps' position, concluding that FPA sections 201(f) and 215(b)(1), taken together, explicitly convey Commission jurisdiction over the entities listed in FPA section 201(f), including federal entities, for purposes of FPA section 215 compliance.¹² The Commission found additional support for this statutory interpretation in FPA section 201(b)(2), which lists FPA section 215 among the provisions of the FPA that are applicable to the kinds of federal and state entities described in FPA section 201(f).¹³ The Commission also concluded that, as a practical matter "excluding federal agencies [from section 215 compliance] would create a significant gap in the ERO's and the Commission's reliability oversight."¹⁴

II. SWPA Violations and NERC Notice of Penalty Filing

9. SWPA is a subdivision of DOE, operating under the authority of section 5 of the Flood Control Act of 1944. SWPA is one of four federal Power Marketing Administrations, marketing hydroelectric power from 24 Army Corps of Engineers projects in the Southwest United States. SWPA markets this power primarily to defined "preference" customers, including rural electric cooperatives and municipal utilities. SWPA operates and maintains 1,380 miles of high-voltage transmission lines in a four-state area located within the region for which SPP Regional Entity has reliability

¹² 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 34.

¹³ *Id.* P 35. Section 201(b)(2) of the FPA, as amended by the Energy Policy Act of 2005 (which added section 215 to the FPA), states in relevant part:

Notwithstanding section 201(f), the provisions of section[] . . . 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.

16 U.S.C. § 824(b)(2).

¹⁴ *Id.* P 34.

oversight.¹⁵ Since May 31, 2007, SWPA has been “registered” in NERC’s Compliance Registry as a balancing authority, purchasing-selling entity, resource planner, transmission owner, transmission operator, transmission planner and transmission service provider.¹⁶ As a result, SWPA is responsible for compliance with Commission-approved Reliability Standards that apply to such entities.¹⁷

10. NERC submitted a Notice of Penalty filing on July 28, 2011, assessing a \$19,500 penalty against SWPA for violations of two Commission-approved Reliability Standards. According to NERC, SWPA violated Critical Infrastructure Protection or “CIP” Reliability Standards designated by NERC as CIP-004-1 (Cyber Security - Personnel and Training) and CIP-007-1 (Cyber Security – Systems Security Management).¹⁸ SWPA self-reported certain violations to SPP Regional Entity in a report submitted July 23, 2009; SPP Regional Entity identified additional violations during a November 2009 spot check.

11. NERC’s Notice of Penalty filing incorporates the findings and justifications adopted by the SPP Regional Entity in its review of the violations, as set out in the Notice of Confirmed Violation and Proposed Penalty or Sanction issued on January 12, 2011 (Notice of Confirmed Violation). NERC states that SWPA does not dispute that the violations occurred or any of the underlying facts, and does not dispute the amount of the proposed penalty.¹⁹ In addition, NERC notes that SWPA submitted a completed

¹⁵ See NERC Notice of Penalty at 1, n. 1.

¹⁶ See NERC Rules of Procedure Section 500 – Organization Registration and Certification.

¹⁷ The particular Reliability Standards at issue here, CIP-004-1 and CIP-007-1, are applicable to SWPA as a registered balancing authority and transmission operator.

¹⁸ See NERC Notice of Penalty at 2-10. Reliability Standard CIP-004-1 sets out requirements for personnel that have authorized cyber access or authorized unescorted physical access to Critical Cyber Assets, including requirements related to personnel risk assessment, training, and security (including cyber security). CIP-007-1 sets out requirements related to security systems determined to be Critical Cyber Assets and other assets within an “Electronic Security Perimeter.”

¹⁹ *Id.* at 2.

mitigation plan to address the Reliability Standard violations, which mitigation plan has been certified as complete.²⁰

12. NERC notes that SPP Regional Entity considered a number of factors when it set the assessed penalty amount at \$19,500, including SWPA's compliance history, which included a prior violation of CIP-004-1 Requirement R3.2 related to the failure to ensure that employees with access to Critical Cyber Assets have current personal risk assessments. SPP Regional Entity also considered potential mitigating factors, including SWPA's cooperation in identifying and addressing the violations.²¹

13. In the Notice of Penalty, NERC explains that, while SWPA did not dispute the violation or underlying facts, SWPA did claim that NERC was barred from assessing a monetary penalty based on the doctrine of sovereign immunity. NERC disagrees with SWPA and maintains that FPA section 215 authorizes the ERO to impose a monetary penalty on a federal entity for violation of an applicable Reliability Standard.²² Citing to the Commission orders pertaining to the Corps, NERC notes that the Commission has already found that federal entities that are users, owners, or operators of the Bulk-Power System must comply with mandatory Reliability Standards under FPA section 215. NERC asserts that its ability as the ERO to impose a penalty for violation of a Reliability Standard is not limited in any way under the terms of FPA section 215, except in requiring Commission review under FPA section 215(e). NERC notes that nothing in FPA section 215 excludes monetary penalties, and all of the penalty provisions of section 215 apply to all users, owners and operators of the Bulk-Power System, without any specific exception for federal entities.

14. NERC also points to the legislative history of FPA section 215 for further confirmation that section 215's penalty provisions are to be broadly applied.²³ Among other things, NERC asserts that the legislative history of the Energy Policy Act of 2005 demonstrates that Congress intended for the ERO to be able to penalize *anyone* who violates an applicable Reliability Standard, and that Congress demonstrated no intent to differentiate between monetary penalties and other penalties or sanctions.

²⁰ *Id.* at 6-8, 9-10.

²¹ *Id.* at 10-11.

²² *Id.* at 13.

²³ *Id.* at 13-14.

15. NERC rejects the arguments made by SWPA in contesting the violation before NERC (and as discussed further below), that FPA section 316A prohibits the imposition of monetary penalties on federal entities such as SWPA.²⁴ NERC asserts that its authority to impose a penalty derives from FPA section 215, which authority expressly extends to federal entities. NERC notes that, while the monetary limits on civil penalties that may be imposed under FPA section 316A have been found to apply to FPA section 215 penalties, the Commission has not found that the ERO's penalty authority derives from FPA section 316A. Rather, the source of authority to impose a penalty for violation of a Reliability Standard is found in FPA section 215, and FPA section 316A merely informs the Commission as to what can constitute an appropriate sanction for purposes of FPA section 215(b)(2)(c). NERC maintains that it is contrary to the clear intent of FPA section 215, which explicitly includes federal entities like SWPA in both its compliance and its enforcement provisions, to read FPA section 316A as limiting this broadly drawn enforcement authority. NERC also argues that there is no policy basis on which to exclude SWPA from exposure to monetary penalties, as the enforcement regime contemplated by FPA section 215 should apply with equal force to any entity found to be in violation of a Reliability Standard.²⁵

III. Application for Review of Notice of Penalty

16. On August 26, 2011, DOE/SWPA filed a Notice of Intervention and Application for Review of the NERC Notice of Penalty, asking the Commission to rule on the one legal issue of whether NERC may assess a monetary fine against a federal agency.²⁶ In addition, DOE/SWPA ask the Commission to stay the proposed penalty against SWPA, and against any other entity within DOE facing a similar monetary penalty under FPA section 215, until the legal question of NERC's penalty authority is resolved.

17. DOE/SWPA maintain that NERC's penalty authority both derives from and is limited by FPA section 316A, which authorizes the Commission to impose a penalty of up to \$1,000,000 for each day that a violation continues on "[a]ny person who violates any provision of subchapter II of this chapter [Part II of the FPA]."²⁷ DOE/SWPA note that a "person" is defined under section 3 of the FPA as "an individual or corporation," and that a federal agency like SWPA does not fall within this definition. Given the

²⁴ *Id.* at 14.

²⁵ *Id.* at 15.

²⁶ DOE/SWPA Application for Review at 1.

²⁷ *Id.* at 5-6.

limitation on the scope of the Commission's penalty authority in FPA section 316A, DOE/SWPA conclude that the ERO, as well as the Commission, is precluded from imposing a monetary penalty on federal agencies under FPA section 215.

18. DOE/SWPA argue that, contrary to NERC's position as stated in the Notice of Penalty, FPA section 215(e) does not provide independent penalty authority to the Commission or to NERC, but rather describes the procedural steps that must be followed prior to imposing a penalty under FPA section 215.²⁸ DOE/SWPA note that unlike FPA section 316A, which clearly announces itself as a grant of penalty authority, FPA section 215 was included with other substantive regulatory provisions of the FPA, and contains no upper limit on the penalties that can be imposed. DOE/SWPA point to an anomaly they assert would be created under NERC's reading of its section 215 penalty authority, whereby NERC, a non-governmental entity, could impose penalties with no upper monetary limit for violations of a Reliability Standard, while the Commission cannot impose such an unbounded penalty, even for acts of fraud or market manipulation.

19. DOE/SWPA argue that the Commission has already determined that FPA section 316A's limitations on penalty authority do apply to FPA section 215 violations.²⁹ DOE/SWPA claim that the Commission not only found that FPA section 316A establishes the monetary limit for penalties assessed for Reliability Standard violations, but also stated: "The Commission has the legal authority to impose a civil penalty pursuant to section 316A of the FPA, *which applies to a violation of any provision under Part II of the FPA, including section 215.*"³⁰ DOE/SWPA maintain that, having found that the quantitative limits of FPA section 316A apply to section 215 penalties, the qualitative limits must also apply.

20. DOE/SWPA maintain that FPA section 201(b)(2) provides no separate grounds for the imposition of monetary penalties on federal entities. DOE/SWPA argue that FPA section 201(b)(2) does not subject entities to any provision of the FPA to which they are not otherwise subject under the terms of the relevant provision, and therefore maintains that 201(b)(2) cannot make federal entities (or any other "person") subject to the provisions of FPA section 316A and its civil penalty authority.³¹ DOE/SWPA argue that

²⁸ *Id.* at 6-7.

²⁹ *Id.* at 8-9 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 575).

³⁰ *Id.* at 9 (quoting Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 786) (emphasis supplied by DOE/SWPA).

³¹ *Id.* at 10-11.

even if the Commission finds that the FPA is ambiguous as to whether a federal entity is subject to monetary penalties for violation of a Reliability Standard, the Commission must rule in DOE/SWPA's favor.

21. DOE/SWPA maintain that three separate legal doctrines are implicated by the imposition of fines on a federal agency: (1) the doctrine of sovereign immunity, which requires that any waiver of the government's immunity be unequivocally expressed; (2) the requirement of a "clear statement" of congressional intent, when one agency is arguably empowered to penalize another agency; and (3) the rule of strict construction for penal statutes. DOE/SWPA maintain that the language of FPA sections 215(e) and 201(b)(2) does not constitute the clear grant of authority required under any of these doctrines.³² DOE/SWPA note the contrast between the purported grant of authority under FPA section 215 (with no change to FPA section 316A), and the clear intent demonstrated by Congress when it revised certain provisions of the FPA to extend their reach to federal agencies, pointing to the language of FPA section 206(e) (with respect to refund authority) and FPA section 222 (prohibiting market manipulation).

22. Finally, DOE/SWPA argue that monetary penalties should not be assessed against federal agencies as a matter of policy. DOE/SWPA claim that other remedies are adequate to ensure compliance and that the imposition of penalties could lead to a waste of federal resources. DOE/SWPA maintain that federal agencies are in a different position with respect to incentives for compliance, as they are accountable to Congress and the President.

IV. Order Initiating Review, Motions to Intervene, and Comments

23. On August 29, 2011, the Commission issued an Order initiating review of the Notice of Penalty, and staying the proposed penalty against SWPA pending the conclusion of the Commission's review.³³ The Commission established a filing deadline of September 19, 2011 for submission of answers, interventions or comments.

³² *Id.* at 12-13 (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996) for the proposition that a waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992), among others, for the proposition that sovereign immunity principles apply equally to cases involving agency adjudications; and *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act* (July 16, 1997), available at http://www.justice.gov/olc/cleanair_op.htm, on the need for a "clear statement" by Congress of an intent to authorize one agency to penalize another).

³³ *North American Electric Reliability Corp.*, 136 FERC ¶ 61,135 (2011).

24. Timely motions to intervene were filed by the American Public Power Association and by four Regional Entities: SPP Regional Entity³⁴ the Western Electric Coordinating Council (WECC), SERC Reliability Corporation, and ReliabilityFirst Corporation. Timely motions to intervene and/or notices of intervention were submitted, with substantive comments, by NERC, by the U.S. Department of the Interior (Interior), and by several entities whose members may purchase preference power or transmission services from SWPA or other federal agencies: the National Rural Electric Cooperative Association (NRECA), Mid-West Electric Consumers Association, Inc. (Mid-West ECA); Southeastern Federal Power Customers (SE FPC); Southwest Transmission Dependent Utility Group (SW TDUs);³⁵ and the Southwestern Power Resources Association (SW PRA).

25. Interior acknowledges that it must comply with Reliability Standards, but contends that standards cannot be enforced against federal agencies by assessing fines.³⁶ Interior's arguments against the imposition of monetary penalties on federal entities largely track those of DOE/SWPA. Interior argues that FPA section 316A limits the Commission's authority to impose a civil penalty for violations of the FPA to "persons," as defined by the FPA. Because the FPA defines a "person" as "an individual or corporation," Interior maintains that federal agencies are not subject to fines.³⁷

26. Interior argues that the overall structure of the FPA reinforces its position, noting that federal agencies, as "201(f) entities," are not subject to FPA part II requirements unless a provision of the FPA makes "specific reference thereto."³⁸ Because FPA section 316A does not include such a specific reference, Interior argues that Congress did not intend to give the Commission authority to impose fines on federal entities when it added section 215 to the FPA. Finally, like DOE/SWPA, Interior maintains that any purported

³⁴ SPP Regional Entity's Motion to Intervene does not include a separate analysis of the legal issue presented by DOE/SWPA's Application for Review, but notes that SPP Regional Entity supports NERC's and the Commission's authority to impose a monetary penalty on federal entities.

³⁵ The SW TDUs support the arguments raised and position taken by DOE/SWPA that NERC lacks authority to impose a monetary fine on federal agencies for violations of a Reliability Standard.

³⁶ Interior Comments at 4.

³⁷ *Id.* at 4-5.

³⁸ *See id.* at 6.

authority to levy a fine against a federal agency is not sufficiently clear to qualify as a clear and unequivocal waiver of immunity.³⁹

27. Mid-West ECA, NRECA and the other federal power customer commenters support DOE/SWPA's position, and make similar arguments with respect to statutory construction.⁴⁰ These commenters reject NERC's position that its authority to impose a monetary penalty derives from FPA section 215 and that it is not limited in scope by the strictures of FPA section 316A.⁴¹

28. Mid-West ECA and SE FPC maintain that the Commission "delegated" penalty authority to NERC as the ERO, and NERC's "delegated authority" to impose a penalty cannot exceed the Commission's own authority. They contend that the Commission's authority, in turn, to levy or collect a fine is limited by FPA section 316A.⁴² In a similar vein, NRECA and Mid-West ECA contend that, because FPA section 215 provides that a penalty imposed by the ERO is subject to Commission review, the Commission – not the ERO – "is the entity with the authority to enforce the ERO's 'imposition of penalties.'"⁴³ Thus, they conclude that the provisions of section 316A that constrain the Commission's enforcement authority also constrain the ERO's sanctioning authority.

29. Mid-West ECA and NRECA argue that the FPA provides no clear and unequivocally expressed waiver of congressional intent to make federal entities subject to all forms of enforcement under FPA section 215, because Congress could have easily modified section 316A to include such entities if it had intended that result, and failed to do so.⁴⁴ These commenters note that FPA section 316A was modified in other respects

³⁹ *Id.* at 7-10 (citing, *inter alia*, *Lane v. Pena*, 518 U.S. 187 (1996) (waiver of sovereign immunity must be unequivocally expressed and will not be implied, and any waiver that would require payments from the federal treasury "must extend unambiguously to such claims"))).

⁴⁰ *See generally*, Mid-West ECA; NRECA; SE FPC; SW PRA.

⁴¹ Mid-West ECA at 4-7; *see also* NRECA at 4-8. These entities make clear that they do not contest the Commission's prior determination that federal entities must comply with mandatory Reliability Standards; they limit their protest to whether penalties can be imposed for non-compliance. *See* SE FPC at 4; NRECA at 3.

⁴² Mid-West ECA at 6; SE FPC at 4-6.

⁴³ Mid-West ECA at 5; NRECA at 5.

⁴⁴ Mid-West ECA at 8; NRECA at 6-7.

when FPA section 215 was added, as were other provisions of the FPA, to extend coverage of certain provisions to federal entities or to other “201(f)” entities. Congress’s failure to do so for FPA section 316A, according to these commenters, demonstrates the lack of any clear statement of congressional intent to give the Commission authority to impose a monetary fine on entities that are not defined as “persons” under the FPA, for violation of a mandatory Reliability Standard under FPA section 215.

30. Mid-West ECA and NRECA point out the distinction between the language of the FPA in which NERC purports to find a waiver of immunity, and other cases in which sovereign immunity was deemed to have been explicitly waived. Mid-West ECA notes that FPA section 316A does not contain waiver language comparable to that in *United States v. Tenn. Air Pollution Control Bd.*, 185 F.3d 529 at 534-35 (6th Cir. 1999), in which the court found that the Clean Air Act provides an explicit waiver of sovereign immunity for federal entities.⁴⁵ Mid-West ECA argues that the legislative history cited by NERC is not only unpersuasive, but also maintains that any reliance on legislative history to gauge congressional intent in a case involving the imposition of a monetary penalty on a federal agency is misplaced.⁴⁶

31. NRECA and Mid-West ECA also note that federal entities may not have the funds available to pay monetary penalties, and therefore may be prohibited under the terms of the Anti-Deficiency Act from making such payments “[e]xcept to the extent that [their] appropriations allow.”⁴⁷ Among other concerns, they maintain that this could put the Commission in the position of reviewing a federal entity’s judgment regarding its authority to pay a NERC penalty under its enabling statutes and the terms of the Anti-Deficiency Act.

32. Mid-West ECA and NRECA suggest that SWPA and other federal Power Marketing Administrations may also have difficulty recovering any penalty costs from their preference customers. These commenters draw a distinction between a pass-through of fines by a federal entity to its preference customers, and pass-through of fines by an RTO or ISO to its members, since the Commission has the authority under FPA section 205 to oversee the apportionment of fines among the RTO or ISO members but has no such authority to oversee the apportionment of fines among a federal Power

⁴⁵ Mid-West ECA at 10-12.

⁴⁶ *Id.* at 11-12 (citing *Lane v. Pena*, *supra* at n. 39 and *United States v. Nordic Village, Inc.*, 502 U.S. 30 (1992), on the need for an explicit and unambiguous waiver of sovereign immunity).

⁴⁷ *Id.* at 13-14; NRECA at 8-9.

Marketing Administration's preference customers.⁴⁸ These commenters suggest that since the Commission's policy is to deny requests to pass-through penalty costs to customers without a case-by-case section 205 review, SWPA and other federal agencies would presumably be unable to pass through penalty costs to their preference customers at all.⁴⁹

33. These commenters also argue that the pass-through of costs to preference customers should be foreclosed based on other policy concerns. Mid-West ECA notes that such a pass-through could "potentially frustrate congressional intent" under the Flood Control Act of 1944, which contemplates the sale of excess power from certain federal projects at the "lowest possible rates" to identified "preference" customers.⁵⁰

34. Moreover, these commenters argue that the pass through of such costs eliminates any incentive the entity has to comply with applicable Reliability Standards, and draw the comparison to an automatic or generic pass-through of penalty costs by RTOs and ISOs, which the Commission has determined is inappropriate.⁵¹ Similarly, SE FPC argues that fining a federal agency has little deterrent value since the fine would be little more than an administrative burden.⁵² Other commenters argue that regardless of whether penalty costs are passed through to customers or recovered through taxpayer-funded appropriations, the federal agency subject to the violation has no real incentive to avoid such fines or to develop more robust compliance programs.⁵³

35. NERC submitted a limited set of comments in response to the policy arguments raised by DOE/SWPA as part of its Application for Review. NERC stresses that its enforcement regime is an integral part of ensuring the reliability of the Bulk-Power System, and that its penalty authority must apply to all users, owners and operators of the Bulk-Power System with equal force. NERC argues that the potential difficulty in the collection of a penalty against a federal entity, due to its limited funding sources, should not prevent the Commission from authorizing the imposition of a monetary penalty at a level consistent with all other users, owners, and operators of the Bulk-Power System.

⁴⁸ See Mid-West ECA at 15.

⁴⁹ *Id.*; NRECA at 10.

⁵⁰ See, e.g., Mid-West ECA at 16.

⁵¹ *Id.* at 17.

⁵² SE FPC at 7.

⁵³ See NRECA at 10-11.

Similarly, NERC notes that the possibility of the pass-through of fines to customers, and the associated potential to dilute the deterrent effect of a monetary penalty, was not seen as a bar to the imposition of such penalties for other (non-federal) non-profit and customer-owned entities.

V. Discussion

A. Procedural Matters

36. The notices of intervention and unopposed, timely-filed motions to intervene are hereby granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure,⁵⁴ and all timely-filed comments are accepted.

B. Commission Determination

37. Based on the reasons discussed below, we conclude that the plain language of FPA section 215 explicitly conveys authority to assess a monetary penalty against a federal entity that is a user, owner, or operator of the Bulk-Power System for violations of a mandatory Reliability Standard. We reject arguments that the grant of enforcement authority under FPA section 215 is limited by the scope of the Commission's general civil penalty authority over federal entities, as set out in FPA section 316A, and instead find that the separate grant of penalty authority over federal entities under FPA section 215 is explicit and unambiguous. We find that the ERO, as well as the Commission, is imbued with the penalty authority granted under FPA section 215(e).

38. We also find no policy basis for exempting federal agencies from the assessment of monetary penalties under section 215, and note that any such exemption would result in a significant gap in NERC's enforcement regime. Finally, we conclude that the statute does not preclude the assessment of penalties against federal agencies, given our findings that Congress's grant of authority to impose a monetary penalty on federal agencies under FPA section 215 is clear and unambiguous.

1. The Plain Language of FPA Section 215 Explicitly Conveys Authority to Impose a Monetary Penalty on Federal Entities for Violation of a Reliability Standard

39. Section 215 of the FPA explicitly states that federal entities, as FPA section 201(f) entities, are subject to penalties for violation of mandatory Reliability Standards. Thus, sovereign immunity is unequivocally waived under the statute. The

⁵⁴ 18 C.F.R. § 385.214 (2011).

Commission has already found, and no party to this proceeding disputes, that FPA section 215 is applicable to federal entities, as set out in FPA section 215(b):

JURISDICTION AND APPLICABILITY. -- (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 this section*. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.⁵⁵

Notably, this provision explicitly states that jurisdiction over the defined entities, *i.e.*, all users, owners, and operators of the Bulk-Power System, including “201(f) entities,” extends to *enforcing compliance* with FPA section 215.⁵⁶ SWPA is a user, owner or operator of the Bulk-Power System, which is evidenced by SWPA’s registration as a transmission operator and balancing authority, among other registered functions, in the NERC Compliance Registry.⁵⁷

40. Enforcement of compliance with the FPA section 215 requirements is, in turn, addressed by FPA section 215(e), which authorizes the imposition of a penalty by the ERO (NERC) or by the Commission. Under FPA section 215(e)(1) and (2), “[t]he ERO may impose . . . a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard,” subject to filing with and “review by the Commission, on its own motion or on application by the user, owner or operator that is the subject of the penalty.”⁵⁸ Under FPA subsection 215(e)(3), the Commission may order compliance with a Reliability Standard and may itself impose a penalty as follows:

⁵⁵ 16 U.S.C. § 824o(b)(1) (emphasis added). FPA section 201(f) in turn provides: “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.” 16 U.S.C. § 824(f).

⁵⁶ Compliance with FPA section 215 includes compliance with the last sentence of section 215(b)(1), quoted above, that all users, owners and operators of the Bulk-Power System must comply with Reliability Standards approved by the Commission.

⁵⁷ See Order No. 693, FERC Stats. and Regs. ¶ 31,242 at PP 92-96.

⁵⁸ 16 U.S.C. § 824o(e)(1), (2).

On its own motion or upon complaint, the Commission . . . *may impose a penalty against a user, owner or operator of the bulk-power system* if the Commission finds . . . that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.⁵⁹

Thus, FPA section 215(e)(1) unambiguously authorizes the ERO, subject to the specific review process required in FPA section 215(e)(2), to assess a penalty against a user, owner or operator of the Bulk-Power System, which is defined by the statute to include federal entities. Likewise, the Commission is unequivocally authorized to assess penalties pursuant to section 215(e)(3) of the FPA.

41. The enforcement provisions of FPA section 215 do not merely contemplate the imposition of penalties, but rely on the imposition of penalties as one of the primary mechanisms of section 215's enforcement regime. The only restrictions on penalties imposed under FPA section 215(e), other than the language providing for Commission review of NERC's assessment of a penalty, are found in subsection 215(e)(6). That subsection requires that "[a]ny 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."⁶⁰ The explicit grant of jurisdiction under FPA section 215 over federal entities for purposes of "enforcing compliance," together with an enforcement regime that features the authority to impose penalties without any exemption or limitation for governmental entities, demonstrates a clear statutory intent that federal entities be subject to monetary penalties for violations of a Reliability Standard under FPA section 215.

42. Accordingly, we conclude that section 215 of the FPA provides an unambiguous grant of authority to the Commission and the ERO to assess monetary penalties against federal entities and, as explained below, this unambiguous authority refutes any claims of sovereign immunity raised by DOE/SWPA.

⁵⁹ 16 U.S.C. § 824o(e)(3) (emphasis added).

⁶⁰ 16 U.S.C. § 824o(e)(6).

2. FPA Section 215's Grant of Enforcement Jurisdiction Over Federal Entities is not Affected or Rendered Ambiguous by FPA Section 316A

43. While DOE/SWPA and certain commenters rely on a variety of doctrines and rules of statutory construction to interpret the scope of the ERO's and Commission's authority to impose or otherwise approve the imposition of a monetary penalty on a federal entity, ultimately their arguments hinge on the relationship between FPA section 215, including its jurisdictional and enforcement provisions, and FPA section 316A. Based on the interplay of FPA section 316A with FPA section 215, these commenters argue that there has been no clear statement or explicit grant of authority to impose a monetary penalty on a federal agency, or that the grant of such authority is not explicit enough to qualify as a waiver of sovereign immunity. We reject these commenters' characterization of FPA section 316A and its relationship to FPA section 215 in its entirety.

44. DOE/SWPA argue that the ERO's and Commission's authority to impose a monetary or civil penalty derives not from FPA section 215(e), which they characterize as a "procedural" provision, but from FPA section 316A, which provides as follows:

(b) Civil Penalties – Any person who violates any provision of part II [of the FPA] or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than \$1,000,000 for each day that such violation continues.⁶¹

45. We reject the notion that the ERO's or Commission's authority to impose a penalty for a violation of a Reliability Standard derives from the Commission's civil penalty authority set forth in FPA section 316A, rather than from the specific enforcement and penalty regime established by FPA section 215. DOE/SWPA claim that the penalty authority granted to NERC under FPA section 215(e) sets out procedural requirements only, and that any authority NERC has to impose a monetary penalty ultimately derives from the Commission's authority to impose a civil penalty under FPA section 316A. That argument is belied by the simple fact that FPA sections 215(e)(1) and (3), separate and apart from FPA section 316A, authorize the ERO and the Commission to impose a penalty for violation of an approved Reliability Standard. Moreover, section 316A does not mention the "ERO." When inserting section 215 into the FPA in the Energy Policy Act of 2005, Congress could have placed in pre-existing section 316A a reference to the ERO while amending section 316A in other respects, but did not do so.

⁶¹ 16 U.S.C. § 825o-1.

Based on the plain language of the statute, we conclude that NERC's authority to impose a penalty for violation of a Reliability Standard derives directly from FPA section 215 and not from the Commission's general civil penalty authority under FPA section 316A.

46. DOE/SWPA argue that FPA section 215 *cannot* be interpreted as an independent grant of penalty authority to NERC without creating the "strange anomaly" that NERC can impose a penalty for a section 215 violation without a monetary cap, while the Commission's penalty authority is capped at \$1,000,000 per day, per violation under FPA section 316A.⁶² However, as we have explained above, *both* the Commission's authority and NERC's authority derive from FPA section 215 and not from FPA section 316A.

47. In addition to the claim that FPA section 215(e) is merely procedural, DOE/SWPA point to certain differences between sections 316A and 215(e) that they claim "illustrate" why FPA section 215(e) does not "create independent penalty authority," none of which we find persuasive. DOE/SWPA note that FPA section 316A is entitled "civil penalties" and is included with the other remedial provisions of Part III of the FPA. First, we note that FPA section 215(e)'s title – Enforcement -- signals the grant of enforcement authority, which includes the authority to impose a penalty (although we do not agree that the title of either section is determinative). Nor can we agree that the placement of FPA section 215(e) with the rest of FPA section 215 is a compelling reason to question its effect as a grant of penalty authority. Quite the contrary, if the intent was to draw a distinction between the penalty authority of the Commission under FPA section 215 (which extends to all 201(f) entities, regardless of their status as a "person" as defined in the FPA) and its penalty authority under FPA section 316A, it would be logical that Congress would have added the new enforcement authority as part of FPA section 215 and not through changes to FPA section 316A.⁶³

⁶² See DOE/SWPA Application for Review at 7-8.

⁶³ Indeed, the fact that FPA section 215(e) provides that "any penalty imposed *under this section* shall bear a reasonable relation to the seriousness of the violation . . ." further shows that any intended penalties for section 215 violations be imposed under section 215 and not another section or part. Similarly, FPA section 215(c), which governs certification of the ERO, indicates that Congress intended FPA section 215 to be an independent source of penalty authority for violations of FPA section 215. Specifically, FPA section 215(c)(2)(C) requires the ERO to establish rules to "provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) . . ." 16 U.S.C. § 824o(c)(2)(C). See also Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 570 (finding that the type of penalty contemplated by FPA section 215 includes monetary penalties).

48. We further reject DOE/SWPA's claim that FPA section 215(e) fails as a grant of penalty authority because it does not contain a firm upper limit, unlike FPA section 316A. We disagree that FPA section 215(e) places "no real limits" on NERC's penalty authority, as all penalties assessed by NERC are "subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty," and all are required to bear a reasonable relation to the seriousness of the violation and to remedial steps taken by the potential recipient of the penalty, as set out in FPA section 215(e)(6).⁶⁴

49. We reject DOE/SWPA and other commenters' position that the Commission's prior holdings on the applicability of the monetary limits set out in FPA section 316A to penalties imposed under FPA section 215(e) require a finding that FPA section 316A thereby limits the scope of FPA section 215.⁶⁵ In Order No. 672, the Commission found that penalties imposed under FPA section 215 are subject to the upper monetary cap on civil penalties as set out in FPA Section 316A,⁶⁶ but in no way suggested that FPA section 316A was the source of the Commission's (or NERC's) authority to impose a penalty for violations of a Reliability Standard under FPA section 215. In other words, the scope of the Commission's penalty authority under FPA section 215 is expressly set out under FPA section 215(b), and does not depend on the general penalty authority granted under FPA section 316A.

50. In pressing this argument, DOE/SWPA quote a statement in Order No. 672 that "[t]he Commission has the legal authority to impose a civil penalty pursuant to section 316A of the FPA, *which applies to a violation of any provision under Part II of the FPA, including section 215.*"⁶⁷ This statement was made in the context of the Commission's consideration elsewhere in Order No. 672 of whether a monetary penalty

⁶⁴ We further note the general rule of statutory construction that a specific statute is not to be controlled or nullified by a general one. *Morton v. Mancari*, 417 U.S. 535 (1974); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (the specific governs the general in statutory construction). In this case, section 215(e) governs the imposition of penalties for violations of a Reliability Standard, while FPA section 316A is a catch-all provision providing for the imposition of penalties for violations of Part II of the FPA that are not otherwise covered.

⁶⁵ *See* DOE/SWPA Comments at 9.

⁶⁶ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 575.

⁶⁷ DOE/SWPA at 9 (quoting Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 786 and supplying emphasis).

could be imposed *on the ERO or a Regional Entity*, to the extent they are not acting as users, owners, or operators of the Bulk-Power System, for violations under FPA section 215. Thus, by the statement the Commission recognized that, with regard to the ERO or a Regional Entity that is not acting as a user, owner or operator of the BPS, the penalty authority under consideration could not derive from FPA section 215, but had to be drawn from our general civil penalty authority under FPA section 316A.⁶⁸

51. We further reject the notion that the failure to modify FPA section 316A to expressly include federal entities has any relevance to the “qualitative scope” of our penalty authority under FPA section 215.⁶⁹ Commenters suggest that Congress would have altered FPA Section 316A by replacing the term “persons” with the term “electric utility,” already defined in the FPA, if it had intended to allow for the imposition of monetary penalties against federal entities that violate a Reliability Standard. We note, however, that the phrase “users, owners and operators of the Bulk-Power System” includes entities that are not “electric utilities.”⁷⁰ Moreover, such a change in section 316A would have given the Commission explicit authority to impose penalties on federal entities for violation of any other section of Part II of the FPA applicable to federal agencies (e.g., FPA section 222). By granting a separate penalty authority as part of FPA section 215, Congress limited federal entities’ new exposure to penalties pursuant to that section to a very specific area of responsibility, i.e., to violations of mandatory Reliability Standards and nothing further.⁷¹

⁶⁸ See Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 786 (“We disagree ... that the Commission’s ability to take action against the ERO or a Regional Entity is limited by section 215(e)(3)” because that provision, “which relates to Commission action against a user, owner or operator of the Bulk-Power System, is not relevant to our authority vis-à-vis the ERO or a Regional Entity.”).

⁶⁹ See Mid-West ECA at 8.

⁷⁰ For example, certain “reliability coordinators” and “interchange authorities” are registered by NERC as users, owners and operators of the Bulk-Power System but may not meet the statutory definition of “electric utility” set forth in section 3(22) of the FPA, 16 U.S.C. § 796(22).

⁷¹ Moreover, if Congress had intended to exclude federal entities such as SWPA from monetary penalties under FPA section 215, as certain commenters suggest, the simplest way of providing such an exemption would be to explicitly state that intention within FPA section 215. Instead, FPA section 215(b)(1) explicitly states that FPA section 215 applies to all users, owners and operators of the Bulk-Power System, including FPA section 201(f) entities, “for purposes of approving reliability standards

(continued...)

52. For the reasons stated above, we cannot find any support for the notion that FPA section 316A's limitations should override the plain language of FPA section 215 with respect to jurisdiction. Moreover, we reject the claim that the statutory language leaves any ambiguity as to the grant to the ERO and the Commission of penalty authority over federal entities under FPA section 215.

53. As commenters note, in cases which implicate sovereign immunity, courts have required that any waiver of the federal government's immunity "must be unequivocally expressed in statutory text and will not be implied."⁷² For the reasons discussed above, we conclude that the language of section 215 of the FPA constitutes an unambiguous waiver of sovereign immunity as well as a clear statement of congressional intent to give the Commission and the ERO, subject to the specific review process required in FPA section 215(e)(2), authority to impose monetary penalties on federal entities for a violation of a mandatory Reliability Standard. Based on the analysis set out above, we determine that the grant of authority to impose a penalty on a federal entity that is a user, owner or operator of the Bulk-Power System, has been unequivocally and unambiguously expressed in the statutory text of FPA section 215, and that it therefore meets these strict standards of statutory interpretation. We find no plausible interpretation of the language of FPA section 215(b) and 215(e) advanced in the record before us that would allow us to differentiate federal entities from any other user, owner or operator of the Bulk-Power

established under this section and enforcing compliance with this section." 16 U.S.C. § 824o(b)(1).

⁷² See, e.g., *Lane v. Pena*, 518 U.S. at 492-93; see also *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992); *U.S. v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529 (6th Cir. 1999) (finding a clear and effective waiver of immunity under the Clean Air Act, such that monetary fines could be imposed on a federal agency found to be in violation of the Act's requirements). An arguably less rigorous standard has been applied in cases involving the imposition of a penalty by one federal agency on another, i.e., whether there is a "clear statement" of congressional intent to authorize the imposition of such a penalty against a federal entity or agency. See, *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*, 2000 OLC LEXIS 20 (2000) (OLC RCRA Opinion); *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 1997 OLC LEXIS 29 (1997) (OLC found a sufficiently "clear statement" of congressional intent to allow EPA to assess civil penalties against federal agencies). We find that the requirements for waiver are met using the highest level of scrutiny, i.e., that waiver has been clearly and unambiguously expressed in the statutory text.

System with respect to our or the ERO's authority to undertake enforcement actions. Moreover, we are required to ensure under FPA section 215(e)(6) that the amount of any penalty bears a reasonable relation to the seriousness of the violation, which we cannot ensure if certain types of entities otherwise subject to 215 requirements are exempt from paying penalties at all.

3. Policy Implications of Imposing Monetary Penalties on Federal Entities under FPA section 215

54. We find no policy rationale to decline to impose monetary penalties on federal entities that are in violation of mandatory Reliability Standards. DOE/SWPA and other commenters essentially argue that the imposition of penalties will result in a waste of federal resources, and that the kinds of penalty incentives that may be required for ensuring compliance among private entities are not necessary in the case of federal agencies, given their accountability to Congress and the President. Other commenters argue that the imposition of penalties will not provide any meaningful incentive for compliance, given that the penalty amounts can be readily passed through to customers of the federal power agencies.

55. First, we find that any exemption of a large class of customers from the imposition of penalties for violations of a mandatory Reliability Standard would undermine NERC's enforcement regime, which is an integral part of ensuring the reliable operation of the Bulk-Power System.⁷³ Accordingly, we cannot agree that it would be a "waste" of federal resources for NERC to take the same kind and level of enforcement measures against federal entities as it takes for other non-federal users, owners and operators of the Bulk-Power System.

56. Nor can we find any reason to draw a distinction between federal agencies and other entities that may be able to pass section 215 fine amounts on to their customers or members, including RTOs, ISOs and publicly-owned entities.⁷⁴ We believe that,

⁷³ We note that the potential "gap" in the scope of NERC's FPA section 215 enforcement authority if federal entities are exempt from monetary penalties is quite substantial. *See* 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 37 (noting that exclusion of federal entities from the reliability provisions of the FPA would create significant gaps in an otherwise comprehensive program). Bonneville Power Administration alone owns and operates over 15,000 miles of transmission lines and markets about 30 percent of the electric power used in the Northwest.

⁷⁴ *See, e.g., North American Electric Reliability Corp.*, 134 FERC ¶ 61,209 (2011) (affirming an \$80,000 penalty assessed against Turlock Irrigation District), *reh'g denied*, 139 FERC ¶ 61,248 (2012).

regardless of their ability to pass penalty costs on to customers, federal entities such as SWPA still have a strong incentive to develop a culture of compliance if subject to monetary penalties, whether in response to congressional oversight or in response to the concerns of their preference customers.

57. Finally, we do not find it inconsistent with the Flood Control Act to require entities like SWPA to adhere to the same kinds of Reliability Standards and to face the same enforcement measures that are applicable to all other users, owners and operators of the Bulk-Power System, including any penalties for failure to comply. The Flood Control Act contemplates the preferential sale of low-cost hydroelectric power to publicly-owned wholesale customers like rural electric cooperatives and municipal utilities. That access to lower-cost power is not affected by a determination that federal agencies like the Power Marketing Administrations are subject to similar penalties as other users, owners, and operators of the Bulk-Power System if they fail to adhere to FPA section 215 requirements in delivering the hydroelectric power.

4. Sources for Payment of Penalty and Consistency with Anti-Deficiency Act Requirements

58. We find commenters' arguments under the Anti-Deficiency Act similarly unpersuasive. The Anti-Deficiency Act provides that an "officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."⁷⁵ We find that the imposition of a monetary penalty on federal agencies under FPA section 215 does not conflict with these requirements under the Anti-Deficiency Act.

59. First, we note that the federal agency involved in this case, SWPA, sells power to preference customers under the Flood Control Act and has itself suggested that it can pass on the cost of FPA section 215 penalties to its preference customers. Accordingly, at least in SWPA's case, there should be no conflict with the Anti-Deficiency Act's proscription against making an expenditure that exceeds amounts available to SWPA.

60. Assuming, however, that the cost of a monetary penalty under FPA section 215 could not be passed through to customers for at least some federal agencies, we still find no discernable conflict with the Anti-Deficiency Act or any other applicable

⁷⁵ 31 U.S.C. §1341(a)(1)(A).

appropriations law.⁷⁶ The Government Accountability Office has published a guide to Appropriations Law, which provides that when a waiver of sovereign immunity is clear and the agency has been found to be liable for a fine or penalty, the appropriation becomes available as a “necessary expense” if it is needed to cover an administratively imposed civil penalty or, if imposed by a court, as a permanent judgment appropriation.⁷⁷ Given our findings above with respect to NERC’s authority to impose a penalty on a federal agency and the clear waiver of any sovereign immunity claim, the funds needed to cover that penalty would be considered a “necessary expense” and any payment of such a fine would not result in a violation of the Anti-Deficiency Act.

The Commission orders:

The Notice of Penalty against SWPA, including the assessment of a \$19,500 penalty amount, is hereby approved and made effective on the date of issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁷⁶ See 31 U.S.C. § 1301(a), stating that appropriations shall only be applied to the objects for which the appropriations were made; 31 U.S.C. § 1341(a)(1)(A), stating that an agency official cannot spend funds in excess of appropriations.

⁷⁷ Government Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 3 Ed. Vol. 1, 4-144-45.