

133 FERC ¶ 61,214
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

North American Electric Reliability Corporation

Docket No. NP10-160-000

ORDER ON REVIEW OF NOTICE OF PENALTY

(Issued December 16, 2010)

1. On September 13, 2010, the North American Electric Reliability Corporation (NERC) submitted an Omnibus Notice of Penalty filing in the instant docket (Omnibus II filing), which included proposed zero dollar (\$0) penalties against the United States Army Corps of Engineers, Tulsa District (Corps-Tulsa District) for alleged violations of Reliability Standards, as determined by the Southwest Power Pool Regional Entity (SPP RE) and the Texas Reliability Entity, Inc. (Texas RE). On October 13, 2010, the Corps-Tulsa District filed a request for review of these Notices of Penalty, asking the Commission to (1) revisit and reverse its earlier determination that section 215 of the Federal Power Act (FPA) applies to federal agencies,¹ or, in the alternative, (2) affirmatively find that federal agencies are not subject to monetary penalties thereunder. On October 13, 2010, the Commission initiated this review of the Corps-Tulsa District's Notices of Penalty pursuant to section 215(e)(2) of the FPA² and section 39.7(e) of the Commission's regulations.³

2. In this Order, the Commission (1) permits the zero dollar penalties for which the Corps-Tulsa District sought review to take effect on the date of issuance of this order, (2) affirms its prior decision in the 2009 Jurisdictional Order that federal agencies are required to adhere to mandatory Reliability Standards adopted under FPA section 215,

¹ *North American Electric Reliability Corp.*, 129 FERC ¶ 61,033 (2009) (2009 Jurisdictional Order), *reh'g denied*, 130 FERC ¶ 61,002 (2010) (2010 Rehearing Order).

² 16 U.S.C. § 824o(e)(2) (2006).

³ 18 C.F.R. § 39.7(e) (2010).

and (3) finds that the question of whether federal entities are subject to monetary penalties for violations of a mandatory Reliability Standard need not be addressed in this proceeding.

I. Background

A. Notice of Penalty Process and Alleged Violations by USACE-Tulsa District

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 Bulk-Power System.⁴ Exercising this statutory authority, the Commission certified the North American Reliability Corporation (NERC) as the ERO⁵ and initially approved 83 Reliability Standards.⁶ NERC delegated to eight Regional Entities, including the Texas RE and the SPP RE, authority to enforce mandatory Reliability Standards.⁷

4. Users, owners, and operators of the Bulk-Power System are required to register with NERC.⁸ NERC's Compliance Registry identifies each entity subject to compliance with the approved Reliability Standards.⁹ NERC has developed a statement of Registry Criteria employed by NERC and the Regional Entities to determine which organizations

⁴ 16 U.S.C. § 824o(e).

⁵ *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).

⁶ *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).

⁷ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

⁸ 18 C.F.R. § 39.2(c).

⁹ The Corps-Tulsa District was registered on the NERC Compliance Registry as a Generator Owner in the Texas RE on June 28, 2007, and as a Generator Owner, Generator Operator, and Transmission Owner in the SPP RE on July 7, 2007.

should be registered.¹⁰ In cases where an entity is registered involuntarily by NERC, that entity has an opportunity to timely appeal its registration status in accordance with section 504 and Appendix 5 to NERC's Rules of Procedure.

5. NERC must file a Notice of Penalty with the Commission before a penalty assessment made by a Regional Entity or NERC for the violation of a Reliability Standard takes effect.¹¹ Each such penalty determination is subject to Commission review, 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.¹² In the absence of the filing of an application for review of a penalty or motion 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.

6. Pursuant to this process, NERC submitted a batch of Notices of Penalty on September 13, 2010. NERC's filing included two penalties against the Corps-Tulsa District, one involving fourteen violations of Reliability Standards alleged to have occurred in the SPP region¹³ and the other involving three violations alleged to have

¹⁰ The Commission accepted the NERC Registry Criteria in Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 93-95.

¹¹ *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).

¹² 16 U.S.C. § 824o(e)(2).

¹³ The violations in the SPP region relate to the following nine Reliability Standards: CIP-001-1 (requirements for procedures for the communication of information related to sabotage on certain critical infrastructure); EOP-004-1 (requirements for adoption of policies requiring prompt analysis of disturbances on the bulk electric system); FAC-008-1 (requirements for adoption of a facility ratings methodology); PRC-001-1 (requirements for notification of relay or equipment failures); PRC-004-1 (requirements for development of a corrective action plan for generator protection system misoperations); PRC-005-1 (requirements for protections system maintenance and testing programs); TOP-002-2 (procedures for use of uniform line identifiers in communications with certain entities); and VAR-002-1 (requirements for operating in automatic voltage control mode). *See* NERC Notice of Penalty Filing, Att. A.

occurred in the Texas RE region.¹⁴ To resolve these violations, the Corps-Tulsa District entered into an Expedited Disposition Agreement with each of SPP RE and Texas RE, in which the parties agreed that a zero dollar penalty would be assessed.¹⁵ Each Expedited Disposition Agreement states that the Corps-Tulsa District's acceptance of the agreement does not constitute a waiver of its right to challenge its registration status with NERC or to contest the Regional Entities', NERC's or the Commission's authority over the Corps-Tulsa District under FPA section 215. NERC reports that the Corps-Tulsa District has completed its mitigation plan for each violation.

B. 2009 Jurisdictional Order

7. In its 2009 Jurisdictional Order, the Commission addressed the jurisdictional question for which the Corps-Tulsa District now seeks reconsideration. That case involved another proposed zero dollar penalty against the Corps-Tulsa District for violation of a Reliability Standard. The Corps-Tulsa District did not seek review of the penalty. Rather, NERC requested that the Commission address the threshold question of whether a federal entity that uses, owns or operates the Bulk-Power System must comply with the mandatory Reliability Standards adopted under FPA section 215. NERC requested this ruling, in part, because the Corps-Tulsa District had previously raised questions about NERC's and the Texas RE's authority to require compliance with mandatory Reliability Standards under section 215 (though the Corps-Tulsa District did not challenge the specific violations in that case).

8. The Commission determined in its 2009 Jurisdictional Order that it not only has the authority to determine the scope of its jurisdiction under FPA section 215 as a matter of process, but that it also has the authority to require federal entities such as the Corps-Tulsa District to comply with mandatory Reliability Standards as adopted under FPA section 215. The Commission declined to address the question of whether federal entities are subject to monetary penalties for violations of Reliability Standards, finding that the penalty issue was "separate and distinct" from the core jurisdictional issue.¹⁶

¹⁴ The violations in the Texas RE region all relate to FAC-008-1 (requirements for development and inspection of a facility ratings methodology). *See* NERC Notice of Penalty Filing, Att. A.

¹⁵ The NERC Expedited Disposition Process is available for disposition of violations that (1) do not pose a serious risk to the reliability of the bulk electric system; (2) were discovered prior to July 3, 2008; and (3) have been fully mitigated.

¹⁶ 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 32.

9. In making this jurisdictional determination, the Commission first looked to the language in FPA section 215(b)(1), governing the Commission's authority under FPA section 215 to require compliance with approved Reliability Standards. That section states, in relevant part:

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 [section 215]. All users, owners and operators of the Bulk-Power System shall comply with reliability standards that take effect under this section.¹⁷

The Commission then turned to the referenced FPA section 201(f), which states that:

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.¹⁸

The Commission concluded that these provisions, taken together, convey Commission jurisdiction over the entities listed in FPA section 201(f), including federal entities, for purposes of FPA section 215 compliance.¹⁹ 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 federal or state entities that are otherwise exempt under FPA section 201(f).²⁰ The Commission also noted that, as a

¹⁷ 16 U.S.C. § 824o(b)(1).

¹⁸ 16 U.S.C. § 824(f).

¹⁹ 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 34.

²⁰ *Id.* P 35. Section 201(b)(2), as amended by the Energy Policy Act of 2005, which inserted section 215 into the FPA, states in relevant 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

(continued...)

practical matter, “excluding federal agencies [from section 215 compliance] would create a significant gap in the ERO’s and the Commission’s reliability oversight.”²¹

10. While a number of commenters asked the Commission to determine whether federal entities could be subject to monetary penalties under FPA section 215, the Commission declined to do so, noting that the case before it did not involve such a monetary penalty.

11. The Corps requested rehearing of the 2009 Jurisdictional Order, arguing, *inter alia*, that the Commission had erred in failing to address the Corps’ arguments with respect to sovereign immunity. On rehearing, the Commission rejected the Corps’ arguments as irrelevant, explaining the limits of its 2009 Jurisdictional Order:

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.²²

12. While the Commission noted that the Corps’ sovereign immunity arguments did not apply because the case did not involve a monetary penalty and because the case did not involve a suit against a federal agency by a third party, the Commission found that

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).

²¹ *Id.* P 34. The Commission also found significant support in the legislative history of FPA section 215 for its determination that federal entities were to be included in FPA section 215’s mandatory Reliability Standards requirements. The Commission found that the relevant history demonstrated Congress’ intent to apply the Reliability Standards to *all* users, owners and operators of the Bulk-Power System. As the Commission noted, FPA section 215 can be traced back to the Thomas amendment, the author of which explained that “mandatory reliability rules will apply to all users of the transmission grid. There are no loopholes. No one is exempt.” *Id.* P 36.

²² Rehearing Order, 130 FERC ¶ 61,002 at P 24.

the language of FPA section 215 was clear enough to effect an explicit waiver of sovereign immunity:

Even if . . . our ruling implicates sovereign immunity, it is clear that the same statutory provisions that establish jurisdiction also provide an explicit waiver of sovereign immunity.²³

II. Request for Review of Notice of Penalty

13. On October 13, 2010, the Corps-Tulsa District filed an Answer to NERC's Notices of Penalty, requesting review of the Notice of Penalty for the alleged violations against the Corps-Tulsa District. The Corps-Tulsa District did not challenge the underlying facts regarding the violations, or its status as a user, owner or operator of the Bulk-Power System.²⁴ Instead, the Corps-Tulsa District asked the Commission to reconsider and reverse its prior determination that FPA section 215 applies to federal agencies, or if it does not reverse that determination, conclude that federal agencies are not subject to monetary penalties for violations of the Reliability Standards.

14. On the applicability of FPA section 215 to federal agencies, the Corps-Tulsa District argues that federal agencies are in a fundamentally different position than private parties with respect to compliance. The Corps-Tulsa District maintains that its compliance with the Reliability Standards cannot be mandated by the Commission or NERC because the Corps-Tulsa District is dependent on Congressional appropriations for the funds required to achieve compliance. In addition, the Corps-Tulsa District argues that it may not have the ability to comply with the mandatory Reliability Standards due to the explicit restrictions of the Anti-Deficiency Act,²⁵ which prohibits making any expenditure in excess of or in advance of an appropriation or fund for that expenditure.

15. The Corps-Tulsa District also suggests that the Commission erred in its interpretation of the statute in its 2009 Jurisdictional Order. The Corps-Tulsa District asserts that nothing in FPA section 215 is sufficient to counter the blanket exemption for

²³ *Id.* P 26.

²⁴ The Corps-Tulsa District states in its Answer that the Corps is a federal agency involved in a wide range of public works in the United States, including providing services and support for dams, canals and flood protection. The Corps operates 75 hydropower plants within the U.S., which account for 3 percent of the nation's total electric capacity.

²⁵ 31 U.S.C. § 1341(a)(1) (2006).

federal agencies, as granted under FPA section 201(f), from the requirements of Part II of the FPA. The Corps-Tulsa District argues that, at the very least, the language of FPA section 215 establishes a statutory ambiguity that must be resolved in favor of the United States under established notions of sovereign immunity.²⁶ The Corps-Tulsa District maintains that the doctrine of sovereign immunity applies in this instance because mandating compliance with the Reliability Standards could interfere with the Corps-Tulsa District's operation of its hydroelectric projects. Thus, it argues, the extension of the Reliability Standards to federal agencies invokes the protections of the sovereign immunity doctrine, which protections can only be waived explicitly.

16. On the issue of a federal entity's liability for monetary penalties under FPA section 215, the Corps-Tulsa District states that NERC's Omnibus II filing presumes throughout that NERC has the authority to impose such a penalty. The Corps-Tulsa District asserts that it, like other federal entities, is not subject to civil monetary penalties under FPA section 316A under a "plain reading" of that provision. While the Corps-Tulsa District acknowledges that FPA section 215(e) gives the ERO authority to impose a penalty on a user, owner or operator of the Bulk-Power System for a violation of a Reliability Standard, it argues that the provision's failure to define the term "penalty" creates an ambiguity. The Corps-Tulsa District argues that, based on the requirements of strict construction for penal statutes, which should be even more strictly applied in cases involving an assessment of a monetary penalty against the United States, the ambiguity must be resolved in favor of the government. Finally, the Corps-Tulsa District asserts that sovereign immunity protections are properly invoked where an enforcement action could result in the Commission ordering the Corps-Tulsa District to pay a monetary penalty to NERC, which the Corp-Tulsa District characterizes as a private entity.

A. Order Initiating Review, Motions to Intervene and Comments

17. On October 13, 2010, in response to the Corps-Tulsa District's October 13, 2010 request, the Commission issued an Order Initiating Review of Notice of Penalty for the Corps-Tulsa District penalty filings.²⁷ The Commission established a filing deadline of November 2, 2010 for answers, interventions, and comments.

18. Timely motions to intervene were filed by the SERC Reliability Corporation (SERC), Mid-West Electric Consumers Association (Mid-West Consumers), the Western Electric Coordination Council (WECC), the SPP RE, Texas RE, Reliability First Corporation (RFC), and the Southwest Power Resources Association (SPRA). Two

²⁶ Corps-Tulsa District Answer at 2 (citing, *inter alia*, *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999)).

²⁷ *North American Electric Reliability Corp.*, 133 FERC ¶ 61,037 (2010).

federal agencies, the Department of Energy (DOE) and the Department of the Interior (Interior), filed notices of intervention and comments. The REs/NERC filed an answer to address the DOE and Interior comments.

19. NERC filed an Answer jointly with SPP RE and Texas RE (collectively, the REs/NERC) in opposition to both the request for reconsideration of the jurisdictional issue and the request for a ruling on the imposition of monetary penalties on a federal entity under FPA section 215. RFC filed comments largely in support of the Joint Answer filed by the REs/NERC, and SPRA filed limited comments seeking deferral of any ruling on the imposition of a monetary penalty on federal entities. DOE and Interior filed Comments in partial support of the Corps-Tulsa District's requests. Neither DOE nor Interior support the Corps-Tulsa District's request for reconsideration of the Commission's ruling that federal entities must comply with the mandatory Reliability Standards, but both agencies agree with the Corps-Tulsa District that no monetary penalties can be imposed on federal entities for violations of Reliability Standards.

20. In their Joint Answer, the REs/NERC ask the Commission to reject the Corps-Tulsa District's request for reconsideration of the Commission's determination that federal entities registered as users, owners and operators of the Bulk-Power System must comply with FPA section 215's mandatory Reliability Standards. The REs/NERC recommend that the Commission decline to address whether a monetary penalty can be assessed against a federal entity, as no monetary penalty is proposed in this case. If the Commission decides to address the issue, however, the REs/NERC argue that the Commission should find that it does have the authority to impose such a penalty under its reasoning in the 2009 Jurisdictional Order and Order on Rehearing.

21. The REs/NERC acknowledge that the Corps-Tulsa District's failure to appeal the Commission's prior order in NP09-26-000 may not preclude its current request for reconsideration as an impermissible collateral attack, because the requested review relates to the Commission's jurisdiction and authority. The REs/NERC assert, however, that the Commission's analysis in the 2009 Jurisdictional Order was correct and therefore cannot be reversed. The REs/NERC point out that the Commission correctly analyzed the language of FPA sections 215(b)(1), 201(f) and 201(b)(2) as being determinative, explicitly requiring that all federal agencies that are users, owners, or operators of the Bulk-Power System must comply with mandatory Reliability Standards adopted under FPA section 215. The REs/NERC assert that the Corps-Tulsa District fails to establish through textual analysis, rather than bald assertion, that any ambiguity exists with respect to the applicability of FPA section 215 to federal entities. The REs/NERC note that the legislative history of FPA section 215 further establishes Congress' clear intent to bring federal entities within its scope, as the Commission explained in the 2009 Jurisdictional Order.

22. The REs/NERC further argue that the question of whether federal entities are subject to penalties for a violation of the Reliability Standards has not been presented

under the facts of this case, and should not be addressed in this proceeding. If the Commission chooses to rule on that issue in this proceeding, however, the REs/NERC argue that the Commission should find that federal entities such as the Corps-Tulsa District are subject to the assessment of monetary penalties under the Commission's reasoning in the 2009 Jurisdictional Order.

23. The REs/NERC argue that FPA sections 215(b)(1), 201(f) and 215(e) are not ambiguous, and that the Corps-Tulsa District has not raised a credible question about the statute's meaning other than to note that the term "penalty" is not defined. The REs/NERC argue that the term does not require a separate definition, as it has a commonly-understood meaning which includes "the assessment of an amount of money for a violation or a failure to fulfill an obligation created by law."²⁸

24. The REs/NERC assert that the Corps-Tulsa District's arguments under FPA section 316A are inapplicable, as that section governs the Commission's (not the ERO's) authority to assess civil monetary penalties for violation of subchapter II of the FPA. The REs/NERC further argue that the Corps-Tulsa District's sovereign immunity arguments are irrelevant, and ignore the fact that the relevant provisions of FPA section 215 are clear regarding the grant of authority, including enforcement authority, over all users, owners and operators of the Bulk-Power System.

25. Finally, the REs/NERC note that any potential inability to pay an assessed penalty due to the restrictions of the Anti-Deficiency Act has no bearing on the ERO's *authority* to assess such a penalty. The REs/NERC assert that the Corps-Tulsa District has overstated the potential conflict with the Anti-Deficiency Act, because that Act merely requires 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," not that a federal entity is precluded from authorizing *any* expenditure without express authorization from Congress, as the Corps-Tulsa District avers.²⁹ The REs/NERC assert that the Corps-Tulsa District could avoid the potential problem under the Anti-Deficiency Act by making a timely request that funds be budgeted and appropriated to cover any penalty incurred.

26. RFC agrees with the REs/NERC that the Commission's reasoning in the 2009 Jurisdictional Order was and remains sound. RFC further argues that the Commission's authority to impose a monetary penalty on federal entities "logically follows" from its findings on the applicability of FPA section 215 to federal entities generally.

²⁸ Joint Answer at 10-11.

²⁹ *Id.* at 12 (citing 31 U.S.C. § 1341(a)(1)(A)).

27. SPRA filed limited Comments advocating that the Commission decline to rule on the question of its authority to impose a monetary penalty on federal entities until a monetary penalty has actually been proposed. SPRA further asks that the Commission provide sufficient notice and time for the affected parties to intervene and comment on the issue if and when it is squarely presented to the Commission.

28. Both DOE and Interior agree with the Commission's conclusion in the 2009 Jurisdictional Order that federal entities must comply with the mandatory Reliability Standards and do not support the Corps-Tulsa District's request to revisit and reverse that decision. However, both DOE and Interior argue that federal entities are not subject to monetary penalties for violations of Reliability Standards. DOE points to the limitations in section 316A of the FPA, which it asserts "governs the imposition of monetary penalties to remedy violations of subsection II of the FPA."³⁰ DOE notes that FPA section 316A restricts monetary penalties to "persons" as defined under the FPA, which term does not include federal entities. DOE concludes that because this quantitative limitation of FPA section 316A applies to penalties imposed under FPA section 215, then its "qualitative limitations" (i.e. its exemption for federal entities) must also apply.

29. DOE argues that even if the Commission is not convinced of a clear exemption for federal entities precluding the imposition of monetary penalties by virtue of FPA section 316A, then it must find that the question of its authority to impose a monetary penalty against federal entities is ambiguous. DOE argues that principles of strict statutory construction must be applied, because of the penal nature of the sanction and because the monetary sanction is being assessed by one agency against another. DOE notes that in cases involving the imposition of a monetary penalty by one federal agency against another, the U.S. Department of Justice's Office of Legal Counsel (OLC) has determined that Congress must provide a "clear statement" of the intent to grant to such authority. DOE argues that no such clear statement exists here, where FPA section 215(e) merely refers to "penalties" without further elaboration.

30. Interior's arguments largely track those of DOE, although Interior formulates many of its arguments as a response to the 2010 Rehearing Order. Interior asserts that the Commission determined in that Order that sovereign immunity concepts did not apply or had been expressly waived by the applicable provisions of FPA section 215. Interior asserts that the Commission's analysis in the 2010 Rehearing Order is flawed, in that (1) it rests on policy arguments related to enforcement efficiency, which do not relate to the question of whether sovereign immunity has been expressly and unambiguously waived; (2) it failed to address FPA section 316 or 316A, which address the Commission's

³⁰ DOE Comments at 2.

authority to assess monetary penalties; and (3) the Commission failed to analyze the Anti-Deficiency Act.

III. Discussion

A. Procedural Matters

31. Notices of intervention and unopposed timely filed motions to intervene are granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure.³¹ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority.³² We are not persuaded to accept the REs/NERC's answer to certain parties' comments, and therefore reject it.

B. Commission Determination

32. We affirm that federal entities such as the Corps-Tulsa District that use, own, or operate the Bulk-Power System must comply with mandatory Reliability Standards pursuant to section 215 of the FPA. We find no error in our analysis of the statutory language when we ruled on this issue in the 2009 Jurisdictional Order, and are not persuaded by any of the arguments raised by the Corps-Tulsa District in seeking reconsideration of that ruling.

33. The Corps-Tulsa District's arguments on the potential lack of funds available to achieve compliance with the mandatory Reliability Standards, and its dependence on Congressional appropriations, do not override Congress' explicit statutory directive on the scope of jurisdiction under FPA section 215. FPA section 215(b)(1) identifies the entities that are subject to the Commission's jurisdiction under FPA section 215 as "including but not limited to the entities described in section 201(f)." FPA section 201(f) in turn refers to "the United States, a State or any political subdivision of a state, . . . or any agency, authority, or instrumentality of any or more of the foregoing." As the Commission has explained in its 2009 Jurisdictional Order, FPA section 215(b)(1) explicitly provides jurisdiction over the entities described in 201(f), including federal entities such as the Corps-Tulsa District "for purposes of approving reliability standards established under this section [215] and enforcing compliance with this section [215]."³³ The Corps-Tulsa District fails to explain why Congress would include the broad

³¹ 18 C.F.R. § 385.214(2010).

³² 18 C.F.R. § 385.213(a)(2)(2010).

³³ 16 U.S.C. § 824o(b)(1).

reference to 201(f) entities in FPA section 215's jurisdictional provision if it did not intend to encompass federal entities, regardless of whether they are dependent to some degree on Congressional appropriations, to achieve compliance with FPA section 215 Reliability Standards.

34. The Corps-Tulsa District's arguments under the Anti-Deficiency Act are similarly unpersuasive. The Anti-Deficiency Act merely prohibits making an expenditure in excess of amounts available to cover that expenditure, providing 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."³⁴ That Act does not prevent the Corps-Tulsa District or any other federal entity from making expenditures as needed to comply with mandatory Reliability Standards if the funds are available from existing appropriations or other revenue sources. Moreover, even if a federal entity was unable to undertake a compliance effort due to the lack of sufficient appropriations within a given fiscal year, that entity could request the necessary funds as part of the budgeting and appropriations process going forward, and would be able to seek an extension from NERC or the Commission for completing a mitigation plan to achieve compliance in appropriate circumstances. In fact, we see no justification for failing to request such funds if they are needed to ensure reliable operation of Bulk-Power System facilities.

35. Finally, the Corps-Tulsa District's attempt to create a statutory ambiguity where none exists is untenable, rendering groundless its claims regarding the need to resolve that "ambiguity" in favor of the government under the doctrine of sovereign immunity.³⁵ The Corps-Tulsa District argues that the general exemption for federal entities granted under FPA section 201(f) supersedes the FPA section 215(b)(1) "general reference" to 201(f) entities. The Corps-Tulsa District fails to note, however, that in granting a general

³⁴ 31 U.S.C. § 1341(a)(1)(A).

³⁵ The Corps-Tulsa District cites to *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999), *et al.* in support of its assertion that waivers of sovereign immunity must be explicit and that any statutory ambiguity raising a question of immunity must be resolved in favor of the United States. *See* Corps-Tulsa District Answer at 2. Although we question whether the doctrine of sovereign immunity applies in this case at all as noted above, we do not take issue with the Corps-Tulsa District's characterization of the need for an explicit waiver of that immunity where the doctrine applies. *See, e.g., U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992). Instead, we find that even if the doctrine of sovereign immunity applies in this case, there has been an explicit and unambiguous waiver of that immunity sufficient to allow federal entities to be subject to FPA section 215 compliance requirements.

exemption for certain entities in FPA section 201(f), the language of that provision contemplates that the blanket exemption is limited by more specific language under the FPA:

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.*³⁶

There is simply no ambiguity generated by these provisions. Thus, even if the doctrine of sovereign immunity were considered applicable to a case where, as here, a zero dollar penalty is involved, we have already determined and continue to find that the relevant language of FPA section 215 is sufficiently clear to constitute an *explicit* waiver of sovereign immunity.³⁷

36. On the question of the Commission's authority to impose a monetary penalty on federal entities, we agree with the REs/NERC, RFC, and SPRA that the issue is not presented in this proceeding and need not be decided at this time. We are not persuaded by Interior's argument that NERC's discussion of potential aggravating factors examined as part of another federal entity's Notice of Penalty case equates to an "assumption" by NERC regarding its authority to impose a monetary penalty, or that NERC's filing otherwise warrants our review. Accordingly, the Commission will not address the issue of whether section 215 of the FPA allows the assessment of monetary penalties against a federal entity in the context of this proceeding.

The Commission orders:

(A) The Notices of Penalty assessed against the Corps-Tulsa District are hereby made effective on the date of issuance of this order; and

³⁶ 16 U.S.C. § 824(f) (emphasis added).

³⁷ See 2010 Rehearing Order, 130 FERC ¶ 61,002 at P 25-26.

(B) The Corps-Tulsa District's request for reconsideration and reversal of the Commission's previous decision that federal entities qualifying as users, owners or operators of the Bulk-Power System must comply with mandatory Reliability Standards is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.