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

Eric S. Morris Complainant)	Docket No. EL15-93-000
)	
)	
v.)	
)	
North American Electric Reliability Corporation SERC Reliability Corporation Respondents)	
)	
)	

**NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION AND SERC
RELIABILITY CORPORATION ANSWER TO COMPLAINT**

Pursuant to Rules 206 and 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure¹ and the Commission’s Notice of Complaint,² the North American Electric Reliability Corporation (“NERC”) and SERC Reliability Corporation (“SERC”) hereby submit this Answer to the Complaint filed by Eric S. Morris (“Complainant”) in the above-captioned docket (“Complaint”). The Complaint claims that NERC and SERC (together, the “Respondents”) violated the NERC Rules of Procedure (“ROP”) Appendix 4B Sanction Guidelines (“Sanction Guidelines”) in the NERC Full Notice of Penalty (“Notice of Penalty”) for the settlement between SERC and Entergy Services Inc.

¹ See, 18 C.F.R. §§ 385.206 and 385.213

² Notice of Complaint, Docket No. EL15-93-000 (Aug. 24, 2015).

(“Entergy”) filed with the Commission in Docket No. NP15-31-000.³ On August 28, 2015, the Commission stated that it would not further review the Notice of Penalty, on its own motion.⁴

As discussed below, the Commission should dismiss the Complaint because: (i) the Complaint exceeds the statutory authority of section 306 of the Federal Power Act (“FPA”), as Respondents are not licensees, transmitting utilities, or public utilities (*see infra*, Section III.A.); (ii) the Complainant lacks standing to initiate review of the Notice of Penalty and requests relief beyond the scope of section 215 of the FPA, as the Complainant is not the registered entity subject to the penalty (*see infra*, Section III.B.); (iii) the Complaint fails to meet the minimum requirements for a complaint, by reflecting unsubstantiated allegations (*see infra*, Section III.C.); (iv) the Notice of Penalty was consistent with section 215 of the FPA, the NERC ROP, and the Sanction Guidelines (*see infra*, Section III.D.); and (v) the Commission has indicated that the Notice of Penalty is consistent with applicable requirements by issuing a notice of no further review (*see infra*, Section III.E.).

I. EXECUTIVE SUMMARY

A. Summary of the Complaint.

The Complainant alleges that the Respondents failed to follow the Sanction Guidelines, by failing to clearly identify that an alternative frequency or duration was used in determining the penalty and providing no supporting rationale. The Complainant asks that the Notice of Penalty be withdrawn or denied, and resubmitted with either the clear identification of the alternative frequency and duration with rationale or with a settlement base amount “re-adjusted

³ *North American Electric Reliability Corporation submits a Notice of Penalty regarding Entergy Services, Inc.*, Docket No. NP15-31-000 (filed Jul. 30, 2015).

⁴ *North Am. Elec. Reliability Corp.*, 152 FERC ¶ 61,157 (2015).

into the multi-million dollar range.”⁵ The Complainant states that his allegation that “NERC and SERC have not clearly identified that an alternative frequency or duration was used and provide[d] no supporting rationale...is the one and only relevant fact about which [he is] complaining[,]”⁶ and admits that he has no documents that support the facts alleged in the Complaint.⁷

B. Summary of Respondents’ Answer.

In response to the Complaint, Respondents provide the following:

- i. The Complaint impermissibly exceeds the statutory authority of section 306 of the FPA because neither Respondent is a proper party to a complaint as neither Respondent is a licensee, transmitting utility, or public utility.⁸
- ii. The Complainant lacks standing to initiate review of the Notice of Penalty or obtain his requested relief, because under section 215 of the FPA and 18 C.F.R. §39.7(e), as emphasized in Order No. 672, the Commission may review notices of penalty “only on its own motion or upon application by the entity that is [the] subject of the penalty.”⁹
- iii. The Complaint fails to meet the minimum requirements applicable under the Commission’s Rules of Practice and Procedure by including no more than unsubstantiated allegations without “an adequate proffer of evidence including pertinent information and analysis to support its claims.”¹⁰

⁵ Complaint, at p. 3.

⁶ *Id.* at p. 2.

⁷ *Id.* at p. 3 (responding to Question 8).

⁸ *Citizens Energy Task Force v. Midwest Reliability Org., et al.*, 144 FERC ¶ 61,006, at P 38 (2013) (“*Citizens Energy Task Force*”).

⁹ *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, P 505 (2006) (describing potential review of a notice of penalty); and 18 C.F.R. § 39.7(e).

¹⁰ *See e.g., Ill. Muni. Elec. Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996); *Citizens Energy Task Force*, at P 39; *Californians for Renewable Energy, Inc., Michael E. Boyd; Robert M. Sarvey v. Pac. Gas and Elec. Co.*, 143 FERC ¶ 61,005, at P 2 (2013) (“2013 CARE Order”); and *Californians for Renewable Energy, Inc., (CARE) and Barbara Durkin v. Nat’l Grid, Cape Wind, and the Mass. Dep’t of Pub. Util.*, 137 FERC ¶ 61,113, at PP 2, 31-32 (2011) (“2011 CARE Order”).

- iv. The Notice of Penalty was consistent with section 215 of the FPA, the NERC ROP, and the Sanction Guidelines.
- v. The Commission has indicated the applied penalty satisfies section 215 of the FPA by issuing a notice of no further review for this settlement agreement.

Therefore, the Commission should dismiss the Complaint, consistent with the Commission's recent determination not to further review the Notice of Penalty.

II. NOTICES AND COMMUNICATIONS

Notices and communications with respect to this filing may be addressed to the following:¹¹

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¹¹ Persons to be included on the Commission's service list are identified by an asterisk. Respondents respectfully request a waiver of Rule 203 of the Commission's regulations, 18 C.F.R. § 385.203 (2015), to allow the inclusion of more than two persons on the service list in this proceeding.

III. ANSWER

A. The Complaint Should Be Dismissed Because the Complaint Exceeds the Statutory Authority of Section 306 of the FPA.

The Complaint exceeds the statutory authority of section 306 of the FPA.¹² While the Complaint was noticed under section 306 of the FPA,¹³ the Complainant is not “complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the [FPA]...” as required by the statute.¹⁴ NERC is the Electric Reliability Organization (“ERO”) under the FPA.¹⁵ SERC is a Regional Entity under the FPA.¹⁶ Respondents serve no other role, and (i) are not licensed under section 4 of the FPA,¹⁷ (ii) do not own, operate, or control facilities used for transmission,¹⁸ and (iii) do not own or operate facilities subject to the Commission’s jurisdiction.¹⁹ As a result, the Respondents fall outside the scope of section 306 of the FPA and are not proper parties to a complaint.

The Commission has previously dismissed a complaint against a Regional Entity because the complaint similarly exceeded the scope of section 306 of the FPA. In *Citizens Energy Task Force v. Midwest Reliability Org., et al.*, the Commission dismissed a complaint against a set of

¹² 16 U.S.C. § 825e; and *Citizens Energy Task Force*, at P 38.

¹³ See Notice of Complaint, Docket No. EL15-93-000 (Aug. 24, 2015).

¹⁴ 16 U.S.C. § 825e.

¹⁵ See *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062 (2006).

¹⁶ 16 U.S.C. § 824o(a)(7) and (e)(4). See also *N. Am. Elec. Reliability Corp.*, 119 FERC ¶ 61,060, order on reh’g, 120 FERC ¶ 61,260 (2007) (accepting a delegation agreement between NERC and SERC in order to designate SERC as a regional entity pursuant to section 215(e)(4) of the FPA).

¹⁷ 16 U.S.C. § 796(5).

¹⁸ 16 U.S.C. § 796(23).

¹⁹ 16 U.S.C. § 824(e).

respondents that included Midwest Reliability Organization (“MRO”) for failure to comply with section 306 of the FPA and the Commission’s Rules of Practice and Procedure.²⁰

With regard to MRO, the Commission determined:

...we conclude that MRO is not a proper party to the Complaint. Section 306 of the FPA permits complaints that allege ‘anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this Act. . . .’ MRO is a ‘regional entity’ pursuant to sections 215(a)(7) and (e)(4) of the FPA. MRO serves no other role under the FPA and is not a licensee, transmitting utility, or public utility. Thus, with respect to the allegations against MRO, the Complaint impermissibly exceeds the statutory authority of section 306 of the FPA. We therefore dismiss the Complaint against MRO.²¹

The Commission should dismiss the Complaint against the Respondents, consistent with the Commission’s decision in *Citizens Energy Task Force* and the statutory scope of section 306 of the FPA.

B. The Complaint Should Be Dismissed Because the Complainant Lacks Standing to Initiate Review of a Notice of Penalty and Requests Relief Beyond the Scope of Section 215 of the FPA and the Commission’s Regulations.

The Complainant lacks standing to initiate review of a notice of penalty in order to obtain his requested relief that the Notice of Penalty be withdrawn or denied, and resubmitted. Section 215 of the FPA and the Commission’s regulations on notices of penalty state that penalties “shall be 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 filed within 30 days after the date such notice is filed with the Commission. . . .”²² As noted in the Commission’s regulations, “[i]n the absence

²⁰ *Citizens Energy Task Force*, at PP 38-39.

²¹ *Id.* at P 38 (internal citations omitted).

²² 16 U.S.C. § 824o(e)(2); and 18 C.F.R. § 39.7(e)(1).

of the filing of an application for review or motion or other action by the Commission, the penalty shall be affirmed by operation of law upon the expiration of the thirty (30)-day period”²³ Order No. 672 emphasized that, “[t]he Commission may review a penalty, but only on its own motion or upon application by the entity that is [the] subject of the penalty.”²⁴ Moreover, interventions regarding notices of penalty are only permitted under the Commission’s regulations after review of a notice of penalty is appropriately initiated.²⁵

The Complainant admits his lack of standing to initiate review of the Notice of Penalty.²⁶ As a result, the Complainant seeks to indirectly accomplish through a complaint that which he lacks standing to accomplish under the Commission’s regulations. The Commission should dismiss the Complaint for the Complainant’s lack of standing to initiate review of the Notice of Penalty and request for relief beyond the scope of section 215 of the FPA and Commission regulations.

C. The Complaint Should Be Dismissed Because the Complaint Fails to Meet the Minimum Requirements of the FPA and the Commission’s Regulations.

The Complaint fails to meet the minimum requirements applicable to complaints under the Commission’s Rules of Practice and Procedure,²⁷ and reflects unsupported assertions that embody the Complainant’s misunderstanding of the Sanction Guidelines. Rule 203, for

²³ 18 C.F.R. § 39.7(e)(1).

²⁴ Order No. 672, at P 505 (emphasis added).

²⁵ 18 C.F.R. § 39.7(e)(4) (stating, “Any answer, intervention or comment to an application for review of a penalty imposed under this part must be filed within twenty (20) days *after the application is filed*, unless otherwise ordered by the Commission.”) (emphasis added).

²⁶ Complaint, at p. 3.

²⁷ 18 C.F.R. §§ 385.203 (regarding the contents of a pleading), 385.206 (regarding complaints), and 385.2101(c) (regarding ethical conduct).

example, requires pleadings to set forth the basis in fact and law for the positions taken.²⁸ Rule 206 provides that complaints must, among their elements, (i) clearly identify the alleged action or inaction claimed to violate applicable statutory or regulatory requirements, (ii) set forth the business, commercial, economic, or other issues presented by the action or inaction “as such relate to or affect the complainant,” and (iii) make a good faith effort to quantify the financial impact or burden created for the complainant due to the action or inaction.²⁹ Long-standing Commission precedent accordingly provides that “rather than bald allegations, [a complainant] must make an adequate proffer of evidence including pertinent information and analysis to support its claims.”³⁰ Rule 2101(c) requires persons appearing before the Commission to conform to the standards of ethical conduct required of practitioners before the Courts of the United States.³¹

The Complaint fails on all of these grounds. In addition to the substantive failures discussed in Section III.D. below, the Complaint fails to demonstrate any adverse effect of the alleged inactions and fails to proffer evidence to support the Complainant’s allegations. For example, the only business, commercial, economic, or other issue alleged in the Complaint as relating to or affecting the Complainant is a bare assertion that the alleged inaction undermines the Complainant’s belief in the regulatory system.³² The fact that section 215 of the FPA and

²⁸ 18 C.F.R. § 385.203(a)(7).

²⁹ 18 C.F.R. § 385.206(b)(1)-(4) (listing the full list of elements for a complaint) (Respondents do not waive objection to the Complaint’s failure to meet other elements of a properly pleaded complaint, but are simply highlighting these elements).

³⁰ *Ill. Muni. Elec. Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084 at 61,482 (1996); *Citizens Energy Task Force*, at PP 38-39; 2013 CARE Order; and 2011 CARE Order.

³¹ 18 C.F.R. § 385.2101 (c).

³² Complaint, at p. 2.

Commission regulations do not provide the Complainant with a right to seek review of notices of penalty (*supra*, Section III.B.), demonstrates that the Complaint does not further any procedural right or unprotected interest. In addition, the Complaint admits that the alleged inaction creates negligible financial impact for the Complainant (and would only have an impact of \$0.0179 for the Complainant’s household under his speculative and unsubstantiated calculation).³³

Moreover, the Complainant admits that he has no documents that support the alleged facts,³⁴ and states that his allegation that “NERC and SERC have not clearly identified that an alternative frequency or duration was used and provide[d] no supporting rationale...is the one and only relevant fact about which [he is] complaining.”³⁵ The offensive and unsupported language in the Complaint, such as the Complainant’s assertion that “regulated entity ICPs, NERC, and FERC OE” engage in “nonsense,”³⁶ is also contrary to the standards of ethical conduct.

As noted above, long-standing Commission precedent supports dismissal for failure to provide the required elements of a properly pleaded complaint. In *Citizens Energy Task Force*, for example, the Commission dismissed the complaint because it “fail[ed] to meet the requirements of Rule 206 because the Complaint does not explain how the averred facts support the alleged violations....”³⁷ The Commission also dismissed complaints by CALifornians for Renewable Energy, Inc. (“CARE”) in 2011 and 2013 for similar failure “to provide factual

³³ *Id.*

³⁴ *Id.* at p. 3.

³⁵ *Id.* at p. 2 and n. 6 (calling the remainder of either his pleading or the Commission’s requirements for a properly pleaded complaint “nonsense”).

³⁶ *Id.* See also, Comments of Eric S Morris, Docket No. NP15-31-000 (Aug. 28, 2015) (submitting abusive and offensive comments after the Commission’s determination not to further review the Notice of Penalty). See also Complaint, at p. 2 (including a reference to children and the Complainant’s asserted “fellow Hoosier Jared Fogle”).

³⁷ *Citizens Energy Task Force*, at P 39.

support, as opposed to unsubstantiated allegations, for the claims made in their complaint as required by Rule 206 of the Commission's Rules of Practice and Procedure, and ... fail[ure] to submit a pleading that meets the Commission's filing requirements contained in Rule 203.”³⁸ In the 2011 CARE Order, the Commission emphasized that it had “admonished parties that ‘rather than bald allegations, [complainants] must make an adequate proffer of evidence including pertinent information and analysis to support its claims.’ ...[T]he Commission reminds the complainants that, ...after a hearing, the Commission may disqualify and deny the privilege of appearing or practicing before it....”³⁹ For the same reasons as in *Citizens Energy Task Force*, the 2011 CARE Order, and the 2013 CARE Order, the Commission should dismiss the present Complaint.

D. The Complaint Should Be Dismissed Because the Notice of Penalty was Consistent with Section 215 of the FPA, the NERC ROP, and the Sanction Guidelines.

As demonstrated above, the Commission should dismiss the Complaint on procedural grounds. Nonetheless, the Complaint also fails on substantive grounds. The Notice of Penalty is consistent with the requirements of section 215 of the FPA, the NERC ROP, and the Sanction Guidelines. The Complainant alleges that NERC and SERC failed to follow section 3 of the Sanction Guidelines.⁴⁰ Under section 3, the Notice of Penalty should identify and provide a

³⁸ 2011 CARE Order, at P 2 (internal citations omitted). *Id.*, at P 32 (same). *See also*, 2013 CARE Order, at P 2 (stating, “In addition to the complaint being incoherent and disjunctive, complainants have failed to provide factual support, as required by Rule 206 of the Commission's Rules of Practice and Procedure, as opposed to unsubstantiated allegations, for the claims made in their complaint. Complainants have similarly failed to submit a pleading that meets the Commission's filing requirements contained in Rule 203.”).

³⁹ 2011 CARE Order, at P 34.

⁴⁰ Complaint, at p. 1 (stating, “The relevant fact is that NERC and SERC have not clearly identified that an alternative frequency or duration was used and provides no supporting rationale.... That is the one and only relevant fact about which I am complaining.”).

rationale if “NERC or the Regional Entity deems that alternative Penalty frequency or duration is warranted.”⁴¹ The Complainant focuses on section 3 to the exclusion of the remainder of the Sanction Guidelines and their broader context.

In particular, section 2.1 of the Sanction Guidelines supersedes section 3, providing that “[a]ny provisions within a settlement regarding Penalties or sanctions can supersede any corresponding Penalties or sanctions that would otherwise be determined pursuant to these Sanction Guidelines.”⁴² This provision reflects an understanding that negotiation of settlements and determination of penalties involve compromise and weighing multiple considerations. As FERC has stated, “discretion exists within NERC’s Sanction Guidelines, which the Commission has approved, because the guidelines ‘provide flexibility as to establishing the appropriate penalty within the range of applicable penalties.’”⁴³

Under the Sanction Guidelines, NERC evaluates the facts and circumstances of every violation to ensure that the penalty for each violation and group of violations is within a range of reasonableness that displays consistency. In addition, NERC reviews each settlement agreement or notice of confirmed violation, and provides a full and accurate record in each full notice of penalty. The Sanction Guidelines’ Adjustment Factors also allow NERC or the Regional Entity to reflect specific facts and circumstances material to each violation.⁴⁴ Furthermore, in addition to the usual Adjustment Factors applied in calculating penalties, the Sanction Guidelines provide

⁴¹ Sanction Guidelines section 3.

⁴² Sanction Guidelines section 2.1.

⁴³ *Guidance Order on Reliability Notices of Penalty*, 124 FERC ¶ 61,015 at P 7 (2008) quoting *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, 118 FERC ¶ 61,218 at P 225 (2007).

⁴⁴ Sanction Guidelines section 3.3: Application of Adjustment Factors, *see also* Sanction Guidelines section 1: Overview.

the Respondents the opportunity to examine other relevant factors they deem appropriate under the circumstances.⁴⁵ All of these factors were explained in the filed Notice of Penalty and its supporting documents, including the executed settlement agreement.⁴⁶ As a result, the Respondents clearly identified and supported the penalty calculation and all factors considered, consistent with the Sanction Guidelines.

As also required under the Sanction Guidelines, the Notice of Penalty reflects a penalty similar to those applied to comparable violations.⁴⁷ Since the mandatory and enforceable date of FAC-009-1 R1, NERC has filed approximately 100 different dispositions that included violations of this requirement. Depending on the facts and circumstances of the individual violations, the assessed penalties⁴⁸ for violations of FAC-009-1 R1 have ranged from approximately \$1,000 penalties for minimal risk noncompliance to a \$30,000 penalty for a serious or substantial risk violation.⁴⁹ The Commission has not chosen to review, nor has any registered entity or Regional Entity raised concerns on, the applied penalties in these filings.

⁴⁵ Sanction Guidelines section 3.3: Application of Adjustment Factors (stating, “NERC or the Regional Entity may also consider other factors it deems appropriate under the circumstances as long as their use is clearly identified and adequately justified. The effect of using these factors must be fully and clearly disclosed in the Notice of Penalty and supporting documents.”).

⁴⁶ See Full Notice of Penalty at pp. 10-11.

⁴⁷ Sanction Guidelines section 1 (providing that the Sanction Guidelines require there be “acceptable similarity in the degree and type of sanction for violations constituting comparable levels of threat to reliability of the Bulk Power System”). See also *Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672*, 123 FERC ¶ 61,046 (2008) (acknowledging the importance of consistent application of penalties). See also *id.* at P 11 (2008) (including, as the Commission discussed the general criteria it would use to determine whether to review specific Notices of Penalty on its own motion, “(3) the application of penalties in a reasonably consistent manner.”).

⁴⁸ NERC’s consideration of Confirmed Violations for the purposes of this comparison is restricted to those carrying a monetary penalty, therefore any \$0 monetary penalties for spreadsheet Notices of Penalty, Find, Fix, Track and Report issues, or Compliance Exceptions have been excluded from this discussion.

⁴⁹ See *N. Am. Elec. Reliability Corp. submits a Notice of Penalty regarding Sunflower Elec. Power Corp.*, Docket No. NP13-43-000 (filed Jul. 31, 2013).

A multi-million dollar penalty in this case, which was suggested in the Complaint, would be inconsistent with the Respondents' obligation to levy penalties that "bear a reasonable relation to the seriousness of the violation while also reflecting consideration of the other factors specified" in the Sanction Guidelines.⁵⁰

E. The Commission Has Indicated the Penalty Satisfies Section 215 of the FPA By Issuing a Notice of No Further Review.

On August 28, 2015, the Commission issued notice it would not further review on its own motion the Notice of Penalty at issue. The Commission's decision came after the Complaint had been filed and the Commission had notice of the Complainant's concerns. Through its decision not to review the penalty further, the Commission indicated that the Respondents' penalty calculation practices embodied in NP15-31-000 satisfy section 215 of the FPA and the Sanction Guidelines. At this point, the Complaint is effectively a collateral attack on the Commission's order stating that it would not further review the Notice of Penalty, on its own motion.⁵¹

⁵⁰ Sanction Guidelines section 2.3. *See also supra* n.49 (a settlement presenting similar facts and risk to the Notice of Penalty. Comparing the Notice of Penalty to the markedly similar situation presented in the 2013 notice of penalty for a single serious or substantial risk violation of FAC-009-1 R1 by Sunflower Electric Power Corporation ("Sunflower") in the Southwest Power Pool Regional Entity ("SPP RE") region. This comparison further underscores the consistency in ERO penalty determinations. In that proceeding, Sunflower, a Transmission Owner like Entergy, also self-reported a FAC-009-1 R1 violation. SPP RE determined that a penalty of \$30,000 was appropriate and bore a reasonable relation to the seriousness and duration of the violation. After review, NERC approved the settlement and penalty. The Commission issued notice that it would not further review, on its own motion, the notice of penalty. The similarity of the Sunflower settlement and the Notice of Penalty demonstrates consistent application of acceptable penalties across the ERO Enterprise.).

⁵¹ *See also, Comments of Eric S Morris*, Docket No. NP15-31-000 (Aug. 28, 2015).

IV. CONCLUSION

WHEREFORE, for the reasons stated above, Respondents respectfully request that the Commission dismiss the Complaint, consistent with the Commission's recent determination not to further review the Notice of Penalty.

Respectfully submitted,

/s/ Edwin G. Kichline

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this document upon all parties listed on the official service list compiled by the Secretary in the above-captioned proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Washington, D.C., this 10th day of September, 2015.

/s/ Leigh Anne Faugust

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