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Comment Date: 5 p.m. Eastern Time on November 9, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–25257 Filed 10–20–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL10–3–000]

Citizens Energy Corporation; Notice of Filing

October 14, 2009.

Take notice that on October 9, 2009, pursuant to Rule 207 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 385.207 (2006), Section 219 of the Federal Power Act, 16 U.S.C. 791a–828c, 824s, and Order No. 679, *Promoting Transmission Investment Through Pricing Reform,* Order No. 679, 116 FERC 61,057, *order on reh'g,* 117 FERC 61,345 (2006) (Order No. 679A) (Incentive Pricing Rule), Citizens Energy Corporation filed a Petition for Declaratory Order requesting Commission approval of two rate treatments for the Sunrise Powerlink Transmission Project, located in Imperial Valley, California.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on November 9, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–25255 Filed 10–20–09; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NP09–26–000]

North American Electric Reliability Corporation; Order Addressing Applicability of Section 215 of the Federal Power Act to Federal Entities

October 15, 2009.

1. On June 24, 2009, the North American Electric Reliability Corporation (NERC) filed a Notice of Penalty for a self-certified violation of a Commission-approved Reliability Standard by the U.S. Army Corps of Engineers (Corps)-Tulsa District. In that filing, NERC requested that the Commission issue a decision addressing the jurisdictional issue of whether, pursuant to section 215 of the Federal Power Act (FPA), federal entities that use, own, or operate the Bulk-Power System, such as the Corps-Tulsa District, must comply with mandatory Reliability Standards.

2. The Corps-Tulsa District did not seek Commission review of the Notice of Penalty, which took effect on the 31st day after filing pursuant to section 215(e)(2) of the FPA.[1] In this order, we affirm that, pursuant to section 215 of the FPA, the Corps-Tulsa District and other federal entities that use, own, or operate the Bulk-Power System must comply with mandatory Reliability Standards.

Background

A. Statutory Framework

3. Section 215 of the FPA authorizes the Commission to certify and oversee an electric reliability organization (ERO), which is responsible for developing and enforcing mandatory Reliability Standards that are applicable to owners, users, and operators of the Bulk-Power System.[2] Section 215(e) authorizes the ERO, as well as the Commission on its own motion or on complaint, to assess penalties for violation of Reliability Standards.[3] Exercising this statutory authority, the Commission certified NERC as the ERO[4] and initially approved 83 Reliability Standards.[5] Further, consistent with the statute, NERC as the ERO delegated to eight Regional Entities, including Texas Regional Entity, authority to, *inter alia,* enforce mandatory Reliability Standards.[6]

4. Users, owners, and operators of the Bulk-Power System are required to register with NERC.[7] NERC's Compliance Registry identifies all entities subject to compliance with the approved Reliability Standards. Further, NERC has developed a statement of Registry Criteria that is employed by NERC and the Regional Entities to determine which organizations should be registered because they are material to the reliability of the Bulk-Power System.[8] In cases where an entity is registered involuntarily by NERC, that entity has an opportunity to timely appeal its registration status in accordance with Rule 504 and Appendix 5 to NERC's Rules of Procedure.

5. NERC must file a Notice of Penalty with the Commission before a Regional Entity or NERC penalty assessment for the violation of a Reliability Standard takes effect.[9] Each penalty determination is subject to Commission review, on its own motion or by an application for review by the recipient

[1] 16 U.S.C. 824o(e)(2) (2006).

[2] 16 U.S.C. 824o(c) (2006).

[3] *Id.* § 824o(e).

[4] *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 ¶ 61,030, *order on compliance,* 118 FERC ¶ 61,190, order on reh'g, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc.* v. *FERC,* 554 F.3d 1342 (D.C. Cir., 2009).

[5] *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).

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

[7] 18 CFR 39.2(c) (2009).

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

[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 at P 506, *order on reh'g,* Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

of a penalty, within thirty days from the date NERC files the applicable Notice of Penalty.[10] 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.

B. Notice of Penalty

1. Corps-Tulsa District Violation

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

7. On June 24, 2009, NERC submitted a Notice of Penalty incorporating the findings and justifications set forth in a Notice of Confirmed Violation and Proposed Penalty or Sanction issued on February 20, 2008, by the Texas Regional Entity.[11] According to NERC, the Corps-Tulsa District self-certified on October 3, 2007, non-compliance with Reliability Standard PRC–005–1 Requirements R1.1 and R2 for its Denison Project Generator.[12] NERC states that, in the self-certification, the Corps-Tulsa District argued that, as a governmental entity, it was not required to comply with section 215 of the FPA. According to NERC, the Corps stated that, because of this uncertainty, it was not in a position to register with the Regional Entity, but that it would strive to meet the electric Reliability Standards established pursuant to section 215 of the FPA, subject to the availability of funds appropriated by Congress and project operation requirements.

8. On October 31, 2007, Texas Regional Entity issued an Initial Notice of Alleged Violation and, subsequently, a Notice of Alleged Violation and Proposed Penalty or Sanction (NAVAPS). NERC states that the Corps-Tulsa District responded to the NAVAPS on November 20, 2007, but did not make the required election of agreeing with/not contesting or contesting the alleged violations and/or penalty. Instead, according to NERC, the Corps-Tulsa District asserted that the self-reporting data it provided on October 3, 2007 to Texas Regional Entity was provided on a voluntary basis, that the submission did not constitute entity registration or a recognition of jurisdiction by the Corps, and that the Corps is not in a position to register with the Corps-Tulsa District's respective reliability organization. NERC states that the Corps-Tulsa District further stated that, in order ''[t]o avoid substantial changes to preliminary mitigation plans as a result of the [Corps'] forthcoming national policy, a mitigation plan for this non-compliance will not be submitted until this national policy has been completed,'' and that it will ''voluntarily conform to the reliability standards * * * [t]o the extent [its] current appropriations allow [it] to comply with the Act.'' [13]

9. NERC states that on January 17, 2008, Texas Regional Entity issued a letter to the Corps-Tulsa District directing it to submit an acceptable mitigation plan within ten days. The Corps-Tulsa District responded asserting that it was unclear whether it is subject to the requirements of section 215 of the FPA, but that it intended to make all reasonable efforts to voluntarily comply with the Reliability Standards while remaining within the funding level provided by Congress. The Corps-Tulsa District stated that it was awaiting receipt of national policy guidance regarding submission of mitigation plans, and projected that it would be able to provide a final regional mitigation plan by October 2008.

10. NERC states that on January 30, 2008, the Corps-Tulsa District submitted a mitigation plan to Texas Regional Entity but again reiterated its belief that section 215 of the FPA does not apply to the Corps-Tulsa District because it does not contain a clear, unequivocally expressed waiver of sovereign immunity, which, the Corps-Tulsa District argues, is necessary for any entity to exercise jurisdiction over a federal agency. The Corps-Tulsa District also reiterated that it intended to make all reasonable efforts to voluntarily comply with NERC Reliability Standards so long as it can do so within the funding levels authorized to it by Congress.

11. Texas Regional Entity proposed a zero dollar penalty. After NERC review, NERC submitted the Notice of Penalty to the Commission on June 24, 2009. The penalty became effective by operation of law on July 27, 2009, and the Commission issued notice to that effect.[14] The Commission noted that the Corps-Tulsa District has challenged the applicability of mandatory Reliability Standards under section 215 of the FPA, that the Commission has sought comments on the applicability of mandatory Reliability Standards to the U.S. Army Corps of Engineers and other federal agencies, and that it would address this issue separately.[15]

2. NERC Request for Decision on Jurisdictional Matter

12. In the Notice of Penalty, NERC states that the Corps-Tulsa District ''has challenged NERC's jurisdiction (and therefore that of the Commission) under section 215 of the FPA.'' [16] NERC, however, believes that the Corps-Tulsa District is subject to mandatory Reliability Standards under section 215 and requests that the Commission, regardless of whether the Corps-Tulsa District seeks Commission review of the Notice of Penalty, issue a decision on the scope of NERC's and the Commission's jurisdiction under section 215 of the FPA.

13. In support of its position, NERC states that section 215 (b)(1) of the FPA provides that ''[t]he 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.'' NERC argues that section 201(f) of the FPA describes agencies or instrumentalities of the United States and thus these entities are expressly included within the term ''users, owners, and operators of the bulk-power system'' in section 215 and made subject to the Commission's jurisdiction to both approve and enforce Reliability Standards.

14. In further support, NERC states that Congress, in the Energy Policy Act

[10] 16 U.S.C. 824o(e)(2) (2006).

[11] Texas Regional Entity is an independent division of the Electric Reliability Council of Texas, Inc. (ERCOT).

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

[13] NERC June 24, 2009 Filing, attachment b (COE–Tulsa District response to the Notice of Alleged Violation and Proposed Penalty and Sanction, November 20, 2007).

[14] *North American Electric Reliability Corp.,* 128 FERC ¶ 61,088 (2009).

[15] *Id.* at n.1.

[16] Notice of Penalty at 7.

of 2005,[17] made technical and conforming amendments to the FPA that were necessitated by the substantive changes to the FPA, including the addition of section 215. As part of these changes, FPA section 201(b), which establishes the applicability of Part II of the FPA, was amended to expressly add ''section 215'' to the list of sections of the FPA enumerated in section 201(b)(2) and to add ''[n]otwithstanding section 201(f)'' to the beginning of section 201(b)(2). NERC argues that the specific provisions of section 201(b)(2) override the general language of section 201(f), which excludes the United States from the application of Part II of the FPA. Thus, NERC argues that section 201(b)(2) provides further confirmation that the United States is subject to section 215 and to Commission jurisdiction both for carrying out the provisions of sections 215 and for enforcing those provisions.

15. Finally, NERC looks to the legislative history of the Energy Policy Act of 2005 and in particular, to the debate surrounding the Thomas amendment, which was adopted by the United States Senate in 2002 and which was a precursor to FPA section 215. NERC points to an explanation offered by Senator Thomas, the author of that amendment, stating ''[t]he new reliability organization will have enforcement powers with real teeth to ensure reliability. The amendment provides that mandatory reliability rules will apply to all users of the transmission grid. There are no loopholes. No one will be exempt.'' [18] NERC notes that Senator Bingaman also stated that ''[t]he reliability system needs to apply to all users.'' In addition, NERC quotes a later analysis of substantively similar reliability legislation by the General Accounting Office acknowledging the applicability of reliability rules to federal entities: ''All users, owners and operators of the bulk-power system would have to comply with the reliability standards. * * * We understand this would include both private entities and Federal entities (such as the Tennessee Valley Authority, the Bonneville Power Administration, and other federal marketing agencies), among others.'' [19]

Notice of Filing and Comments

16. Notice of NERC's June 24, 2009 filing was published in the **Federal Register**, 74 FR 32,153 (2009), with comments due on or before July 24, 2009. By notice published July 24, 2009, the comment period was extended to August 24, 2009.

17. The Corps filed a motion to intervene and comments regarding the applicability of Reliability Standards under section 215 of the FPA.

18. In addition, Western Electricity Coordinating Council (WECC), Tex-La Electric Cooperative of Texas, Inc., SERC Reliability Corporation, and the Midwest Reliability Organization filed motions to intervene. Mid-West Electric Consumers Association and the Southwestern Power Resources Association (collectively, Federal Power Customers), Texas Regional Entity, the National Rural Electric Cooperative Association (NRECA), the United States Department of Energy (DOE), ReliabilityFirst Corporation (ReliabilityFirst), the Southeastern Federal Power Customers, Inc. (Southeastern Customers) and the United States Department of the Interior (Interior) filed motions to intervene and comments. The Department of the Army, Office of the Assistant Secretary for Civil Works (Department of the Army), filed comments. The Southwest Transmission Dependent Utility Group (Southwest Utility Districts), Tri-State Generation and Transmission Association, Inc. (Tri-State) filed motions to intervene and protests.

19. On September 8, 2009, NERC filed reply comments. On September 23, 2009, the Corps filed an objection to NERC's motion for leave to file reply comments. On October 7, 2009, DOE filed a response to NERC's reply comments. On October 7, 2009, DOE also filed a motion for a stay to suspend enforcement activity only in those cases where a civil fine against a DOE entity is at issue.[20]

A. The Corps' Comments

20. The Corps states that it currently operates 75 hydropower plants nationwide and they account for three percent of the nation's total electrical capacity. The Corps states that the Denison powerhouse, the subject of NERC's Notice of Penalty, is operated as a peaking plant with approximately 37 percent plant annual capacity factor. The Corps also states that although there are two transmission lines going into the Denison switchyard, only the transmission line going into Texas is being utilized for transmission of power from the Denison powerhouse. The other line is energized up to an open breaker and associated disconnecting switch in the switchyard. According to the Corps, while it is possible to transmit power both into Oklahoma and Texas simultaneously using individual units, the two systems can never be connected together without resulting in equipment damage. A ''bus tie'' breaker is used to separate the two units for this type of operation. Therefore, the Corps asserts that this switchyard is treated as a radial transmission line with no critical connection to the ERCOT system. The Corps further asserts that since no power is ''wheeled'' through the switchyard to serve another load, NERC has not alleged that if the switchyard equipment fails, there will be an adverse effect on the reliability of the Bulk Power System.

21. The Corps contends that section 215 does not grant the Commission or NERC jurisdiction over Corps-owned hydroelectric generating facilities at its Civil Works projects.[21] The Corps adds that NERC's analysis is flawed in that the Corps has numerous hydropower projects and in order to respond to NERC's filing, which is essentially a request for declaratory judgment, the Corps must address the unique configurations of each of its facilities, although only one was involved in the Notice of Penalty. The Corps asserts that this violates its due process rights because only the Denison Generator Project has been cited. The Corps also asserts that Congress has not waived the Corps' sovereign immunity, and thus, NERC cannot issue monetary penalties against the Corps. Further, the Corps asserts that the legal dispute should be submitted to the Attorney General, not through the Commission's notice and comment process.

B. Other Comments and Protests

22. The Department of the Army, NRECA, Southwest Utility Districts, and Interior raise procedural issues. The Department of the Army states that the Department of Justice's Office of Legal Counsel, and not the Commission's adjudicatory process, is the proper forum for resolving the disagreement on implementation of section 215 of the FPA. NRECA states that it supports NERC's need for clarity regarding the scope of its jurisdiction under section 215 but does not believe a specific

[17] Energy Policy Act of 2005 (EPAct 2005), Pub. L. No 109–58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005).

[18] *Citing* Cong. Rec. 1874 (March 14, 2002).

[19] *Citing* General Accounting Office, *Draft Legislation Concerning an Electric Reliability Organization,* at 3, n.5 (March 18, 2003).

[20] The Commission recognizes that the DOE has a concern that the possibility of civil penalties for federal entities may cause litigation in a number of proceedings; however, given that the issue of civil fines is beyond the scope of this proceeding, we do not discuss DOE's motion here. *See infra* P 32.

[21] According to the Corps' January 31, 2007 Civil Works Information Paper, all 75 of its hydropower plants are Civil Works projects. U.S. Army Corps of Engineers, *Civil Works Program Statistics* (January 31, 2007) *available at http://140.194.76.129/cw/cecwb/GWiz07.pdf.*

penalty proceeding is appropriate for resolving this broad issue involving multiple federal agencies and one or more cabinet-level departments. NRECA states that it would be more appropriate for the Commission to temporarily suspend the procedural schedule in this docket and confer with the Corps and other federal agencies. Interior states that the proceeding should be stayed to allow for prompt interagency resolution of the relevant jurisdictional issues. Southwest Utility Districts state that the Commission should create a list of specific issues and seek supplemental briefing of the parties who do intervene in this proceeding and of federal agencies that do not intervene but could file subsequent comments.

23. Texas Regional Entity, WECC, and ReliabilityFirst agree with NERC's conclusion that federal entities such as the Corps-Tulsa District are subject to mandatory Reliability Standards under section 215 of the FPA, including its penalty and sanction provisions. Texas Regional Entity reiterates the information described in NERC's Notice of Penalty and requests that the Commission affirm jurisdiction by the Commission and NERC over the Corps-Tulsa District under section 215 of the FPA. ReliabilityFirst asserts that a determination that exempts federal entities from the Commission's section 215 jurisdiction would have far-reaching implications for the reliability of the Bulk-Power System. According to ReliabilityFirst, federal entities are an important part of the users, owners, and operators of the Bulk-Power System in ReliabilityFirst's region and they have an even more substantial presence in other regions. Thus, according to ReliabilityFirst, exempting federal entities from compliance with mandatory Reliability Standards would impair the reliability and the resilience of the electric grid.

24. ReliabilityFirst identifies a number of potential consequences if federal entities are not required to comply with mandatory Reliability Standards. It states that such an exclusion ''would provide a disincentive to the interaction between users, owners, and operators that is necessary to preserve reliability.'' [22] It adds that not only do some Reliability Standards depend on the timely exchange of information and directives between registered entities, but the effectiveness of some Reliability Standards, in particular the Critical Infrastructure Protection standards, depends in large part on system-wide compliance. ReliabilityFirst further states that several Reliability Standards require reliability coordinators to issue directives to other registered entities so that necessary steps are taken to preserve reliability. It adds that if a federal entity fulfilling a transmission operator or generator operator function is exempt from the Commission's jurisdiction and refuses to acknowledge this reliability coordinator authority in an emergency situation, cascading outages or other manifestations of severe grid instability could result. Similarly, according to ReliabilityFirst, failure to heed a reliability coordinator's directive to return the system to within an Interconnection Reliability Operating Limit could have disastrous results for system reliability. Likewise, the failure of generators to notify their corresponding transmission operators and balancing authorities if they experience a protective relay or equipment failure may prevent the transmission operator from learning of this failure in time to take appropriate corrective action, thereby endangering system reliability.

25. Finally, ReliabilityFirst asserts that the application of Reliability Standards to federal entities is meaningless without the power to enforce those Reliability Standards. ReliabilityFirst states that without enforcement power, compliance would be voluntary, the situation that existed before the passage of section 215 of the FPA. ReliabilityFirst urges the Commission to conclude that federal entities are subject to section 215, including the penalty and sanction provisions and states that this is the plain meaning of the statute and to decide otherwise would contravene the intent of Congress and undermine all of the Commission's efforts to ensure the reliability of the Bulk-Power System and prevent a cascading blackout.

26. DOE, Interior, Tri-State and Southeastern Customers argue that federal agencies must comply with NERC's Reliability Standards but should not be subject to monetary penalties. DOE argues that the plain language of section 215(b)(1) makes it clear that the Commission has 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.'' [23] DOE adds that the clear inclusion of federal entities described in section 201(f) is consistent with Congress's intent to ensure reliability nationwide. DOE further contends that section 201(b)(2) limits the Commission's section 215 jurisdiction over federal entities to the purposes described in section 215, providing:

> 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 the enforcement authorities of this Act with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section * * * 215 * * * shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

DOE argues that section 201(b)(2) supports Commission jurisdiction over DOE entities under section 215 and section 215 alone; it does not authorize the Commission to punish violations of section 215 by assessing criminal penalties or levying monetary civil fines under any other section of the FPA. DOE also asserts that the term ''penalty'' is not defined with sufficient clarity in section 215(e) to support the imposition of punitive monetary penalties on DOE entities under that section.

27. Tri-State argues that it is vital that all users, owners and operators, including federal agencies, obey the same mandatory Reliability Standards to ensure the reliability of the Bulk-Power System. Southeastern Customers state that the Commission has already determined that in the Southeast the Corps was appropriately registered as the transmission operator and the Corps did not challenge this application of the Reliability Standards.[24] Both Tri-State and Southeastern Customers, argue, however, that federal agencies should not be subject to monetary penalties for violation of Reliability Standards. Tri-State argues that federal agencies rely on appropriated funds from the U.S. Treasury to finance their statutory obligations and generally do not have the authority to pay civil penalties because they have limited discretion in allocating these funds. Tri-State adds that even where a court has found a claim to be valid under the law, the claim may not be paid unless Congress has enacted an appropriation available for that purpose.[25] In addition, both Tri-State and Southeastern Customers argue that the Anti-Deficiency Act prohibits a federal agency from paying monetary penalties because it may not spend or

[22] ReliabilityFirst Comments at 5.

[23] 16 U.S.C. 824o(b)(1) (2006).

[24] *Citing Southeastern Power Administration,* 125 FERC ¶ 61,294, at P 24 (2008).

[25] *Citing Office of Pers. Management* v. *Richmond,* 496 U.S. 414, 424–25 (1990); *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321 (1937).

obligate more capital than was appropriated through the congressional funding process for that particular purpose.[26] Likewise, Southwest Utility Districts argue that assessing a fine against a federal agency is much more complicated than assessing it against a private utility, in particular because the funds received by a federal agency are received with specific statutory instructions and limitations.

28. Federal Power Customers state that their members are purchasers of energy generated and/or marketed by federal agencies, specifically, the Corps, the U.S. Bureau of Reclamation, the Western Area Power Administration, and the Southwestern Power Administration. Federal Power Customers comment that it is unclear whether potential penalties assessed by NERC and the Commission against the aforementioned federal agencies may become subsumed in the costs passed on to Federal Power Customers or their members. Federal Power Customers request that, in reaching a jurisdictional determination, such determination not contain any inference regarding the federal agencies' ability to pass through penalties to customers.

Discussion

A. Procedural Matters

29. Pursuant to Rule 214 of the Commissions Rules of Practice and Procedure, 18 CFR 385.214 (2009), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 CFR 385.213(a)(2) (2009), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept NERC's or DOE's answers and will, therefore, reject them.

B. Commission Determination

30. As discussed below, we conclude that, pursuant to section 215 of the FPA, federal entities such as the Corps-Tulsa District that are users, owners, or operators of the Bulk-Power System must comply with mandatory Reliability Standards. The issue of whether a specific entity is a user, owner, or operator of the Bulk-Power System is a factual matter that is, in the first instance, determined by the ERO and the relevant Regional Entity in NERC's compliance registration process.[27] Thus, to the extent that the Corps raises concerns whether specific Corps facilities are Bulk-Power System facilities or a specific Corp District is a user, owner, or operator of the Bulk-Power System, these matters are appropriately raised in the first instance with the relevant Regional Entity pursuant to NERC's compliance registry procedures. In this order, we are not making factual determinations regarding specific entities or facilities. Rather, we address the legal applicability of section 215 of the FPA to federal entities such as the Corps-Tulsa District.

1. Procedural Arguments

31. At the outset, we disagree with comments suggesting that the Commission's process is the incorrect forum for determining the implementation of section 215, or that the proceedings should be stayed to allow for interagency resolution. Pursuant to section 215(b) of the FPA, all users, owners, and operators of the Bulk-Power System must comply with mandatory Reliability Standards that are developed by the ERO and approved by the Commission. We have in the first instance the authority to determine the scope of our jurisdiction.[28] Our authority to make this determination is not dependent on the ultimate outcome of the determination. Accordingly, we address here the issue of the Commission's authority pursuant to section 215 of the FPA to require that federal entities such as the Corps-Tulsa District comply with mandatory, Commission-approved Reliability Standards.

32. The Corps and several commenters address the additional question of whether federal entities are subject to monetary penalties for non-compliance with mandatory Reliability Standards. We view this as a separate and distinct issue. We need not and do not address it here.

2. Section 215 Jurisdiction Over Users, Owners, and Operators

33. With regard to the Commission's section 215 jurisdiction, FPA section 215(b)(1) 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.[29]

FPA section 201(f) states, in relevant part,

> No provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, * * * or any agency, authority, or instrumentality of any one or more of the foregoing * * * unless such provision makes specific reference thereto.

34. The language of section 215(b) refers to entities within the Commission's section 215 jurisdiction as ''including but not limited to the entities described in section 201(f).'' In turn, section 201(f) specifically refers to ''the United States, a State or any political subdivision of a state, * * * or any agency, authority, or instrumentality of any one or more of the foregoing.'' FPA section 215(b) is clear that the Commission shall have jurisdiction over those described entities ''for purposes of approving reliability standards established under this section and enforcing compliance with this section.'' Had Congress intended, by its reference to section 201(f), to extend the section 201(f) exemption to section 215, there would have been no need to include the reference at all. Section 201(f) is in place, absent a specific reference to the contrary. Congress instead specifically included within the Commission's section 215 jurisdiction each entity described in section 201(f) that is a user, owner, or operator of the Bulk-Power System. Based on the expanded jurisdictional reach of the statute, the Commission concludes that Congress intended section 215 to be comprehensive; excluding federal agencies would create a significant gap

[26] *Citing* the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A) (2006).

[27] *See, e.g.,* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 93–96. Pursuant to NERC's Rules of Procedure, an entity that disagrees with the ERO's registration determination can seek Commission review of that decision.

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

[29] 16 U.S.C. 824o(b)(1) (2006). Section 215 defines the Bulk-Power System as ''(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and (B) the electric energy from generation facilities needed to maintain transmission system reliability.'' 16 U.S.C. 824o(a)(1) (2006).

in the ERO's and the Commission's reliability oversight.

35. Further, section 201(b)(2) adds additional weight to the argument, which we find persuasive, that Congress intended to include federal entities under the Commission's jurisdiction. Such section, as amended by the Energy Policy Act of 2005, states under the heading ''Declaration of Policy; Application of Part'':

> Notwithstanding section 201(f), the provisions of sections * * * 215 * * * shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act with respect to such provisions.

Prior to the Energy Policy Act of 2005, few provisions of Part II of the FPA applied to governmental and other non-public utility entities. Previously, section 201(b)(2) referred only to entities subject to FPA sections 210, 211, and 212. The Energy Policy Act of 2005 added new provisions that use broad terms such as ''all users, owners and operators,'' and these provisions apply to governmental as well as private entities. In turn, EPAct 2005 amended section 201(b)(2) to make clear that the Commission's jurisdiction over otherwise exempt public utilities under certain substantive provisions of the FPA, including the reliability provision, is only for the narrow purposes of implementing and enforcing those provisions. When Congress amended 201(b)(2), it also specifically added the phrase ''[n]otwithstanding section 201(f),'' at the beginning of the provision to make clear that entities (including governmental entities) otherwise exempted from Commission regulation by virtue of section 201(f) are indeed subject to limited Commission regulation for purposes of certain FPA provisions. Had Congress not intended section 215 to apply to governmental and other exempt public utility entities, there would have been no reason to add the reference to section 215 in section 201(b)(2).

36. Finally, as NERC points out,[30] the legislative history of FPA section 215 supports the conclusion that Congress intended FPA section 215 to require that *all* users, owners, and operators of the Bulk-Power System, including federal entities, comply with Commission-approved Reliability Standards. FPA section 215 can be traced to the Thomas amendment and Senator Thomas, the author of that amendment stated that mandatory reliability rules will apply to all users of the transmission grid. There are no loopholes. No one is exempt.''[31]

37. Further, the legislative history makes clear that, among other things, the reliability provision was added to the FPA to prevent cascading blackouts. The debate during consideration of the Conference Report on the proposed bill states that mandatory, enforceable reliability rules began in response to the 1996 blackouts in the Pacific Northwest and gained more urgency with the Northeast blackout of 2003.[32] Exclusion of federal entities from the reliability provision would run counter to this legislative purpose as it would create significant gaps in an otherwise comprehensive program to apply mandatory Reliability Standards to better assure the reliability of the Bulk-Power System. As ReliabilityFirst attests, excluding federal entities from the requirements of the Reliability Standards raises serious potential consequences for the reliability of the Bulk-Power System. Thus, it stands to reason that Congress intended that all users, owners, and operators of the Bulk-Power System, including federal entities, be required to comply with the Reliability Standards. It would be contrary to Congressional intent and likely ineffective to return to a voluntary system based on individual discretion as the Corps proposes with respect to federal entities.[33]

38. Accordingly, we find that, pursuant to section 215 of the FPA, federal entities such as the Corps-Tulsa District that are registered by the ERO as users, owners, and operators of the Bulk-Power System must comply with mandatory Reliability Standards as to facilities that fall within the Bulk-Power System.

The Commission Orders

(A) The Commission grants NERC's request for a decision that, pursuant to section 215 of the FPA, federal entities that use, own, or operate the Bulk-Power System, must comply with mandatory Reliability Standards, as discussed in the body of this order.

(B) The Secretary is directed to publish a copy of this order in the **Federal Register**.

By the Commission. Commissioner Kelly is not participating.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

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[30] *See supra* P 15.

[31] In addition, the General Accounting Office stated that ''[a]ll users, owners and operators of the bulk-power system would have to comply with the reliability standards.'' and ''We understand this would include both private entities and federal entities (such as the Tennessee Valley Authority, the Bonneville Power Administration, and other federal power marketing agencies), among others.'' General Accounting Office, *Draft Legislation Concerning an Electric Reliability Organization,* at 3, n.5 (March 18, 2003), available at *http://www.gao.gov/decisions/other/360241.pdf.*

[32] *See, e.g.,* 151 Cong. Rec. House 6943–44 (July 28, 2005) (statement of Rep. Hastings); 151 Cong. Rec. Senate 9344 (July 29, 2005) (statement of Sen. Maria Cantwell).

[33] NERC June 24, 2009 Notice of Penalty at 2–3 (citing October 3, 2007 Letter from Department of the Army, Southwestern Division, Corps of Engineers, to ERCOT).

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8971–2]

Agency Information Collection Activities; OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566–1682, or e-mail at *westlund.rick@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR Number 1884.04; Partial Update of the TSCA Section 8(b) Inventory Data Base, Production and Site Reports; 40 CFR part 710; was approved on 09/17/2009; OMB Number 2070–0162; expires on 09/30/2012; Approved without change.

EPA ICR Number 2034.04; NESHAP for the Wood Products Surface Coating Industry; 40 CFR part 63, subpart A and 40 CFR part 63, subpart QQQQ; was approved on 09/22/2009; OMB Number 2060–0510; expires on 09/30/2012; Approved without change.

EPA ICR Number 1712.06; NESHAP for Shipbuilding and Ship Repair Facilities—Surface Coating; 40 CFR part 63, subpart A and 40 CFR part 63, subpart II; was approved on 09/22/2009;