

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

North American Electric Reliability Corporation     )     Docket No. NP09-26-000

**MOTION TO INTERVENE AND COMMENTS OF THE  
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

The National Rural Electric Cooperative Association (“NRECA”), pursuant to the Federal Energy Regulatory Commission’s (“Commission”) June 26, 2009, “Notice of Filing Regarding Notice of Penalty and Request for Decision on Jurisdiction Issue,” as corrected on June 30, 2009, in the above referenced docket, respectfully submits for filing its Motion to Intervene and Comments regarding the North American Electric Reliability Corporation’s (“NERC”) request for a ruling on an important jurisdictional issue. NERC seeks a determination by the Commission of the applicability of mandatory Reliability Standards under section 215 of the Federal Power Act (“FPA”), 16 U.S.C. § 824o, to all federal agencies. NRECA submits these comments to advise the Commission of its concern with ruling in this narrow penalty proceeding on NERC’s broad request for ruling concerning the applicability of section 215 of the FPA to all federal agencies.

While NRECA supports NERC’s need for clarity regarding the scope of its jurisdiction under section 215, for the reasons discussed below, NRECA does not believe a specific penalty proceeding is appropriate for resolving an issue involving multiple federal agencies and one or more cabinet level departments. Rather, as discussed more fully below, the Commission should proceed by first utilizing a mutually

deliberative or consultative process with respect to all potentially affected federal departments and agencies. Prior to taking any action it should temporarily suspend the procedural schedule in this docket and confer with the Corps and the “other federal agencies” and departments referenced, but not specifically identified, in the Notice. Prudence and comity with those other agencies and departments suggest this would be the appropriate path. At a minimum, NRECA agrees with the Federal Power Customers’ Comments<sup>1</sup> with respect to their request to provide the federal agencies and departments the opportunity to fully develop their position and understanding of this important jurisdictional issue and to postpone the comment date of July 24, 2009.

## **I. INTRODUCTION**

NRECA is the not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives. The great majority of these cooperatives are distribution cooperatives, which provide retail electric service to over 42 million consumer-owners in 47 states. Kilowatt-hour sales by rural electric cooperatives account for approximately 10% of total electricity sales in the United States. NRECA’s members also include approximately 65 generation and transmission (“G&T”) cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost. Many cooperatives purchase transmission or power from federal departments or agencies that are potentially affected by the requested ruling.

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<sup>1</sup> On July 21, 2009, the Mid-West Electric Consumers Association, Inc. and the Southwestern Power Resources Association (collectively, the “Federal Power Customers”) filed a motion to intervene and comments in this proceeding.

## II. MOTION TO INTERVENE

This motion to intervene is tendered pursuant to sections 205, 206 and 215 of the FPA, 16 U.S.C. §§ 824d, 824e and 824o (2000); Rules 212 and 214 of the Rules of Practice and Procedure of the Commission, 18 C.F.R. §§ 385.212 and 385.214 (2009); and the Commission's June 26, 2009 "Notice of Filing Regarding Notice of Penalty and Request for Decision on Jurisdiction Issue," as modified by the "Errata Notice" of June 30, 2009, establishing July 24, 2009 as the date by which motions to intervene and comments are to be filed in this proceeding. NRECA's motion to intervene is timely filed. It is therefore appropriate for the Commission to grant NRECA's motion to intervene in this proceeding, with all rights appurtenant to that status.

The persons to whom correspondence, pleadings, and other papers in relation to this proceeding should be addressed and the persons whose names are to be placed on the Commission's official service list are designated as follows pursuant to Rule 203, 18 C.F.R. § 385.203 (2009):

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### III. COMMENTS

The June 26, 2009 Notice issued by the Commission in this docket states that NERC requests that the Commission issue a decision on the jurisdictional issue regarding the applicability of mandatory Reliability Standards under section 215 of the FPA to the U.S. Army Corps of Engineers (“Corps”) and to issue an advisory opinion in this same proceeding as to “other federal agencies.” (Emphasis added.) While NERC understandably seeks the Commission’s guidance if it believes there is a lack of clarity as to its authority, its request inappropriately seeks a determination regarding the applicability of compliance and enforcement with Reliability Standards developed under section 215 of the FPA as to federal agencies that have no connection to the specific penalty and violation alleged in this proceeding. In addition, a Notice issued in an individual Notice of Penalty proceeding that references “other federal agencies” may not be realistically adequate to reach federal agencies or departments that might be similarly situated. Accordingly, NRECA submits these Comments to suggest a more appropriate path for providing NERC the necessary guidance that it seeks.

FPA section 215(b) gives the Commission jurisdiction over, *inter alia*, “entities described in section 201(f), for purposes of ... enforcing compliance.” Section 201(f) explicitly refers, *inter alia*, to “the United States ... or any agency, authority, or instrumentality of ... the foregoing....” While there is a legitimate basis for NERC’s seeking clarity as to its authority, at least as it applies to the Corps, NRECA believes a specific penalty proceeding presents an unduly narrow forum for the Commission to resolve this broad industry issue.

Insofar as this NP docket is a reliability enforcement proceeding involving a single governmental entity (*i.e.*, the Corps), this docket is not the appropriate vehicle in

which to examine the broader issue of the Commission's jurisdiction over "other federal agencies." It would be more appropriate to conduct the broader inquiry raised in the Notice in the context of a correspondingly broader proceeding, such as a proposed policy statement or technical conference in which all of the potentially affected "other federal agencies" would have sufficient notice and appropriate opportunity to participate, and only after discussions with those agencies as the Commission has done elsewhere in circumstances where issues of comity arise.

Given the magnitude of the underlying issue, as it could apply to "other federal agencies" or departments, the Commission should not rely on a mere technical notice in the Federal Register in this single reliability enforcement proceeding. Rather, it should formally contact and communicate directly with those federal departments and agencies. It is unrealistic to conclude that all potentially affected federal agencies have been following this specific docket involving, up to now, only the Corps closely enough to be prepared to fully develop the important legal and policy issues that NERC raises in its clarification inquiry.

In numerous other unrelated dockets, the Commission has been increasingly sensitive to jurisdictional boundaries, such as those involving the states. The Commission should be no less sensitive and careful when examining its jurisdictional reach into the conduct of other federal agencies. Indeed, the Commission's and NERC's actions could involve a requested expenditure of funds by those "other federal agencies" or departments for monetary penalties or mitigation actions. This, in turn, could involve interpretation of conditions on appropriations granted by Congress to those "other federal agencies" and departments and potential cases of first impression construing the Anti-

Deficiency Act as it would apply to the specific appropriation legislation applicable to each department or agency. The fact that monetary penalties, when levied or agreed to, would be used to directly offset the costs of NERC and the Regional Entities – all private corporations – further potentially complicates whether fines may come from the appropriated funds of those federal agencies.

The Commission has heretofore had significant successful experience interacting with other federal agencies involving, for example, licensing of hydropower facilities and certification of natural gas pipelines. After decades of experience and litigation, the Commission has learned the benefits of an up-front deliberative or consultative process when dealing with other federal departments or agencies.

#### **IV. CONCLUSION**

The Commission should proceed by first utilizing a mutually deliberative or consultative process with respect to affected federal departments and agencies. Prior to taking any action it should temporarily suspend the procedural schedule in this docket and confer with the Corps and the “other federal agencies” and departments referenced, but not specifically identified, in the Notice. Prudence and comity with those other agencies and departments suggest this would be the appropriate path. To be sure, NRECA is not asserting here that federal agencies cannot be subject to Reliability Standards. Rather, NRECA suggests that the Commission move carefully and prudently when dealing with these matters of first impression involving jurisdiction among federal agencies, departments and Congressional appropriations.

At a minimum, NRECA agrees with the Federal Power Customers’ Comments with respect to their request to provide the federal agencies and departments

the opportunity to fully develop their position and understanding of this important jurisdictional issue and to postpone the comment date of July 24, 2009.

Dated: July 24, 2009

Respectfully submitted,

NATIONAL RURAL ELECTRIC  
COOPERATIVE ASSOCIATION

/s/ Wallace F. Tillman

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Washington, D.C., this 24th day of July 2009.

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