

**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
RELIABILITYFIRST CORPORATION**

Pursuant to Rule 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. § 385.214 (2008), ReliabilityFirst Corporation (“ReliabilityFirst”) hereby moves to intervene in the above-captioned proceeding and offers comments on the request for a jurisdictional determination made by the North American Electric Reliability Corporation (“NERC”) in this proceeding.

ReliabilityFirst agrees with NERC’s conclusion that federal entities such as the U.S. Army Corps of Engineers—Tulsa District (“COE—Tulsa District”) are subject to mandatory Reliability Standards under Section 215 of the Federal Power Act, including the possibility of penalties and other sanctions.¹ Furthermore, ReliabilityFirst believes that a determination by the Commission that the COE—Tulsa District and other federal agencies are not subject to mandatory Reliability Standard enforcement under the Federal Power Act would fundamentally undermine the reliability of the Bulk-Power System and contradict the intent of Congress in enacting Section 215 as part of the Energy Policy Act of 2005.²

¹ 16 U.S.C. § 824o (2006).

² Pub. L. No. 109-58, 119 Stat. 594.

I. NOTICES AND COMMUNICATIONS

Notices and communications regarding this filing may be addressed to:

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II. MOTION TO INTERVENE

On June 24, 2009, NERC filed with the Commission a Notice of Penalty regarding a violation of PRC-005-1 Requirement R1.1 by the COE—Tulsa District regarding its Denison Project Generator in the Texas Regional Entity Region. Within the Notice of Penalty NERC also requested a jurisdictional determination from the Commission regarding whether federal entities such as the COE—Tulsa District are subject to Section 215 of the Federal Power Act, including penalties and other sanctions for violations of mandatory Reliability Standards.

Reliability*First* is one of eight FERC-approved Regional Entities that support NERC in its role as the Electric Reliability Organization (“ERO”) and is responsible for ensuring that the Bulk Electric Systems in some or all of thirteen states and the District of Columbia remain reliable via application of both NERC and regional reliability requirements.

As such, Reliability*First* has an interest in whether federal entities that are users, owners, or operators of the Bulk-Power System in the Reliability*First* Region are subject to Section 215 of the Federal Power Act and, accordingly, Reliability*First*’s Reliability Standard enforcement authority delegated from NERC to Reliability*First* pursuant to a Commission-approved delegation agreement. Because of this, the Commission’s jurisdictional determination will affect the manner in which Reliability*First* enforces Reliability Standards in its Region. As a result, Reliability*First* has a direct interest in this proceeding that cannot adequately be represented by any other party and the Commission should permit Reliability*First* to intervene.

III. COMMENTS

A. The Commission Has Jurisdiction Over Federal Entities Under Section 215 of the Federal Power Act

As NERC explained in the Notice of Penalty regarding the COE—Tulsa District, the language of the statute is unambiguous, explicitly granting the Commission jurisdiction over “all users, owners, and operators of the bulk-power system” including federal and state governmental entities that are otherwise exempt from the jurisdiction of the Commission. *ReliabilityFirst* supports NERC’s analysis of the reliability jurisdiction of the Commission—and therefore NERC and the Regional Entities—under Section 215 of the Federal Power Act. This analysis, supported by the legislative history cited by NERC, provides a straightforward reading of the statute. *ReliabilityFirst* urges the Commission to reach the same conclusion when issuing its jurisdictional determination.

As NERC noted in the Notice of Penalty, such a determination would be in accordance with Commission precedent, in particular past Commission decisions on NERC Compliance Registry appeals that have supported a determination that federal entities are users, owners, and operators of the Bulk-Power System under Section 215 of the Federal Power Act. In *U.S. Department of Energy, Portsmouth/Paducah Project Office*,³ the Commission upheld the registration of the DOE Portsmouth/Paducah Project Office, a federal entity and the owner of a uranium enrichment plant including significant switchyards, as a Transmission Owner, Transmission Operator, and Distribution Provider in the *ReliabilityFirst* Region.⁴ In *Southeastern Power Administration*,⁵ the Commission upheld the registration of the Southeastern

³ 124 FERC ¶ 61,072 (2008).

⁴ *Id.* at Ordering Paragraph A.

⁵ 125 FERC ¶ 61,294 (2008).

Power Administration, a federal entity, as a Transmission Operator in the SERC Region.⁶ In that proceeding, the Commission also determined that the U.S. Army Corps of Engineers should be co-registered with the Southeastern Power Administration in the SERC Region as a Transmission Operator.⁷

Although these cases did not explicitly address whether the Commission had jurisdiction over these federal entities under Section 215, the Commission's decision in each proceeding was premised on the existence of appropriate jurisdiction. Therefore, in issuing its jurisdictional determination, the Commission should follow this precedent and find that it has jurisdiction over federal entities for the enforcement of mandatory Reliability Standards.

B. The Enforcement of Reliability Standards Against Federal Entities is Essential to Bulk-Power System Reliability

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. The purpose of Congress in adding Section 215 to the Federal Power Act in the Energy Policy Act of 2005 was to ensure the reliability of the Bulk-Power System, but the Commission cannot fulfill this purpose unless the mandatory Reliability Standards approved by the Commission are applied to all users, owners, and operators of the Bulk-Power System, including federal entities such as the COE—Tulsa District.

1. Importance of Federal Entities to the Bulk-Power System

Federal entities are an important part of the users, owners, and operators of the Bulk-Power System in the ReliabilityFirst Region, and unless they are subject to mandatory Reliability Standards, the reliability of the electric system in this region could suffer

⁶ *Id.* at P 16.

⁷ *Id.* at P 25.

considerably. For example, as explained above, the Department of Energy is a Registered Entity in the ReliabilityFirst Region, registered as a Transmission Operator, Transmission Owner, Distribution Provider, and Load-Serving Entity for its Portsmouth/Paducah Project Office following the Commission's decision on DOE's appeal of its registration.⁸ Federal entities have an even more substantial presence in other Regions, such as the Tennessee Valley Authority and the Southeastern Power Administration in the SERC Region and the Bonneville Power Administration, the Southwestern Power Administration, and the Western Area Power Administration in the WECC Region.

As this indicates, federal entities have a substantial presence among the users, owners, and operators of the Bulk-Power System in the various Regions, including the ReliabilityFirst Region. As such, exempting these entities from compliance with mandatory Reliability Standards would impair the reliability and the resilience of the electric grid.

2. Dangers of Exempting Federal Entities from Reliability Standard Compliance

Failure to permit the application of mandatory Reliability Standards to federal entities would undermine reliability system-wide because it would provide a disincentive to the interaction between users, owners, and operators of the Bulk-Power System that is necessary to preserve reliability. Not only do some Reliability Standards depend on the timely exchange of information and directives between Registered Entities, the effectiveness of some Reliability Standards, in particular the Critical Infrastructure Protection standards, depends in large part on system-wide compliance.

Several Reliability Standards require Reliability Coordinators to issue directives to other Registered Entities so that the necessary steps are taken to preserve reliability. As an example,

⁸ See *U.S. Department of Energy, Portsmouth/Paducah Project Office*, 124 FERC ¶ 61,072 (2008).

IRO-001-1.1 R3 gives Reliability Coordinators the authority to direct Transmission Operators, Balancing Authorities, Generator Operators, Transmission Service Providers, Load-Serving Entities, and Purchasing-Selling Entities to take actions to preserve reliability. This is intended to give Reliability Coordinators the authority necessary to direct emergency actions to protect the reliability of the Bulk-Power System. 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, IRO-005-2 R17 requires Reliability Coordinators to monitor the actions taken to return the system to within IROL if an IROL is exceeded; if the actions taken are insufficient, the Reliability Coordinator can direct the appropriate Transmission Operators, Balancing Authorities, Generator Operators, and Load-Serving Entities to return the system to within IROL. If a federal entity fulfilling a transmission operator function is not required to comply with the Reliability Standards, the Reliability Coordinator's directive to return the system to within IROL could go unheeded, with disastrous results for system reliability.

Other Reliability Standards require Registered Entities to exchange certain information that is critical to reliability; removing this obligation from federal entities could have serious reliability implications because such exchanges may no longer occur. For example, PRC-001-1 R2.1 requires Generator Operators to notify their corresponding Transmission Operators and Balancing Authorities if they experience a protective relay or equipment failure that would reduce system reliability. As PRC-001-1 R2.2 explains, Transmission Operators need this information so that they can take corrective action. If a federal entity performing a generator operator function is exempt from the Reliability Standards, it may not pass this information on to

its Transmission Operator. As a result, the Transmission Operator may not learn of a protective relay failure endangering system reliability in time to take appropriate corrective actions.

The failure to ensure that federal entities are subject to mandatory Reliability Standards would be especially harmful to the cyber security of the electric grid. The Commission has recognized that as the connectivity of the entities connected to the grid increases, so does the danger from cyber attack.⁹ For that reason, NERC has developed and the Commission has approved Reliability Standards for Critical Infrastructure Protection.¹⁰ These standards are intended to strengthen the resiliency of the grid to threats to the interconnected computer systems that operate much of the Bulk-Power System. However, if federal entities are not subject to these CIP Reliability Standards because they are exempt from the Commission's jurisdiction under Section 215 of the Federal Power Act, their failure to implement appropriate cyber protections could endanger the entire system. A cyber attack could cause a sudden shutdown of all of the transmission and generation operated by a federal entity. Similarly, a cyber attack could exploit the vulnerability of the federal entity's computer system to compromise the systems of other entities with communications links to the federal entity.

3. Reliability of the Bulk-Power System Depends on the Registration of all Users, Owners, and Operators, including Federal Entities

The application of Reliability Standards to federal entities is meaningless without the power to enforce those Reliability Standards. Without enforcement power, compliance would be voluntary, the situation that existed before the passage of Section 215 of the Federal Power Act,

⁹ See, e.g., *Smart Grid Policy*, 128 FERC ¶ 61,060 at P 40 (2009).

¹⁰ See, e.g., *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order No. 706, 122 FERC ¶ 61,040 (2008); *order on reh'g*, Order No. 706-A, 123 FERC ¶ 61,174 (2008), *order on clarification*, Order No. 706-B, 126 FERC ¶ 61,229 (2009); *order denying request for clarification*, Order No. 706-C, 127 FERC ¶ 61,273 (2009).

and the same situation that contributed to the Northeast Blackout in August 2003.¹¹ Voluntary Reliability Standards have existed since the 1960s, but, as the 2003 Blackout demonstrated, voluntary compliance is insufficient. For that reason, all users, owners, and operators of the Bulk-Power System are subject, not only to registration, but also to the enforcement of their reliability obligations in accordance with the Compliance Monitoring and Enforcement Program approved by the Commission.

Therefore, ReliabilityFirst urges the Commission to conclude that federal entities such as the COE—Tulsa District are subject to Section 215 of the Federal Power Act, including the penalty and sanction provisions. Not only is this conclusion the plain meaning of the statute, as NERC has demonstrated, but 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 such as that which occurred in August 2003.

IV. CONCLUSION

Wherefore, ReliabilityFirst respectfully requests that the Commission consider these comments in this proceeding and grant this Motion to Intervene so as to make ReliabilityFirst a party in the above-captioned proceedings with full rights of participation thereto.

Respectfully submitted,

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¹¹ See U.S.-CANADA POWER SYSTEM OUTAGE TASK FORCE, FINAL REPORT ON THE AUGUST 14, 2003 BLACKOUT IN THE UNITED STATES AND CANADA at 17 (2004) (noting that NERC's lack of enforcement authority for Reliability Standards contributed to the blackout).

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 this 24th day of July 2009.

/s/ J. Daniel Skees

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