

**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
SOUTHEASTERN FEDERAL POWER CUSTOMERS, INC.**

Pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure, 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, the Southeastern Federal Power Customers, Inc. (“SeFPC”) submits the following motion to intervene and comments in the above captioned proceeding. On June 24, 2009, the North American Electric Reliability Corporation (“NERC”) submitted a Notice of Penalty regarding U.S. Army Corps of Engineers—Tulsa District (“Notice of Penalty”). The SeFPC supports the conclusion that the U.S. Army Corps of Engineers (“Corps”) is subject to the reliability standards with which NERC and related regional entities ensure compliance. However, the SeFPC disagrees with the assertion presented in the Notice of Penalty that NERC retains the authority to fine the Corps for non-compliance.

I. COMMUNICATIONS

SeFPC requests that all correspondence or communications with respect to this proceeding be sent to:

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II. MOTION TO INTERVENE

The Southeastern Power Administration (“SEPA”) is the Federal Power Marketing Administration which has the responsibility to market the electric power generated at hydropower projects owned and operated by the Corps in the southeast. The SeFPC is a not-for-profit corporation representing 238 rural electric cooperatives and municipally owned electric systems in Alabama, Georgia, Mississippi, Kentucky, North Carolina, South Carolina, Florida and Virginia that purchase capacity and energy from SEPA. The class of eligible customers, several of which are SeFPC members, who purchase power from SEPA are typically referred to as “preference customers.”

The members of the SeFPC have a direct and substantial interest in this proceeding because a determination that the Corps does not have to comply with

reliability standards in the Southwestern Power Administration's ("SWPA") marketing area could lead to the Corps abdicating similar responsibilities in the Southeast.

Furthermore, because any costs or fees incurred by the Corps because of the failure to adhere to the reliability standards will be ultimately borne by power customers who have contracts with the various Power Marketing Administrations ("PMAs"), the SeFPC has an interest in any ruling by FERC relating to the authority of NERC to assess a fine on the Corps. The Commission has previously recognized that the SeFPC has standing to represent the interests of its members in matters before the Commission on issues involving reliability standards and the costs that SEPA incurs in the sale of energy and capacity.¹ Because no other party may adequately represent SeFPC's interest in this proceeding and the participation of the SeFPC is in the public interest, the members of the SeFPC respectfully request that the Commission grant the SeFPC's request to intervene.

III. COMMENTS ON THE NOTICE OF PENALTY

The SeFPC agrees and disagrees with NERC's filing in this proceeding. As an initial matter, the SeFPC believes that the Corps has an obligation and responsibility to abide by the reliability standards that NERC administers and with which it ensures compliance by all stakeholders. The SeFPC disagrees, however, with NERC's implied assertion that it retains the ability to assess fines as a part of the entire enforcement program. Although the instant filing does not impose a financial penalty for the

¹. See Order Remanding Proceeding To Electric Reliability Organization 122 FERC ¶ 61, 140 (2008)

violation, NERC has presented the question regarding the scope of NERC's authority over federal agencies.

A. The Corps Must Comply with NERC's Reliability Standards

As a fundamental matter, the SeFPC agrees with the underlying premise that the Corps must abide by the reliability standards that are applicable to the entire electric industry. In this regard, the SeFPC concurs generally with the concerns raised by NERC in the instant filing. In its Notice of Penalty, the Corps asserts that the Corps Tulsa District is bound by the mandatory reliability standards for the Denison Project Generator. The challenge of NERC's jurisdiction under Section 215 of the Federal Power Act by the Corps Tulsa District cannot be viewed, however, as an isolated event.²

The disclaimer of responsibility troubles the SeFPC because of the potential disruption in the allocation of responsibilities for reliability in the Southeast. If the Corps is not responsible for complying with the reliability standards in the marketing region for the SWPA, the same argument could be asserted in abdicating reliability responsibilities in the Southeast. Indeed, the arguments asserted by the Tulsa District could reverberate throughout the nation and thus merit careful deliberation by the Commission.

² The SeFPC observes that there may not be a truly live controversy between the agencies in light of the remediation taken to date and the issuance of zero penalty. The opportunity for the Corps to contest the application of the reliability standards to its mission previously passed in SEPA's challenge of its registration status. Nonetheless, as noted in several of the comments submitted to date, the agencies implicated should avail themselves of such steps as appropriate to resolve this matter. The fact that NERC has sought to make this filing suggests that further encouragement may be needed. (*See* Motion to Intervene and Comments of the National Rural Electric Cooperative Association at pp. 4-6, Docket No. NP09-26, Filed July 24, 2009)

In the Southeast, FERC has already ruled that the Corps and SEPA must register for reliability functions as required by SERC, and approved by NERC. As set forth in the “Order Upholding Electric Reliability Organization Compliance Registry Determination and Conditionally Directing Additional Registration,” the Commission determined that in the Southeast, “the record indicates that the Corps performs, and is responsible for, a number of the tasks that are part of the transmission operator function.”³ Based on this observation, the Commission concluded that the Corps was appropriately registered as the transmission operator.⁴

In the prior consideration of reliability responsibilities in the Southeast, the Corps did not intervene in SEPA’s appeal of its registry obligations. The Corps’ silence on these matters at that time is illuminating because SEPA argued that the Corps, not SEPA, was the entity that should be registered as the transmission operator. In the Southeast Compliance Order on Rehearing, the Commission directed the Corps to co-register with SEPA as the Transmission Operator. Although the Commission afforded the agencies the opportunity for further comment, none was made. In essence, the Corps did not challenge the application of the reliability standards in the Southeast.

While the SeFPC argued at the time that the Corps should be the sole registrant for the Transmission Operator function, the Commission’s directive was nonetheless appropriate in light of NERC’s desire to ensure that no gaps exist in the accountability of

³ Order Upholding Electric Reliability Organization Compliance Registry Determination And Conditionally Directing Additional Registration, 125 FERC ¶ 61,294 at P 24 (2008)(“Southeast Compliance Order on Rehearing”).

⁴ *Id.*

the operation of the bulk power system. Because NERC has sought to ensure that some entity assumes responsibility and has accountability for each element of the bulk power system, the SeFPC is particularly troubled by the Corps challenge of the mandatory reliability standards. If the Corps' position is correct, NERC would need to seek other entities to assume responsibilities for those that the Corps has abdicated. This outcome would require entities who have no ownership or control of Corps facilities to assume responsibilities that they cannot adequately manage. The ensuing quagmire of compliance obligations and near certain repetitive violations would undermine the integrity of NERC's reliability program and ultimately the delivery of carbon free hydropower. This cannot be what Congress envisioned when it passed Section 215.

B. NERC Cannot Impose Monetary Penalties

While the SeFPC supports holding the Corps accountable under the reliability standards, they disagree with the implication in the Notice of Penalty that NERC can institute a financial penalty on the Corps. As a federal taxpayer-supported agency that seeks to recover its costs of generating hydropower from the ultimate customers in rates paid to the PMAs, the Corps does not have the same incentive to respond to a financial assessment as the majority of the users and beneficiaries of the bulk power system. For the Corps, or PMAs for that matter, a fine is an administrative burden at best. In the end, taxpayers and more likely the ultimate ratepayers are going to pay the cost of the fine.

While the federal agencies may be financially indifferent to a monetary penalty, the ability of NERC to issue a fine to a federal agency presents a particularly difficult

question. Not all agencies operate with the same financial structure.⁵ Moreover, statutes such as the Anti-Deficiency Act prohibit the payment of fines using funds provided by annual appropriations bills.

SeFPC believes that FERC can issue a ruling in this instance that would acknowledge NERC's authority to impose a penalty, but declare as a matter of legal interpretation that all federal agencies shall be deemed to be unable to pay any fines assessed by NERC. Indeed, NERC has the authority to impose zero dollar penalties on entities that lack the ability to pay.⁶

In light of the prohibition on paying fines imposed by the Anti-Deficiency Act, the Commission should declare as a matter of legal interpretation that the Federal Agencies are unable to pay fines. Such ruling would allow NERC to preserve its core responsibilities yet avoid the legal hurdles that would arise in the event a federal agency such as the Corps faced a financial penalty for its failure to comply.

Declaring that the Federal Agencies that have responsibilities for operation of the bulk power system cannot pay fines assessed by NERC yields a solution that is simple, straightforward, and consistent with the law. Moreover, it does not require the Commission to answer what types of non-monetary fines NERC may assess, a question that was implicitly suggested by the Department of Energy in their filing on July 24. While the question of whether NERC may assess a monetary penalty is squarely before

⁵ See Motion to Intervene and Comments of Southwest Transmission Dependent Utilities, Docket No. NP09-26 (filed July 22, 2009).

⁶ See Sanction Guidelines of the North American Electric Reliability Corporation, at Section 3.11, Effective January 15, 2008.

the Commission, the question of what types of non-monetary fines may be assessed has not been presented in the notice and is therefore not properly before the Commission at this time.

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, the SeFPC respectfully requests that the Commission: (i) grant the SeFPC's request to intervene in the above captioned proceeding; (ii) affirm NERC's authority to impose reliability standards on the Corps; (iii) declare that the Corps or any other federal agency with obligations under the mandatory reliability standards are unable to pay as a matter of law; and (iv) grant such other relief as the Commission deems appropriate.

Respectfully Submitted,

/S/

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August 24, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2009), upon each person designated on the official service list in each of these proceedings as compiled by the Secretary of the Federal Energy Regulatory Commission.

/S/

David A. Fitzgerald

Dated at Washington, D.C., this 24th Day of August, 2009.