



NORTH AMERICAN ELECTRIC
RELIABILITY CORPORATION

July 28, 2011

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

**Re: NERC Notice of Penalty regarding Southwestern Power Administration (SPA),
FERC Docket No. NP11-___-000**

Dear Secretary Bose:

The North American Electric Reliability Corporation (NERC) hereby provides this Notice of Penalty (NOP) regarding Southwestern Power Administration (SPA), NERC Registry ID No. NCR01144,¹ with information and details regarding the nature and resolution of the violations² discussed in detail herein, in accordance with the Federal Energy Regulatory Commission's (Commission or FERC) rules, regulations and orders, as well as NERC Rules of Procedure including Appendix 4C (NERC Compliance Monitoring and Enforcement Program (CMEP)).³

Three of the violations, regarding Reliability Standards CIP-004-1 R2.1, R3.2, R4, R4.1, that are discussed herein were the subject of a self-report submitted by SPA on July 23, 2009. Another violation, regarding Reliability Standard CIP-007-1 R1 was discovered during a spot check conducted by SPP RE on November 4, 2009.

¹ SPA is a subdivision of the United States Department of Energy whose primary purpose is to market the energy produced at multipurpose hydroelectric dams owned by the United States Army Corps of Engineers. SPA owns transmission facilities located in a four state area within the Southwest Power Pool (SPP). SPA operates approximately 1,380 miles of transmission lines at the 69 kV, 138 kV and 161 kV voltage levels. SPP Regional Entity (SPP RE) confirmed that SPA is registered as a Balancing Authority (BA), Purchasing-Selling Entity (PSE), Resource Planner (RP), Transmission Owner (TO), Transmission Operator (TOP), Transmission Planner (TP) and Transmission Service Provider (TSP) since May 31, 2007. As a BA and TOP, SPA is subject to the requirements of NERC Reliability Standards CIP-004-1 R2.1, R3.2, R4, and R4.1, as well as CIP-007-1 R1.

² For purposes of this document, each violation at issue is described as a "violation," regardless of its procedural posture and whether it was a possible, alleged or confirmed violation.

³ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 2006–2007 FERC Stats. & Regs., Regs. Preambles ¶ 31,204, *order on reh'g*, Order No. 672-A, 2006–2007 FERC Stats. & Regs. ¶ 31,212, *appeal dismissed sub nom. N.Y. Indep. Sys. Operator, Inc. v. FERC*, No. 06-1185 (D.C. Cir. Sept. 29, 2006), *modified*, 123 FERC ¶ 61,046 (2007); *Notice of New Docket Prefix "NP" for Notices of Penalty Filed by the North American Electric Reliability Corporation*, Docket No. RM05-30-000 (February 7, 2008). See also 18 C.F.R. Part 39 (2010).

SPA does not dispute the violations discussed herein or the amount of the assessed penalty, of nineteen thousand and five hundred dollars (\$19,500).⁴ Accordingly, the violations identified as NERC Violation Tracking Identification Numbers SPP200900097, SPP200900098, SPP200900099, SPP200900161 are Confirmed Violations, as that term is defined in the NERC Rules of Procedure and the CMEP.

However, SPA contests the authority of the Commission and its delegates (*i.e.*, NERC and the Regional Entities – in this case, SPP RE) to levy a monetary civil fine or penalty against SPA or any other agency of the federal government.

For the reasons stated below, NERC requests that the Commission issue a decision in this case on the legal issue regarding the authority of NERC and Regional Entities to levy a monetary civil fine or penalty. NERC and the Regional Entities request that the Commission rule on this fundamental legal question even if SPA chooses not to seek review of this NERC decision.

STATEMENT OF FINDINGS UNDERLYING THE VIOLATIONS

This NOP incorporates the findings and justifications set forth in the Notice of Confirmed Violation and Proposed Penalty or Sanction (NOCV) issued on January 12, 2011, by SPP RE. The details of the findings and the basis for the penalty are set forth herein. This NOP filing contains the basis for approval of this NOP by the NERC Board of Trustees Compliance Committee (BOTCC). In accordance with Section 39.7 of the Commission's Regulations, 18 C.F.R. § 39.7, NERC provides the following summary table identifying each violation of a Reliability Standard at issue in this NOP.

NOC ID	NERC Violation ID	Reliability Std.	Req. (R)	VRF	Duration	Total Penalty (\$)
NOC-761	SPP200900097	CIP-004-1	2.1	Medium ⁵	9/28/08-11/17/08	\$19,500

⁴ As discussed herein, SPA contested the amount of the monetary penalty in its September, 7, 2010 response to the SPP RE Notice of Alleged Violation and Proposed Penalty or Sanction (NAVAPS), but subsequently stated in its December 15, 2010, Amended Motion for Summary Disposition before the SPP RE Hearing Body, that it did not contest "the Notice of Alleged Violations issued by Southwest Power Pool Regional Entity and does not dispute the amount of the civil fine imposed by SPP RE."

⁵ CIP-004-1 R2, R2.2.1, R2.2.2, R2.2.3 and R2.3 each have a "Lower" Violation Risk Factor (VRF); R2.1, R2.2 and R2.2.4 each have a "Medium" VRF. When NERC filed VRFs it originally assigned CIP-004-1 R2.1 a "Lower" VRF. The Commission approved the VRF as filed; however, it directed NERC to submit modifications. NERC submitted the modified "Medium" VRF and on January 27, 2009, the Commission approved the modified "Medium" VRF. Therefore, the "Lower" VRF for CIP-004-1 R2.1 was in effect from June 18, 2007 until January 27, 2009, when the "Medium" VRF became effective.

NOC ID	NERC Violation ID	Reliability Std.	Req. (R)	VRF	Duration	Total Penalty (\$)
NOC-761	SPP200900098	CIP-004-1	3.2	Lower ⁶	7/1/08-7/8/09	
NOC-761	SPP200900099	CIP-004-1	4, 4.1	Lower ⁷	7/1/08-4/9/09	
NOC-761	SPP200900161	CIP-007-1	1, R1.1, R1.2, R1.3	Medium ⁸	7/1/08-1/21/10	

CIP-004-1

The purpose statement of CIP-004-1 provides: “Standard CIP-004 requires that personnel having authorized cyber or authorized unescorted physical access to Critical Cyber Assets, including contractors and service vendors, have an appropriate level of personnel risk assessment, training, and security awareness. Standard CIP-004 should be read as part of a group of standards numbered Standards CIP-002 through CIP-009.”

CIP-004-1 provides in pertinent part:

R2. Training – The Responsible Entity^[9] shall establish, maintain, and document an annual cyber security training program for personnel having authorized cyber or authorized unescorted physical access to Critical Cyber Assets, and review the program annually and update as necessary.

R2.1. This program will ensure that all personnel having such access to Critical Cyber Assets, including contractors and service vendors, are trained within ninety calendar days of such authorization.

R3. Personnel Risk Assessment – The Responsible Entity shall have a documented personnel risk assessment program, in accordance with federal, state, provincial, and local laws, and subject to existing collective bargaining unit agreements, for personnel having authorized cyber or authorized unescorted

⁶ CIP-004-1 R3 has a “Medium” VRF; R3.1, R3.2 and R3.3 each have a “Lower” VRF. When NERC filed VRFs it originally assigned CIP-004-1 R3 a “Lower” VRF. The Commission approved the VRF as filed; however, it directed NERC to submit modifications. NERC submitted the modified “Medium” VRF and on January 27, 2009, the Commission approved the modified “Medium” VRF. Therefore, the “Lower” VRF for CIP-004-1 R3 was in effect from June 18, 2007 until January 27, 2009, when the “Medium” VRF became effective.

⁷ CIP-004-1 R4 and R4.1 each have a “Lower” VRF; R4.2 has a “Medium” VRF. When NERC filed VRFs, it originally assigned CIP-004-1 R4.2 a Lower VRF. The Commission approved the VRF as filed; however, it directed NERC to submit modifications. NERC submitted the modified Medium VRF and on January 27, 2009, the Commission approved the modified Medium VRF. Therefore, the Lower VRF for CIP-004-1 R4.2 was in effect from June 18, 2007 until January 27, 2009 when the Medium VRF became effective.

⁸ CIP-007-1 R1 and R1.1 each have a “Medium” VRF; R1.2 and R1.3 each have a “Lower” VRF.

⁹ Within the text of Standard CIP-004, “Responsible Entity” shall mean Reliability Coordinator, Balancing Authority, Interchange Authority, Transmission Service Provider, Transmission Owner, Transmission Operator, Generator Owner, Generator Operator, Load Serving Entity, NERC, and Regional Reliability Organizations.

physical access. A personnel risk assessment shall be conducted pursuant to that program within thirty days of such personnel being granted such access. Such program shall at a minimum include:

R3.2. The Responsible Entity shall update each personnel risk assessment at least every seven years after the initial personnel risk assessment or for cause.

R4. Access – The Responsible Entity shall maintain a list(s) of personnel with authorized cyber or authorized unescorted physical access to Critical Cyber Assets, including their specific electronic and physical access rights to Critical Cyber Assets.

R4.1. The Responsible Entity shall review the list(s) of its personnel who have such access to Critical Cyber Assets quarterly, and update the list(s) within seven calendar days of any change of personnel with such access to Critical Cyber Assets, or any change in the access rights of such personnel. The Responsible Entity shall ensure access list(s) for contractors and service vendors are properly maintained.

(Footnote added.)

Violation Description, Duration and Reliability Risk Statement - Potential and Actual

SPP200900097 CIP-004-1 R2.1

In a Self-Report dated July 23, 2009, SPA reported that two employees on its authorized unescorted access list had not received 2008 physical security training within ninety (90) days of being placed on its access list. The violation was discovered during an internal review performed by SPA on July 8, 2009.

SPA acquired physical security training for its staff on October 1, 2008. The 2008 Continuity of Operational Awareness Course, presented by the U.S. Department of Energy (DOE) Online Learning Center (OLC), covered both physical and cyber security.

Employees “A” and “B” were granted unescorted access prior to CIP-004-1 R2 becoming enforceable for SPA on July 1, 2008. Employee “A” completed the physical security training and provided notification of completion to SPA staff on November 5, 2008. Because Employee “A” did not complete the physical security training within 90 days of July 1, 2008, Employee “A” was found to have exceeded the 90-day period allowed for physical security training by 37 days. Employee “B” failed to provide SPA with notification that his physical security training was complete. Documentation of physical security training for Employee “B” was subsequently located on October 10, 2009, indicating that Employee “B” had completed the physical security training on November 17, 2008. Employee “B” was found to have exceeded the 90-day period allowed for physical security training by 49 days.

The violation lasted from September 28, 2008 (90 days after the employee was granted physical access) through November 17, 2008 (when Employee “B” completed the required training).

The violation posed a minimal risk to the reliability of the bulk power system (BPS) but not a serious or substantial risk to the reliability of the BPS. Employee “A” and Employee “B” received the required physical security training within 37 and 49 days, respectively, of the 90-day deadline. Both employees involved were long-term SPA employees and in good standing. In addition, no incidents involving CCAs occurred during the violation period.

SPP200900098 CIP-004-1 R3.2

In a self-report dated July 23, 2009, SPA reported that Employees “C” and “D” were placed on its access list and given unescorted physical access to the critical cyber asset (CCA) area without a criminal background check being performed within the past seven years. Both of the employees held a current DOE “L” level clearance (equivalent to a “Secret” security clearance), consistent with DOE and Office of Personnel Management (OPM) requirements for background investigations for Federal security clearance. Employee “C” was granted a DOE “L” clearance on March 19, 2001 and Employee “D” was granted a DOE “L” clearance on September 29, 2000.

SPA’s CCA area access logs show that Employee “C” never accessed the CCA area. Employee “D” accessed the CCA area twice before being removed from the access list. Employee “D” was escorted by an authorized employee on both occasions. Employees “C” and “D” are both long term employees of SPA and both had received annual physical and cyber security training.

The violation lasted from July 1, 2008 (when the Standard became mandatory and enforceable for “Table 1” entities) through July 8, 2009 (when access was revoked for Employees “C” and “D”).

The violation posed a minimal risk to the reliability of the BPS but not a serious or substantial risk to the reliability of the BPS. Both employees were long-term SPA employees and in good standing. Both employees had passed a background investigation, qualifying each of them to hold a DOE “L” security clearance. Additionally, SPA immediately revoked the employees’ access on July 8, 2009, when the discrepancy was found. SPP RE confirmed that Employee “C” never accessed the SPA CCA area, and that Employee “D” was properly escorted during the two (2) times the CCA area was accessed. In addition, no incidents involving CCAs occurred during the violation period.

SPP200900099 CIP-004-1 R4, 4.1

In a Self-Report dated July 23, 2009, SPA reported that two contractors were improperly included in the list of personnel with authorized, unescorted physical access to the CCA area. During an internal review, performed April 9, 2009, SPA discovered that the two contractors, who were on a Division of Information Technology listing used to track computer use and access (non critical assets) were inadvertently carried over to SPA’s official CCA area access listing on July 1, 2008. SPA’s CCA access logs indicate neither contractor accessed the CCA area. In

addition, neither contractor had cyber access to the critical cyber assets. The error was corrected on April 9, 2009, the day of the internal review.

In addition, SPA reported that on July 3, 2008, Employee “E” voluntarily retired from SPA. Both cyber and physical access were revoked on the day of separation, but the CCA access list was not updated within seven (7) days, as required by NERC Reliability Standard CIP-004-1 R4.1.

The violation lasted from July 1, 2008 (when the Standard became mandatory and enforceable for “Table 1” entities) through April 9, 2009 (the date the access list error was corrected).

The violation posed a minimal risk to the reliability of the BPS and not a serious or substantial risk to the reliability of the BPS. Although one of the contractors had a door access badge, he did not have access privileges to any CCAs. The second contractor was never issued a door access badge. The documentation error was corrected on April 9, 2009, the day it was discovered. SPA properly revoked the physical and electronic access, and confiscated and destroyed the security badge of Employee “E” on July 3, 2008, the day that Employee “E” retired from SPA. SPA’s security door access logs confirm Employee “E” did not gain physical access after July 3, 2008. In addition, neither contractor had physical or electronic access to Critical Cyber Assets during the violation period.

Actions Taken to Mitigate the Issue and Prevent Recurrence/Status of Mitigation Plan

SPA’s Mitigation Plans to address its violations of CIP-004-1 R2.1, CIP-004-1 R3.2, CIP-004-1 R4, 4.1, respectively, were submitted to SPP RE as completed as of August 28, 2009. The Mitigation Plans were accepted by SPP RE on September 2, 2009 and approved by NERC on September 18, 2009. The Mitigation Plans for these violations are designated as MIT-08-1977, MIT-08-1978, MIT-08-1979, respectively, and were submitted as non-public information to FERC on September 23, 2009, in accordance with FERC orders. SPA certified on November 5, 2009 that the Mitigation Plans were completed on July 23, 2009. As evidence of completion of its Mitigation Plans, SPA submitted the following:

SPP200900097 CIP-004-1 R2.1

- a. Certificate of Completion, 2008 Continuity of Operation Awareness course, Version 2[GPC1], for Employee “A”, November 5, 2008.
- b. Certificate of Completion, 2008 Continuity of Operation Awareness course, Version 2[GPC1], for Employee “B”, November 17, 2008.
- c. SPA Division of Human Resources Management Memorandum, October 22, 2009.
- d. Form 473.10 U.S. Department of Energy, Southwestern Power Administration, Physical Access Authorization, Rev. 07/09.

SPP200900098 CIP-004-1 R3.2

- a. Employee “D” attestation of escort during physical access, August 7, 2009.
- b. DSX Door Access Log 4/9/09 – 7/8/09 for Employee “C”, July 14, 2009.
- c. DSX Door Access Log 4/9/09 – 7/8/09 for Employee “D”, July 14, 2009.
- d. SPA Response to SPP RE July 24, 2009 RFI, September 3, 2009.
- e. Form 473.10 U.S. Department of Energy, Southwestern Power Administration, Physical Access Authorization, Rev. 07/09.

SPP200900099 CIP-004-1 R4, 4.1

- a. DSX Door Access Log 7/1/08 – 4/9/09 for Contractors, July 14, 2009.
- b. Memorandum, SPA Facility Security Officer confirming no access by Contractors, August 18, 2009.
- c. Memorandum, SPA Human Resources, destruction of Employee “E” security badge, July 10, 2009.
- d. DSX Door Access Log 7/1/08 – 4/9/09 for Employee “E”, July 14, 2009.
- e. Memorandum, SPA Facility Security Officer confirming no access by Employee “E”, August 3, 2009.
- f. Memorandum, SPA LAN Administrator, confirming termination of electronic access, Employee “E”, July 9, 2009.
- g. Form 320.2 U.S. Department of Energy, Southwestern Power Administration, Separation Clearances, Tulsa Office, Rev. 07/09).
- h. Form 320.2a U.S. Department of Energy, Southwestern Power Administration, Separation Clearances, Field Offices, Rev. 07/09).
- i. Form 473.10 U.S. Department of Energy, Southwestern Power Administration, Physical Access Authorization, Rev. 07/09.

After SPP RE’s review of SPA’s submitted evidence, SPP RE verified that SPA’s Mitigation Plans were completed on July 23, 2009 and notified SPA in letters dated February 26, 2010, March 1, 2010 and March 1, 2010, respectively, that it had verified completion of the Mitigation Plans related to the subject reliability standards.

The Mitigation Plan required the following actions:

Employee “A” completed the physical security training and provided notification of completion to SPA staff on November 5, 2008. Employee “B” completed the physical security training on November 17, 2008. SPA revoked the access of Employees “C” and “D” on July 8, 2009, when the discrepancy was found. SPP RE confirmed that Employee “C” never accessed the SPA CCA area, and that Employee “D” was properly escorted during the two (2) times the CCA area was accessed. On April 9, 2009, SPA corrected the CCA area access lists.

In addition, SPA centralized coordination of its CCA area access listing and delegated oversight of CIP-004 requirements to its Division of Human Resources Management (Division) which is responsible for personnel investigations, in-processing new hires, out-processing separating employees, administration of SPA’s training plan, and maintenance of employee records.

SPA also revised its current physical access process to include several approval levels and steps to be completed prior to granting unescorted physical access to CCA areas or placement on its access list. SPA Form 473.10 (Physical Access Authorization) is utilized to initialize, track, and document the approvals and requirements for granting unescorted access to the CCA area. Verification of physical and cyber security training and completion of a background investigation are required. Unescorted access is not granted unless all of the requirements identified on SPA Form 473.10 have been completed.

Finally, SPA revised its separation clearance forms for out-processing agency and federal contractor employees to include specific clearance Sections for termination of both cyber and physical access. The out-processing is documented on SPA Forms 320.2 and Form 320.2a (Separation Clearances for Headquarters and Field Sites respectively). The out-processing is managed by the Division, which is assigned coordination of CIP-004 requirements and maintenance of the CIP-004 access list.

CIP-007-1

The purpose statement of CIP-007-1 provides: “Standard CIP-007 requires Responsible Entities^[10] to define methods, processes, and procedures for securing those systems determined to be Critical Cyber Assets, as well as the non-critical Cyber Assets within the Electronic Security Perimeter(s). Standard CIP-007 should be read as part of a group of standards numbered Standards CIP-002 through CIP-009.” Footnote added.

CIP-007-1 R1 provides:

R1. Test Procedures – The Responsible Entity shall ensure that new Cyber Assets and significant changes to existing Cyber Assets within the Electronic Security Perimeter do not adversely affect existing cyber security controls. For

¹⁰ Within the text of Standard CIP-004, “Responsible Entity” shall mean Reliability Coordinator, Balancing Authority, Interchange Authority, Transmission Service Provider, Transmission Owner, Transmission Operator, Generator Owner, Generator Operator, Load Serving Entity, NERC, and Regional Reliability Organizations.

purposes of Standard CIP-007, a significant change shall, at a minimum, include implementation of security patches, cumulative service packs, vendor releases, and version upgrades of operating systems, applications, database platforms, or other third-party software or firmware.

Violation Description, Duration and Reliability Risk Statement - Potential and Actual

In a Spot Check conducted on November 4, 2009, SPP RE determined that SPA was not compliant with CIP-007-1 R1. Specifically, SPA's test program for significant changes to Cyber Assets only verified application functionality and did not verify that existing security controls were not adversely affected. SPA did not test the proper configuration and operation of the security controls. SPA performed a functional test to verify that applications continued to operate properly after significant changes were applied. Under this process, changes were first installed in a test environment and allowed to run for a period of time, with specific functionality tests being performed to verify the application had not been affected by a change. Updates were then rolled out into the production environment. SPP RE determined that the testing performed by SPA only verified that application functionality was not adversely affected by a patch or update and did not verify that the existing security controls were not adversely affected by a change, as required by the standard. The functionality testing performed by SPA did not test the proper configuration and operation of the security controls.

The violation lasted from July 1, 2008 (the date the Standard became mandatory and enforceable for "Table 1" entities) through January 21, 2010 (Mitigation Plan complete).

The violation posed a minimal risk to the reliability of the BPS and did not pose a serious or substantial risk because SPA utilizes a "defense in depth" approach to protect CCAs within its ESP and runs redundant intrusion detection systems in addition to utilizing anti-malware software within the ESP. According to SPA, SPA has not experienced a breach of ESP security.

Actions Taken to Mitigate the Issue and Prevent Recurrence/Status of Mitigation Plan

SPA's Mitigation Plan to address its violation of CIP-007-1 R1 was submitted to SPP RE as completed as of January 26, 2010. The Mitigation Plan was accepted by SPP RE on March 10, 2010, and approved by NERC on March 15, 2010. The Mitigation Plan for this violation is designated as MIT-08-2396 and was submitted as non-public information to FERC on March 15, 2010, in accordance with FERC orders. SPA certified on March 31, 2010 that the Mitigation Plan requirements were completed on January 21, 2010. As evidence of completion of its Mitigation Plan, SPA submitted the following:

SPP200900161, CIP-007-1 R1

- a. SPA response to SPP RE April 15, 2010 RFI, April 23, 2010.
- b. Southwestern Power Administration, Patch Management, January 21, 2010.

After SPP RE's review of SPA's submitted evidence, SPP RE verified that SPA's Mitigation Plan was completed on January 21, 2010 and notified SPA in a letter dated May 26, 2010 that it had verified completion of the Mitigation Plan for the subject reliability standard.

The Mitigation Plan required the following actions:

SPA modified its patch testing procedures to ensure that new cyber assets and significant changes to existing cyber assets within the ESP do not adversely affect existing cyber security controls. These procedures validate security controls during patch testing. The testing includes basic port scans to identify open/available services, test for malicious code, validation of security-related functions, and a review of active user accounts.

SPA completed modification of its patch testing procedures on January 21, 2010, per Southwest Patch Management Procedures; Section 5.2 "PCS SCADA Patch Procedure," as amended January 21, 2010.

REGIONAL ENTITY'S BASIS FOR PENALTY

SPP RE assessed a penalty of nineteen thousand and five hundred dollars (\$19,500) for the referenced violations. In reaching this determination, SPP RE considered the following factors:

- SPA's compliance history.

A NOCV covering violations of CIP-004-1 R3.2 for SPA (NOC-211) was approved by the BOTCC on December 9, 2009 and filed with FERC under NP10-134-000 on July 6, 2010. On August 5, 2010, FERC issued an order stating it would not engage in further review of the Notice of Penalty. Because SPA had previously failed to ensure its employees with access to Critical Cyber Assets had current personal risk assessments SPP RE considered the present violation of CIP-004-1 R3.2 to be a repeat violation and an aggravating factor in the determination of an appropriate penalty.

- SPA's full cooperation.
- The presence and quality of SPA's compliance program:

SPA has established a Compliance Monitoring Team (CMT) comprised of four employees located in two of SPA's offices. The Compliance Manager; Program Assistant; and Director, Division of Operations and Scheduling are stationed in SPA's Springfield Missouri Operations office. The fourth CMT member is the Public Utilities Specialist stationed at SPA Headquarters in Tulsa, Oklahoma. SPA's internal compliance program has the full support of senior management. Compliance status and updates are regularly provided to Senior Management. Managers also attend and participate in internal compliance related meetings, and have attended and actively participated in SPA's past compliance audits. They are also actively involved in compliance issues which involve or potentially impact agency policies, regulatory or

statutory issues. Notwithstanding SPA's designation of a Compliance Monitoring Team, SPPRE did not find the SPA compliance program worthy of credit and did not determine it to be a mitigating factor in the penalty determination.

- SPA did not attempt to conceal the violations or information needed to review, evaluate or investigate the violation.
- There was no evidence the violations were intentional.
- There were no other mitigating or aggravating factors or extenuating circumstances.

PROCEDURAL HISTORY ASSOCIATED WITH VIOLATIONS AT ISSUE

On September 7, 2010, the SPP RE issued a NAVAPS to SPA for violation of the above mentioned Reliability Standards and proposing a penalty of \$19,500. On October 7, 2010, SPA filed a response to the SPP RE NAVAPS, indicating it did not contest the violations of the Reliability Standards, but contested the proposed monetary penalty and, in particular, the authority of the SPP RE to levy the proposed penalty. On November 15, 2010, subsequent to a conference call, held October 21, 2010, to discuss SPA's response to the SPP RE NAVAPS, SPA requested a hearing before the SPP RE Hearing Body. Therein, SPA stated:

SPA does not dispute that federal entities must comply with the mandatory electric reliability standards approved by the Commission pursuant to FPA § 215. Equally clear, however, is that federal entities are not subject to monetary penalties for such violations. For that reason, SPA contends that neither the \$19,500 amount imposed nor any amount is reasonable. . . . Simply put, SPP RE, NERC, and FERC lack authority under FPA § 316A to impose monetary penalties on federal entities.¹¹

Based on affirmative statements from SPA that it was contesting the monetary amount of the penalty, in addition to SPP RE's authority to levy such a penalty against SPA, a federal entity, the SPP RE issued a Notice of Hearing on November 29, 2010. On December 9, 2010 SPA filed a Motion for Summary Disposition.¹² In its Motion for Summary Disposition SPA requested the Hearing Officer issue a ruling providing summary disposition of the matter stating:

Southwestern does not contest the Notice of Alleged Violations issued by the Southwest Power Pool Regional Entity (SPP RE) and does not dispute the amount of the civil fine imposed by SPP RE.¹³

Here, Southwestern does not take issue with SPP RE's alleged violations of September 7, 2010, does not contest any of the material facts stated in the Notice

¹¹ SPA Request for Hearing at 2-3.

¹² On December 15, 2010, the SPA filed an Amended Motion for Summary Disposition to correct formatting errors in its original Motion. No substantive changes were made to the original Motion for Summary Disposition.

¹³ SPA Motion for Summary Disposition at 2.

[NAVAPS] and does not desire to argue about the amount of the civil fine levied by SPP RE. The only issue in this case is whether SPP RE has the legal authority to assess any monetary civil fines against federal entities.¹⁴

On December 14, 2010, SPP RE filed a Request for Interlocutory Appeal with NERC seeking to have NERC rule on the sole legal question stating:

The sole issue in this proceeding is the legal question – does the FERC, NERC and SPP RE have authority to impose monetary penalties on Southwestern, a Federal Entity. Resolution of this legal question has important implications regarding the enforcement of the NERC Reliability Standards by the eight (8) Regional Entities against the many Federal Entities who use, own, and operate large segments of the Bulk Power System. Acceptance of this Interlocutory Appeal is appropriate because the NERC Rules of Procedure do not allow, as a matter of procedure, the SPP RE Hearing Body to hear this legal question and resolution of this legal question is necessary and proper for the timely conclusion of the matter and to prevent irreparable harm to any party.¹⁵

The NERC Board of Trustees Compliance Committee (BOTCC) acknowledged receipt of SPP RE's Request for Interlocutory Appeal on December 14, 2010 and issued a Request for Information to SPP RE and SPA to provide additional information in support of their respective positions regarding genuine issues of material fact that exists, if any, and the legal issue of whether the FERC, NERC and SPP RE have authority to impose penalties on SPA and other Federal Entities. Responses were requested by January 21, 2010.

Concurrent with the filing of the Request for Interlocutory Appeal with NERC, on December 14, 2010, SPP RE filed a Motion to Stay the Proceedings with the SPP RE Hearing Body, seeking to halt the ongoing proceeding until NERC ruled on SPP RE's Request for Interlocutory Appeal.

On January 12, 2011, SPP RE issued a NOCV regarding the above mentioned violations because SPA no longer disputed the alleged violations and the proposed penalty or sanctions set forth in the previously issued NAVAPS. In the NOCV, SPP RE acknowledged that SPA challenged the SPP RE, NERC and FERC's authority to levy a penalty against SPA and that this legal question has not been, and may not be, determined by the SPP RE or its Hearing Body. The SPP RE further acknowledged and affirmatively stated that there are no material issues of fact remaining in this matter; that SPA has properly preserved the aforementioned legal question; and, that SPA has not waived its right to bring this matter before the NERC BOTCC and FERC for consideration. SPP RE further requested the BOTCC to consider this legal question and to afford SPA the opportunity to provide comments in support of its position on this matter.

On January 13, 2011 the BOTCC issued a Notice of Acceptance for Review of Notice of Confirmed Violation, Termination of Interlocutory Appeal and Revised Request for Information. Among other things, the BOTCC terminated the interlocutory appeal phase of the proceeding

¹⁴ *Id.* at 4.

¹⁵ SPP RE Request for Interlocutory Appeal at 1.

and established revised due dates for SPP RE and SPA to provide documents in support of their respective positions on the legal questions before the BOTCC. SPP RE and SPA made additional submittals to the BOTCC on February 4 and 22, 2011.

APPLICABILITY OF NERC’S MANDATORY RELIABILITY STANDARDS AND PENALTY AUTHORITY TO SPA

Scope of FPA Section 215 Jurisdiction

Sections 215(b)-(e) set forth the requirements by which FERC authorized NERC to be the ERO to develop and enforce penalties for violations of Reliability Standards applicable to “all users, owners and operators of the bulk-power system, including but not limited to the entities described in § 201(f), for purposes of approving reliability standards established under this Section and enforcing compliance with this Section.” Section 201(f) includes the United States, its agencies, its instrumentalities, employees and officers.

There is no question that federal entities that use, own and operate the bulk power system must comply with mandatory reliability standards. FERC has confirmed this understanding in *North American Electric Reliability Corporation*, 129 FERC ¶ 61,033 (2009) *reh’g denied*, 130 FERC ¶ 61,002 (2010); and *North American Electric Reliability Corporation*, 133 FERC ¶ 61,214 (2010), *reh’g pending*. SPA does not question the applicability of the Reliability Standards at issue in the NOCV to its activities. Further, SPA acknowledges that it is subject to compliance with all provisions of Section 215 of the FPA, including Section 215(e), which allows the ERO to impose a penalty on “a user, or owner or operator of the bulk-power system for a violation of a reliability standard.” However, SPA argues that Section 215(e) only allows the ERO and FERC to impose non-monetary penalties on federal entities.¹⁶

Nowhere in Section 215 is the ability of the ERO to impose a penalty for a violation of reliability standards limited in any way, except that, under Section 215(e), FERC has the ability to review and modify the penalty. Section 215(b)(2)(C) provides a non-exclusive list of the types of penalties that the ERO rules may contemplate, which include limitations on activities, function or operations, or other appropriate sanctions. Significantly, nothing in Section 215 suggests that the words “penalty” or “sanctions” as they are used in the statute should be read to exclude monetary or any other types of penalties. Finally, all penalty provisions in Section 215 clearly apply to the entire universe of users, owners and operators of the bulk power system.

The legislative history of the Energy Policy Act of 2005 (EPA) and, in particular, Section 215, shows that Congress intended to allow the ERO to enforce mandatory reliability standards broadly. The Senate Committee on Energy and Natural Resources’ report on the bill that became EPA provided that Section 215 “grants the ERO, approved by FERC, the power to establish mandatory rules for operation of the transmission grid and authority to penalize **anyone** who violates those standards.”¹⁷ The legislative history also shows that Congress did not intend to differentiate between penalties and monetary penalties such as civil fines and, in fact, used the

¹⁶ SPA Motion for Summary Disposition at 5. See also SPA Reply to SPP RE Response to Request for Information at 5.

¹⁷ S. Rep. 109-78, 2005 WL 6486104 (June 9, 2005) (emphasis added).

term “penalty” and “fine” interchangeably.¹⁸ For example, in analyzing the cost of EPAct, the Congressional Budget Office noted: “[t]he bill would affect revenues...by authorizing the ERO and FERC to collect penalties for noncompliance with reliability standards...CBO expects that the ERO and its regional affiliates would retain and spend any penalties it collects...”¹⁹

Impact of Section 316A of the FPA on Penalty Authority

SPA’s argument that Section 316A of the FPA prohibits the application of monetary penalties to federal entities such as SPA is without merit. The authority of the ERO to impose a penalty, subject to FERC review, is contained in Section 215 which, as discussed, does not limit its application to any particular set of users, owners and operators of the bulk power system.²⁰ To the contrary, Section 215 expressly includes federal entities within its scope.

Section 316A was amended through EPAct to increase the limit of civil penalties that can be applied by FERC to violations of provisions under Part II of the FPA to \$1,000,000 per day, per violation. In Order No. 672, FERC found that this limit would also apply to penalties imposed by the ERO under Section 215.²¹ FERC did not address any other issues concerning Section 316A in Order No. 672 and there is no bases to conclude that FERC considers Section 316A as the source for the ERO’s authority to impose monetary penalties for violations of reliability standards.

In fact, the source for ERO’s authority to impose monetary penalties is not Section 316A. At most, Section 316A of the FPA informs FERC as to what constitute “appropriate sanctions” for purposes of Section 215(b)(2)(C). SPA’s interpretation of Section 316A, as a limitation on the ERO’s authority under Section 215 is inconsistent with the clear language of Section 215 as well as the legislative history of the statute, both of which show a deliberate effort by Congress to bring every user, owner and operator of the bulk power system, including federal entities, under the new enforcement regime. Congress’ intent is evident in the express abrogation of the FPA federal entity exemption for violations of Section 215 and in the specific enumeration of federal entities as being subject to the ERO’s enforcement authority, which includes the ability to impose penalties. SPA’s interpretation introduces a limitation into Section 215 that does not exist and cannot be supported by the statutory language or any other basis.²²

¹⁸ 149 Cong. Rec. H7922-03, H7923 (Sept. 4, 2003) (“[a]ccording to NERC, last year there were over 500 violations of the rules that could have been subject to some \$9 million in fines had they been authorized. The practical effect of the reliability provisions would be to codify the NERC as the electric reliability organization charged with setting reliability standards and enforcing them through appropriate penalties and other sanctions.”)

¹⁹ 146 Cong. Rec. S8284-02, S8286 (Sept. 8, 2008).

²⁰ Given that FERC and NERC are authorized to impose penalties against entities under Section 215 of the FPA, NERC does not reach the separate question of whether FERC could assess a financial penalty under Section 316A of the FPA against a registered entity for a Reliability Standard violation in an action initiated by FERC. When FERC affirms what NERC assesses, FERC is not the one imposing the penalty. For this case, the issue is moot.

²¹ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 71 FR 8,662 (Feb. 17, 2006), FERC Stats. & Regs. Regulations Preambles ¶ 31,204 (2006) P 575.

²² The clear language of the statute and the legislative history supply any “clear statement” that may be required to impose a penalty against SPA. SPA has suggested that a “clear statement” rule applies to all cases involving the imposition of a penalty against a federal entity. Given the clear language of the statute and the legislative history, it

Enforcing an Order Imposing Civil Fines against SPA

SPA also claims that the doctrine of sovereign immunity insulates SPA from any efforts by NERC to enforce civil fines in court. While NERC understands that any collection effort against a registered entity may involve litigation and controversy, it submits that this is not a sound reason to abstain from imposing a monetary penalty when one is appropriate under its sanction guidelines. SPA's statements regarding the importance that SPA attributes to reliability should somehow alleviate the need for monetary penalties are contradicted by this very NOP in which the regional entity found a violation that warranted both mitigation and penalty. NERC believes that all registered entities strive for compliance but that good intentions alone do not obviate the need for the enforcement regime put in place through Section 215 of the FPA.

Response to Due Process Claims

Contrary to SPA's position, SPA's due process rights were respected and preserved. Under the NERC Rules of Procedure framework, hearings may be requested to resolve contested violation findings or contested penalty amounts. If there is no contest, the Regional Entity may issue a Notice of Confirmed Violation. Here, while SPA initially contested the penalty amount, in the course of the hearing, it stated that it was no longer contesting the violation finding or the penalty amount. Rather, it wished to pursue related legal arguments about whether federal entities could be assessed financial penalties for violations of the NERC Reliability Standards.

As noted above, in its Motion for Summary Disposition SPA requested the Hearing Officer issue a ruling providing summary disposition of the matter stating:

Southwestern does not contest the Notice of Alleged Violations issued by the Southwest Power Pool Regional Entity (SPP RE) and does not dispute the amount of the civil fine imposed by SPP RE.²³

Here, Southwestern does not take issue with SPP RE's alleged violations of September 7, 2010, does not contest any of the material facts stated in the Notice [NAVAPS] and does not desire to argue about the amount of the civil fine levied by SPP RE. The only issue in this case is whether SPP RE has the legal authority to assess any monetary civil fines against federal entities.²⁴

As a result, it became appropriate to resolve the issue through a NOCV. Importantly, SPP RE preserved the legal issue for the NERC BOTCC's consideration and ultimately FERC's consideration, both of which are impartial arbiters. Therefore, due process was maintained.

is not necessary to consider whether such a rule applies in this case. There are, however, questions as to the applicability of such "rule" in this context.

²³ SPA Motion for Summary Disposition at 2.

²⁴ *Id.* at 4.

**STATEMENT DESCRIBING THE ASSESSED PENALTY, SANCTION OR
ENFORCEMENT ACTION IMPOSED²⁵**

Basis for Determination

Taking into consideration the Commission's direction in Order No. 693, the NERC Sanction Guidelines and the Commission's July 3, 2008, October 26, 2009 and August 27, 2010 Guidance Orders,²⁶ the NERC BOTCC reviewed the NOCV and supporting documentation on April 11, 2011. The NERC BOTCC approved the NOCV and the assessment of a penalty in the amount of nineteen thousand and five hundred dollars (\$19,500) against SPA based upon SPPRE's findings and determinations, the NERC BOTCC's review of the applicable requirements of the Commission-approved Reliability Standards and the underlying facts and circumstances of the violations at issue.

In reaching this determination, the NERC BOTCC considered the following factors:

1. the violations constituted SPA's second violation of one of the subject NERC Reliability Standards;
2. SPA self-reported some but not all of the violations;
3. SPP RE reported that SPA was cooperative throughout the compliance enforcement process;
4. SPA had a compliance program at the time of the violation but SPP RE did not consider it a mitigating factor, as discussed above;
5. there was no evidence of any attempt to conceal a violation nor evidence of intent to do so;
6. SPP RE determined that the violations posed a minimal risk and did not pose a serious or substantial risk to the reliability of the BPS, as discussed above; and
7. SPP RE reported that there were no other mitigating or aggravating factors or extenuating circumstances that would affect the assessed penalty.

For the foregoing reasons, the NERC BOTCC believes that the assessed penalty of nineteen thousand and five hundred dollars (\$19,500) is appropriate for the violations and circumstances at issue, and is consistent with NERC's goal to promote and ensure reliability of the BPS.

Pursuant to 18 C.F.R. § 39.7(e), the penalty will be effective upon expiration of the 30 day period following the filing of this NOP with the Commission, or, if the Commission decides to review the penalty, upon final determination by the Commission.

²⁵ See 18 C.F.R. § 39.7(d)(4).

²⁶ *North American Electric Reliability Corporation*, "Guidance Order on Reliability Notices of Penalty," 124 FERC ¶ 61,015 (2008); *North American Electric Reliability Corporation*, "Further Guidance Order on Reliability Notices of Penalty," 129 FERC ¶ 61,069 (2009); *North American Electric Reliability Corporation*, "Notice of No Further Review and Guidance Order," 132 FERC ¶ 61,182 (2010).

NEED FOR CLEAR COMMISSION DECISION ON APPLICABILITY OF PENALTY AUTHORITY

As noted above, SPA has challenged the authority of SPPRE, NERC or FERC to impose monetary penalties against federal entities under the FPA. For the reasons detailed in this Notice of Penalty, NERC believes that it has the authority to impose such penalties pursuant to Section 215 of the Federal Power Act. Enforcement of penalties on all users, owners, and operators of the bulk power system is an integral part of ensuring the reliable operation of the bulk power system. If federal entities are excluded from the enforcement regime and are not faced with the threat of monetary penalties, there is increased risk to the reliability of the bulk power system and the potential for an incident caused by an agency of the United States. That would be inconsistent with the legislative history of Section 215 discussed above.

It is in the public interest and the interest of an efficient and effective implementation of Section 215 that the Commission issue a clear decision in this case on the scope of Section 215. Therefore, even in the event that SPA does not request that the Commission review this case, NERC requests that the Commission issue a decision in this matter on the scope of the authority of NERC and FERC to impose monetary penalties against federal entities under Section 215 of the FPA. For the reasons discussed above, NERC respectfully requests that FERC find that NERC and the regional entities have the authority to impose monetary penalties on federal entities and affirm the present Notice of Penalty.

A FORM OF NOTICE SUITABLE FOR PUBLICATION²⁷

A copy of a notice suitable for publication is included in Attachment a.

²⁷ See 18 C.F.R. § 39.7(d)(6).

NOTICES AND COMMUNICATIONS

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

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CONCLUSION

Accordingly, NERC respectfully requests that FERC find that NERC and the regional entities have the authority to impose monetary penalties on federal entities and affirm the present Notice of Penalty.

Respectfully submitted,

/s/ Rebecca J. Michael

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cc: Southwestern Power Administration
Southwest Power Pool Regional Entity

Attachment

Attachment a

Notice of Filing

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwestern Power Administration

Docket No. NP11-____-000

NOTICE OF FILING
July 28, 2011

Take notice that on July 28, 2011, the North American Electric Reliability Corporation (NERC) filed a Notice of Penalty regarding Southwestern Power Administration in the Southwest Power Pool Regional Entity region.

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, N.E., Washington, D.C. 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, D.C. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: [BLANK]

Kimberly D. Bose,
Secretary