

153 FERC ¶ 61,266
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Eric S. Morris

v.

Docket No. EL15-93-000

North American Electric Reliability Corporation and
SERC Reliability Corporation

ORDER DISMISSING COMPLAINT AND DENYING PETITION FOR
RULEMAKING

(Issued December 2, 2015)

1. In this order, we dismiss a complaint and deny a petition for rulemaking, filed on August 21, 2015, as amended on September 16, 2015, by Mr. Eric S. Morris. In the complaint filed on August 21, 2015, Mr. Morris alleges that North American Electric Reliability Corporation (NERC) and SERC Reliability Corporation (SERC) violated the NERC Rules of Procedure, Appendix 4B (Sanction Guidelines) in assessing a penalty against Entergy Services, Inc. (Entergy). In a September 16, 2015 motion, Mr. Morris moved to partially withdraw the complaint and requested that the Commission, pursuant to Rule 207(b)(4) of the Commission Rules of Practice and Procedure and 18 C.F.R. § 39.10(b), order NERC to remove a provision of the Sanction Guidelines pertaining to settlement of compliance obligations.¹

2. As discussed below, NERC and SERC are not licensees, transmitting utilities or public utilities and, therefore, not subject to a complaint pursuant to section 306 of the

¹ See 18 C.F.R. § 385.207(b)(4) (2015) (“a person must file a petition when seeking A rule of general applicability”); 18 C.F.R. § 39.10(b) (2015) (changes to an Electric Reliability Organization Rule).

Federal Power Act (FPA).² Accordingly, the Commission dismisses the complaint. In addition, with regard to the petition for rulemaking under Rule 207(a)(4) of the Commission's Rules of Practice and Procedure, Mr. Morris has not shown that there is a sufficient problem to merit a generic solution through a rulemaking. We, therefore, deny the petition.

I. Background

3. On August 21, 2015, Mr. Morris filed a complaint alleging that NERC and SERC violated the Sanction Guidelines in assessing a penalty against Entergy.³ The complaint states that NERC filed with the Commission in a notice of penalty in Docket No. NP15-31-000 a settlement between SERC and Entergy for a total penalty of \$55,000 to settle six separate violations of two Reliability Standard requirements, with a violation duration of multiple years. According to the complaint, NERC's settlement filing "does not clearly identify that an alternative frequency or duration was used and provides no supporting rationale."⁴ The complaint then asserts that the failure to identify an alternative frequency or duration and supporting rationale violates NERC Rules of Procedure and, if properly applied, should have resulted in the assessment of a multi-million dollar penalty against Entergy. As to relief, the complaint asks that the notice of penalty filed in Docket No. NP15-31-000 be withdrawn and resubmitted to either: (1) provide rationale for applying an alternative frequency; or (2) adjust the base penalty amount to consider the full duration of the violation.

4. On September 16, 2015, Mr. Morris filed a motion to partially withdraw his complaint and either petition for a rulemaking under Rule 207(a)(4) or complain under 18 C.F.R. § 39.10(b) for changes to the NERC Sanction Guidelines. In his pleading, Mr. Morris seeks, pursuant to Rule 216(a) of the Commission's Rules of Practice and Procedure, to "partially withdraw" portions of the complaint "specifically referencing [Docket No.] NP15-31 as the sole unjust action and instead incorporate by reference the relevant procedural parts into an amended filing."⁵ In addition, Mr. Morris requests that

² 16 U.S.C. § 825e.

³ On July 30, 2015, pursuant to section 215(e) of the FPA, NERC filed this notice of penalty. On August 28, 2015, the Commission issued a notice stating that it would not further review the notice of penalty, on its own motion.

⁴ Complaint at 2. Under section 3 of the Sanction Guidelines, a penalty "may be assessed on a per violation per day basis or with an alternative frequency or duration."

⁵ Petition at 1.

the Commission initiate a rulemaking that directs NERC to remove the following sentence from section 2.1 of the Sanction Guidelines: “Any provisions within a settlement regarding Penalties or sanctions can supersede any corresponding Penalties or sanctions that would otherwise be determined pursuant to these Sanction Guidelines.”⁶

5. The petition states that settlement should rightly remain as one of numerous potential adjustment factors, as in the Commission’s penalty guidelines⁷ when offering credit for avoiding a trial-type hearing. However, the petition claims that NERC’s Rules of Procedure “do not require that departures from the Sanction Guidelines be set out on the record, specifically whether a rationale if NERC or the Regional Entity deems that alternative Penalty frequency or duration is warranted and for the violation time horizon.”⁸

6. The petition contends that approximately 92 percent of all notices of penalty NERC files with the Commission represent a negotiated disposition of a violation. The petition argues that “the exception of allowing settlement to negate the rest of the Sanction Guidelines, which undermines transparency, by allowing NERC to fail to list rationales for time horizons and frequency and duration determinations, has become the rule.”⁹ The petition cites three examples of notices of penalty that do not state they include settlements but for which NERC did not provide any rationale for the penalty amounts.¹⁰

II. Notice of Filing and Responsive Pleadings

7. Notice of the complaint was published in the *Federal Register*, with interventions and protests due on or before September 10, 2015.¹¹ NERC and SERC timely filed a joint answer to the complaint, but did not respond to the petition.

⁶ *Id.*

⁷ *Enforcement of Statutes, Orders, Rules, and Regulations*, 132 FERC ¶ 61,216 (2010) (Revised Policy Statement on Penalty Guidelines).

⁸ Petition at 1 (footnotes omitted).

⁹ *Id.* at 2.

¹⁰ *Id.* (listing the notices of penalty filed in Docket Nos. NP13-2-000, NP14-13-000, and NP14-41-000).

¹¹ 80 Fed. Reg. 52,268-69 (2015).

III. Answer of NERC and SERC

8. NERC and SERC ask the Commission to dismiss the complaint. NERC and SERC argue that the complaint exceeds the statutory authority of section 306 of the FPA because the respondents are not licensees, transmitting utilities or public utilities.¹² Further, according to NERC and SERC, the complainant lacks standing to initiate review of a notice of penalty and to obtain the requested relief of withdrawal or denial of the notice of penalty. NERC and SERC note that section 215 of the FPA and the Commission's regulations provide that penalties "shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty..."¹³ NERC and SERC assert that the complainant lacks standing to initiate review of a notice of penalty and, therefore, should not be permitted to indirectly accomplish through a complaint that which he lacks standing to accomplish under the Commission's regulations. NERC and SERC further respond that the complaint should be dismissed for failure to satisfy the requirements of Rule 206 of the Commission's Rules of Practice and Procedure that set forth the requirements for bringing a complaint. According to NERC and SERC, the complaint fails to demonstrate any adverse effect of the alleged inactions and fails to proffer evidence in support of the complainant's allegations.

9. NERC and SERC also contend that the complaint also fails on substantive grounds because the notice of penalty in Docket No. NP15-31-000, in fact, conforms to the Sanction Guidelines. NERC and SERC assert that the obligation to provide a rationale for an alternative "frequency or duration" under section 3 of the Sanction Guidelines is not applicable when a penalty is resolved by settlement. In particular, NERC and SERC refer to section 2.1 of the Sanction Guidelines in this regard. NERC and SERC also note that the penalty amount at issue is similar to penalties assessed for comparable violations.¹⁴

¹² NERC and SERC Answer at 3, 5-6, citing *Citizens Energy Task Force v. Midwest Reliability Organization*, 144 FERC ¶ 61,006, at P 38 (2013) (dismissing a complaint against Midwest Reliability Organization (MRO), a Regional Entity, because MRO is not a licensee, transmitting utility, or public utility).

¹³ NERC and SERC Answer at 6.

¹⁴ *Id.* at 12.

IV. Commission Determination

10. We dismiss the complaint against NERC and SERC, as partially withdrawn by Mr. Morris. Section 306 of the FPA permits a complaint that alleges “anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of this Act. . . .” NERC is the Electric Reliability Organization pursuant to sections 215(a)(2) and (b) of the FPA. SERC is a regional entity as defined in FPA section 215(a)(7). Neither serves as a licensee, transmitting utility, or public utility. Thus, consistent with the plain words of the statute, and our precedent, we conclude that the complaint exceeds the statutory authority of section 306 of the FPA.¹⁵

11. Moreover, to the extent that Mr. Morris did not withdraw his request that the notice of penalty in Docket No. NP15-31-000 be resubmitted, the complainant lacks standing to initiate review of a notice of penalty. Both section 215(e)(2) of the FPA and the Commission’s regulations provide that penalties “shall be subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is the subject of the penalty. . . .”¹⁶ Neither the statute or the Commission regulation allows an application to review a notice of penalty from any entity other than the user, owner, or operator that is the subject of the penalty. We agree with NERC that the complainant lacks standing to initiate review of a notice of penalty in order to indirectly accomplish through a complaint what he lacks standing to seek under the statute and the Commission’s regulations.

12. We also decline to initiate a rulemaking as requested by Mr. Morris in his September 16 Petition.¹⁷ The Commission has rejected petitions and requests that it implement a rulemaking when the requesting party fails to show a sufficient change in circumstances or that there is a sufficient problem to merit a generic solution.¹⁸

¹⁵ See *Citizens Energy Task Force v. MRO*, 144 FERC ¶ 61,006 at P 38.

¹⁶ 16 U.S.C. § 824o(e)(2); 18 C.F.R. § 39.7(3)(1) (2015).

¹⁷ Courts apply the arbitrary and capricious standard of review to agency refusals to initiate rulemaking, and review is extremely limited and highly deferential. See *Am. Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987); *Massachusetts v. EPA*, 549 U.S. 497 at 527-28 (2007) (quoting *Nat’l Customs Brokers & Forwarders Ass’n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

¹⁸ See *Tenaska Power Servs. Co. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 107 FERC ¶ 61,308, at P 33 (2004) (rejecting request to implement a rulemaking, stating that the requesting party had not shown that circumstances had sufficiently changed as to warrant re-examining issues); *Midwest Indep. Transmission Sys.*

(continued...)

Mr. Morris bases his request that the Commission initiate a rulemaking on the fact that the current NERC Rules of Procedure do not require that departures from the Sanction Guidelines be set out on the record in notices of penalty, and on his assertion that there should be adequate transparency in the record based on the rest of the “reasonable” Sanction Guidelines.¹⁹ Mr. Morris has failed to show any change in circumstances that merit a new rulemaking. As NERC and SERC point out, the obligation to provide a rationale for an alternative “frequency or duration” under section 3 of the Sanction Guidelines is not applicable when a penalty is resolved by settlement.²⁰

13. Nor has Mr. Morris provided any substantiated evidence demonstrating that section 2.1 of the Sanction Guidelines is inconsistent with the Commission’s regulations specifying the record that is required to be included in notices of penalty. Section 39.7(d) of the Commission’s regulations states that a notice of penalty must include, along with the name of the entity upon which a penalty is imposed, and the identification of each Reliability Standard violated, “a statement setting forth findings of fact with respect to the act or practice resulting in the violation of each Reliability Standard; [a] statement describing any penalty imposed; [t]he record of the proceeding; [and o]ther matters the Electric Reliability Organization or the Regional Entity, as appropriate, may find relevant.”²¹ Nothing in this regulation requires that NERC or a Regional Entity in every instance specifically discuss how a notice of penalty is consistent with the Sanction Guidelines.

Operator, Inc., 104 FERC ¶ 61,060, at P 21 (2003) (rejecting petition for rulemaking when there had not been a substantial change in circumstances), *aff’d*, 388 F.3d 903 (D.C. Cir. 2004); *Natural Gas Supply Ass’n*, 115 FERC ¶ 61,327, at PP 10-11 (2006) (rejecting request for rulemaking to establish natural gas quality and interchangeability standards, stating that gas quality and interchangeability issues arise under discrete circumstances, and as there was no evidence of an industry wide problem, petitioner had not justified its specific nationwide standards); *Amoco Prod. Co.*, 26 FERC ¶ 61,271, at 61,624 (1984) (rejecting request to implement a rulemaking to amend the definition of minimum rate gas, stating there was insufficient evidence to support generic relief).

¹⁹ Petition at 1-2.

²⁰ See NERC and SERC Answer at 11.

²¹ 18 C.F.R. § 39.7(d)(3)-(6).

14. The Sanction Guidelines set forth numerous factors that Regional Entities and NERC are to consider, if applicable, in penalty assessments.²² Notices of penalty, including the ones Mr. Morris cites in his pleadings, identify the factors that apply to particular penalties and describe how they are applied. As to a negotiated or consensual resolution of Reliability Standard violations in a notice of penalty, rather than a litigated matter, we believe that NERC's listing of applicable penalty factors and explanation of how they apply generally provides adequate notice to the industry and public of, and information about, the nature and seriousness of the violation and how the responsible entity mitigated it. In this context, NERC's practice generally provides sufficient information to be consistent with the standard for penalty-setting stated at FPA section 215(e)(6).²³

15. Mr. Morris contends that NERC's notices of penalty include settlements 92 percent of the time. He asserts that the remaining eight percent of notices of penalty that are not the result of settlements should include a rationale that specifically addresses the application of the penalty determination process in the Sanction Guidelines. However, the specific examples that Mr. Morris cites in his petition of notices of penalty that are not "settlements" represent consensual resolutions of possible violations of reliability standards and proposed penalty amounts, not litigated determinations.²⁴ As such, we believe that section 2.1 of the Sanction Guidelines reasonably permitted NERC and the Regional Entities to forego stating whether a penalty is to be assessed on a per violation per day basis or with an alternative frequency or duration in these notices of penalty.

16. We conclude that Mr. Morris has not made a sufficient showing to demonstrate a systemic problem. Further, Mr. Morris has not demonstrated that his proposed solution, to remove a sentence from section 2.1 of the Sanction Guidelines, is a just and reasonable

²² See, e.g., Sanction Guidelines sections 2.3 through 2.16 and 3.3.

²³ 16 U.S.C. § 824o(e)(6) ("Any penalty imposed under [section 215] shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.")

²⁴ See, e.g., Docket No. NP13-2-000, "based on information from Western Electricity Coordinating Council (WECC)," the registered entity "agrees with or does not contest the violation of PRC-005-1 R2 and the proposed forty thousand dollar (\$40,000) penalty to be assessed to" the registered entity. Notice of Penalty in Docket No. NP13-2-000 at 2 (footnote omitted) (filed Oct. 31, 2013).

way to address the concerns of which he complains, or that it will rectify these concerns. Accordingly, we decline to initiate a rulemaking.²⁵

The Commission orders:

(A) The complaint of Mr. Eric Morris is hereby dismissed, as discussed in the body of this order.

(B) The petition of Mr. Morris is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁵ Likewise, to the extent Mr. Morris amended his complaint to seek a revision to NERC's Rules of Procedure pursuant to FPA section 215(f) and 18 C.F.R. § 39.10, we decline to initiate such a proceeding because the pleading does not provide factual evidence to support the allegations for the claims made as required by Rule 206 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.206 (2015). *See, e.g., Californians for Renewable Energy, Inc., Michael E. Boyd, and Robert M. Sarvey v. Pac. Gas and Elec. Co.*, 143 FERC ¶ 61,005 (2013).