IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHWESTERN POWER ADMINISTRATION, UNITED STATES DEPARTMENT OF ENERGY and UNITED STATES DEPARTMENT OF INTERIOR,

Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISION

Respondent.

No. 13-1033

PETITION FOR REVIEW

Pursuant to 16 U.S.C. § 825*l*(b) and Federal Rule of Appellate Procedure 15(a), the United States Department of Energy, the United States Department of Interior, and the Southwestern Power Administration, an agency of the U.S. Department of Energy, hereby petition this Court for review of the following final order of the Federal Energy Regulatory Commission, as affirmed on rehearing: *North American Electric Reliability*

Corp., Docket No. NP11-238-001, 141 FERC ¶ 61,242 (Dec. 20, 2012), affirming on rehearing *North American Electric Reliability Corp.*, Docket No. NP11-238-000, 140 FERC ¶ 61,048 (July 19, 2012), which are both attached in Appendix A.

Respectfully submitted,

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FEBRUARY 2013

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, I filed the foregoing petition for review with the Clerk of the Court by sending an original and four copies to the Court by hand delivery.

I certify that I served the foregoing upon each party designated in the official service list in the underlying proceeding (NP-11-238) before the Federal Energy Regulatory Commission, a list of which parties is attached as Appendix B, and upon:

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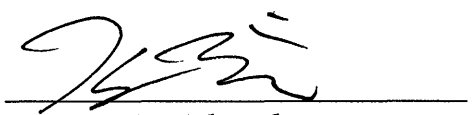

Henry C. Whitaker

Appendix A

141 FERC ¶ 61,242
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

North American Electric Reliability Corporation Docket No. NP11-238-001

ORDER DENYING REHEARING

(Issued December 20, 2012)

1. On July 19, 2012, the Commission issued an order[1] finding that section 215 of the Federal Power Act (FPA)[2] authorizes the imposition of a monetary penalty on a federal entity that violates a mandatory Reliability Standard, and affirming the North American Electric Reliability Corporation's (NERC's) imposition of a $19,500 penalty against the Southwestern Power Administration (SWPA). Several entities, including SWPA, jointly with the U.S. Department of Energy (DOE), and the Department of the Interior (Interior), submitted requests for rehearing of the July 2012 Order, asserting that the Commission erred in (1) finding that sovereign immunity had been waived with respect to the imposition of a monetary penalty against a federal entity such as SWPA; (2) departing from established Commission precedent finding that FPA section 316A, which addresses the imposition of civil penalties for violations of Part II of the FPA, is applicable to FPA section 215; and (3) construing the enforcement authorities of FPA section 215 in a manner that frustrates other congressionally-established policies under the Flood Control Act and the Anti-Deficiency Act.

2. We hereby deny the requests for rehearing and affirm our prior ruling finding that FPA section 215 authorizes the imposition of a monetary penalty on federal entities found to be in violation of a mandatory Reliability Standard.

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[1] *North American Electric Reliability Corp.*, 140 FERC ¶ 61,048 (2012) (July 2012 Order).

[2] 16 U.S.C. §824o (2006).

I. Background

A. Statutory Framework

3. Section 215 of the FPA authorizes the Commission to certify and oversee an electric reliability organization (ERO) responsible for the development and enforcement of mandatory Reliability Standards applicable to users, owners and operators of the Bulk-Power System.[3] Exercising this statutory authority, the Commission certified NERC as the ERO in 2006,[4] and has since approved over one hundred national Reliability Standards as mandatory and enforceable, pursuant to FPA section 215(d).[5] As contemplated under FPA section 215(e)(4), NERC has delegated certain oversight and enforcement authority to eight Regional Entities,[6] including the Southwest Power Pool Regional Entity (SPP Regional Entity), which has enforcement and oversight responsibility for SWPA.

4. Section 215(b)(1) of the FPA, titled "Jurisdiction and Applicability," describes the Commission's reliability jurisdiction as follows:

> The Commission shall have jurisdiction . . . over . . . all users, owners and operators of the bulk-power system, *including but not limited to the entities described in section 201(f)*, for purposes of approving reliability standards established under this section *and enforcing compliance* with [FPA section 215]. All users, owners and operators of the

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[3] 16 U.S.C. § 824o(c).

[4] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,190, *order on reh'g* 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

[5] 16 U.S.C. § 824o(d); *see, e.g., Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. and Regs. ¶ 31,242, *order or reh'g,* Order No. 693-A, 120 FERC ¶ 61,053 (2007).

[6] *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, *order on reh'g,* 120 FERC ¶ 61,260 (2007).

> bulk-power system shall comply with reliability standards that take effect under this section.[7]

Section 201(f) of the FPA, in turn, provides that Part II of the FPA (which includes section 215) does not apply to federal agencies, among other entities, except where a particular provision makes an exception:

> No provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, . . . or any agency, authority, or instrumentality of any one or more of the foregoing . . . *unless such provision makes specific reference thereto*.[8]

5. NERC and the Regional Entities to which NERC delegated compliance and enforcement authority identify potential violations using various compliance tools, including audits, spot checks, investigations, required self-certifications, and voluntary self-reporting. If a violation is found, NERC has authority pursuant to FPA section 215(e)(1) to impose a penalty on the user, owner or operator of the Bulk-Power System found to be in violation, subject to certain due process and review requirements.[9]

6. Under the statute and its implementing regulations, NERC must file a Notice of Penalty with the Commission before an assessed penalty can take effect.[10] Each such penalty determination is subject to Commission review, either on its own motion or by application for review by the recipient of a penalty, within thirty days from the date NERC files the applicable Notice of Penalty.[11] In the absence of an application for

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[7] 16 U.S.C. § 824o(b)(1) (emphasis added).

[8] 16 U.S.C. § 824(f) (emphasis added).

[9] 16 U.S.C. § 824o(e)(1).

[10] 16 U.S.C. § 824o(e)(1) and (2); *see also Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 506, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[11] 16 U.S.C. § 824o(e)(2).

review of a penalty or other action by the Commission, each penalty filed by NERC is affirmed by operation of law upon the expiration of the applicable thirty-day period.[12]

B. SWPA Violations and NERC Notice of Penalty Filing

7. As noted in the July 2012 Order, SWPA is a subdivision of DOE, operating under the authority of section 5 of the Flood Control Act of 1944 (Flood Control Act). SWPA is one of four federal Power Marketing Administrations, and markets hydroelectric power from 24 Army Corps of Engineers projects in the Southwest United States, primarily to defined "preference" customers including rural electric cooperatives and municipal utilities. SWPA operates and maintains 1,380 miles of high-voltage transmission lines in a four-state area located within the region for which the SPP Regional Entity has reliability oversight.[13] SWPA is registered in NERC's Compliance Registry as a balancing authority, purchasing-selling entity, resource planner, transmission owner, transmission operator, transmission planner and transmission service provider[14] and, as such, is required to comply with all Commission-approved Reliability Standards applicable to such entities.[15]

8. In 2009, SWPA self-reported certain violations of NERC's approved Critical Infrastructure Protection or "CIP" Reliability Standards, and the SPP Regional Entity subsequently identified additional violations of those standards during a spot check.[16] The SPP Regional Entity proposed a penalty of $19,500 in total for the violations, which NERC ultimately affirmed over SWPA's objection. Notably, SWPA did not dispute the

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[12] *Id.*; *see also* 18 C.F.R. § 39.7(e)(1) (2012).

[13] *See* July 2012 Order, 140 FERC ¶ 61,048 at P 9; *see also* NERC Notice of Penalty at 1, n.1.

[14] *See* NERC Rules of Procedure Section 500 – Organization Registration and Certification.

[15] The particular Reliability Standards at issue here, CIP-004-1 and CIP-007-1, are applicable to SWPA as a registered balancing authority and transmission operator.

[16] *See* NERC Notice of Penalty at 2-10. Reliability Standard CIP-004-1 sets out requirements for personnel who have authorized cyber access or authorized unescorted physical access to Critical Cyber Assets, including requirements related to personnel risk assessment, training, and security (including cyber security). CIP-007-1 sets out requirements related to security systems determined to be Critical Cyber Assets and other assets within an "Electronic Security Perimeter."

underlying facts related to the violations or the amount of the proposed penalty. Instead, SWPA contested the penalty before NERC based on the claim that federal entities are not subject to monetary penalties for Reliability Standard violations because FPA section 316A, which sets out the Commission's general civil penalty authority, does not extend to federal entities.[17]

9. NERC filed the SWPA Notice of Penalty with the Commission on July 28, 2011, and included a detailed discussion of the procedural history associated with the violations, as well as NERC's analysis of the scope of its penalty authority under FPA section 215. SWPA, in a joint filing with DOE, made a timely request for Commission review of NERC's assessed penalty, on similar legal grounds as were argued before NERC, i.e., that FPA section 316A does not permit the imposition of civil penalties on a federal agency (because such penalties can only be imposed on "persons," defined as an individual or a corporation), that FPA section 215 is not an independent source of authority to impose penalties, or that, at a minimum, the FPA does not reflect a sufficiently clear statement of congressional intent to waive sovereign immunity. A number of entities intervened, making similar arguments to those of SWPA and DOE, including Interior and various associations of wholesale customer groups who purchase power from SWPA and other similar federal power marketing entities.

C. July 2012 Order

10. In the July 2012 Order, the Commission held that the grant of authority to impose a penalty on any user, owner, or operator of the Bulk-Power System that violates a mandatory Reliability Standard, including federal entities, is explicit and unambiguous. The Commission reviewed and relied on the plain language of FPA section 215, first noting that section 215(b) states that the Commission has jurisdiction over all users, owners, and operators of the bulk-power system "*including but not limited to the entities described in section 201(f)*, for purposes of approving reliability standards established under this section *and enforcing compliance with this section.*"[18] The Commission then noted that enforcement of FPA section 215 is governed by subsection 215(e), which authorizes the imposition of a penalty by the ERO under (e)(1) and (e)(2), and by the

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[17] FPA section 316A states in relevant part that "[a]ny person who violates any provision of part II or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues." 16 U.S.C. § 825o-1(b).

[18] July 2012 Order, 140 FERC ¶ 61,048 at P 39 (quoting 16 U.S.C. § 824o(b)(1) (emphasis supplied in order, emphasis added to the statute).

Commission under (e)(3).[19] The Commission held that these grants of authority to the ERO and to the Commission are unambiguous and unequivocal, and as such are sufficient to act as a waiver of sovereign immunity with respect to federal entities found to be in violation of a mandatory Reliability Standard.[20]

11. The Commission further found that FPA section 316A does not alter this explicit grant of authority under FPA section 215 or otherwise render it ambiguous.[21] The Commission rejected the arguments of DOE/SWPA that the authority to impose a monetary penalty for violations of a Reliability Standard derives from FPA section 316A and not from FPA section 215, including their claim that FPA section 215(e) merely sets out procedural requirements and does not act as an independent grant of penalty authority.[22] In addition, the Commission rejected the notion that its prior findings on the applicability of the monetary cap set out in FPA section 316A to penalties imposed under FPA section 215 suggest that FPA section 316A is the source of the Commission's FPA section 215 penalty authority.[23]

12. The Commission specifically addressed whether the grant of authority to impose a monetary penalty on federal entities under FPA section 215 was sufficiently clear and unequivocal to serve as a waiver of sovereign immunity.[24] The Commission concluded that regardless of which standard of clarity is used to test whether sovereign immunity has been waived,[25] the language of FPA section 215 is sufficiently explicit to find such a waiver.

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[19] *Id.* P 40.

[20] *Id.* P 42.

[21] *See id.* PP 42-53.

[22] *Id.* PP 45-48.

[23] *Id.* P 49.

[24] *Id.* P 53.

[25] *See id.* P 53 & n.72 (noting that the standard for imposition of a penalty on a federal entity by another federal agency is arguably less rigorous than the standard applicable to private suits, and only requires a "clear statement" of congressional intent to authorize the imposition of a penalty). Despite the likely applicability of this standard, the Commission found that "the requirements for waiver are met using the highest level of scrutiny, i.e., that waiver has been clearly and unambiguously expressed in the statutory text." *Id.* n.72.

13. The Commission also rejected various policy-based arguments for interpreting its (and NERC's) section 215 penalty authority more narrowly, first noting the detrimental impact on electric system reliability of exempting such a large class of registered entities from section 215's reliability regime. The Commission rejected arguments that the imposition of penalties on federal entities such as SWPA would not provide a meaningful incentive for future compliance, regardless of the potential for passing such costs on to customers or recovering them from taxpayers, given the expectation of congressional and customer scrutiny if such entities continue to incur significant FPA section 215 penalties.[26] The Commission found no inconsistency with the Flood Control Act in imposing monetary penalties on federal entities like SWPA.[27] Finally, the Commission found no discernible conflict with the Anti-Deficiency Act, given that payment of such an administratively imposed civil penalty is permissible as a "necessary expense" where sovereign immunity has been waived.[28]

D. Requests for Rehearing

14. Timely requests for rehearing were filed by DOE and SWPA jointly (DOE/SWPA), Interior, the Mid-West Electric Consumers Association and the Southwestern Power Resources Association (Mid-West ECA), and the Southeastern Federal Power Customers, Inc. (SE FPC). DOE/SWPA and Interior also included a motion for stay of the SWPA penalty while the requests for rehearing were pending.

15. All of the entities seeking rehearing make arguments based on the doctrine of sovereign immunity, alleging that the Commission erred in both its reading of the language of FPA section 215 and in its analysis of the impact of FPA section 316A on the authority to impose monetary penalties on federal entities found in violation of a mandatory Reliability Standard. With respect to the applicable standard for determining whether sovereign immunity has been waived, DOE/SWPA, Interior, and SE FPC maintain that any such waiver must be "unequivocally expressed" in the statutory text.[29]

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[26] *Id.* P 56.

[27] *Id.* P 57.

[28] *Id.* PP 58-60.

[29] *See* DOE/SWPA Rehearing Request at 4 (citing *Lane v. Pena,* 518 U.S. 187 (1996) (*Lane v. Pena*), *United States Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (*DOE v. Ohio*); and *United States v. Nordic Village, Inc.,* 503 U.S. 30 (1992) (*Nordic Village*), among others, for the proposition that a waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text); *see also* Interior Rehearing Request at 3; SE FPC Rehearing Request at 10.

These entities also assert that under this strict standard of interpretation, ambiguities must be construed in favor of immunity, and that ambiguity exists if "there is a plausible interpretation of the statute that would not authorize money damages against the Government."[30] Moreover, these entities assert that any ambiguities with respect to the *scope* of the waiver must be construed in favor of the governmental entity, and that "any waiver of sovereign immunity that would authorize payments from the federal treasury 'must extend unambiguously to such monetary claims.'"[31]

16. DOE/SWPA and Interior argue that the sub-sections of FPA section 215 on which the Commission relies in the July 2012 Order do not contain the kind of explicit language needed to support an unequivocal and unambiguous waiver of sovereign immunity.[32] First, they note that FPA section 215(b) does not grant any enforcement or penalty powers to the ERO.[33] While they acknowledge that FPA section 215(b) makes federal agencies subject to the Commission's jurisdiction for purposes of "enforcing compliance" with FPA section 215, they argue that the provision does not speak to *how* the Commission can enforce compliance and note that it does not explicitly state that such enforcement can include "retrospective monetary penalties."[34] In support of this position, DOE/SWPA maintain that the phrase "enforce compliance" is used elsewhere in the FPA

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[30] DOE/SWPA Rehearing Request at 4 (citing *Federal Aviation Admin. v. Cooper,* 132 S. Ct. 1441, 1448 (2012) and quoting *Nordic Village,* 503 U.S. at 34, 37); *see also* Interior at 4.

[31] Interior Rehearing Request at 4 (quoting *Lane v. Pena*, 518 U.S. at 192); DOE/SWPA Rehearing Request at 4. According to SE FPC, the case law on sovereign immunity requires that the following three elements be met: (1) waiver must be part of the statutory text; (2) waiver cannot be implied; and (3) waiver must explicitly reference monetary claims. SE FPC Rehearing Request at 11. SE FPC further maintains that this line of cases requires that the statutory language must specifically reference the federal government and must include "language delineating a waiver such as 'notwithstanding any immunity.'" *Id.* at 13.

[32] DOE/SWPA Rehearing Request at 5-6; *see also* Interior Rehearing Request at 5-6 (asserting that the statute does not clearly indicate that federal entities are subject to monetary penalties, as is necessary to effectuate a waiver of sovereign immunity), SE FPC Rehearing Request at 8-10.

[33] *See* DOE/SWPA Rehearing Request at 6.

[34] *Id.* at 7; *see also* SE FPC Rehearing Request at 8.

to mean actions other than the imposition of penalties, citing FPA section 201(g) and FPA section 314(a).[35]

17. DOE/SWPA argue that FPA section 215(e) also lacks the specificity needed to effectuate a waiver of sovereign immunity because it does not state that the penalties it authorizes can be monetary in nature.[36] DOE/SWPA argue that FPA section 215(e) does not "expressly apply to the federal government," and that section 215(b) "only makes federal entities subject to the Commission's jurisdiction for purposes of 'enforcing compliance' and does not mention exposing federal entities to penalties, much less monetary penalties."[37] For all of these reasons, these entities claim that they have advanced a plausible interpretation of FPA section 215 that does not permit the imposition of penalties on federal entities.[38]

18. In the alternative, DOE/SWPA and Interior argue that no waiver of sovereign immunity can be found when FPA section 215 is read in concert with FPA section 316A. Interior explains that FPA section 316A does not authorize civil penalties against federal entities, because they do not meet the FPA's definition of "person," and that this provision therefore creates sufficient ambiguity to find no waiver of sovereign immunity under FPA section 215.[39] These entities also assert that FPA section 215 cannot be read as a separate grant of penalty authority, because FPA section 215 does not bear any "indicia" of a grant of such authority. Specifically, DOE/SWPA note that FPA section 215 does not specify what penalties may be imposed, does not contain quantitative limits, and does not specify a mechanism for judicial enforcement.[40]

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[35] DOE/SWPA Rehearing Request at 8.

[36] *Id.* at 9-10 (citing *Maine v. Dep't of Navy,* 973 F.2d 1007, 1011 (1st Cir. 1992) and *DOE v. Ohio,* 503 U.S. at 621, for the proposition that a lack of specificity as to the kind of penalty authorized equates to a failure to unequivocally and unambiguously waive immunity). *See also* Interior Rehearing Request at 5 ("Section 215 does not elaborate on the meaning of 'penalty,' nor does it expressly state that monetary penalties are permissible.").

[37] DOE/SWPA Rehearing Request at 11.

[38] *See id.*

[39] Interior Rehearing Request at 6-8.

[40] DOE/SWPA Rehearing Request at 12-13.

19. DOE/SWPA and Interior also argue that the Commission's findings in the July 2012 Order contradict its prior findings in Order No. 672, in which the Commission held that "Section 316A of the FPA establishes a limit on a monetary penalty for a violation of a Reliability Standard pursuant to FPA Section 215."[41] According to DOE/SPWA, logic dictates that if FPA section 215 is a separate grant of penalty authority then it should not be limited by FPA section 316A at all. If that is not the case, and the two provisions are instead to be read together, then DOE/SWPA maintain that "all of Section 316A's provisions apply to monetary penalties under Section 215."[42] DOE/SWPA further argue that "[i]f section 316A governs the size of monetary penalties under Section 215, it must also govern which entities may be forced to pay."[43]

20. Mid-West ECA and SE FPC make many of the same, or similar, arguments to that of DOE/SWPA in support of their requests for rehearing. Mid-West ECA asserts that the Commission failed to explain its departure from established precedent interpreting FPA section 316A as establishing limits on monetary penalties for violations under FPA section 215.[44] Mid-West ECA argues that the Commission's prior rulings, in Order No. 672 and elsewhere, "demonstrate that Section 316A is the source of 'empowerment' for the Commission's and NERC's authority to impose a penalty" under FPA section 215.[45]

21. Similarly, Mid-West ECA asserts that the Commission failed to consider the FPA in its entirety when assessing the Commission's authority under FPA section 215, maintaining that the Commission's only explicit authority to impose monetary penalties is contained in FPA section 316A.[46] Mid-West ECA argues that FPA section 215 fails to meet the standard required for a waiver of sovereign immunity as set out in *Lane v. Pena*

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[41] *Id.* at 14 (quoting Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 575).

[42] *Id.* at 14-15.

[43] *Id.* at 15.

[44] Mid-West ECA Rehearing Request at 7-13.

[45] *Id.* at 9. Mid-West ECA also notes that the Commission "has consistently described the impact of Section 316A on Section 215 as 'establishing' and 'setting' rather than guiding," thereby demonstrating that Section 215 does not provide an independent source of penalty authority. *Id.* at 10.

[46] *Id.* at 15-16.

and *DOE v. Ohio, et al.*,[47] but also maintains that FPA section 215 does not even qualify as a "clear statement" of congressional intent to subject federal agencies to penalty authority.[48] Mid-West ECA asserts that if Congress had intended to make federal entities subject to penalties under the FPA, it could have amended FPA section 316A to do so.[49] Similarly, Mid-West ECA suggests that Congress would have revised the language of FPA section 201(b)(2), where it lists the FPA provisions applicable to section 201(f) entities, to include FPA section 316A if it had intended to waive immunity for FPA section 215 violations.[50]

22. Mid-West ECA also relies on a number of policy arguments in seeking rehearing of the July 2012 Order, claiming that the Commission's reading of FPA section 215 frustrates congressional intent under other statutes or leads to inconsistencies in the Commission's own policies.[51] First, Mid-West ECA argues that the imposition of a penalty on a federal agency will not provide an incentive to proactively comply with Reliability Standards, because the penalty costs may be readily passed through to customers or covered by taxpayers through appropriations.[52] Mid-West ECA likens this situation to that of RTOs and ISOs, where the Commission has recognized that the ready availability of such pass-through mechanisms can weaken compliance incentives.[53]

23. Mid-West ECA also asserts that the imposition of penalties on federal agencies, which then pass those costs on to preference customers, would frustrate the intent of the Flood Control Act and its encouragement of the distribution of power and energy to preference customers at "the lowest possible rates to consumers consistent with sound business principles."[54] Mid-West ECA asserts that the July 2012 Order incorrectly characterizes the congressional mandate of the Flood Control Act, and that any imposition of a monetary penalty on a covered federal entity is inconsistent with the

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[47] *Id.* at 22-25.

[48] *Id.* at 19-22.

[49] *Id.* at 20.

[50] *Id.* at 21.

[51] *See id.* at 25-32.

[52] *Id.* at 25-27.

[53] *Id.* at 26.

[54] *Id.* at 28 (quoting section 5 of the Flood Control Act, 16 U.S.C. § 825s (2006)).

Flood Control Act's directive to provide preference customers access to power at the "lowest possible price."[55]

24. Finally, Mid-West ECA and SE FPC argue that the Commission did not properly consider the potential conflict between its interpretation of FPA section 215 and the Anti-Deficiency Act,[56] asserting, *inter alia,* that payment of a penalty by a federal agency or federal officer could run afoul of the Anti-Deficiency Act if there is no clear waiver of sovereign immunity.[57] Mid-West ECA maintains that the Commission must consider and make a determination regarding all applicable statutory and appropriations authorities to assess whether a penalty payment by a specific federal entity is precluded by the Anti-Deficiency Act.[58] Mid-West ECA argues that the Commission failed to make these kinds of careful determinations regarding how penalty amounts can or should be paid, and otherwise to fully consider the potential conflicts under the Anti-Deficiency Act.[59]

25. Finally, DOE/SWPA and Interior include a motion for stay of the penalty against SWPA pending resolution of the rehearing requests, with DOE/SWPA noting the Commission's general policy of staying penalties under Commission review.[60] DOE/SWPA assert that a stay would prevent wasted government resources, particularly with respect to the pursuit of other penalty cases now pending before the Regional Entities.[61]

II. Discussion

26. We find, as we did in the underlying July 2012 order, that FPA section 215 unequivocally and unambiguously authorizes the imposition of monetary penalties on

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[55] *Id.* at 29.

[56] 31 U.S.C. § 1341 (2006).

[57] Mid-West ECA Rehearing Request at 30; SE FPC Rehearing Request at 17-18.

[58] Mid-West ECA Rehearing Request at 31.

[59] *Id.* at 32.

[60] DOE/SWPA Rehearing Request at 17 (citing *Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672,* 123 FERC ¶ 61,046 at P 12 (2008)); *see also* Interior Rehearing Request at 9-10.

[61] DOE/SWPA Rehearing Request at 18; Interior Rehearing Request at 9.

federal entities that are found to be in violation of a mandatory Reliability Standard. We reach that conclusion based on the explicit language of FPA section 215 in context and in its entirety, and we do not agree that the section can plausibly be interpreted as a grant of enforcement authority over federal entities that are users, owners, or operators of the Bulk-Power System for reliability-related purposes *other* than the imposition of monetary penalties, as the entities seeking rehearing maintain.[62]

27. We further find that no ambiguity arises as a result of the Commission's arguably more limited authority to impose a monetary penalty on a federal entity under FPA section 316A, and reject the notion that FPA section 215 does not serve as an independent source of authority to impose a monetary penalty. Nor do we agree that our findings with respect to such independent authority represents a departure from our prior rulings regarding the applicability of FPA section 316A's monetary cap to FPA section 215 penalties. As we found in the underlying order, our decision to allow the application of such monetary caps to FPA section 215 in no way suggested that any other limitations of FPA section 316A should supplant the plain language of FPA section 215 with respect to scope.

28. We reject arguments that the grant of enforcement authority under FPA section 215 is limited by the scope of the Commission's general civil penalty authority over federal entities, as set out in FPA section 316A, and instead find that the separate grant of penalty authority over federal entities under FPA section 215 is explicit and unambiguous. Accordingly, we find that the ERO, as well as the Commission, is imbued with the penalty authority granted under FPA section 215(e).

29. As in our underlying order, we find no policy basis for exempting federal agencies from the assessment of monetary penalties under section 215. While we acknowledge that federal agencies may not share the *same* incentive systems as privately-owned users, owners and operators of the Bulk-Power System, we believe that the imposition of penalties still acts as a significant incentive for future compliance. Finally, we again find no inconsistency with the Anti-Deficiency Act.

A. FPA Section 215 is Unequivocal and Unambiguous in Authorizing the Imposition of Monetary Penalties on Federal Entities

30. In the July 2012 Order, we found that the plain language of FPA section 215 explicitly conveys authority to assess a monetary penalty against a federal entity for violations of a mandatory Reliability Standard. We did so through an examination of the

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[62] Given our findings in this Order Denying Rehearing, we dismiss as moot the motions for stay of the $19,500 penalty against SWPA.

specific statutory language of FPA section 215 (and the applicable definitional sections of the FPA), without recourse to any underlying policy objectives or legislative history, as some of the entities have suggested.[63] Nor did we rely on assumptions or implication in our analysis of FPA section 215. Rather, we considered the plain meaning of the statutory text, in the context of, and with reference to, the entirety of FPA section 215 and the rest of the FPA.

31. In the July 2012 Order, we explained that FPA section 215(b) defines the jurisdictional scope of FPA section 215 as extending to all users, owners and operators of the Bulk-Power System, "including but not limited to the entities described in section 201(f) for purposes of approving reliability standards under this section *and enforcing compliance with this section.*"[64] We further explained that SWPA is an FPA section 201(f) entity and is a user, owner or operator of the Bulk-Power System.[65] Finally, we found that enforcement of compliance under FPA section 215 is covered under subsection 215(e), which explicitly includes the option of imposing a penalty on any user, owner or operator of the Bulk-Power System found to be in violation of a mandatory Reliability Standard.[66]

32. Notably, we reached our conclusion regarding the scope of FPA section 215's penalty authority using the same strict standards of statutory construction that DOE/SWPA and other entities claim is required in order to find a waiver of immunity,

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[63] *See, e.g.,* SE FPC Rehearing Request at 15 (stating that "[t]he Commission's reliance on arguments presented by NERC and its reference to the legislative history are equally unavailing to support a finding of a waiver of sovereign immunity" and citing to the July 2012 Order, 140 FERC ¶ 61,048 at P 14). Notably, SE FPC cites to a paragraph in our background discussion of the history of the case, not to findings or arguments made in the substantive sections of the order. Similarly, while Mid-West ECA correctly remarks that the July 2012 Order noted the potentially large regulatory gap if federal entities are not subject to penalties under FPA section 215 (*see* Mid-West ECA Rehearing Request at 24), we did so as part of our analysis of the policy arguments put forward *by commenters* in favor of our declining to impose penalties on federal entities and not as part of our statutory analysis regarding the clarity of the immunity waiver under FPA section 215.

[64] *See* July 2012 Order, 140 FERC ¶ 61,048 at P 39 (quoting 16 U.S.C. § 824o(b)(1) (emphasis added)).

[65] *Id.*

[66] *Id.* P 40.

i.e., that waiver "must be unequivocally expressed in statutory text and will not be implied."[67] Although we noted in our July 2012 Order that a less rigorous standard might be more applicable in this kind of case, involving the imposition of a penalty on a federal entity for violations of a federal statute, we found the language of FPA section 215 to be sufficiently clear to meet the highest level of scrutiny.[68]

33. As described above, DOE/SWPA and other entities seeking rehearing maintain that, under this strict standard for finding a waiver, any ambiguity must be resolved in favor of the government and that there can be no waiver if there is *any plausible* interpretation of the statute that would not authorize a monetary penalty on federal entities. These entities then argue for an interpretation of FPA section 215 that is *implausible* and requires that each subsection be considered without reference to any other subsection or the applicable definitional provisions of the FPA.

34. DOE/SWPA and other entities acknowledge that federal agencies "are subject to the Commission's jurisdiction 'for purposes . . . of enforcing compliance'" under FPA section 215(b).[69] However, they argue that the phrase "enforcing compliance" in FPA

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[67] *Id.* P 53, n.72.

[68] *Id.* As we stated in the July 2012 Order, a "less rigorous standard has been applied in cases involving the imposition of a penalty by one federal agency on another, i.e., whether there is a 'clear statement' of congressional intent to authorize the imposition of such a penalty against a federal entity or agency" (citing two opinions from the Office of Legal Counsel (OLC), *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conversation and Recovery Act,* 2000 OLC LEXIS 20 (2000) (OLC RCRA Opinion) and *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act,* 1997 OLC LEXIS 29, *slip op.* at 15-16 (1997) (OLC Clean Air Act Opinion)).

Notably, in the OLC RCRA Opinion, the OLC relied on both the plain text of the statute *and* its legislative history in finding a sufficiently clear statement of congressional intent to authorize the assessment of penalties against federal agencies for violations of RCRA's underground storage tank requirements. 2000 OLC LEXIS 20 at 6, n.3. Similarly, in the OLC Clean Air Act Opinion, the OLC relied on changes in the text of the Clean Air Act and House Reports explaining the reason for the change, as well as the plain text of the statute, in finding that "Congress clearly indicated . . . its intent to authorize EPA to use its section 113 enforcement authorities [including civil penalty authority] against federal agencies." 1997 OLC LEXIS 29 at 10-15.

[69] DOE/SWPA Rehearing Request at 7.

section 215(b) lacks the specificity necessary to constitute a waiver and that the Commission's reading of that term "greatly expands" on how the term is used elsewhere in the FPA.[70] This line of reasoning might have some merit (albeit limited) if there were no specific language elsewhere in FPA section 215 to explain the intended scope of enforcement authority. However, that is not the case, and any plausible interpretation of FPA section 215 must include a consideration of *all* relevant subsections. Thus, when FPA section 215(b) is read in conjunction with FPA section 215(e), we found that FPA section 215 *explicitly* contemplates the imposition of penalties by either the ERO or the Commission.[71]

35. DOE/SWPA and other entities requesting rehearing seek to avoid this result by arguing that (1) use of the word "penalty" in FPA section 215(e) is not explicit enough to allow the imposition of a monetary penalty or fine; and/or (2) FPA section 215(e) does not explicitly refer back to FPA section 201(f) entities (or to federal entities), and therefore cannot effectuate a waiver of immunity.

36. With respect to the first argument, DOE/SWPA and others fail to cite a single sovereign immunity case in which the word "penalty" was found to be insufficiently explicit to allow the imposition of a monetary penalty, nor is that term commonly understood to exclude a monetary fine. Indeed, the very provision of the FPA that these same entities point to as an example of a clear grant of authority to impose a monetary fine, FPA section 316A, uses the terms "penalty" and "civil penalty" but does not use the word "monetary."

37. SE FPC, in particular, overstates what is required under the caselaw to find that a monetary penalty can be imposed on a federal entity, asserting that the waiver of sovereign immunity "must explicitly reference monetary claims."[72] However, SE FPC's own example of statutory language sufficient to authorize the imposition of a monetary penalty on a federal agency demonstrates the fallacy of its argument. SE FPC sets out the following provision from the revised Resource Conservation and Recovery Act (RCRA), as an example of the kind of language necessary to effectuate a waiver of immunity that extends to a monetary fine:

> The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any

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[70] *Id.*

[71] July 2012 Order, 140 FERC ¶ 61,048 at P 37.

[72] *See* SE FPC Rehearing Request at 11.

> such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative relief, administrative order or *civil or administrative penalty* or fine referred to in the preceding sentence, or reasonable service charge).[73]

Notably, this statutory provision, like 215(e)(1) and (e)(3), uses the word "penalty" to include a monetary penalty, without the explicit use of the word "monetary," "monetary claim," or "monetary damages."

38. Thus, contrary to the assertions of the entities seeking rehearing, the courts have not been overly concerned with the use of the term "monetary damage" or "monetary claim" in cases involving the imposition of penalties on a federal entity that violates a federal statute, as opposed to a private suit for damages.[74] As one example, the court in

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[73] SE FPC Rehearing Request at 12-13 (quoting from 42 U.S.C. § 6961, and explaining that the revised language was developed "in the wake of the *U.S. Department of Energy v. Ohio* decision," when "Congress passed the Federal Facilities Compliance Act of 1992 to clarify the scope of the sovereign immunity that was waived under [RCRA]"). *See also U.S. v. Colorado,* 990 F.2d 1565, 1569-70 at n.4 (10th Cir. 1993) (noting that Congress amended RCRA after the Court's decision in *DOE v. Ohio* to clearly provide that federal agencies are not immune from penalties thereunder).

SE FPC also argues that the failure to use explicit immunity "waiver" language (such as "notwithstanding any immunity") must be construed to mean no waiver was intended, but provides no support for that position other than to provide examples of cases in which such language happened to be part of the relevant statute. In fact, courts have found a waiver of sovereign immunity where the statute did not include language stating that "The United States hereby expressly waives any immunity . . . ." *E.g., U.S. v. Tennessee Air Pollution Control Board,* 185 F.3d 529 (6th Cir. 1999) (holding that the Clean Air Act's "state suit" provision, which empowers states to bring enforcement actions against the United States and to obtain administrative remedies or sanctions in the same manner as nongovernmental entities but does not include an express statement of waiver of sovereign immunity, is sufficient to allow the imposition of a $2,500 civil penalty on the U.S. Army).

[74] *See, e.g., Cudjoe v. Dept. of Veterans Affairs,* 426 F.3d 241 (3d Cir. 2005) (finding no waiver of immunity for private suits for money damages for failure to disclose lead paint contamination under the Toxic Substances Act, while noting the statute's express waiver of immunity with respect to EPA enforcement, including the imposition of fines and penalties). In making this distinction, the Court in *Cudjoe*

(continued…)

U.S. v. Tennessee Air Pollution Control Bd.[75] found that the Clean Air Act "unequivocally and unambiguously" effects a waiver of sovereign immunity that extends to the imposition of penalties for past violations of air quality standards. The court relied on the following savings clause in making that determination, with no apparent concern about its lack of the use of the word "monetary":

> Nothing in this section or in any law of the United States shall be construed to prohibit . . . any State . . . from . . . bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency . . . against the United States . . . .[76]

39. We further reject DOE/SWPA's claim that the use of the phrase "enforce compliance" in FPA sections 201(g) and 314(a) has any relevance to the proper interpretation of FPA section 215. FPA section 201(g) and 314(a) both relate to the enforcement authorities of the U.S. districts courts, in the former case giving the district courts authority to enforce compliance with any state commission order to examine the books and accounts of certain jurisdictional entities, and in the latter case to enforce compliance or to enjoin acts or practices that could constitute a violation of the FPA. The use of the term "enforce compliance" in those sections is simply not comparable to that of section 215, particularly when FPA section 215(e) goes on to specify that "enforcement" is intended to include "penalties" that the ERO or the Commission, not a court, would impose. That intent is made most clear in subsection 215(e)(3), which states that upon finding that a user, owner or operator of the Bulk-Power System has engaged in or will engage in acts that violate a Reliability Standard, the Commission "may order compliance with a reliability standard *and* may impose a penalty against [that] user or owner or operator of the bulk-power system."[77] If the term "enforcing compliance" in FPA section 215(b) was intended to cover injunctions or other equitable remedies only, as DOE/SWPA have argued, then there would be no reason for subsection (e)(3) to give the Commission the authority *both* to "order compliance" with Reliability Standards and to "impose a penalty" for violations of those standards.

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pointed out that the term "civil penalty" is defined in Black's Law Dictionary as "a fine assessed for a violation of a statute or regulation." *Id.* at 247.

[75] 185 F.3d 529 (6th Cir. 1999).

[76] *Id.* at 532.

[77] 16 U.S.C. § 824o(e)(3) (emphasis added).

40. With respect to the second argument of DOE/SWPA and others, that FPA section 215(e) does not explicitly refer to federal entities (or to 201(f) entities), we reject the notion that a waiver of sovereign immunity can only be effectuated if conferred under a single subsection of FPA section 215. We do not believe that the scope of the Commission's jurisdiction and obligations with respect to enforcing compliance, as described in FPA section 215(b), can be understood without reference to FPA section 215(e), and that the definition of the term "users, owners and operators of the Bulk-Power System" as set out in FPA section 215(b), which includes FPA section 201(f) entities, necessarily informs its use throughout the remaining sections of FPA section 215. Thus, we agree with DOE/SWPA when they argue elsewhere that statutory language which purports to effect a waiver of immunity must be read in context. Unlike DOE/SWPA, however, we believe this rule of construction rule applies not only to the FPA as a whole but also *within* the context of FPA section 215.

41. Finally, DOE/SWPA and others point out that the FPA section 215(b) description of jurisdictional scope and applicability refers only to the Commission's jurisdiction and not to the ERO's. We do not find this distinction to be meaningful in this context. First, as discussed above, we have held that FPA section 215(b) serves to define the scope of "all users, owners and operators of the Bulk-Power System" as that term is to be applied to the remainder of FPA section 215. Notably, the statute uses the exact same phrase -- "user or owner or operator of the bulk-power system" -- in the provision governing the Commission's enforcement authority (section 215(e)(3)), and in the provision governing the ERO's enforcement authority (section 215(e)(1)), without any indication that they are intended to have a different scope. We believe the only plausible approach to interpreting this language is to read "user or owner or operator of the bulk-power system" as having a consistent meaning throughout section 215 that encompasses entities, like SWPA, that are included in section 201(f).[78]

B. FPA Section 316A Does Not Otherwise Render Ambiguous the Grant of Authority to Impose Penalties on a Federal Entity Under FPA Section 215

42. We disagree with DOE/SWPA and other entities seeking rehearing that we failed to consider our FPA section 215 authority in the context of the rest of the FPA, and particularly that we failed to consider FPA section 316A, which grants the Commission the authority to impose a civil penalty on "persons" who violate any provision of Part II

[78] We further note that an ERO-imposed penalty cannot take effect until the 31st day after it is filed with the Commission, and that each such penalty is subject to Commission review on its own motion or on application by the recipient of the penalty. *See* 16 U.S.C. § 824o(e)(2).

of the FPA. We fully considered whether the grant of authority to impose a penalty on a federal entity under FPA section 215 is inconsistent with or otherwise conflicts with FPA section 316A, and we found that it did not.

43. In their rehearing requests, DOE/SWPA and other entities make a number of arguments similar to those made in their initial comments in this proceeding, i.e., that FPA section 215 is merely a procedural provision,[79] that it cannot serve as an independent grant of penalty authority because it does not bear the indicia of such a grant, and that FPA section 316A is the sole source of civil penalty authority for violations of Part II of the FPA.

44. We find such a limited reading of FPA section 215 implausible. As we noted in the July 2012 Order, FPA sections 215(e)(1) and (3), separate and apart from FPA section 316A, authorize the ERO and the Commission to impose a penalty for violation of a mandatory Reliability Standard. Moreover, FPA section 316A does not mention the "ERO" and therefore cannot serve as a source of penalty authority for NERC. With respect to arguments about FPA section 215 lacking the "indicia" of a grant of penalty authority, we found, and reiterate, as follows:

> First, we note that FPA section 215(e)'s title – Enforcement -- signals the grant of enforcement authority, which includes the authority to impose a penalty . . . . Nor can we agree that the placement of FPA section 215(e) with the rest of FPA section 215 is a compelling reason to question its effect as a grant of penalty authority. Quite the contrary, if the intent was to draw a distinction between the penalty authority of the Commission under FPA section 215 (which extends to all 201(f) entities, regardless of their status as a "person" as defined in the FPA) and its penalty authority under FPA section 316A, it would be logical that Congress would have added the new enforcement authority as part of FPA section 215 and not through changes to FPA section 316A.[63]
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> [63] Indeed, the fact that FPA section 215(e) provides that "any penalty imposed *under this section* shall bear a reasonable relation to the seriousness of the violation . . . " further shows that any intended penalties for section 215 violations be

[79] *See, e.g.,* DOE/SWPA Rehearing Request at 12; Mid-West ECA Rehearing Request at 17 (describing FPA section 215 as a substantive regulatory provision that is enforced through 316A).

> imposed under section 215 and not another section or part. Similarly, FPA section 215(c), which governs certification of the ERO, indicates that Congress intended FPA section 215 to be an independent source of penalty authority for violations of FPA section 215. Specifically, FPA section 215(c)(2)(C) requires the ERO to establish rules to "provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) . . . ." 16 U.S.C. § 824o(c)(2)(C). *See also* Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 570 (finding that the type of penalty contemplated by FPA section 215 includes monetary penalties).[80]

45. We also reject the notion that the failure to include a monetary cap in FPA section 215 indicates that the section was not intended to serve as a grant of penalty authority. As is discussed more fully in section II.C., below, we have determined that the monetary cap set out in FPA section 316A is applicable to FPA section 215 penalties. Despite this, we cannot plausibly read FPA section 215 as relying on FPA section 316A as the source for its penalty authority, and note that if FPA section 316A did not exist or were otherwise withdrawn from the FPA, the penalty authorities described in FPA section 215 would still exist and could be carried out (even if uncapped).[81]

46. Moreover, as we noted in the July 2012 Order, FPA section 215 may not place a specific dollar-value cap on penalties, but does include other significant limitations.[82] Among other things, all penalties assessed by NERC are "subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is

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[80] July 2012 Order, 140 FERC ¶ 61,048 at P 47.

[81] As we found in the July 2012 Order, we find no merit in the argument that Congress would have modified FPA section 316A to refer to 201(f) entities, or section 201(b)(2) to include section 316A among the list of provisions of the FPA that are applicable to 201(f) entities if it had intended for federal entities to be subject to monetary penalties for violations of FPA section 215. On the contrary, any such modification explicitly would have made federal entities subject to penalties for *any* violation of FPA Part II. *See* July 2012 Order, 140 FERC ¶ 61,048 at PP 47, 51 ("By granting a separate penalty authority as part of FPA section 215, Congress limited federal entities' new exposure to penalties . . . to a very specific area of responsibility, *i.e.,* to violations of mandatory Reliability Standards and nothing further.").

[82] *Id.* P 48.

the subject of the penalty," and all are required to bear a reasonable relation to the seriousness of the violation and to consider remedial steps taken by the potential recipient of the penalty, as set out in FPA section 215(e)(6).

47. Thus, we maintain that FPA section 215 acts as a separate grant of penalty authority with respect to violations of mandatory Reliability Standards. Further, we are satisfied that the waiver of immunity effected through FPA section 215 is not rendered ambiguous by FPA section 316A or any limitations it may have to "persons" as defined under the FPA.[83]

C. The July 2012 Order is Not a Departure from Prior Commission Rulings Regarding the Applicability of FPA Section 316A Penalty Caps to FPA Section 215

48. Mid-West ECA argues that the July 2012 Order effectively denies the existence of Commission precedent, in Order No. 672 and elsewhere, that the monetary caps set out in FPA section 316A are applicable to penalties imposed under FPA section 215. To the contrary, we directly addressed that precedent and what it meant in our underlying order:

> We reject DOE/SWPA and other commenters' position that the Commission's prior holdings on the applicability of the monetary limits set out in FPA section 316A to penalties imposed under FPA section 215(e) require a finding that FPA section 316A thereby limits the scope of FPA section 215. In Order No. 672, the Commission found that penalties imposed under FPA section 215 are subject to the upper monetary cap on civil penalties as set out in FPA Section 316A, but in no way suggested that FPA section 316A was the source of the Commission's (or NERC's) authority to impose a penalty for violations of a Reliability Standard under FPA section 215. In other words, the scope of the Commission's penalty

[83] The legislative history of section 215, while not dispositive, supports the conclusion that Congress did not require section 316A to govern section 215 penalties. In September 2002, the first version of what subsequently became FPA section 215(e)(6) was included in a conference committee draft of House omnibus energy bill, H.R. 4. The first two offers of that bill (HR4 Offer 001 and Offer 002) explicitly provided that section 316A would govern section 215 penalties; the third removed any reference to section 316A. The explicit rejection of a provision linking a section 215 penalty to section 316A supports the conclusion that FPA section 215 was intended to act as a separate grant of penalty authority.

> authority under FPA section 215 is expressly set out under FPA section 215(b), and does not depend on the general penalty authority granted under FPA section 316A.
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> In pressing this argument, DOE/SWPA quote a statement in Order No. 672 that "[t]he Commission has the legal authority to impose a civil penalty pursuant to section 316A of the FPA, which applies to a violation of any provision under Part II of the FPA, including section 215." This statement was made in the context of the Commission's consideration elsewhere in Order No. 672 of whether a monetary penalty could be imposed on the ERO or a Regional Entity, to the extent they are not acting as users, owners, or operators of the Bulk-Power System, for violations under FPA section 215.[84]

49. Thus, we disagree that the Commission has indicated, in Order No. 672 or elsewhere, that FPA section 316A is "the source of 'empowerment'" to impose a penalty for violations of Reliability Standards under FPA section 215, as Mid-West ECA and other entities seeking rehearing argue. We note that the issue before us, and the issue on which entities commented in response to the Notice of Proposed Rulemaking (NOPR) that preceded Order No. 672, was whether or not the monetary caps contained in FPA section 316A should also apply to FPA section 215 penalties, and *not* the question of whether federal entities should be subject to monetary penalties under FPA section 215. Accordingly, when the Commission "interpreted" Section 316A as establishing limits on monetary penalties for violations of a Reliability Standard, that finding cannot be read to mean that we intended (or that Congress intended) for other aspects of FPA section 316A to *supplant* FPA section 215's grant of limited jurisdiction to impose penalties on 201(f) entities that violate a mandatory Reliability Standard.

50. Nor do we agree that our position on the relationship between FPA section 215 and FPA section 316A effectively reads the word "persons" out of FPA section 316A, as DOE/SWPA have argued, or that we have not responded to the argument that if FPA section 316A applies to the size of the monetary penalty it must also govern which entities pay.[85] DOE/SWPA and these other entities seek to expand our decision regarding the applicability of FPA section 316A far beyond anything included in our ordering language. The exact language of the relevant paragraph in Order No. 672 is as follows:

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[84] July 2012 Order, 140 FERC ¶ 61,048 at PP 49-50.

[85] *See* DOE/SWPA Rehearing Request at 15-16.

> The Commission confirms its interpretation that section 316A of the FPA establishes a limit on a monetary penalty for violation of a Reliability Standard that may be imposed by the Commission, the ERO, or a Regional RE pursuant to FPA section 215.[86]

Likewise, the Commission again held in a subsequent order that "[i]n Order No. 672, we interpreted section 316A *as setting a cap on the monetary penalties* that the Commission, NERC, and the Regional Entities could impose under FPA section 215."[87] Notably, the Commission did not hold that FPA section 316A is the source of penalty authority under FPA section 215, nor did the Commission find that language in FPA section 316A could or should supplant the specific language contained in FPA section 215 as to who is liable for enforcement and penalties pursuant to that section. Instead, the Commission determined that penalties imposed under FPA section 215, which are required to "bear a reasonable relation to the seriousness of the violation" but which are *not otherwise limited under FPA section 215 itself*, should be subject to the same monetary caps that apply to civil penalties for violations of Part II of the FPA.[88] FPA section 215 contains specific language addressing enforcement authority for violation of mandatory reliability standards as well as the universe of entities subject to 215 penalties, but does not provide for specific penalty caps. Under generally-accepted rules of statutory construction, the enforcement authority set forth in section 215 specifically addressing who is liable for penalties prevails over the more generalized penalty provision set forth in section 316A of the FPA. Likewise, under the same rule of statutory construction, it was appropriate for the Commission to interpret the more specific penalty cap set forth in Section 316A as applicable to section 215, which does not include any specific language on penalty amounts. But for the Commission to also apply the term "person" included in section 316A to replace the specific terms in section 215 identifying which entities are subject to compliance requirements and penalties as SWPA argues, would not constitute application of the statutory construction principle of the specific over the general but a revision of the specific terms in section 215 as to who is eligible for penalties, which the Commission cannot do.[89]

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[86] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 575.

[87] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,046 at n.29 (2007) (emphasis added).

[88] *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 574.

[89] *See, e.g., Radlax Gateway Hotel, LLC v. Amalgamated Bank,* 132 S.Ct. 2065, 2071 (2012) ("The general/specific canon is perhaps most frequently applied to statutes

(continued…)

D. Policy Implications and Consistency with the Flood Control Act

51. Mid-West ECA relies on arguments almost identical to those raised in initial comments in this proceeding with respect to the policy implications of imposing monetary penalties on federal entities. As argued previously, Mid-West ECA suggests that the imposition (or threat of the imposition) of monetary penalties does not provide the same kind of incentive when imposed on federal entities as it does to other kinds of users, owners and operators of the Bulk-Power System, because federal entities can readily pass the penalty costs on to their preference customers.[90] Mid-West ECA also argues that the Commission's decision in the July 2012 Order is inconsistent with its stated position on the reduced compliance incentives for RTOs and ISOs if allowed to automatically pass on their penalty costs to all members.[91]

52. We reject the notion that the imposition of penalties on federal entities is inconsistent with our stated policies regarding the need to review the pass-through of penalty costs in cases where such a review is within our jurisdiction, as it is with RTOs and ISOs. In fact, the Commission has affirmed the appropriateness of assessing monetary penalties against RTOs and ISOs for violation of mandatory Reliability Standards and the Regional Entities have imposed penalties against RTOs and ISOs for such violations.[92] Moreover, excluding federal entities from the prospect of monetary penalties would, at least from a policy perspective, be in direct conflict with the imposition of such penalties on many other entities that may pass such costs on to their

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in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one."); *see also Morton v. Mancari,* 417 U.S. 535, 550-51 (1974).

[90] Mid-West ECA Rehearing Request at 25-26.

[91] *Id.* at 26.

[92] *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 634; *In re California System Operator Corp.,* 141 FERC ¶ 61,209 (2012); *Midwest Independent Transmission System Operator, Inc.,* 135 FERC ¶ 61,118 (2011); *Electric Reliability Council of Texas, Inc.,* 137 FERC ¶ 61,088 (2011).

customers or members, including certain other publicly-owned or member-owned entities.[93]

53. We also disagree that an arguably "reduced" incentive to avoid penalties, due to the ability to pass-through the associated costs, equates to no incentive. As we noted in the July 2012 Order, "federal entities such as SWPA still have a strong incentive to develop a culture of compliance if subject to monetary penalties, whether in response to Congressional oversight or in response to the concerns of their preference customers."[94]

54. Mid-West ECA also resurrects its arguments regarding the inherent conflict between the imposition of monetary penalties on federal entities such as SWPA for Reliability Standard violations, and the Flood Control Act. Mid-West ECA notes that the Flood Control Act requires that power sold to preference customers by SWPA and similar entities must be sold "at the lowest possible rates to consumers." Mid-West ECA maintains that the imposition of a monetary penalty would necessarily "translate" into higher rates for preference customers, which they suggest inherently conflicts with the Flood Control Act's requirements.

55. We find no merit in these arguments, and find no support for such a narrow reading of the Flood Control Act. Among other things, we note that under the Flood Control Act, applicable federal entities are required to transmit and dispose of power "in such a manner as to *encourage* the most widespread use [of energy generated at applicable projects] at the lowest possible rates to consumers *consistent with sound business principles.*"[95] We do not understand this to mean that federal entities are therefore exempt from exposure to a potential cost of doing business -- in the form of 215 penalties -- that is applicable to similarly-situated, private entities that are not covered by the Flood Control Act. Moreover, we believe that the interpretation of the Flood Control Act advanced by Mid-West ECA could, by extension, preclude the imposition of *any* regulatory requirement that imposes an additional compliance cost on an applicable covered federal entity, including requirements to protect water quality or fish and wildlife in the operation of a hydroelectric facility. We cannot find any support for this interpretation of the Flood Control Act, and affirm our position that the imposition of a monetary penalty on a federal entity for violation of a mandatory

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[93] *See* July 2012 Order, 140 FERC ¶ 61,048 at P 56, n 74 (citing to *North American Electric Reliability Corp.,* 134 FERC ¶ 61,209 (2011) (affirming an $80,000 penalty against Turlock Irrigation District)).

[94] *Id.* P 56.

[95] 16 U.S.C. § 825s (emphasis added).

Reliability Standard does not impermissibly conflict with the policies stated in the Flood Control Act.

E. The July 2012 Order Appropriately Found That Imposition of Monetary Penalties on Federal Entities Does Not Conflict with the Anti-Deficiency Act

56. Mid-West ECA and SE FPC argue that the July 2012 Order "hastily dismissed" concerns raised about potential violations of the Anti-Deficiency Act if federal entities are required to pay monetary penalties. They maintain that the Commission was instead required to "research the entity's most recent congressional appropriation, as well as any previous legislation" that might prohibit payment of a penalty, and make specific findings related to laws affecting those appropriations to ensure no conflict with the requirements of the Anti-Deficiency Act.[96]

57. We reject the notion that the Commission is required to undertake an analysis of SWPA's (or other federal entities') congressional appropriations or other applicable legislation in order to find no conflict with the Anti-Deficiency Act. As we noted in the July 2012 Order, the Anti-Deficiency Act provides that an "officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."[97] With respect to the payment of administrative penalties, the Office of General Counsel of the United States General Accounting Office has concluded that "agency operating appropriations are available under the 'necessary expense' theory, to pay administratively imposed civil penalties," as long as there has been an express waiver of sovereign immunity.[98] While SWPA and the federal agencies participating in this proceeding may not agree that immunity has been expressly waived, SWPA can point to

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[96] *See* Mid-West ECA Rehearing Request at 31.

[97] 31 U.S.C. §1341(a)(1)(A).

[98] Government Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 3 Ed. Vol. 1, 4-144 - 4-145. *See also EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conversation and Recovery Act,* 2000 OLC LEXIS 20, 15-16 (2000) (OLC RCRA Opinion) (noting that an agency would "typically have authority to pay the penalties that have been lawfully assessed against it in the course of its conduct of agency business, pursuant to the 'necessary expense' principle of appropriations law," and that its findings with respect to the validity of a penalty in the OLC opinion served as a basis for concluding that agency appropriations would be available to pay the penalties).

our July 2012 Order and the instant Order Denying Rehearing to support the use of its operating appropriations to cover a penalty payment as a "necessary expense," with no consequent violation of the Anti-Deficiency Act.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order, and the motions for stay are dismissed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

140 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

North American Electric Reliability Corporation Docket No. NP11-238-000

ORDER ON REVIEW OF NOTICE OF PENALTY

(Issued July 19, 2012)

1. On July 28, 2011, the North American Electric Reliability Corporation (NERC) submitted a Notice of Penalty filing to the Commission, assessing a $19,500 penalty against the Southwestern Power Administration (SWPA) for violations of certain Reliability Standards under section 215(e) of the Federal Power Act (FPA).[1] The Department of Energy (DOE), together with SWPA, an organizational entity within DOE, filed an application with the Commission for review of the Notice of Penalty on August 26, 2011. DOE/SWPA ask the Commission to find that NERC has no authority to assess a monetary penalty against a federal agency under FPA section 215, and, accordingly, to dismiss the Notice of Penalty assessing a $19,500 penalty against SWPA.

2. In this Order, the Commission finds that section 215 of the FPA authorizes the imposition of a monetary penalty against a federal agency for violation of a mandatory Reliability Standard and, accordingly, allows the $19,500 penalty as assessed by NERC to go into effect.

I. Background

A. Statutory Framework

3. Section 215 of the FPA authorizes the Commission to certify and oversee an electric reliability organization (ERO) responsible for developing and enforcing mandatory Reliability Standards that are applicable to users, owners and operators of the

[1] 16 U.S.C. § 824o(e) (2006).

Bulk-Power System.[2] Exercising this statutory authority, the Commission certified NERC as the ERO in 2006,[3] and has since approved over one hundred national Reliability Standards as mandatory and enforceable, pursuant to FPA section 215(d).[4] As contemplated under FPA section 215(e)(4), NERC has delegated certain oversight and enforcement authority to eight Regional Entities,[5] including the Southwest Power Pool Regional Entity (SPP Regional Entity), which has enforcement and oversight responsibility for SWPA.

4. Section 215(b)(1), titled "Jurisdiction and Applicability," describes the Commission's reliability jurisdiction as follows:

> The Commission shall have jurisdiction . . . over . . . all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 201(f), for purposes of approving reliability standards established under this section and enforcing compliance with [FPA section 215]. All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.[6]

Section 201(f) of the FPA provides:

> No provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, . . . or any agency, authority, or

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[2] 16 U.S.C. § 824o(c).

[3] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,190, *order on reh'g* 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

[4] 16 U.S.C. § 824o(d); *see, e.g., Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. and Regs. ¶ 31,242, *order or reh'g,* Order No. 693-A, 120 FERC ¶ 61,053 (2007).

[5] *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, *order on reh'g,* 120 FERC ¶ 61,260 (2007).

[6] 16 U.S.C. § 824o(b)(1). Section 201(f) of the FPA generally provides that Part II of the FPA does not apply to, *inter alia*, federal agencies.

instrumentality of any one or more of the foregoing . . . unless such provision makes specific reference thereto.

5. Pursuant to FPA section 215(e)(1), NERC as the ERO has the authority to "impose . . . a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard approved by the Commission," subject to certain due process and review requirements.[7] NERC, as well as the Regional Entities to which NERC delegated compliance and enforcement authority, identify potential violations using various compliance tools, including audits, spot checks, investigations, required self-certifications, and voluntary self-reporting.

6. Under the statute and its implementing regulations, NERC must file a Notice of Penalty with the Commission before a penalty NERC or a Regional Entity assesses for violation of a Reliability Standard can take effect.[8] Each such penalty determination is subject to Commission review, either on its own motion or by application for review by the recipient of a penalty, within thirty days from the date NERC files the applicable Notice of Penalty.[9] In the absence of an application for review of a penalty or other action by the Commission, each penalty filed by NERC is affirmed by operation of law upon the expiration of the applicable thirty-day period.[10]

B. Prior Jurisdictional Orders

7. In two prior proceedings, the Commission has held that a federal entity that uses, owns or operates the Bulk-Power System must comply with mandatory Reliability Standards.[11] Each case involved the finding that a division of the U.S. Army Corps of Engineers (Corps) violated certain Reliability Standards. While the Corps was required

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[7] 16 U.S.C. § 824o(e)(1).

[8] 16 U.S.C. § 824o(e)(1) and (2); *see also Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 506, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[9] 16 U.S.C. § 824o(e)(2).

[10] *Id.*

[11] *North American Electric Reliability Corp.*, 129 FERC ¶ 61,033 (2009) (2009 Jurisdictional Order), *reh'g denied*, 130 FERC ¶ 61,002 (2010); *North American Electric Reliability Corp.*, 133 FERC ¶ 61,214 (2010), *reh'g denied*, 137 FERC ¶ 61,044 (2011).

to mitigate the violations, neither Notice included the assessment of a monetary penalty. In each proceeding, the Corps argued that federal agencies are exempt from the requirements of FPA section 215, including the requirement to comply with mandatory Reliability Standards.

8. The Commission rejected the Corps' position, concluding that FPA sections 201(f) and 215(b)(1), taken together, explicitly convey Commission jurisdiction over the entities listed in FPA section 201(f), including federal entities, for purposes of FPA section 215 compliance.[12] The Commission found additional support for this statutory interpretation in FPA section 201(b)(2), which lists FPA section 215 among the provisions of the FPA that are applicable to the kinds of federal and state entities described in FPA section 201(f).[13] The Commission also concluded that, as a practical matter "excluding federal agencies [from section 215 compliance] would create a significant gap in the ERO's and the Commission's reliability oversight."[14]

II. SWPA Violations and NERC Notice of Penalty Filing

9. SWPA is a subdivision of DOE, operating under the authority of section 5 of the Flood Control Act of 1944. SWPA is one of four federal Power Marketing Administrations, marketing hydroelectric power from 24 Army Corps of Engineers projects in the Southwest United States. SWPA markets this power primarily to defined "preference" customers, including rural electric cooperatives and municipal utilities. SWPA operates and maintains 1,380 miles of high-voltage transmission lines in a four-state area located within the region for which SPP Regional Entity has reliability

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[12] 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 34.

[13] *Id.* P 35. Section 201(b)(2) of the FPA, as amended by the Energy Policy Act of 2005 (which added section 215 to the FPA), states in relevant part:

> Notwithstanding section 201(f), the provisions of section[ ]. . . 215 . . . shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act with respect to such provisions.

16 U.S.C. § 824(b)(2).

[14] *Id.* P 34.

oversight.[15] Since May 31, 2007, SWPA has been "registered" in NERC's Compliance Registry as a balancing authority, purchasing-selling entity, resource planner, transmission owner, transmission operator, transmission planner and transmission service provider.[16] As a result, SWPA is responsible for compliance with Commission-approved Reliability Standards that apply to such entities.[17]

10. NERC submitted a Notice of Penalty filing on July 28, 2011, assessing a $19,500 penalty against SWPA for violations of two Commission-approved Reliability Standards. According to NERC, SWPA violated Critical Infrastructure Protection or "CIP" Reliability Standards designated by NERC as CIP-004-1 (Cyber Security - Personnel and Training) and CIP-007-1 (Cyber Security – Systems Security Management).[18] SWPA self-reported certain violations to SPP Regional Entity in a report submitted July 23, 2009; SPP Regional Entity identified additional violations during a November 2009 spot check.

11. NERC's Notice of Penalty filing incorporates the findings and justifications adopted by the SPP Regional Entity in its review of the violations, as set out in the Notice of Confirmed Violation and Proposed Penalty or Sanction issued on January 12, 2011 (Notice of Confirmed Violation). NERC states that SWPA does not dispute that the violations occurred or any of the underlying facts, and does not dispute the amount of the proposed penalty.[19] In addition, NERC notes that SWPA submitted a completed

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[15] *See* NERC Notice of Penalty at 1, n. 1.

[16] *See* NERC Rules of Procedure Section 500 – Organization Registration and Certification.

[17] The particular Reliability Standards at issue here, CIP-004-1 and CIP-007-1, are applicable to SWPA as a registered balancing authority and transmission operator.

[18] *See* NERC Notice of Penalty at 2-10. Reliability Standard CIP-004-1 sets out requirements for personnel that have authorized cyber access or authorized unescorted physical access to Critical Cyber Assets, including requirements related to personnel risk assessment, training, and security (including cyber security). CIP-007-1 sets out requirements related to security systems determined to be Critical Cyber Assets and other assets within an "Electronic Security Perimeter."

[19] *Id.* at 2.

mitigation plan to address the Reliability Standard violations, which mitigation plan has been certified as complete.[20]

12. NERC notes that SPP Regional Entity considered a number of factors when it set the assessed penalty amount at $19,500, including SWPA's compliance history, which included a prior violation of CIP-004-1 Requirement R3.2 related to the failure to ensure that employees with access to Critical Cyber Assets have current personal risk assessments. SPP Regional Entity also considered potential mitigating factors, including SWPA's cooperation in identifying and addressing the violations.[21]

13. In the Notice of Penalty, NERC explains that, while SWPA did not dispute the violation or underlying facts, SWPA did claim that NERC was barred from assessing a monetary penalty based on the doctrine of sovereign immunity. NERC disagrees with SWPA and maintains that FPA section 215 authorizes the ERO to impose a monetary penalty on a federal entity for violation of an applicable Reliability Standard.[22] Citing to the Commission orders pertaining to the Corps, NERC notes that the Commission has already found that federal entities that are users, owners, or operators of the Bulk-Power System must comply with mandatory Reliability Standards under FPA section 215. NERC asserts that its ability as the ERO to impose a penalty for violation of a Reliability Standard is not limited in any way under the terms of FPA section 215, except in requiring Commission review under FPA section 215(e). NERC notes that nothing in FPA section 215 excludes monetary penalties, and all of the penalty provisions of section 215 apply to all users, owners and operators of the Bulk-Power System, without any specific exception for federal entities.

14. NERC also points to the legislative history of FPA section 215 for further confirmation that section 215's penalty provisions are to be broadly applied.[23] Among other things, NERC asserts that the legislative history of the Energy Policy Act of 2005 demonstrates that Congress intended for the ERO to be able to penalize *anyone* who violates an applicable Reliability Standard, and that Congress demonstrated no intent to differentiate between monetary penalties and other penalties or sanctions.

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[20] *Id.* at 6-8, 9-10.

[21] *Id.* at 10-11.

[22] *Id.* at 13.

[23] *Id.* at 13-14.

15. NERC rejects the arguments made by SWPA in contesting the violation before NERC (and as discussed further below), that FPA section 316A prohibits the imposition of monetary penalties on federal entities such as SWPA.[24] NERC asserts that its authority to impose a penalty derives from FPA section 215, which authority expressly extends to federal entities. NERC notes that, while the monetary limits on civil penalties that may be imposed under FPA section 316A have been found to apply to FPA section 215 penalties, the Commission has not found that the ERO's penalty authority derives from FPA section 316A. Rather, the source of authority to impose a penalty for violation of a Reliability Standard is found in FPA section 215, and FPA section 316A merely informs the Commission as to what can constitute an appropriate sanction for purposes of FPA section 215(b)(2)(c). NERC maintains that it is contrary to the clear intent of FPA section 215, which explicitly includes federal entities like SWPA in both its compliance and its enforcement provisions, to read FPA section 316A as limiting this broadly drawn enforcement authority. NERC also argues that there is no policy basis on which to exclude SWPA from exposure to monetary penalties, as the enforcement regime contemplated by FPA section 215 should apply with equal force to any entity found to be in violation of a Reliability Standard.[25]

III. Application for Review of Notice of Penalty

16. On August 26, 2011, DOE/SWPA filed a Notice of Intervention and Application for Review of the NERC Notice of Penalty, asking the Commission to rule on the one legal issue of whether NERC may assess a monetary fine against a federal agency.[26] In addition, DOE/SWPA ask the Commission to stay the proposed penalty against SWPA, and against any other entity within DOE facing a similar monetary penalty under FPA section 215, until the legal question of NERC's penalty authority is resolved.

17. DOE/SWPA maintain that NERC's penalty authority both derives from and is limited by FPA section 316A, which authorizes the Commission to impose a penalty of up to $1,000,000 for each day that a violation continues on "[a]ny person who violates any provision of subchapter II of this chapter [Part II of the FPA]."[27] DOE/SWPA note that a "person" is defined under section 3 of the FPA as "an individual or corporation," and that a federal agency like SWPA does not fall within this definition. Given the

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[24] *Id.* at 14.

[25] *Id.* at 15.

[26] DOE/SWPA Application for Review at 1.

[27] *Id.* at 5-6.

limitation on the scope of the Commission's penalty authority in FPA section 316A, DOE/SWPA conclude that the ERO, as well as the Commission, is precluded from imposing a monetary penalty on federal agencies under FPA section 215.

18. DOE/SWPA argue that, contrary to NERC's position as stated in the Notice of Penalty, FPA section 215(e) does not provide independent penalty authority to the Commission or to NERC, but rather describes the procedural steps that must be followed prior to imposing a penalty under FPA section 215.[28] DOE/SWPA note that unlike FPA section 316A, which clearly announces itself as a grant of penalty authority, FPA section 215 was included with other substantive regulatory provisions of the FPA, and contains no upper limit on the penalties that can be imposed. DOE/SWPA point to an anomaly they assert would be created under NERC's reading of its section 215 penalty authority, whereby NERC, a non-governmental entity, could impose penalties with no upper monetary limit for violations of a Reliability Standard, while the Commission cannot impose such an unbounded penalty, even for acts of fraud or market manipulation.

19. DOE/SWPA argue that the Commission has already determined that FPA section 316A's limitations on penalty authority do apply to FPA section 215 violations.[29] DOE/SWPA claim that the Commission not only found that FPA section 316A establishes the monetary limit for penalties assessed for Reliability Standard violations, but also stated: "The Commission has the legal authority to impose a civil penalty pursuant to section 316A of the FPA, *which applies to a violation of any provision under Part II of the FPA, including section 215.*"[30] DOE/SWPA maintain that, having found that the quantitative limits of FPA section 316A apply to section 215 penalties, the qualitative limits must also apply.

20. DOE/SWPA maintain that FPA section 201(b)(2) provides no separate grounds for the imposition of monetary penalties on federal entities. DOE/SWPA argue that FPA section 201(b)(2) does not subject entities to any provision of the FPA to which they are not otherwise subject under the terms of the relevant provision, and therefore maintains that 201(b)(2) cannot make federal entities (or any other "person") subject to the provisions of FPA section 316A and its civil penalty authority.[31] DOE/SWPA argue that

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[28] *Id.* at 6-7.

[29] *Id.* at 8-9 (citing Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 575).

[30] *Id.* at 9 (quoting Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 786) (emphasis supplied by DOE/SWPA).

[31] *Id.* at 10-11.

even if the Commission finds that the FPA is ambiguous as to whether a federal entity is subject to monetary penalties for violation of a Reliability Standard, the Commission must rule in DOE/SWPA's favor.

21. DOE/SWPA maintain that three separate legal doctrines are implicated by the imposition of fines on a federal agency: (1) the doctrine of sovereign immunity, which requires that any waiver of the government's immunity be unequivocally expressed; (2) the requirement of a "clear statement" of congressional intent, when one agency is arguably empowered to penalize another agency; and (3) the rule of strict construction for penal statutes. DOE/SWPA maintain that the language of FPA sections 215(e) and 201(b)(2) does not constitute the clear grant of authority required under any of these doctrines.[32] DOE/SWPA note the contrast between the purported grant of authority under FPA section 215 (with no change to FPA section 316A), and the clear intent demonstrated by Congress when it revised certain provisions of the FPA to extend their reach to federal agencies, pointing to the language of FPA section 206(e) (with respect to refund authority) and FPA section 222 (prohibiting market manipulation).

22. Finally, DOE/SWPA argue that monetary penalties should not be assessed against federal agencies as a matter of policy. DOE/SWPA claim that other remedies are adequate to ensure compliance and that the imposition of penalties could lead to a waste of federal resources. DOE/SWPA maintain that federal agencies are in a different position with respect to incentives for compliance, as they are accountable to Congress and the President.

IV. Order Initiating Review, Motions to Intervene, and Comments

23. On August 29, 2011, the Commission issued an Order initiating review of the Notice of Penalty, and staying the proposed penalty against SWPA pending the conclusion of the Commission's review.[33] The Commission established a filing deadline of September 19, 2011 for submission of answers, interventions or comments.

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[32] *Id.* at 12-13 (citing *Lane v. Pena,* 518 U.S. 187, 192 (1996) for the proposition that a waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text; *United States v. Nordic Village, Inc.,* 503 U.S. 30, 37 (1992), among others, for the proposition that sovereign immunity principles apply equally to cases involving agency adjudications; and *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act* (July 16, 1997), available at http://www.justice.gov/olc/cleanair_op.htm, on the need for a "clear statement" by Congress of an intent to authorize one agency to penalize another).

[33] *North American Electric Reliability Corp.,* 136 FERC ¶ 61,135 (2011).

24. Timely motions to intervene were filed by the American Public Power Association and by four Regional Entities: SPP Regional Entity[34] the Western Electric Coordinating Council (WECC), SERC Reliability Corporation, and Reliability*First* Corporation. Timely motions to intervene and/or notices of intervention were submitted, with substantive comments, by NERC, by the U.S. Department of the Interior (Interior), and by several entities whose members may purchase preference power or transmission services from SWPA or other federal agencies: the National Rural Electric Cooperative Association (NRECA), Mid-West Electric Consumers Association, Inc. (Mid-West ECA); Southeastern Federal Power Customers (SE FPC); Southwest Transmission Dependent Utility Group (SW TDUs);[35] and the Southwestern Power Resources Association (SW PRA).

25. Interior acknowledges that it must comply with Reliability Standards, but contends that standards cannot be enforced against federal agencies by assessing fines.[36] Interior's arguments against the imposition of monetary penalties on federal entities largely track those of DOE/SWPA. Interior argues that FPA section 316A limits the Commission's authority to impose a civil penalty for violations of the FPA to "persons," as defined by the FPA. Because the FPA defines a "person" as "an individual or corporation," Interior maintains that federal agencies are not subject to fines.[37]

26. Interior argues that the overall structure of the FPA reinforces its position, noting that federal agencies, as "201(f) entities," are not subject to FPA part II requirements unless a provision of the FPA makes "specific reference thereto."[38] Because FPA section 316A does not include such a specific reference, Interior argues that Congress did not intend to give the Commission authority to impose fines on federal entities when it added section 215 to the FPA. Finally, like DOE/SWPA, Interior maintains that any purported

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[34] SPP Regional Entity's Motion to Intervene does not include a separate analysis of the legal issue presented by DOE/SWPA's Application for Review, but notes that SPP Regional Entity supports NERC's and the Commission's authority to impose a monetary penalty on federal entities.

[35] The SW TDUs support the arguments raised and position taken by DOE/SWPA that NERC lacks authority to impose a monetary fine on federal agencies for violations of a Reliability Standard.

[36] Interior Comments at 4.

[37] *Id.* at 4-5.

[38] *See id.* at 6.

authority to levy a fine against a federal agency is not sufficiently clear to qualify as a clear and unequivocal waiver of immunity.[39]

27. Mid-West ECA, NRECA and the other federal power customer commenters support DOE/SWPA's position, and make similar arguments with respect to statutory construction.[40] These commenters reject NERC's position that its authority to impose a monetary penalty derives from FPA section 215 and that it is not limited in scope by the strictures of FPA section 316A.[41]

28. Mid-West ECA and SE FPC maintain that the Commission "delegated" penalty authority to NERC as the ERO, and NERC's "delegated authority" to impose a penalty cannot exceed the Commission's own authority. They contend that the Commission's authority, in turn, to levy or collect a fine is limited by FPA section 316A.[42] In a similar vein, NRECA and Mid-West ECA contend that, because FPA section 215 provides that a penalty imposed by the ERO is subject to Commission review, the Commission – not the ERO – "is the entity with the authority to enforce the ERO's 'imposition of penalties.'"[43] Thus, they conclude that the provisions of section 316A that constrain the Commission's enforcement authority also constrain the ERO's sanctioning authority.

29. Mid-West ECA and NRECA argue that the FPA provides no clear and unequivocally expressed waiver of congressional intent to make federal entities subject to all forms of enforcement under FPA section 215, because Congress could have easily modified section 316A to include such entities if it had intended that result, and failed to do so.[44] These commenters note that FPA section 316A was modified in other respects

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[39] *Id.* at 7-10 (citing, *inter alia, Lane v. Pena,* 518 U.S. 187 (1996) (waiver of sovereign immunity must be unequivocally expressed and will not be implied, and any waiver that would require payments from the federal treasury "must extend unambiguously to such claims")).

[40] *See generally,* Mid-West ECA; NRECA; SE FPC; SW PRA.

[41] Mid-West ECA at 4-7; *see also* NRECA at 4-8. These entities make clear that they do not contest the Commission's prior determination that federal entities must comply with mandatory Reliability Standards; they limit their protest to whether penalties can be imposed for non-compliance. *See* SE FPC at 4; NRECA at 3.

[42] Mid-West ECA at 6; SE FPC at 4-6.

[43] Mid-West ECA at 5; NRECA at 5.

[44] Mid-West ECA at 8; NRECA at 6-7.

when FPA section 215 was added, as were other provisions of the FPA, to extend coverage of certain provisions to federal entities or to other "201(f)" entities. Congress's failure to do so for FPA section 316A, according to these commenters, demonstrates the lack of any clear statement of congressional intent to give the Commission authority to impose a monetary fine on entities that are not defined as "persons" under the FPA, for violation of a mandatory Reliability Standard under FPA section 215.

30. Mid-West ECA and NRECA point out the distinction between the language of the FPA in which NERC purports to find a waiver of immunity, and other cases in which sovereign immunity was deemed to have been explicitly waived. Mid-West ECA notes that FPA section 316A does not contain waiver language comparable to that in *United States v. Tenn. Air Pollution Control Bd.,* 185 F.3d 529 at 534-35 (6th Cir. 1999), in which the court found that the Clean Air Act provides an explicit waiver of sovereign immunity for federal entities.[45] Mid-West ECA argues that the legislative history cited by NERC is not only unpersuasive, but also maintains that any reliance on legislative history to gauge congressional intent in a case involving the imposition of a monetary penalty on a federal agency is misplaced.[46]

31. NRECA and Mid-West ECA also note that federal entities may not have the funds available to pay monetary penalties, and therefore may be prohibited under the terms of the Anti-Deficiency Act from making such payments "[e]xcept to the extent that [their] appropriations allow."[47] Among other concerns, they maintain that this could put the Commission in the position of reviewing a federal entity's judgment regarding its authority to pay a NERC penalty under its enabling statutes and the terms of the Anti-Deficiency Act.

32. Mid-West ECA and NRECA suggest that SWPA and other federal Power Marketing Administrations may also have difficulty recovering any penalty costs from their preference customers. These commenters draw a distinction between a pass-through of fines by a federal entity to its preference customers, and pass-through of fines by an RTO or ISO to its members, since the Commission has the authority under FPA section 205 to oversee the apportionment of fines among the RTO or ISO members but has no such authority to oversee the apportionment of fines among a federal Power

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[45] Mid-West ECA at 10-12.

[46] *Id.* at 11-12 (citing *Lane v. Pena, supra* at n. 39 and *United States v. Nordic Village, Inc.,* 502 U.S. 30 (1992), on the need for an explicit and unambiguous waiver of sovereign immunity).

[47] *Id.* at 13-14; NRECA at 8-9.

Marketing Administration's preference customers.[48] These commenters suggest that since the Commission's policy is to deny requests to pass-through penalty costs to customers without a case-by-case section 205 review, SWPA and other federal agencies would presumably be unable to pass through penalty costs to their preference customers at all.[49]

33. These commenters also argue that the pass-through of costs to preference customers should be foreclosed based on other policy concerns. Mid-West ECA notes that such a pass-through could "potentially frustrate congressional intent" under the Flood Control Act of 1944, which contemplates the sale of excess power from certain federal projects at the "lowest possible rates" to identified "preference" customers.[50]

34. Moreover, these commenters argue that the pass through of such costs eliminates any incentive the entity has to comply with applicable Reliability Standards, and draw the comparison to an automatic or generic pass-through of penalty costs by RTOs and ISOs, which the Commission has determined is inappropriate.[51] Similarly, SE FPC argues that fining a federal agency has little deterrent value since the fine would be little more than an administrative burden.[52] Other commenters argue that regardless of whether penalty costs are passed through to customers or recovered through taxpayer-funded appropriations, the federal agency subject to the violation has no real incentive to avoid such fines or to develop more robust compliance programs.[53]

35. NERC submitted a limited set of comments in response to the policy arguments raised by DOE/SWPA as part of its Application for Review. NERC stresses that its enforcement regime is an integral part of ensuring the reliability of the Bulk-Power System, and that its penalty authority must apply to all users, owners and operators of the Bulk-Power System with equal force. NERC argues that the potential difficulty in the collection of a penalty against a federal entity, due to its limited funding sources, should not prevent the Commission from authorizing the imposition of a monetary penalty at a level consistent with all other users, owners, and operators of the Bulk-Power System.

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[48] *See* Mid-West ECA at 15.

[49] *Id.*; NRECA at 10.

[50] *See, e.g.,* Mid-West ECA at 16.

[51] *Id.* at 17.

[52] SE FPC at 7.

[53] *See* NRECA at 10-11.

Similarly, NERC notes that the possibility of the pass-through of fines to customers, and the associated potential to dilute the deterrent effect of a monetary penalty, was not seen as a bar to the imposition of such penalties for other (non-federal) non-profit and customer-owned entities.

V. Discussion

A. Procedural Matters

36. The notices of intervention and unopposed, timely-filed motions to intervene are hereby granted pursuant to the operation of Rule 214 of the Commission's Rules of Practice and Procedure,[54] and all timely-filed comments are accepted.

B. Commission Determination

37. Based on the reasons discussed below, we conclude that the plain language of FPA section 215 explicitly conveys authority to assess a monetary penalty against a federal entity that is a user, owner, or operator of the Bulk-Power System for violations of a mandatory Reliability Standard. We reject arguments that the grant of enforcement authority under FPA section 215 is limited by the scope of the Commission's general civil penalty authority over federal entities, as set out in FPA section 316A, and instead find that the separate grant of penalty authority over federal entities under FPA section 215 is explicit and unambiguous. We find that the ERO, as well as the Commission, is imbued with the penalty authority granted under FPA section 215(e).

38. We also find no policy basis for exempting federal agencies from the assessment of monetary penalties under section 215, and note that any such exemption would result in a significant gap in NERC's enforcement regime. Finally, we conclude that the statute does not preclude the assessment of penalties against federal agencies, given our findings that Congress's grant of authority to impose a monetary penalty on federal agencies under FPA section 215 is clear and unambiguous.

1. The Plain Language of FPA Section 215 Explicitly Conveys Authority to Impose a Monetary Penalty on Federal Entities for Violation of a Reliability Standard

39. Section 215 of the FPA explicitly states that federal entities, as FPA section 201(f) entities, are subject to penalties for violation of mandatory Reliability Standards. Thus, sovereign immunity is unequivocally waived under the statute. The

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[54] 18 C.F.R. § 385.214 (2011).

Commission has already found, and no party to this proceeding disputes, that FPA section 215 is applicable to federal entities, as set out in FPA section 215(b):

> JURISDICTION AND APPLICABILITY. -- (1) The Commission shall have jurisdiction . . . over . . . all users, owners and operators of the bulk-power system, *including but not limited to the entities described in section 201(f),* for purposes of approving reliability standards established under this section *and enforcing compliance with this section.* All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.[55]

Notably, this provision explicitly states that jurisdiction over the defined entities, *i.e.,* all users, owners, and operators of the Bulk-Power System, including "201(f) entities," extends to *enforcing compliance* with FPA section 215.[56] SWPA is a user, owner or operator of the Bulk-Power System, which is evidenced by SWPA's registration as a transmission operator and balancing authority, among other registered functions, in the NERC Compliance Registry.[57]

40. Enforcement of compliance with the FPA section 215 requirements is, in turn, addressed by FPA section 215(e), which authorizes the imposition of a penalty by the ERO (NERC) or by the Commission. Under FPA section 215(e)(1) and (2), "[t]he ERO may impose … a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard," subject to filing with and "review by the Commission, on its own motion or on application by the user, owner or operator that is the subject of the penalty."[58] Under FPA subsection 215(e)(3), the Commission may order compliance with a Reliability Standard and may itself impose a penalty as follows:

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[55] 16 U.S.C. § 824o(b)(1) (emphasis added). FPA section 201(f) in turn provides: "No provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, . . . or any agency, authority, or instrumentality of any one or more of the foregoing . . . unless such provision makes specific reference thereto." 16 U.S.C. § 824(f).

[56] Compliance with FPA section 215 includes compliance with the last sentence of section 215(b)(1), quoted above, that all users, owners and operators of the Bulk-Power System must comply with Reliability Standards approved by the Commission.

[57] *See* Order No. 693, FERC Stats. and Regs. ¶ 31,242 at PP 92-96.

[58] 16 U.S.C. § 824o(e)(1), (2).

> On its own motion or upon complaint, the Commission . . . *may impose a penalty against a user, owner or operator of the bulk-power system* if the Commission finds . . . that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.[59]

Thus, FPA section 215(e)(1) unambiguously authorizes the ERO, subject to the specific review process required in FPA section 215(e)(2), to assess a penalty against a user, owner or operator of the Bulk-Power System, which is defined by the statute to include federal entities. Likewise, the Commission is unequivocally authorized to assess penalties pursuant to section 215(e)(3) of the FPA.

41. The enforcement provisions of FPA section 215 do not merely contemplate the imposition of penalties, but rely on the imposition of penalties as one of the primary mechanisms of section 215's enforcement regime. The only restrictions on penalties imposed under FPA section 215(e), other than the language providing for Commission review of NERC's assessment of a penalty, are found in subsection 215(e)(6). That subsection requires that "[a]ny penalty imposed under this section 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."[60] The explicit grant of jurisdiction under FPA section 215 over federal entities for purposes of "enforcing compliance," together with an enforcement regime that features the authority to impose penalties without any exemption or limitation for governmental entities, demonstrates a clear statutory intent that federal entities be subject to monetary penalties for violations of a Reliability Standard under FPA section 215.

42. Accordingly, we conclude that section 215 of the FPA provides an unambiguous grant of authority to the Commission and the ERO to assess monetary penalties against federal entities and, as explained below, this unambiguous authority refutes any claims of sovereign immunity raised by DOE/SWPA.

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[59] 16 U.S.C. § 824o(e)(3) (emphasis added).

[60] 16 U.S.C. § 824o(e)(6).

2. FPA Section 215's Grant of Enforcement Jurisdiction Over Federal Entities is not Affected or Rendered Ambiguous by FPA Section 316A

43. While DOE/SWPA and certain commenters rely on a variety of doctrines and rules of statutory construction to interpret the scope of the ERO's and Commission's authority to impose or otherwise approve the imposition of a monetary penalty on a federal entity, ultimately their arguments hinge on the relationship between FPA section 215, including its jurisdictional and enforcement provisions, and FPA section 316A. Based on the interplay of FPA section 316A with FPA section 215, these commenters argue that there has been no clear statement or explicit grant of authority to impose a monetary penalty on a federal agency, or that the grant of such authority is not explicit enough to qualify as a waiver of sovereign immunity. We reject these commenters' characterization of FPA section 316A and its relationship to FPA section 215 in its entirety.

44. DOE/SWPA argue that the ERO's and Commission's authority to impose a monetary or civil penalty derives not from FPA section 215(e), which they characterize as a "procedural" provision, but from FPA section 316A, which provides as follows:

> (b) Civil Penalties – Any person who violates any provision of part II [of the FPA] or any provision of any rule or order thereunder shall be subject to a civil penalty of not more than $1,000,000 for each day that such violation continues.[61]

45. We reject the notion that the ERO's or Commission's authority to impose a penalty for a violation of a Reliability Standard derives from the Commission's civil penalty authority set forth in FPA section 316A, rather than from the specific enforcement and penalty regime established by FPA section 215. DOE/SWPA claim that the penalty authority granted to NERC under FPA section 215(e) sets out procedural requirements only, and that any authority NERC has to impose a monetary penalty ultimately derives from the Commission's authority to impose a civil penalty under FPA section 316A. That argument is belied by the simple fact that FPA sections 215(e)(1) and (3), separate and apart from FPA section 316A, authorize the ERO and the Commission to impose a penalty for violation of an approved Reliability Standard. Moreover, section 316A does not mention the "ERO." When inserting section 215 into the FPA in the Energy Policy Act of 2005, Congress could have placed in pre-existing section 316A a reference to the ERO while amending section 316A in other respects, but did not do so.

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[61] 16 U.S.C. § 825o-1.

Based on the plain language of the statute, we conclude that NERC's authority to impose a penalty for violation of a Reliability Standard derives directly from FPA section 215 and not from the Commission's general civil penalty authority under FPA section 316A.

46. DOE/SWPA argue that FPA section 215 *cannot* be interpreted as an independent grant of penalty authority to NERC without creating the "strange anomaly" that NERC can impose a penalty for a section 215 violation without a monetary cap, while the Commission's penalty authority is capped at $1,000,000 per day, per violation under FPA section 316A.[62] However, as we have explained above, *both* the Commission's authority and NERC's authority derive from FPA section 215 and not from FPA section 316A.

47. In addition to the claim that FPA section 215(e) is merely procedural, DOE/SWPA point to certain differences between sections 316A and 215(e) that they claim "illustrate" why FPA section 215(e) does not "create independent penalty authority," none of which we find persuasive. DOE/SWPA note that FPA section 316A is entitled "civil penalties" and is included with the other remedial provisions of Part III of the FPA. First, we note that FPA section 215(e)'s title – Enforcement -- signals the grant of enforcement authority, which includes the authority to impose a penalty (although we do not agree that the title of either section is determinative). Nor can we agree that the placement of FPA section 215(e) with the rest of FPA section 215 is a compelling reason to question its effect as a grant of penalty authority. Quite the contrary, if the intent was to draw a distinction between the penalty authority of the Commission under FPA section 215 (which extends to all 201(f) entities, regardless of their status as a "person" as defined in the FPA) and its penalty authority under FPA section 316A, it would be logical that Congress would have added the new enforcement authority as part of FPA section 215 and not through changes to FPA section 316A.[63]

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[62] *See* DOE/SWPA Application for Review at 7-8.

[63] Indeed, the fact that FPA section 215(e) provides that "any penalty imposed *under this section* shall bear a reasonable relation to the seriousness of the violation . . . " further shows that any intended penalties for section 215 violations be imposed under section 215 and not another section or part. Similarly, FPA section 215(c), which governs certification of the ERO, indicates that Congress intended FPA section 215 to be an independent source of penalty authority for violations of FPA section 215. Specifically, FPA section 215(c)(2)(C) requires the ERO to establish rules to "provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) . . . ." 16 U.S.C. § 824o(c)(2)(C). *See also* Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 570 (finding that the type of penalty contemplated by FPA section 215 includes monetary penalties).

48. We further reject DOE/SWPA's claim that FPA section 215(e) fails as a grant of penalty authority because it does not contain a firm upper limit, unlike FPA section 316A. We disagree that FPA section 215(e) places "no real limits" on NERC's penalty authority, as all penalties assessed by NERC are "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," and all are required to bear a reasonable relation to the seriousness of the violation and to remedial steps taken by the potential recipient of the penalty, as set out in FPA section 215(e)(6). [64]

49. We reject DOE/SWPA and other commenters' position that the Commission's prior holdings on the applicability of the monetary limits set out in FPA section 316A to penalties imposed under FPA section 215(e) require a finding that FPA section 316A thereby limits the scope of FPA section 215.[65] In Order No. 672, the Commission found that penalties imposed under FPA section 215 are subject to the upper monetary cap on civil penalties as set out in FPA Section 316A,[66] but in no way suggested that FPA section 316A was the source of the Commission's (or NERC's) authority to impose a penalty for violations of a Reliability Standard under FPA section 215. In other words, the scope of the Commission's penalty authority under FPA section 215 is expressly set out under FPA section 215(b), and does not depend on the general penalty authority granted under FPA section 316A.

50. In pressing this argument, DOE/SWPA quote a statement in Order No. 672 that "[t]he Commission has the legal authority to impose a civil penalty pursuant to section 316A of the FPA, *which applies to a violation of any provision under Part II of the FPA, including section 215.*"[67] This statement was made in the context of the Commission's consideration elsewhere in Order No. 672 of whether a monetary penalty

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[64] We further note the general rule of statutory construction that a specific statute is not to be controlled or nullified by a general one. *Morton v. Mancari,* 417 U.S. 535 (1974); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (the specific governs the general in statutory construction). In this case, section 215(e) governs the imposition of penalties for violations of a Reliability Standard, while FPA section 316A is a catch-all provision providing for the imposition of penalties for violations of Part II of the FPA that are not otherwise covered.

[65] *See* DOE/SWPA Comments at 9.

[66] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 575.

[67] DOE/SWPA at 9 (quoting Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 786 and supplying emphasis).

could be imposed *on the ERO or a Regional Entity,* to the extent they are not acting as users, owners, or operators of the Bulk-Power System, for violations under FPA section 215. Thus, by the statement the Commission recognized that, with regard to the ERO or a Regional Entity that is not acting as a user, owner or operator of the BPS, the penalty authority under consideration could not derive from FPA section 215, but had to be drawn from our general civil penalty authority under FPA section 316A.[68]

51. We further reject the notion that the failure to modify FPA section 316A to expressly include federal entities has any relevance to the "qualitative scope" of our penalty authority under FPA section 215.[69] Commenters suggest that Congress would have altered FPA Section 316A by replacing the term "persons" with the term "electric utility," already defined in the FPA, if it had intended to allow for the imposition of monetary penalties against federal entities that violate a Reliability Standard. We note, however, that the phrase "users, owners and operators of the Bulk-Power System" includes entities that are not "electric utilities."[70] Moreover, such a change in section 316A would have given the Commission explicit authority to impose penalties on federal entities for violation of any other section of Part II of the FPA applicable to federal agencies (e.g., FPA section 222). By granting a separate penalty authority as part of FPA section 215, Congress limited federal entities' new exposure to penalties pursuant to that section to a very specific area of responsibility, i.e., to violations of mandatory Reliability Standards and nothing further.[71]

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[68] *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 786 ("We disagree … that the Commission's ability to take action against the ERO or a Regional Entity is limited by section 215(e)(3)" because that provision, "which relates to Commission action against a user, owner or operator of the Bulk-Power System, is not relevant to our authority vis-à-vis the ERO or a Regional Entity.").

[69] *See* Mid-West ECA at 8.

[70] For example, certain "reliability coordinators" and "interchange authorities" are registered by NERC as users, owners and operators of the Bulk-Power System but may not meet the statutory definition of "electric utility" set forth in section 3(22) of the FPA, 16 U.S.C. § 796(22).

[71] Moreover, if Congress had intended to exclude federal entities such as SWPA from monetary penalties under FPA section 215, as certain commenters suggest, the simplest way of providing such an exemption would be to explicitly state that intention within FPA section 215. Instead, FPA section 215(b)(1) explicitly states that FPA section 215 applies to all users, owners and operators of the Bulk-Power System, including FPA section 201(f) entities, "for purposes of approving reliability standards

(continued…)

52. For the reasons stated above, we cannot find any support for the notion that FPA section 316A's limitations should override the plain language of FPA section 215 with respect to jurisdiction. Moreover, we reject the claim that the statutory language leaves any ambiguity as to the grant to the ERO and the Commission of penalty authority over federal entities under FPA section 215.

53. As commenters note, in cases which implicate sovereign immunity, courts have required that any waiver of the federal government's immunity "must be unequivocally expressed in statutory text and will not be implied."[72] For the reasons discussed above, we conclude that the language of section 215 of the FPA constitutes an unambiguous waiver of sovereign immunity as well as a clear statement of congressional intent to give the Commission and the ERO, subject to the specific review process required in FPA section 215(e)(2), authority to impose monetary penalties on federal entities for a violation of a mandatory Reliability Standard. Based on the analysis set out above, we determine that the grant of authority to impose a penalty on a federal entity that is a user, owner or operator of the Bulk-Power System, has been unequivocally and unambiguously expressed in the statutory text of FPA section 215, and that it therefore meets these strict standards of statutory interpretation. We find no plausible interpretation of the language of FPA section 215(b) and 215(e) advanced in the record before us that would allow us to differentiate federal entities from any other user, owner or operator of the Bulk-Power

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established under this section and enforcing compliance with this section." 16 U.S.C. § 824o(b)(1).

[72] *See, e.g., Lane v. Pena,* 518 U.S. at 492-93; *see also U.S. Department of Energy v. Ohio,* 503 U.S. 607 (1992); *U.S. v. Tennessee Air Pollution Control Bd.,* 185 F.3d 529 (6th Cir. 1999) (finding a clear and effective waiver of immunity under the Clean Air Act, such that monetary fines could be imposed on a federal agency found to be in violation of the Act's requirements). An arguably less rigorous standard has been applied in cases involving the imposition of a penalty by one federal agency on another, i.e., whether there is a "clear statement" of congressional intent to authorize the imposition of such a penalty against a federal entity or agency. *See, EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conversation and Recovery Act,* 2000 OLC LEXIS 20 (2000) (OLC RCRA Opinion); *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act,* 1997 OLC LEXIS 29 (1997) (OLC found a sufficiently "clear statement" of congressional intent to allow EPA to assess civil penalties against federal agencies). We find that the requirements for waiver are met using the highest level of scrutiny, i.e., that waiver has been clearly and unambiguously expressed in the statutory text.

System with respect to our or the ERO's authority to undertake enforcement actions. Moreover, we are required to ensure under FPA section 215(e)(6) that the amount of any penalty bears a reasonable relation to the seriousness of the violation, which we cannot ensure if certain types of entities otherwise subject to 215 requirements are exempt from paying penalties at all.

3. Policy Implications of Imposing Monetary Penalties on Federal Entities under FPA section 215

54. We find no policy rationale to decline to impose monetary penalties on federal entities that are in violation of mandatory Reliability Standards. DOE/SWPA and other commenters essentially argue that the imposition of penalties will result in a waste of federal resources, and that the kinds of penalty incentives that may be required for ensuring compliance among private entities are not necessary in the case of federal agencies, given their accountability to Congress and the President. Other commenters argue that the imposition of penalties will not provide any meaningful incentive for compliance, given that the penalty amounts can be readily passed through to customers of the federal power agencies.

55. First, we find that any exemption of a large class of customers from the imposition of penalties for violations of a mandatory Reliability Standard would undermine NERC's enforcement regime, which is an integral part of ensuring the reliable operation of the Bulk-Power System.[73] Accordingly, we cannot agree that it would be a "waste" of federal resources for NERC to take the same kind and level of enforcement measures against federal entities as it takes for other non-federal users, owners and operators of the Bulk-Power System.

56. Nor can we find any reason to draw a distinction between federal agencies and other entities that may be able to pass section 215 fine amounts on to their customers or members, including RTOs, ISOs and publicly-owned entities.[74] We believe that,

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[73] We note that the potential "gap" in the scope of NERC's FPA section 215 enforcement authority if federal entities are exempt from monetary penalties is quite substantial. *See* 2009 Jurisdictional Order, 129 FERC ¶ 61,033 at P 37 (noting that exclusion of federal entities from the reliability provisions of the FPA would create significant gaps in an otherwise comprehensive program). Bonneville Power Administration alone owns and operates over 15,000 miles of transmission lines and markets about 30 percent of the electric power used in the Northwest.

[74] *See, e.g., North American Electric Reliability Corp.,* 134 FERC ¶ 61,209 (2011) (affirming an $80,000 penalty assessed against Turlock Irrigation District), *reh'g denied*, 139 FERC ¶ 61,248 (2012).

regardless of their ability to pass penalty costs on to customers, federal entities such as SWPA still have a strong incentive to develop a culture of compliance if subject to monetary penalties, whether in response to congressional oversight or in response to the concerns of their preference customers.

57. Finally, we do not find it inconsistent with the Flood Control Act to require entities like SWPA to adhere to the same kinds of Reliability Standards and to face the same enforcement measures that are applicable to all other users, owners and operators of the Bulk-Power System, including any penalties for failure to comply. The Flood Control Act contemplates the preferential sale of low-cost hydroelectric power to publicly-owned wholesale customers like rural electric cooperatives and municipal utilities. That access to lower-cost power is not affected by a determination that federal agencies like the Power Marketing Administrations are subject to similar penalties as other users, owners, and operators of the Bulk-Power System if they fail to adhere to FPA section 215 requirements in delivering the hydroelectric power.

4. Sources for Payment of Penalty and Consistency with Anti-Deficiency Act Requirements

58. We find commenters' arguments under the Anti-Deficiency Act similarly unpersuasive. The Anti-Deficiency Act provides that an "officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."[75] We find that the imposition of a monetary penalty on federal agencies under FPA section 215 does not conflict with these requirements under the Anti-Deficiency Act.

59. First, we note that the federal agency involved in this case, SWPA, sells power to preference customers under the Flood Control Act and has itself suggested that it can pass on the cost of FPA section 215 penalties to its preference customers. Accordingly, at least in SWPA's case, there should be no conflict with the Anti-Deficiency Act's proscription against making an expenditure that exceeds amounts available to SWPA.

60. Assuming, however, that the cost of a monetary penalty under FPA section 215 could not be passed through to customers for at least some federal agencies, we still find no discernable conflict with the Anti-Deficiency Act or any other applicable

[75] 31 U.S.C. §1341(a)(1)(A).

appropriations law.[76] The Government Accountability Office has published a guide to Appropriations Law, which provides that when a waiver of sovereign immunity is clear and the agency has been found to be liable for a fine or penalty, the appropriation becomes available as a "necessary expense" if it is needed to cover an administratively imposed civil penalty or, if imposed by a court, as a permanent judgment appropriation.[77] Given our findings above with respect to NERC's authority to impose a penalty on a federal agency and the clear waiver of any sovereign immunity claim, the funds needed to cover that penalty would be considered a "necessary expense" and any payment of such a fine would not result in a violation of the Anti-Deficiency Act.

The Commission orders:

The Notice of Penalty against SWPA, including the assessment of a $19,500 penalty amount, is hereby approved and made effective on the date of issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[76] *See* 31 U.S.C. § 1301(a), stating that appropriations shall only be applied to the objects for which the appropriations were made; 31 U.S.C. § 1341(a)(1)(A), stating that an agency official cannot spend funds in excess of appropriations.

[77] Government Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 3 Ed. Vol. 1, 4-144-45.

Appendix B

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