

**UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

North American Electric Reliability Corporation

Docket No. NP09-26-000

**THE UNITED STATES ARMY CORPS OF ENGINEERS' REQUEST FOR  
REHEARING**

**I. INTRODUCTION**

COMES NOW, the United States Army Corps of Engineers (“USACE”), by and through its attorney of record, and pursuant to 18 C.F.R. § 385.713, files its request for rehearing of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Final Order Addressing the Applicability of Section 215 of the Federal Powers Act to Federal Entities issued October 15, 2009. The Commission erred because the final order is procedurally defective and it fails to properly analyze the applicability of Section 215 of the Federal Powers Act (“FPA”) to multi-purpose USACE civil works projects.

**II. STATEMENT OF THE CASE**

On June 24, 2009, the North American Electric Reliability Corporation (“NERC”) issued USACE-Tulsa District a Notice of Penalty (“NOP”) regarding its Denison Project Generator. In the NOP, NERC requested that FERC issue a decision on whether NERC has jurisdiction over USACE under Section 215 of the FPA.

USACE requested an extension of time to respond to the NOP, and on July 24, 2009, FERC granted the extension and allowed USCAE until August 24, 2009 to file comments. On July 24, 2009, Acting Assistant Secretary of the Army (Civil Works), Terrence C. Salt responded to NERC's NOP. He reiterated his initial view that Section 215 of the FPA does not grant FERC or NERC jurisdiction over Corps-owned hydroelectric generating facilities at its Civil Works projects. Three days later, on July 27, 2009, FERC issued a notice permitting NERC's NOP to take effect by operation of law and in a footnote FERC stated that the jurisdictional issue would be addressed separately.

On August 24, 2009, USACE filed comments in response to the NOP that addressed both the jurisdictional issue and the penalty. Also, fifteen other interveners filed comments and protest in response to the NOP. On September 8, 2009, NERC filed a motion for leave to reply to USACE comments. On September 23, 2009, USCAE filed objections to NERC's motion for leave. On October 7, 2009, the Department of Energy ("DOE") filed responses to NERC's motion for leave and also filed a motion to stay.

On October 8, 2009, FERC issued a "Sunshine Act Meeting Notice" on its website stating that a meeting was being held on October 15, 2009 at its headquarters to discuss the USACE matter. The notice was not served on USCAE and USACE did not participate in the meeting.

On October 15, 2009, FERC issued a final order granting NERC's

request for a decision that, “pursuant to section 215 of the FPA, federal entities that use, own, or operate the Bulk Power System must comply with mandatory Reliability Standards.” On the same day, FERC issued a press release concerning the order. FERC’s order did not provide for an appeal by any affected entity or party. The order was never served on USCAE.

### III. STATEMENT OF ISSUES

- A. The Commission’s order is procedurally defective because FERC’s Rules of Procedures do not provide for declaratory judgment in a Notice of Penalty proceeding.**
- B. The U.S. Department of Justice, Office of Legal Counsel is the proper forum to decide disagreement between federal agencies.**
- C. Neither USACE, nor Congress has explicitly or tacitly waived USACE’s sovereign immunity.**

### IV. ARGUMENT

- A. The Commission’s order is procedurally defective.

The Commission’s Rules of Practice and Procedure do not provide for declaratory judgment in a Notice of Penalty proceeding.

The instant matter was initiated as a NOP proceeding when on June 24, 2009, NERC submitted a NOP regarding USACE-Tulsa District. NERC’s NOP filing included a request to FERC to issue a decision on whether the mandatory Reliability Standards under section 215 of the FPA are applicable to USACE and other federal agencies.

In its NOP, NERC issued USACE a “non-monetary penalty.”<sup>1</sup> On June 26, 2009, NERC issued a notice seeking public comment on the NOP. USACE and several other entities filed comments. NERC issued a notice stating that to the extent it had jurisdiction, the penalty became effective by operation of law on July 27, 2009.<sup>2</sup> In a footnote in the same notice, FERC stated that the jurisdictional issue “raised by USACE” (*emphasis added*) would be addressed separately. The notice did not explain how the issue would be addressed or what procedural due process rights USACE would be afforded. USACE did not file exceptions or request rehearing on the final order affirming the penalty.

Although a final order was issued addressing the penalty in this matter, and no appeal was taken, FERC continued to address issues unrelated to the penalty (*i.e.*, jurisdictional issue) in the same proceeding.

On October 15, 2009, FERC held a meeting in which it decide that pursuant to section 215 of the FPA, federal entities that use, own, or operate the Bulk Power System must comply with mandatory Reliability Standards. USACE was not given notice of the meeting and did not participate.

A declaratory order or rule to terminate a controversy or remove

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<sup>1</sup> See NERC’s Motion for Leave to File Reply Comments and Reply Comments of NERC Regarding NERC’s NOP, USACE-Tulsa District- September 8, 2009.

<sup>2</sup> *North American Electric Reliability Corp.*, 128 FERC ¶ 61,088 (2009).

uncertainty must be filed under 18 C.F.R. § 385.207. This FERC regulation is only applicable to matters brought under subpart I, J, or K of the Commission's Rules of Procedure. A NOP proceeding is not properly brought under subpart I, J, or K. Nothing in the record indicates how FERC addressed a request for declaratory judgment via a NOP proceeding. Because the Commission has failed to follow its own regulations, the final order is procedurally defective and a nullity

**B. The Commission's adjudicatory process is not the proper forum to resolve disputes among federal agencies.**

The Department of Justice's Office of Legal Counsel is the proper forum for resolving disagreement among federal agencies. FERC opines that it has the authority to determine the scope of its jurisdiction. In support of its position, FERC cites to *Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033, at p. 30 & n.31 (2005), *aff'd*, 452 F. 3d 822 (D.C. Cir. 2006). This case involves a tariff allowed electricity generators that provide power to the transmission grid to avoid transmission and local distribution charges for the power they took from the grid for station power, so long as the power the generators produced in any month exceeded the power taken. The *Nine Mile Point Nuclear Station* case does not involve an issue of sovereign immunity and is not applicable. Furthermore, USACE was not allowed an opportunity to contest the applicability or relevance of any cases FERC relied upon in deciding to resolve the legal issues raised in the NOP.

USCAE disagrees that the cases cited by FERC in its final order

establish that FERC has the authority to determine that USACE multi-purpose hydropower facilities are subject to NERC's mandatory Reliability Standards under section 215 of the FPA. As such, the jurisdictional issues raised in the NOP should be addressed among the affected federal agencies and not through the public comment mechanism required by FERC. Whenever two Executive agencies are unable to resolve a legal dispute between them, the agencies should submit the dispute to the Attorney General.<sup>3</sup>

C. Neither USACE, nor Congress has waived USACE's sovereign immunity.

The principles governing sovereign immunity are well-established. sovereign immunity bars "any action" against the United States if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act. The reason for this rule is to prevent undermining the powers of Congress to set spending levels for federal programs.

Since Congress has the sole authority to set terms of any waiver, an administrative agency has no more authority to prosecute or adjudicate a claim against the federal Government than does a federal court. Federal courts have applied the same sovereign immunity principles in reviewing administrative adjudications as they have in federal court suits. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37

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<sup>3</sup> Exec. Order No. 12146

(1992). Waiver of sovereign immunity must be explicit. *Dept of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The FPA does not contain a clear statement of Congress's intent to waive USACE's sovereign immunity.

In its final order, FERC failed to address USACE's argument concerning sovereign immunity.

## **V. CONCLUSION**

Section 215 of the FPA does not grant FERC or NERC jurisdiction over Corps-owned hydroelectric generating facilities at its Civil Works projects. Furthermore, Congress has not waived USACE's sovereign immunity, and as such, FERC cannot compel USACE to comply with NERC's mandatory Reliability Standards.

FERC should deny NERC's request for declaratory judgment under the NOP procedures because such a request is improper and procedurally defective. If FERC does not dismiss NERC's request for declaratory judgment, FERC should grant a rehearing on the motion for declaratory judgment and allow USACE an opportunity to present evidence and argument on the issues involved. In the alternative, FERC should stay this proceeding and allow the federal agencies potentially affected by the NOP to attempt to resolve the important jurisdictional issues raised in this matter. The issues raised in the NOP do not lend

themselves to resolution through the public comment mechanism or declaratory judgment.

Respectfully Submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 16th day of November, 2009, I have served the foregoing document upon each of the parties designated on the official service list compiled by the Secretary in this proceeding.

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