

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

North American Electric Reliability Corporation

Docket No. NP09-26-000

**COMMENTS OF THE UNITED STATES ARMY CORPS OF ENGINEERS
REGARDING THE APPLICABILITY OF MANDATORY RELIABILITY
STANDARDS UNDER SECTION 215 OF THE FEDERAL POWERS ACT**

Pursuant to the Federal Energy Regulatory Commission's Notice of Filing Regarding Notice of Penalty and Request for Decision on Jurisdiction Issue and the corresponding Errata Notice, the United States Army Corps of Engineers files the following comments and objections.

BACKGROUND:

The United States Army Corps of Engineers ("USACE") is a federal agency and a major Army command made up of some 34,600 civilian and 650 military personnel making it the world's largest public engineering, design and construction management agency. Although generally associated with dams, canals, and flood protection in the United States, USACE is involved in a wide range of public works support to the nation and the Department of Defense throughout the world.

The Corps's mission is to provide military and public works services to the United States by providing vital engineering services and capabilities, as a public service, across the full spectrum of operations—from peace to war—in support of national interests.

Through various statutes, Congress has directed consideration of hydroelectric power in water resource development plans. USACE formulates comprehensive plans which include development of hydroelectric power. USACE currently operates 75 hydropower plants nationwide. Corps hydropower plants account for 3 percent of the nation's total electrical capacity. USACE regional water resource projects serve multiple purposes to balance the diverse needs of communities, ecosystems and industry.

One such project, the Denison Project Generator is located on the Red River in Bryan County, Oklahoma and Grayson County, Texas, about 726 miles upstream from the mouth of the river. Denison Dam was authorized for construction by the Flood Control Act approved June 28, 1938, (Public Law 75-791) for flood control and generation of hydroelectric power. The dam, spillway, and outlet works were started in August 1939 and completed in February 1944. At that time, Denison Dam was the largest rolled, earth filled dam in the United States. The project was put into operation for flood control in January 1944. The first hydroelectric turbine was placed in operation in March 1945, while a second unit became operational in September 1949.

The Denison powerhouse is operated as a peaking plant with approximately 37% plant factor. Peaking plants are utilized to supply power during the peak periods of day. There are two main generators with a maximum plant capacity of 80 megawatts. Although there are two transmission lines going into the Denison switchyard, only the transmission line going into Texas is being utilized for transmission of power from the Denison powerhouse. The other line is energized up to an open breaker and associated disconnecting switch in the switchyard. Although it is possible to transmit power both into Oklahoma and Texas simultaneously using individual units, the two systems can never be connected together without resulting in equipment damage. A “bus tie” breaker is used to separate the two units for this type of operation. Therefore this switchyard is treated as a radial transmission line with no critical connection to the ERCOT system.

The North American Electric Reliability Corporation (“NERC”) has not alleged that if the switchyard equipment fails, there will be an adverse effect on the reliability of the Bulk Power System since no power is “wheeled” through the switchyard to serve another load. Each switchyard must be evaluated individually to determine if its operation will have an effect on the reliability of the Bulk Power System.

NOTICE OF PENALTY:

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.¹

The NOP incorporates the findings and justifications set forth in the Notice of Confirmed Violation and Proposed Penalty or Sanction (“NOCV”) issued on February 20, 2008 by Texas Regional Entity (“TRE”). In the NOCV, NERC found that USACE-Tulsa District violated Reliability Standard PRC-005-1, R1.1, which requires that all generation protection systems affecting reliability of the Bulk Electric System be maintained and tested. NERC determined the violation to be a documentation issue because USACE had a program for testing and maintenance, but the program did not include the basis for the testing intervals. TRE and NERC determined the alleged violation warranted no monetary penalty.

DISCUSSION:

On May 30, 2007, NERC involuntarily registered USACE-Tulsa District as a transmission operator. On June 24, 2009, when NERC issued USACE-Tulsa District a NOP regarding its Denison Project Generator, it also requested that the Federal Energy Regulatory Commission (“FERC”) issue a decision on whether NERC has jurisdiction over USACE under Section 215 of the Federal Powers Act (“FPA”). NERC, a private entity, argues that Section 215 of the FPA gives it jurisdiction over federal agencies if a federal agency is a “user, owner, or operator” of the bulk power system.

¹ Docket No. NP09-26-000

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.

NERC's NOP appears to ask FERC to find jurisdiction over every U.S. Army Corps of Engineers hydropower project (and possibly every federal entity allegedly subject to the mandatory Reliability Standards), based upon the facts alleged in a single NOP, issued to a single hydropower project, the Dennison Generator Project.

NERC's analysis of this issue is flawed. USACE has numerous hydropower projects and in order to respond to what is essentially a request for declaratory judgment, USACE must address the unique configurations of each of its facilities, although only one was involved in the NOP. This process violates the due process rights of USACE because only the Dennison Generator Project has been cited. To require USACE to respond to NERC's incomplete and flawed analysis is fundamentally unfair.

NERC further argues that it can issue a penalty against federal agencies for violations of the mandatory reliability standards. Assessment of a penalty requires a waiver of 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 (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 allow the assessment of civil penalties against federal entities.

Whenever two Executive agencies are unable to resolve a legal dispute between them, each agency is encouraged to submit the dispute to the Attorney General. Exec. Order No. 12146.

The jurisdictional issues raised by the NOP should be addressed among the affected federal agencies and not through the public comment mechanism required by FERC in its July 27, 2009 notice.

CONCLUSION:

It is USACE's position that that 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, NERC cannot issue monetary penalties against USACE.

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.

Respectfully Submitted,

Ernest A. Burford

Ernest A. Burford
Assistant Division Counsel
United States Army Corps of Engineers
1100 Commerce Street, Suite 824
Dallas, TX 75242
Ernest.a.burford@usace.army.mil
469-487-7015
469-487-7193 facsimile

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 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.

Ernest A. Burford

Ernest A. Burford

Assistant Division Counsel

United States Army Corps of Engineers

1100 Commerce Street, Suite 824

Dallas, TX 75242

Ernest.a.burford@usace.army.mil

469-487-7015

469-487-7193 facsimile

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