



# NERC's Enforcement Authority Weakened, Other Recent Developments

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Section 215 of the Federal Power Act (FPA) gave substantial authority to the Federal Energy Regulatory Commission (FERC) and to the Electric Reliability Organization for the United States, which is the North American Electric Reliability Corporation (NERC), to promulgate and enforce reliability standards, including the authority to impose penalties for noncompliance.

Moreover, authority under Section 215 was much more expansive because it applied to entities that are generally exempted from other provisions of the FPA, including the United States, a state, a political subdivision of a state or instrumentalities thereof, and certain electric cooperatives. Yet in *Southwestern Power Administration v. FERC*,<sup>1</sup> the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that while Section 215 indeed subjects the United States to mandatory reliability standards and FERC's enforcement authority, neither FERC nor NERC can impose a penalty against the United States or its instrumentalities for a reliability standard violation because there is a "plausible interpretation" of

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Section 215 requires the development and enforcement of mandatory reliability standards for the bulk-power system.<sup>2</sup> Section 215(b)(1) outlines FERC's jurisdiction with respect to enforcement of those reliability standards, stating that FERC

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

Section 201(f) specifically includes the United States.<sup>3</sup> Under other provisions of Section 215, NERC and FERC may impose a penalty on "a user or owner or operator of the bulk-power system for a violation of a reliability standard."<sup>4</sup> Using this enforcement and penalty authority, NERC assessed a \$19,500 monetary penalty against the Southwestern Power Administration (SWPA), a federal power marketing administration (PMA), for violating several reliability standards. SWPA and the US Departments of Energy and the Interior challenged the penalty, arguing that in the FPA, Congress did not waive the sovereign immunity

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of the United States. FERC upheld the penalty on the grounds that Section 215(b)(1) grants FERC jurisdiction over the United States “for the purposes of approving reliability standards . . . and enforcing compliance,” which authority carries through to the authority to assess monetary fines for reliability standard violations set forth in Section 215(e).

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However, the D.C. Circuit took a different view. Under the doctrine of sovereign immunity, the United States is immune from suit except where it consents or waives such immunity.<sup>5</sup> A suit is 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.”<sup>6</sup> It is well settled that a waiver of such sovereign immunity “must be unequivocally expressed in statutory text and will not be implied.”<sup>7</sup> Therefore, according to the D.C. Circuit, any ambiguities in the statutory text will be construed in favor of immunity, and an ambiguity “exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.”<sup>8</sup>

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The court recognized the logic in FERC’s argument that a waiver of sovereign immunity is effected (in part) because Section 215(b)(1) specifically subjects the United States to FERC’s jurisdiction because the United States is included in the provision that states: “[FERC] shall have jurisdiction . . . over . . . all users, owners and operators of the bulk-power system . . . for purposes of approving reliability standards . . . and enforcing compliance,” and Section 215(e)(3) uses similar phrasing (i.e., “user or owner or operator of the bulk-power system”) to capture the entities upon whom FERC and NERC may impose penalties for reliability standard violations. However, the D.C. Circuit found that the first section (Section 215(b)(1)) “does not unambiguously define ‘users, owners

and operators’ as including the United States *for all of* [Section] 215.”<sup>9</sup> Moreover, the court found that Section 201(f) states that no provision of the FPA is applicable to the United States, a state, or the other entities described in that section “unless such provision makes specific reference thereto.”<sup>10</sup>

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The court found that a “provision” is a “clause in statute,”<sup>11</sup> and because the penalty provision does not specifically wrap in the United States, there is a plausible interpretation that Congress did not intend to provide FERC and NERC the authority to impose monetary penalties against the United States.<sup>12</sup> Thus, the court found that while sovereign immunity is unambiguously waived in the jurisdiction provision—Section 215(b)(1)—it is not waived with the same requisite clarity in the penalty provision, Section 215(e)(1). The court vacated FERC’s decision imposing the monetary penalty against SWPA.

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This decision has a broad impact. SWPA and the three other PMAs—the Bonneville Power Administration (BPA), the Western Area Power Administration (WAPA), and the Southeastern Power Administration (SEPA)—operate electric systems and sell the electrical output of federally owned and operated hydroelectric dams in 33 states. With some exceptions, they are registered with NERC as balancing authorities, transmission owners, transmission operators, and transmission planners, among other categories.

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Thus, these government facilities can have a tremendous impact on the bulk-power system. BPA itself operates three-quarters of the high-voltage transmission system in its operating territory. Additionally, the PMAs marketed 42 percent of the nation’s hydroelectricity in 2012, representing 7 percent of total US electric capacity.<sup>13</sup> And the

PMA's are not the only instrumentalities of the United States that use, own, or operate parts of the bulk-power system. The Tennessee Valley Authority (TVA) is registered with NERC in numerous categories, including generator owner, generator operator, transmission owner, and transmission operator, as well as reliability coordinator. TVA is a federally owned corporation that owns and operates 56 power plants in parts of six states, with a combined net summer capacity of more than 35 gigawatts, which is about 3 percent of the total US electricity capacity.<sup>14</sup>

Possible argument exists that NERC's and FERC's penalty authority under Section 215(e) does not extend to a state, a political subdivision, or . . . municipal electric authorities.

Similarly, the US Army Corps of Engineers (USACE) is registered with NERC in multiple categories, including generator owner and operator and transmission owner and operator. While the court did not address the ability of NERC and FERC to assess penalties against TVA and the USACE specifically, the ruling appears to be equally applicable to them as instrumentalities of the United States. In addition, given the court's statutory construction analysis of the interplay between FPA Sections 201(f) and 215(e), a possible argument exists that NERC's and FERC's penalty authority under Section 215(e) does not extend to a state, a political subdivision, or other instrumentality thereof, and other entities identified in Section 201(f), which includes municipal electric authorities.

Their ability to enforce mandatory reliability standards across the continental United States is weakened.

Although the D.C. Circuit recognized that FERC may still impose nonmonetary means of enforcement, such as compliance orders, directives, and enforcement audits,<sup>15</sup> FERC and NERC no longer have the teeth of a monetary penalty to incentivize this large swath of users, owners, and operators of the bulk-power system to fully comply with all aspects of applicable reliability standards. Consequently, their ability to enforce mandatory

reliability standards across the continental United States is weakened.

### **FERC APPROVES MONETARY/ NONMONETARY SANCTION COMBINATIONS FOR RELIABILITY STANDARD VIOLATIONS**

FERC also recently approved two settlements addressing possible reliability standard violations associated with a September 8, 2011, system disturbance in the Pacific Southwest that resulted in cascading outages and a total load loss of more than 30,000 megawatt-hours (the Blackout). Those settlements included a combination of monetary and nonmonetary sanctions, with Arizona Public Service Company (APS) and Imperial Irrigation District (IID) each agreeing to (1) pay civil penalties, (2) make investments in reliability enhancement measures, (3) implement measures necessary to mitigate the violations, and (4) make progress reports to FERC and NERC, as sanctions to resolve the violations.

FERC and NERC investigated the Blackout and issued a report in 2012 that detailed the events leading to the Blackout and its root causes (Blackout Report).<sup>16</sup> Subsequent to the issuance of the report, FERC and NERC investigated several entities with respect to their role in the Blackout.

### **APS Fined \$3.25 Million, Partially Offset**

FERC and NERC determined that APS violated several requirements in two of the transmission operator standards. Among other things, FERC and NERC found that APS failed to perform a unique next-day study or current-day study of September 8, 2011; failed to coordinate its next-day studies with neighboring transmission operators; and failed to adequately plan for unscheduled changes in system configuration, particularly following the loss of the Hassayampa-North Gila 500-kilovolt transmission line (H-NG), which is a segment of a major transmission corridor. FERC and NERC determined that the violations undermined bulk-power system reliability, contributing to the sequence of events that led to the Blackout. According to the settlement, during the investigation it was clear that APS had voluntarily been making improvements in its planning and operations procedures to implement the recommendations identified in the Blackout Report, including improvements

to (1) switching operations; (2) coordination of transmission system operations; (3) measures that increase situational awareness; and (4) information sharing about equipment outages, load, and system conditions. In addition, APS was the first entity that attempted to resolve the potential violations without the need for litigation.<sup>17</sup>

In the approved settlement, APS neither admitted nor denied any reliability standard violation, but agreed to pay a civil penalty of \$3.25 million. Of that amount, APS is required to pay the United States Treasury and NERC \$1 million each. APS also received a \$1.25 million “partial civil penalty offset”<sup>18</sup> in exchange for completing reliability enhancements that are beyond mitigation of the violations and the requirements of the reliability standards. These enhancements include installing of phasor measurement units and a share of a capacity bank on WAPA’s Kofa substation. APS also agreed to implement various mitigation measures detailed in the settlement to resolve the identified violations.<sup>19</sup>

Finally, APS agreed to make semiannual reports to FERC and NERC for at least one year to notify them of actions taken to satisfy the terms of the settlement, including mitigation measures, reliability enhancements, the details of any new possible reliability standard violations, and APS’s response to such violations.

### **IID Fined \$12 Million, Partially Offset**

FERC and NERC also determined that IID, a political subdivision of the state of California, violated numerous requirements of various transmission operator and transmission planning standards during the Blackout. Among other things, FERC and NERC found that IID failed to have valid next-day and current-day plans and failed to coordinate its operations planning with its neighbors. FERC and NERC also found that IID established invalid system operating limits and consequently did not operate within valid system operating limits. Finally, IID’s near- and long-term planning studies were found to be deficient because they failed to consider the loss of H-NG.<sup>20</sup>

In the approved settlement, IID neither admitted nor denied that it violated any reliability standard, but agreed to pay a \$12 million civil penalty of which IID would receive a partial civil penalty offset in exchange for its constructing \$9 million worth

of reliability enhancements, including one or more utility-scale battery energy storage systems of 33 megawatt amperes or better capacity. IID agreed to pay the remaining \$3 million to the United States Treasury and NERC in equal parts. Like APS, IID agreed to implement various mitigation measures detailed in the settlement to resolve the identified violations<sup>21</sup> and to make semiannual reports to FERC and NERC for at least one year.

The very substantial civil penalty offsets in exchange for installation of bulk-power system facilities intended to improve reliability demonstrate the continuing evolution of the FERC and NERC compliance and enforcement programs and the willingness of these enforcement authorities to be creative in imposing sanctions that are not simply punitive, but actually should serve to demonstrably improve reliability. 

### **NOTES**

1. D.C. Cir. No. 13-1033, 2014 U.S. App. LEXIS 16175 (D.C. Cir. Aug. 22, 2014) (*SWPA v. FERC*).
2. 16 U.S.C. § 824o (2013).
3. 16 U.S.C. § 824(f).
4. 16 U.S.C. § 824o(e)(1), (3).
5. See, e.g., *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).
6. See *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotations and citations omitted).
7. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted).
8. *SWPA v. FERC*, slip at 8 (quoting *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012)).
9. *Ibid.*, p. 10 (emphasis added).
10. 16 U.S.C. § 824(f).
11. *SWPA v. FERC*, slip p. 11 (internal citations omitted).
12. *Ibid.*, p. 12.
13. Energy Information Administration (EIA). (2013, June 12). Federal Power Marketing Administrations operate across much of United States. *Today in Energy*. Retrieved from <http://www.eia.gov/todayinenergy/detail.cfm?id=11651>.
14. Energy Information Administration (EIA). (2013, May 7). President’s budget calls for strategic review of government’s role in TVA. *Today in Energy*. Retrieved from <http://www.eia.gov/todayinenergy/detail.cfm?id=11151>.
15. *SWPA v. FERC*, slip p. 10.
16. Staffs of Federal Energy Regulatory Commission and North American Electric Reliability Corporation. (2012, April). *Arizona-Southern California Outages on September 8, 2011, Causes and Recommendations*. Retrieved from <http://www.ferc.gov/legal/staff-reports/04-27-2012-ferc-nerc-report.pdf>.
17. *Arizona Public Service Co.*, 148 FERC ¶ 61,009, at PP 12–13 (2014) (the APS Stipulation is an attachment to the order).
18. APS Stipulation, p. 13.
19. APS Stipulation, pp. 15–26.
20. *Imperial Irrigation District*, 148 FERC ¶ 61,108, at PP 15–17 (2014) (the IID Stipulation is an attachment to the order).
21. IID Stipulation, pp. 17–82.