

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

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

**UNITED STATES DEPARTMENT OF ENERGY
SOUTHWESTERN POWER ADMINISTRATION
NOTICE OF INTERVENTION AND APPLICATION FOR REVIEW OF
NORTH AMERICAN ELECTRIC CORPORATION NOTICE OF PENALTY**

Pursuant to Rule 214 of the Federal Energy Regulatory Commission's (FERC or the Commission) Rules of Practice and Procedure, 18 C.F.R. § 385.214(a)(1), the U.S. Department of Energy (DOE or the Department), notices intervention in this proceeding. Pursuant to Section 215(e)(2) of the Federal Power Act (FPA), 16 U.S.C. § 824o(e)(2), and Section 39.7 of the Commission's regulations, 18 C.F.R. § 39.7(e)(1), the Department, together with the Southwestern Power Administration (SPA), an organizational entity within the Department, applies for review of the Notice of Penalty issued by the North American Electric Reliability Corporation (NERC) against SPA. The Department also moves to stay any penalty against SPA or any other entity within DOE until the legal question in this proceeding is resolved.

The sole issue for review is whether NERC may assess punitive monetary fines against agencies of the United States federal government. The plain language of the FPA dictates that it may not. Section 316A of the FPA governs civil penalties for violations of Part II of the FPA, which includes the electric reliability standards invoked by NERC in this proceeding. Section 316A expressly limits the application of civil penalties to "persons," a term defined in the FPA to exclude the federal government. Because NERC lacks statutory authority to assess monetary penalties against a federal agency, its Notice of Penalty assessing a \$19,500 penalty against SPA must be dismissed.

I. SERVICE AND COMMUNICATIONS

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II. APPLICATION FOR REVIEW

A. Background

On July 28, 2011 NERC issued a Notice of Penalty to SPA for four violations of the Reliability Standards:

1. SPA self-reported a violation of CIP-004-1 R2.1 because two SPA employees on its unescorted access list failed to receive physical security training within 90 days of being placed on the list. The employees received the training 127 and 139 days after being placed on the list.
2. SPA self-reported a violation of CIP-004-1 R3.2 because two employees were given unescorted access to its critical cyber assets area without a criminal background check being performed within seven years. Each of the employees held a current DOE “L” level clearance (equivalent to a “Secret” security clearance) that had been issued within nine years of the self-report.
3. SPA self-reported a violation of CIP-004-1 R4, 4.1 because two of its contractors were for a period inappropriately included on the list of personnel with unescorted access to the critical cyber assets area. Neither contractor accessed the critical cyber assets area during that period.
4. A spot check by the Southwest Power Pool Regional Entity identified a violation of CIP-007-1 R1 because SPA’s program for testing changes to its cyber assets verified application functionality but did not verify that existing security controls were not

adversely affected by such changes. SPA has implemented a mitigation plan that modifies its patch testing procedures.¹

NERC characterized each of these violations as posing no more than a “minimal risk” to the reliability of the Bulk Power System² and assessed a penalty of \$19,500.

In proceedings before the Southwest Power Pool Regional Entity and NERC, the Department has not contested the nature of the violations or the size of the penalty proposed.³ Nor has the Department disputed that the electric reliability standards promulgated by NERC apply to federal entities.⁴ Rather, the only issue in dispute – which NERC acknowledges has been properly preserved⁵ – is whether NERC and the regional entities may take the extraordinary step of assessing monetary penalties against an agency of the United States government.

As shown below, they may not.

B. The FPA Does Not Authorize Civil Penalties Against Federal Agencies

NERC may not assess civil penalties against federal agencies because the FPA’s civil penalty provision, Section 316A, applies only to “persons,” a term the FPA defines to exclude federal agencies. NERC’s attempt to ground its penalty authority in Section 215(e) fails. Section 215(e) is a procedural provision that may not reasonably be read as a distinct source of penalty authority free from the limits that apply to all other penalties under the FPA. And,

¹ See NERC Notice of Penalty regarding Southwester Power Administration (SPA) (July 28, 2011) (Notice of Penalty) at 9 – 10.

² *Id.* at 5, 6 & 9.

³ See *id.* at 11 – 13.

⁴ When the issue whether the electric reliability standards apply to federal agencies came to the Commission on first impression, the Department took the same position it takes today: the reliability standards apply to federal agencies, but the civil penalty authority granted in the FPA does not. See Notice of Intervention and Comments of the U.S. Dep’t of Energy (July 24, 2009) Docket No. NP09-26.

⁵ Notice of Penalty at 12.

indeed, the Commission has already held that Section 316A establishes limits on penalties assessed pursuant to Section 215(e).

In all events, even if there was some ambiguity as to this interpretive issue, Section 215(e) falls far short of the kind of clear statement that would be required to impose monetary penalties on federal agencies. Three separate judicial doctrines, including the doctrine of sovereign immunity, require a clear and unambiguous statement in statutory text for the federal government to be subject to monetary penalties. Nothing in Section 215(e), or any other provision of the FPA, provides such a clear and unambiguous statement.

1. Section 316A limits civil penalties to “persons”

The Commission’s civil penalty authority derives from Section 316A of the FPA. Section 316A contains both a grant of civil penalty authority and a set of limits on that authority.⁶ In pertinent part, Section 316A provides:

(b) Civil penalties

Any person who violates any provision of subchapter II of this chapter⁷ 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.⁸

⁶ In the Energy Policy Act of 2005 (EPA 2005), Congress strengthened Section 316A by extending its application to violation of “any provision” of Part II of the FPA (it previously applied to only a few, enumerated sections within Part II) and by increasing the maximum penalty from \$10,000 per day to \$1,000,000 per day. It is important to note that Congress added the words “any provision” to Section 316A in the same legislation in which it created Section 215. Thus, Congress clearly understood that penalties under Section 316A would be available for violations of Section 215.

⁷ Note that Part II of the FPA is referred to as “subchapter II” in the U.S. Code.

⁸ 16 U.S.C. § 825o-1.

NERC lacks authority to impose penalties on federal agencies because Section 316A authorizes civil penalties only against a “person.” “Person” is defined in Section 3 of the FPA to mean “an individual or a corporation,” neither of which applies to federal agencies.⁹

2. Section 215 is not an independent grant of penalty authority

NERC does not deny that Section 316A applies only to “persons” or that the term “person” excludes federal agencies. Nor does it deny that the reliability standards fall under Part II of the FPA.¹⁰ Rather, even though Section 316A applies to “any provision” of Part II of the FPA, NERC argues that the limits on the Commission’s civil penalty authority contained in Section 316A do not apply to violations of Section 215. NERC contends that Section 215(e) provides a source of penalty authority that is separate and distinct from Section 316A and, hence, free from its limitations.¹¹

NERC’s position finds no support in Section 215(e). Section 215(e) is not an independent penalty provision like Section 316A, but a description of the steps that must be followed before imposing penalties. Thus, Section 215(e)(1), the only provision of Section 215 quoted by NERC in support of its position, reads as follows:

The ERO may impose, subject to paragraph (2), 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 under subsection (d) of this section if the ERO, after notice and an opportunity for a hearing—

- (A) finds that the user or owner or operator has violated a reliability standard approved by the Commission under subsection (d) of this section; and

⁹ 16 U.S.C. § 796.

¹⁰ In EPCRA 2005, Congress both extended the reach of Section 316A to “any provision” in “Part II” of the FPA and expressly placed Section 215 on electric reliability within Part II). EPCRA 2005 §§ 1211(a) & 1284(e).

¹¹ See Notice of Penalty at 14.

(B) files notice and the record of the proceeding with the Commission.¹²

To be sure, this provision does reference the ERO's power to assess penalties. But its purpose is to describe the procedural steps the ERO must go through in assessing penalties. It cannot plausibly be read as a deliberate act by Congress to create a new and separate source of penalty authority free from the limits that apply to all other penalties under the FPA.

The fact that Section 215(e) does not create independent penalty authority is further illustrated by comparison to Section 316A, in which Congress actually did grant civil penalty authority. In Section 316A, Congress clearly announced its grant of civil penalty authority (Section 316A(b) is entitled "Civil penalties"), placed a firm upper limit on the amount of such penalties, and placed the section in Part III of the FPA next to the other remedial provisions. In enacting Section 215, Congress did none of these things. Section 215 is located in Part II with other substantive regulatory provisions, it contains no upper monetary limit on penalties, and never announces itself as a grant of penalty authority.

Explaining the penalty authority it believes it was granted by Section 215, NERC observes that: "Nowhere in Section 215 is the ability of the ERO to impose a penalty for a violation of reliability standards limited in any way, except that, under Section 215(e), FERC has the ability to review and modify the penalty." But again, the fact that Section 215 places no real limits on NERC's penalty authority only re-inforces the point that Congress intended the penalties referenced in Section 215 to be limited by Section 316A. Indeed, NERC's reading, in which it has unlimited penalty authority, would create a strange anomaly within the FPA: while all other violations of Part II are limited by the \$1,000,000 per day maximum penalty – including

¹² 16 U.S.C. § 824o(e)(1).

acts of fraud or market manipulation (and even criminal acts under Section 316) – under NERC’s contorted reading, violations of the reliability standards are not. NERC’s reading would also mean that the sole grant of unlimited penalty authority in the FPA would be placed principally in the hands of a non-governmental entity that, along with its regional delegees, is free to retain and spend the penalty money it collects. Congress could not have intended such a strange penalty scheme.¹³

NERC’s position is also foreclosed by Commission precedent holding that the limits in Section 316A apply to penalties assessed for violations of Section 215. After enactment of EAct 2005, the Commission conducted a rulemaking on the certification of the ERO and the establishment, approval, and enforcement of the reliability standards. In its NOPR, the Commission stated that it “interprets section 316A of the FPA, as amended by Congress in the Electricity Modernization Act of 2005, *as establishing limits on monetary penalties for violation of Reliability Standards* that may be imposed by the ERO, Regional Entities and the Commission,” and sought comment on that interpretation.¹⁴ The overwhelming majority of commenters, including NERC itself, supported the Commission’s reading of Section 316A as limiting penalties under Section 215. In its comments on the NOPR, NERC wrote:

NERC concurs with the Commission’s interpretation of Section 316A of the FPA as establishing limits on the level of monetary penalties that may be imposed by the ERO and the regional entities for violations of reliability standards . . . That section places a \$1 million per day cap on the amount of a civil penalty that may be levied against a person for violating the FPA. This cap is

¹³ See *McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011) (holding that “Absurd results are to be avoided” when interpreting statutes)(*quoting United States v. Wilson*, 503 U.S. 329, 334 (1992)).

¹⁴ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, 112 FERC ¶ 61,239 (Sept. 1 2005) at 30 (emphasis added).

applicable to all FPA violations, whether the monetary penalty is levied by the Commission in the first instance or initially by the ERO or a regional entity, with possible appeal to the Commission.¹⁵

In its final rule, Order No. 672, the Commission affirmed the position it had taken in its NOPR and that was supported by NERC, concluding that “Section 316A of the FPA establishes a limit on a monetary penalty for a violation of a Reliability Standard that may be imposed by the Commission, the ERO, or a Regional Entity pursuant to FPA Section 215.”¹⁶ Reinforcing the point, later in Order No. 672 the Commission 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.*”¹⁷

In response to this Commission precedent, NERC contends: “At most, Section 316A of the FPA informs FERC as to what constitute ‘appropriate sanctions’ for purposes of Section 215(b)(2)(C).”¹⁸ But, as is clear from the above, the Commission held that penalties for violations of Section 215 are limited to \$1,000,000 per day not because Section 316A “informs” the appropriate penalty, but because Section 316A “establishes a limit” on such penalties as a matter of law.

Given that the quantitative limits in Section 316A apply to penalties imposed for violations of Section 215, it follows inescapably that the qualitative limits also apply. Like all other penalties issued under Section 316A, monetary penalties issued to remedy Section 215 may only be assessed against “persons” as defined in the FPA. NERC’s desire to read the word

¹⁵ Comments of NERC (Oct. 7 2005) Docket No. RM05-30 at 50.

¹⁶ *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 (2006) at P 575.

¹⁷ *Id.* at P 786 (emphasis added).

¹⁸ NERC Notice of Penalty at 14.

“person” out of Section 316A runs afoul of U.S. Supreme Court precedent in which statutory definitions of the word “person” have been faithfully applied to protect federal agencies from unauthorized penalty liability. In *U.S. Postal Service v. Flamingo Industries*,¹⁹ the Court held that the Sherman Act did not impose liability on federal agencies because they did not meet the definition of “person,” which – like the FPA definition of “person” – did not include federal agencies.²⁰ Similarly, in *U.S. Dep’t of Energy v. Ohio*, the Supreme Court held that federal agencies could not be sued under the Clean Water Act and the Resource Conservation and Recovery Act because, under those statutes, states’ penalty authority was limited to “persons,” a defined term that did not include federal agencies.²¹ As the Supreme Court established in those cases, the Commission may not read the word “person” out of the FPA in order to subject federal agencies to civil penalties.

3. Section 201(b)(2) of the FPA does not alter the scope of Section 316A

In past pleadings, NERC and the regional entities have also invoked Section 201(b)(2)²² as support for their contention that they may penalize federal agencies. Section 201(f) of the FPA places so-called “201(f) entities” – a category that includes federal agencies – outside the

¹⁹ 540 U.S. 736, 744 – 745 (2004).

²⁰ *Id.* (quoting 16 U.S.C. § 7).

²¹ 503 U.S. 607, 617 – 18 (1992).

²² Section 201(b)(2), 16 U.S.C. § 824(b)(2), provides:

Notwithstanding subSection (f) of this Section, the provisions of Sections 824b(a)(2), 824e (e), 824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title 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 chapter with respect to such provisions.

jurisdiction of the FPA. Section 201(b)(2) lifts that jurisdictional bar for fourteen different substantive provisions within Part II of the FPA as well as the Act's enforcement provisions as applied to those provisions. Section 201(b)(2), however, does not subject 201(f) entities to any provisions of the FPA they would not otherwise be subject to under the terms of those provisions. For example, if a particular federal entity is not a user, owner, or operator of the bulk power system, it would not be subject to the requirements of Section 215 simply by virtue of Section 201(b)(2). Likewise, because federal agencies are not "persons" under the FPA, they are not subject to Section 316A simply by virtue of Section 201(b)(2).²³

4. At a minimum, the FPA does not contain a clear statement of authority to impose monetary penalties against federal agencies

The Department has shown that Section 316A does not authorize penalties against federal agencies for violations of Part II of the FPA. Nevertheless, even were the Commission to find the FPA ambiguous on this point, it must rule in favor of the Department. Three separate doctrines prevent the Commission from expanding the FPA's penalty authority beyond what the plain language requires. First, reading the FPA to empower non-federal entities such as NERC and the regional entities to extract monetary penalties from federal agencies implicates the doctrine of sovereign immunity.²⁴ A waiver of the federal government's sovereign immunity "must be unequivocally expressed in statutory text . . . and will not be implied."²⁵

²³ It is useful to note that, although federal agencies do not qualify as "persons" under the Act, many other 201(f) entities would.

²⁴ Reviewing the applicable precedent, the Department of Justice's Office of Legal Counsel has concluded that "an administrative agency has no more authority to prosecute or adjudicate a claim against the federal Government than does a federal court" and hence that sovereign immunity applies "with equal force to agency adjudications." *See Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program* (March 17, 2008) available at <http://www.justice.gov/olc/2008/payment-alien-physicians-h1b-visa.pdf> (quoting *The Equal Employment Opportunity Commission's Authority to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Administrative Judges*

Second, there is a strict judicial demand for legislative precision when considering whether a statute authorizes one federal agency to assess monetary penalties against another. The Department of Justice's Office of Legal Counsel has found that the imposition of monetary penalties by one federal agency against another raises difficult constitutional questions relating to the separation of powers and the authority of the President under Article II of the Constitution to supervise and direct executive branch activities.²⁶ Following Supreme Court precedent, the Office of Legal Counsel has concluded that Congress must provide a "clear statement" when it intends to enable one agency to penalize another.²⁷

Third, a basic principle in both civil and criminal contexts is that "penal statutes are to be construed strictly and one is not to be subject to a penalty unless the words of the statute plainly impose it."²⁸ When determining the scope of enforcement authority in legislation, courts hold that "the statute must plainly establish a penal sanction in order for the agency to have authority to impose a penalty [such as a pecuniary fine] but [an] agency has broad administrative powers to impose administrative sanctions that are not penalties as long as the sanctions are reasonably related to the purpose of the enabling statute."²⁹

There is no clear or unequivocal statement in the FPA to support imposition of civil penalties against federal agencies. The unelaborated reference to "penalties" in Section 215(e) is

(Jan. 6, 2003) available at http://www.justice.gov/olc/opinions/01062003_eecnavy.pdf); see also e.g., *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); *Ardestani v. INS*, 502 U.S. 129, 137 (1991); *Foreman v. Dep't of the Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001).

²⁵ *Lane v. Pena*, 518 U.S. 187, 192 (1996).

²⁶ See *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.

²⁷ *Id.* (collecting cases); see also *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation And Recovery Act* (June 14, 2000) available at <http://www.justice.gov/olc/ustop2.htm>.

²⁸ *Comm'r v. Acker*, 361 U.S. 87, 91 (1959) (internal citation omitted).

²⁹ *Gold Kist v. Dept. of Agric.*, 741 F.2d 344, 348 (11th Cir. 1984) (internal citation omitted).

certainly not a “clear statement” of authority to penalize federal agencies when, as the Commission has held, the limits of Section 316A apply to penalties under that section. Section 201(b)(2) of the FPA also falls far short. The only clear statement in Section 201(b)(2) is that Section 201(f) does not apply to certain sections of the FPA. Nothing in Section 201(b)(2) subjects 201(f) entities to provisions of the FPA they would not have otherwise been subject to under the terms of those provisions. Finally, NERC states that the “clear language of the statute and the legislative history supply any ‘clear statement’ that may be required.”³⁰ But even if NERC had credible legislative history on point, which it does not,³¹ legislative history may not provide the “clear statement” needed to penalize a federal agency where none exists in the statutory text.³²

Moreover, where Congress has intended to subject federal agencies to particular provisions of the FPA, it has had no difficulty expressing that intention clearly.³³ In addition to creating Section 215 and strengthening Section 316A, EPAct 2005 amended several other

³⁰ Notice of Penalty at 14 n.22.

³¹ NERC relies on a single source of legislative history: a two-sentence summary of Section 215 from the Senate Committee on Energy and Natural Resources’ report, which states that the ERO may penalize “anyone” who violates the reliability standards. NERC places vastly more weight on this one word than it can bear. The summary in the report is brief and noticeably imprecise. It refers to the “*Electricity Reliability Organization*” and summarizes the ERO’s authority as the “power to establish mandatory rules for operation of the transmission grid” – a summary that, needless to say, both overstates and understates NERC’s authority. In any event, the summary does not expressly confront the issue presented here: whether federal agencies must pay civil penalties for violations of Section 215 notwithstanding the plain language in the FPA’s civil penalty section.

³² See, e.g., *Lane* 518 U.S. at 192 (“A statute’s legislative history cannot supply a waiver that does not appear clearly in any statutory text; the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.”)(internal quotations omitted).

³³ See *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 916 (9th Cir. 2005) (holding that FERC lacked authority to order a federal power marketing administration to pay refunds because it was not a “public utility” under the FPA and stating: “When Congress wanted a provision of FPA subchapter II to apply to governmental entities, it knew how to so specify.”).

provisions of the FPA and made them applicable to the federal government. Those include Section 206(e) (Commission refund authority),³⁴ Section 211A (open access by unregulated transmitting utilities),³⁵ Section 221 (prohibition on filing false information),³⁶ and Section 222 (prohibition of energy market manipulation).³⁷ In each instance, Congress applied the amendments to federal entities by inserting language that indicated the new requirements applied to entities “described in § 201(f),” the same phrase used to apply Section 215 to federal entities. The EAct 2005 amendments to Sections 306, 307(a) and 313(a) of the FPA expanded Commission authority over some federal agencies by inserting “electric utility,” the definition of which was itself amended to include the federal power marketing authorities, in the place of or in addition to “person.”³⁸ When Congress overhauled Section 316A it could have easily extended the reach of that provision to federal agencies as it did in the other sections referenced above. That it chose not to underscores its intention to limit monetary penalties to “persons” as defined in the FPA.³⁹

5. Even if the Commission had authority to impose monetary penalties against federal agencies, it should decline to do so as a matter of policy

As the Department has explained, the Commission lacks authority to impose monetary penalties against federal agencies. Yet, even if the Commission were to possess such authority,

³⁴ EAct 2005 § 1286, 16 U.S.C. § 824e(e)(2).

³⁵ EAct 2005 § 1231, 16 U.S.C. § 824j-1.

³⁶ EAct 2005 § 1282, 16 U.S.C. § 824u.

³⁷ EAct 2005 § 1283, 16 U.S.C. § 824v.

³⁸ EAct 2005 §§ 1284 & 1291.

³⁹ See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (holding that where Congress wanted to provide for successor liability in the Coal Act it did so explicitly, as in other sections of the Act); *Bluewater Network v. EPA*, 370 F.3d 1, 14 (D.C. Cir. 2004) (concluding that when Congress includes particular language in one section of a statute but omits it in another section of the same statute it is presumed that the exclusion was intentional).

it should decline to do so as a matter of policy.⁴⁰ Given that the ERO and the regional entities have the full arsenal of non-monetary remedial tools at their disposal,⁴¹ the imposition of monetary penalties against federal agencies will only lead to waste of federal resources. As the Commission is well aware, the possibility of monetary penalties can turn a conversation between engineers into a confrontation between lawyers – with all the attendant cost and delay. Indeed, monetary penalty disputes between federal agencies are particularly likely to provoke needless legal conflict given the persistent question whether the federal agency has statutory authority to pay the penalty. Given the burdens placed on federal officials under the Anti-Deficiency Act,⁴² questions about statutory authority for payment are likely to present themselves repeatedly as a barrier to settlement with federal agencies.

The expense and delay associated with monetary penalties may be a necessary cost of incentivizing compliance among private parties. Federal agencies, however, are accountable to the Congress and the President of the United States. The Commission should not presume that federal agencies such as the Department of Energy take their obligations under Section 215 any less seriously than the other provisions of federal law that govern their conduct and for which no monetary penalties are necessary to ensure compliance.

⁴⁰ See *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C.Cir.1984) (holding that agency discretion is at its “zenith” in fashioning remedies.).

⁴¹ Those administrative sanctions include enforcement audits; compliance directives; limiting activities, functions, or operations; placing an entity on a reliability watch list; ordering specific operating or planning criteria limitations or mitigation plans and requiring system studies; defining operating practices or guidelines; requiring inspection or testing; and requiring training or development of operating plans. See *Sanctions Guidelines of the North American Electric Reliability Corporation* ¶¶ 3.17, 5 & 6.7 (Jan. 15, 2008); see also *Order Certifying North American Electric Reliability Organization as the Electric Reliability Organization*, 116 FERC ¶ 61,062 (2006).

⁴² See 31 U.S.C. § 1341 (prohibiting officers of the U.S. government from undertaking expenditures in excess of appropriated amounts).

III. MOTION TO STAY

Section 39.7(e)(3) of the Commission's regulations states that application for review of a penalty does not stay the penalty unless the Commission so orders on its own motion or the motion of the party that is the subject of the penalty. The Department moves to stay this and any other penalty assessed against the Department and any entity within the Department for violation of the reliability standards until a final non-appealable judgment has been rendered on the legal question at issue here. Until that time, it would be imprudent to devote further resources of the Department, NERC, the regional entities, and this Commission to penalty proceedings that may be rendered moot.

IV. CONCLUSION

For the reasons stated above, the Department respectfully requests that the Commission hold that civil penalties may not be assessed against federal agencies for violations of Section 215 of the FPA and that it stay any penalty assessed against the Department until the important legal issue presented in this application is resolved.

Respectfully submitted,

/s/ Steven A. Porter

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August 26, 2011

Washington, D.C.

CERTIFICATE OF SERVICE

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

DATED at Washington, D.C. this 26th day of August, 2011.

/s/ Samuel T. Walsh

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Document Content(s)

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