

FERC Issues Order Requiring Federal Entity Compliance with Reliability Standards for the Bulk-Power System

October 16, 2009

On June 24, 2009, the North American Electric Reliability Corporation (NERC) filed a Notice of Penalty for a violation of a Federal Energy Regulatory Commission (FERC)–approved Reliability Standard by the U.S. Army Corps of Engineers-Tulsa District (Corps-Tulsa District). In that filing, NERC requested that FERC issue a decision addressing the jurisdictional issue of whether, pursuant to section 215 of the Federal Power Act (FPA), federal entities that use, own, or operate the Bulk-Power System must comply with mandatory Reliability Standards. In an order issued October 15, FERC affirmed that, pursuant to section 215 of the FPA, such federal entities must comply with mandatory Reliability Standards.

Section 215 of the FPA authorizes FERC to certify and oversee an electric reliability organization (ERO) that is responsible for developing and enforcing mandatory Reliability Standards that are applicable to owners, users, and operators of the Bulk-Power System. Exercising this statutory authority, FERC has certified NERC as the ERO and has approved many mandatory Reliability Standards.

On October 3, 2007, the Corps-Tulsa District acknowledged noncompliance with an approved Reliability Standard but argued that, as a governmental entity, it was not required to comply with section 215 of the FPA or the Reliability Standards issued pursuant to it. On October 31, 2007, the Corps-Tulsa District was issued a Notice of Alleged Violation and Proposed Penalty or Sanction. Throughout the ensuing process, the Corps-Tulsa District voluntarily complied but continued to assert its belief that section 215 of the FPA does not apply to it because the section does not contain a clear waiver of sovereign immunity.

In its October 15 Order, FERC explains that section 215 of the FPA gives FERC jurisdiction over all users, owners, and operators of the Bulk-Power System, including but not limited to the entities identified in section 201(f) of the FPA. That section specifically refers to “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.” Although that reference is contained in an exemption from the application of Part II of the FPA, FERC concludes that the language of section 215 is meant to include such entities despite the exemption.

FERC finds additional evidence of this reading in section 201(b)(2), which states that section 215 applies to such entities “[n]otwithstanding section 201(f).” FERC also points to the legislative history as

further evidence of congressional intent to give FERC jurisdiction over federal entities for the enforcement of Reliability Standards.

In reaching its decision, FERC declined to address whether federal entities are subject to monetary penalties for noncompliance with mandatory Reliability Standards.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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