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Federal Agencies Cannot Be Fined for Reliability Standard Violations

The D.C. Circuit concluded that sovereign immunity prevents FERC and NERC from imposing monetary penalties on federal agencies that violate Reliability Standards.

Resolving a dispute between the Federal Energy Regulatory Commission (FERC) and the Southwestern Power Administration (SWPA), the U.S. Court of Appeals for the District of Columbia Circuit concluded that federal sovereign immunity prevents FERC, as well as the North American Electric Reliability Corporation (NERC), from imposing monetary penalties on federal agencies that violate mandatory Reliability Standards. As a result of the August 22 decision, federal agencies that are users, owners, and operators of the bulk-power system, such as the various federal power marketing administrations, will not be subject to fines if they violate any of the dozens of Reliability Standards that regulate everything from real-time power system operations to electric utility cybersecurity. Although these agencies are still subject to other enforcement mechanisms, such as compliance directives, the major enforcement tool available to FERC and NERC no longer applies to them.

In this case, the SWPA, which markets hydroelectric power, was fined $19,500 for violating Reliability Standards. FERC upheld the penalty, which had been filed by NERC, on the grounds that section 215 of the Federal Power Act requires the SWPA to comply with Reliability Standards and FERC has the authority to enforce those standards, including through monetary fines, against any entities subject to FERC's reliability jurisdiction.

The D.C. Circuit rejected FERC's claim, concluding that, as a federal agency, the SWPA is protected by sovereign immunity and that, even though federal agencies must comply with Reliability Standards, section 215 of the Federal Power Act did not "unequivocally" waiver the federal government's sovereign immunity. As the court explained, if the statute is at all ambiguous as to whether sovereign immunity was waived, no such waiver has occurred because the court is "required to construe any ambiguity against a waiver of sovereign immunity." Although FERC (and NERC) may enforce Reliability Standards against federal agencies, this authority does not necessarily encompass the ability to impose monetary penalties. The court found that there was a "plausible interpretation" that enforcement authority over the United States did not include the ability to impose monetary penalties. The existence of that plausible interpretation was enough to defeat FERC's claim to be able to impose such fines.

Although the court found that the statutory provisions on monetary penalties did not cover the federal government, the decision may also have ramifications beyond the federal agencies at issue in this proceeding. For example, the decision may affect whether FERC and NERC have the authority to fine municipalities, state and local governmental entities, and cooperatives that are users, owners, and operators of the bulk-power system but that are not clearly delineated as subject to monetary penalties. The court did not decide that issue in this case. However, if a future court finds that FERC and NERC lack the authority to fine municipalities, cooperatives, and similar entities, a more significant portion of the industry would be excluded from the main instrument that is traditionally used to punish violations and encourage compliance with Reliability Standards.

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