141 FERC ¶ 61,242
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

North American Electric Reliability Corporation   Docket No. NP11-238-001

ORDER DENYING REHEARING

(Issued December 20, 2012)

1. On July 19, 2012, the Commission issued an order[1] finding that section 215 of the Federal Power Act (FPA)[2] authorizes the imposition of a monetary penalty on a federal entity that violates a mandatory Reliability Standard, and affirming the North American Electric Reliability Corporation's (NERC's) imposition of a $19,500 penalty against the Southwestern Power Administration (SWPA). Several entities, including SWPA, jointly with the U.S. Department of Energy (DOE), and the Department of the Interior (Interior), submitted requests for rehearing of the July 2012 Order, asserting that the Commission erred in (1) finding that sovereign immunity had been waived with respect to the imposition of a monetary penalty against a federal entity such as SWPA; (2) departing from established Commission precedent finding that FPA section 316A, which addresses the imposition of civil penalties for violations of Part II of the FPA, is applicable to FPA section 215; and (3) construing the enforcement authorities of FPA section 215 in a manner that frustrates other congressionally-established policies under the Flood Control Act and the Anti-Deficiency Act.

2. We hereby deny the requests for rehearing and affirm our prior ruling finding that FPA section 215 authorizes the imposition of a monetary penalty on federal entities found to be in violation of a mandatory Reliability Standard.

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[1] *North American Electric Reliability Corp.*, 140 FERC ¶ 61,048 (2012) (July 2012 Order).

[2] 16 U.S.C. §824o (2006).

I. Background

A. Statutory Framework

3. Section 215 of the FPA authorizes the Commission to certify and oversee an electric reliability organization (ERO) responsible for the development and enforcement of mandatory Reliability Standards applicable to users, owners and operators of the Bulk-Power System.[3] Exercising this statutory authority, the Commission certified NERC as the ERO in 2006,[4] and has since approved over one hundred national Reliability Standards as mandatory and enforceable, pursuant to FPA section 215(d).[5] As contemplated under FPA section 215(e)(4), NERC has delegated certain oversight and enforcement authority to eight Regional Entities,[6] including the Southwest Power Pool Regional Entity (SPP Regional Entity), which has enforcement and oversight responsibility for SWPA.

4. Section 215(b)(1) of the FPA, titled "Jurisdiction and Applicability," describes the Commission's reliability jurisdiction as follows:

> The Commission shall have jurisdiction . . . over . . . all users, owners and operators of the bulk-power system, *including but not limited to the entities described in section 201(f)*, for purposes of approving reliability standards established under this section *and enforcing compliance* with [FPA section 215]. All users, owners and operators of the

[3] 16 U.S.C. § 824o(c).

[4] *North American Electric Reliability Corp*., 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,190, *order on reh'g* 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

[5] 16 U.S.C. § 824o(d); *see, e.g., Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. and Regs. ¶ 31,242, *order or reh'g,* Order No. 693-A, 120 FERC ¶ 61,053 (2007).

[6] *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, *order on reh'g,* 120 FERC ¶ 61,260 (2007).

> bulk-power system shall comply with reliability standards that take effect under this section.[7]

Section 201(f) of the FPA, in turn, provides that Part II of the FPA (which includes section 215) does not apply to federal agencies, among other entities, except where a particular provision makes an exception:

> No provision in [Part II of the FPA] shall apply to, or be deemed to include, 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 . . . *unless such provision makes specific reference thereto*.[8]

5. NERC and the Regional Entities to which NERC delegated compliance and enforcement authority identify potential violations using various compliance tools, including audits, spot checks, investigations, required self-certifications, and voluntary self-reporting. If a violation is found, NERC has authority pursuant to FPA section 215(e)(1) to impose a penalty on the user, owner or operator of the Bulk-Power System found to be in violation, subject to certain due process and review requirements.[9]

6. Under the statute and its implementing regulations, NERC must file a Notice of Penalty with the Commission before an assessed penalty can take effect.[10] Each such penalty determination is subject to Commission review, either on its own motion or by application for review by the recipient of a penalty, within thirty days from the date NERC files the applicable Notice of Penalty.[11] In the absence of an application for

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[7] 16 U.S.C. § 824o(b)(1) (emphasis added).

[8] 16 U.S.C. § 824(f) (emphasis added).

[9] 16 U.S.C. § 824o(e)(1).

[10] 16 U.S.C. § 824o(e)(1) and (2); *see also Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 506, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[11] 16 U.S.C. § 824o(e)(2).

review of a penalty or other action by the Commission, each penalty filed by NERC is affirmed by operation of law upon the expiration of the applicable thirty-day period.[12]

B. SWPA Violations and NERC Notice of Penalty Filing

7. As noted in the July 2012 Order, SWPA is a subdivision of DOE, operating under the authority of section 5 of the Flood Control Act of 1944 (Flood Control Act). SWPA is one of four federal Power Marketing Administrations, and markets hydroelectric power from 24 Army Corps of Engineers projects in the Southwest United States, primarily to defined "preference" customers including rural electric cooperatives and municipal utilities. SWPA operates and maintains 1,380 miles of high-voltage transmission lines in a four-state area located within the region for which the SPP Regional Entity has reliability oversight.[13] SWPA is registered in NERC's Compliance Registry as a balancing authority, purchasing-selling entity, resource planner, transmission owner, transmission operator, transmission planner and transmission service provider[14] and, as such, is required to comply with all Commission-approved Reliability Standards applicable to such entities.[15]

8. In 2009, SWPA self-reported certain violations of NERC's approved Critical Infrastructure Protection or "CIP" Reliability Standards, and the SPP Regional Entity subsequently identified additional violations of those standards during a spot check.[16] The SPP Regional Entity proposed a penalty of $19,500 in total for the violations, which NERC ultimately affirmed over SWPA's objection. Notably, SWPA did not dispute the

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[12] *Id.*; *see also* 18 C.F.R. § 39.7(e)(1) (2012).

[13] *See* July 2012 Order, 140 FERC ¶ 61,048 at P 9; *see also* NERC Notice of Penalty at 1, n.1.

[14] *See* NERC Rules of Procedure Section 500 – Organization Registration and Certification.

[15] The particular Reliability Standards at issue here, CIP-004-1 and CIP-007-1, are applicable to SWPA as a registered balancing authority and transmission operator.

[16] *See* NERC Notice of Penalty at 2-10. Reliability Standard CIP-004-1 sets out requirements for personnel who have authorized cyber access or authorized unescorted physical access to Critical Cyber Assets, including requirements related to personnel risk assessment, training, and security (including cyber security). CIP-007-1 sets out requirements related to security systems determined to be Critical Cyber Assets and other assets within an "Electronic Security Perimeter."

underlying facts related to the violations or the amount of the proposed penalty. Instead, SWPA contested the penalty before NERC based on the claim that federal entities are not subject to monetary penalties for Reliability Standard violations because FPA section 316A, which sets out the Commission's general civil penalty authority, does not extend to federal entities.[17]

9. NERC filed the SWPA Notice of Penalty with the Commission on July 28, 2011, and included a detailed discussion of the procedural history associated with the violations, as well as NERC's analysis of the scope of its penalty authority under FPA section 215. SWPA, in a joint filing with DOE, made a timely request for Commission review of NERC's assessed penalty, on similar legal grounds as were argued before NERC, i.e., that FPA section 316A does not permit the imposition of civil penalties on a federal agency (because such penalties can only be imposed on "persons," defined as an individual or a corporation), that FPA section 215 is not an independent source of authority to impose penalties, or that, at a minimum, the FPA does not reflect a sufficiently clear statement of congressional intent to waive sovereign immunity. A number of entities intervened, making similar arguments to those of SWPA and DOE, including Interior and various associations of wholesale customer groups who purchase power from SWPA and other similar federal power marketing entities.

C. July 2012 Order

10. In the July 2012 Order, the Commission held that the grant of authority to impose a penalty on any user, owner, or operator of the Bulk-Power System that violates a mandatory Reliability Standard, including federal entities, is explicit and unambiguous. The Commission reviewed and relied on the plain language of FPA section 215, first noting that section 215(b) states that the Commission has jurisdiction over all users, owners, and operators of the bulk-power system "*including but not limited to the entities described in section 201(f)*, for purposes of approving reliability standards established under this section *and enforcing compliance with this section*."[18] The Commission then noted that enforcement of FPA section 215 is governed by subsection 215(e), which authorizes the imposition of a penalty by the ERO under (e)(1) and (e)(2), and by the

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[17] FPA section 316A states in relevant part that "[a]ny person who violates any provision of part II 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." 16 U.S.C. § 825o-1(b).

[18] July 2012 Order, 140 FERC ¶ 61,048 at P 39 (quoting 16 U.S.C. § 824o(b)(1) (emphasis supplied in order, emphasis added to the statute).

Commission under (e)(3).[19] The Commission held that these grants of authority to the ERO and to the Commission are unambiguous and unequivocal, and as such are sufficient to act as a waiver of sovereign immunity with respect to federal entities found to be in violation of a mandatory Reliability Standard.[20]

11. The Commission further found that FPA section 316A does not alter this explicit grant of authority under FPA section 215 or otherwise render it ambiguous.[21] The Commission rejected the arguments of DOE/SWPA that the authority to impose a monetary penalty for violations of a Reliability Standard derives from FPA section 316A and not from FPA section 215, including their claim that FPA section 215(e) merely sets out procedural requirements and does not act as an independent grant of penalty authority.[22] In addition, the Commission rejected the notion that its prior findings on the applicability of the monetary cap set out in FPA section 316A to penalties imposed under FPA section 215 suggest that FPA section 316A is the source of the Commission's FPA section 215 penalty authority.[23]

12. The Commission specifically addressed whether the grant of authority to impose a monetary penalty on federal entities under FPA section 215 was sufficiently clear and unequivocal to serve as a waiver of sovereign immunity.[24] The Commission concluded that regardless of which standard of clarity is used to test whether sovereign immunity has been waived,[25] the language of FPA section 215 is sufficiently explicit to find such a waiver.

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[19] *Id.* P 40.

[20] *Id.* P 42.

[21] *See id.* PP 42-53.

[22] *Id.* PP 45-48.

[23] *Id.* P 49.

[24] *Id.* P 53.

[25] *See id.* P 53 & n.72 (noting that the standard for imposition of a penalty on a federal entity by another federal agency is arguably less rigorous than the standard applicable to private suits, and only requires a "clear statement" of congressional intent to authorize the imposition of a penalty). Despite the likely applicability of this standard, the Commission found that "the requirements for waiver are met using the highest level of scrutiny, i.e., that waiver has been clearly and unambiguously expressed in the statutory text." *Id.* n.72.

13. The Commission also rejected various policy-based arguments for interpreting its (and NERC's) section 215 penalty authority more narrowly, first noting the detrimental impact on electric system reliability of exempting such a large class of registered entities from section 215's reliability regime. The Commission rejected arguments that the imposition of penalties on federal entities such as SWPA would not provide a meaningful incentive for future compliance, regardless of the potential for passing such costs on to customers or recovering them from taxpayers, given the expectation of congressional and customer scrutiny if such entities continue to incur significant FPA section 215 penalties.[26] The Commission found no inconsistency with the Flood Control Act in imposing monetary penalties on federal entities like SWPA.[27] Finally, the Commission found no discernible conflict with the Anti-Deficiency Act, given that payment of such an administratively imposed civil penalty is permissible as a "necessary expense" where sovereign immunity has been waived.[28]

D. Requests for Rehearing

14. Timely requests for rehearing were filed by DOE and SWPA jointly (DOE/SWPA), Interior, the Mid-West Electric Consumers Association and the Southwestern Power Resources Association (Mid-West ECA), and the Southeastern Federal Power Customers, Inc. (SE FPC). DOE/SWPA and Interior also included a motion for stay of the SWPA penalty while the requests for rehearing were pending.

15. All of the entities seeking rehearing make arguments based on the doctrine of sovereign immunity, alleging that the Commission erred in both its reading of the language of FPA section 215 and in its analysis of the impact of FPA section 316A on the authority to impose monetary penalties on federal entities found in violation of a mandatory Reliability Standard. With respect to the applicable standard for determining whether sovereign immunity has been waived, DOE/SWPA, Interior, and SE FPC maintain that any such waiver must be "unequivocally expressed" in the statutory text.[29]

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[26] *Id.* P 56.

[27] *Id.* P 57.

[28] *Id.* PP 58-60.

[29] *See* DOE/SWPA Rehearing Request at 4 (citing *Lane v. Pena,* 518 U.S. 187 (1996) (*Lane v. Pena*), *United States Dep't of Energy v. Ohio,* 503 U.S. 607 (1992) (*DOE v. Ohio*); and *United States v. Nordic Village, Inc.,* 503 U.S. 30 (1992) (*Nordic Village*), among others, for the proposition that a waiver of the federal government's sovereign immunity must be unequivocally expressed in statutory text); *see also* Interior Rehearing Request at 3; SE FPC Rehearing Request at 10.

These entities also assert that under this strict standard of interpretation, ambiguities must be construed in favor of immunity, and that ambiguity exists if "there is a plausible interpretation of the statute that would not authorize money damages against the Government."[30] Moreover, these entities assert that any ambiguities with respect to the *scope* of the waiver must be construed in favor of the governmental entity, and that "any waiver of sovereign immunity that would authorize payments from the federal treasury 'must extend unambiguously to such monetary claims.'"[31]

16. DOE/SWPA and Interior argue that the sub-sections of FPA section 215 on which the Commission relies in the July 2012 Order do not contain the kind of explicit language needed to support an unequivocal and unambiguous waiver of sovereign immunity.[32] First, they note that FPA section 215(b) does not grant any enforcement or penalty powers to the ERO.[33] While they acknowledge that FPA section 215(b) makes federal agencies subject to the Commission's jurisdiction for purposes of "enforcing compliance" with FPA section 215, they argue that the provision does not speak to *how* the Commission can enforce compliance and note that it does not explicitly state that such enforcement can include "retrospective monetary penalties."[34] In support of this position, DOE/SWPA maintain that the phrase "enforce compliance" is used elsewhere in the FPA

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[30] DOE/SWPA Rehearing Request at 4 (citing *Federal Aviation Admin. v. Cooper,* 132 S. Ct. 1441, 1448 (2012) and quoting *Nordic Village,* 503 U.S. at 34, 37); *see also* Interior at 4.

[31] Interior Rehearing Request at 4 (quoting *Lane v. Pena*, 518 U.S. at 192); DOE/SWPA Rehearing Request at 4. According to SE FPC, the case law on sovereign immunity requires that the following three elements be met: (1) waiver must be part of the statutory text; (2) waiver cannot be implied; and (3) waiver must explicitly reference monetary claims. SE FPC Rehearing Request at 11. SE FPC further maintains that this line of cases requires that the statutory language must specifically reference the federal government and must include "language delineating a waiver such as 'notwithstanding any immunity.'" *Id.* at 13.

[32] DOE/SWPA Rehearing Request at 5-6; *see also* Interior Rehearing Request at 5-6 (asserting that the statute does not clearly indicate that federal entities are subject to monetary penalties, as is necessary to effectuate a waiver of sovereign immunity), SE FPC Rehearing Request at 8-10.

[33] *See* DOE/SWPA Rehearing Request at 6.

[34] *Id.* at 7; *see also* SE FPC Rehearing Request at 8.

to mean actions other than the imposition of penalties, citing FPA section 201(g) and FPA section 314(a).[35]

17. DOE/SWPA argue that FPA section 215(e) also lacks the specificity needed to effectuate a waiver of sovereign immunity because it does not state that the penalties it authorizes can be monetary in nature.[36] DOE/SWPA argue that FPA section 215(e) does not "expressly apply to the federal government," and that section 215(b) "only makes federal entities subject to the Commission's jurisdiction for purposes of 'enforcing compliance' and does not mention exposing federal entities to penalties, much less monetary penalties."[37] For all of these reasons, these entities claim that they have advanced a plausible interpretation of FPA section 215 that does not permit the imposition of penalties on federal entities.[38]

18. In the alternative, DOE/SWPA and Interior argue that no waiver of sovereign immunity can be found when FPA section 215 is read in concert with FPA section 316A. Interior explains that FPA section 316A does not authorize civil penalties against federal entities, because they do not meet the FPA's definition of "person," and that this provision therefore creates sufficient ambiguity to find no waiver of sovereign immunity under FPA section 215.[39] These entities also assert that FPA section 215 cannot be read as a separate grant of penalty authority, because FPA section 215 does not bear any "indicia" of a grant of such authority. Specifically, DOE/SWPA note that FPA section 215 does not specify what penalties may be imposed, does not contain quantitative limits, and does not specify a mechanism for judicial enforcement.[40]

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[35] DOE/SWPA Rehearing Request at 8.

[36] *Id.* at 9-10 (citing *Maine v. Dep't of Navy,* 973 F.2d 1007, 1011 (1st Cir. 1992) and *DOE v. Ohio,* 503 U.S. at 621, for the proposition that a lack of specificity as to the kind of penalty authorized equates to a failure to unequivocally and unambiguously waive immunity). *See also* Interior Rehearing Request at 5 ("Section 215 does not elaborate on the meaning of 'penalty,' nor does it expressly state that monetary penalties are permissible.").

[37] DOE/SWPA Rehearing Request at 11.

[38] *See id.*

[39] Interior Rehearing Request at 6-8.

[40] DOE/SWPA Rehearing Request at 12-13.

19. DOE/SWPA and Interior also argue that the Commission's findings in the July 2012 Order contradict its prior findings in Order No. 672, in which the Commission held that "Section 316A of the FPA establishes a limit on a monetary penalty for a violation of a Reliability Standard pursuant to FPA Section 215."[41] According to DOE/SPWA, logic dictates that if FPA section 215 is a separate grant of penalty authority then it should not be limited by FPA section 316A at all. If that is not the case, and the two provisions are instead to be read together, then DOE/SWPA maintain that "all of Section 316A's provisions apply to monetary penalties under Section 215."[42] DOE/SWPA further argue that "[i]f section 316A governs the size of monetary penalties under Section 215, it must also govern which entities may be forced to pay."[43]

20. Mid-West ECA and SE FPC make many of the same, or similar, arguments to that of DOE/SWPA in support of their requests for rehearing. Mid-West ECA asserts that the Commission failed to explain its departure from established precedent interpreting FPA section 316A as establishing limits on monetary penalties for violations under FPA section 215.[44] Mid-West ECA argues that the Commission's prior rulings, in Order No. 672 and elsewhere, "demonstrate that Section 316A is the source of 'empowerment' for the Commission's and NERC's authority to impose a penalty" under FPA section 215.[45]

21. Similarly, Mid-West ECA asserts that the Commission failed to consider the FPA in its entirety when assessing the Commission's authority under FPA section 215, maintaining that the Commission's only explicit authority to impose monetary penalties is contained in FPA section 316A.[46] Mid-West ECA argues that FPA section 215 fails to meet the standard required for a waiver of sovereign immunity as set out in *Lane v. Pena*

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[41] *Id.* at 14 (quoting Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 575).

[42] *Id.* at 14-15.

[43] *Id.* at 15.

[44] Mid-West ECA Rehearing Request at 7-13.

[45] *Id.* at 9. Mid-West ECA also notes that the Commission "has consistently described the impact of Section 316A on Section 215 as 'establishing' and 'setting' rather than guiding," thereby demonstrating that Section 215 does not provide an independent source of penalty authority. *Id.* at 10.

[46] *Id.* at 15-16.

and *DOE v. Ohio, et al.*,[47] but also maintains that FPA section 215 does not even qualify as a "clear statement" of congressional intent to subject federal agencies to penalty authority.[48] Mid-West ECA asserts that if Congress had intended to make federal entities subject to penalties under the FPA, it could have amended FPA section 316A to do so.[49] Similarly, Mid-West ECA suggests that Congress would have revised the language of FPA section 201(b)(2), where it lists the FPA provisions applicable to section 201(f) entities, to include FPA section 316A if it had intended to waive immunity for FPA section 215 violations.[50]

22. Mid-West ECA also relies on a number of policy arguments in seeking rehearing of the July 2012 Order, claiming that the Commission's reading of FPA section 215 frustrates congressional intent under other statutes or leads to inconsistencies in the Commission's own policies.[51] First, Mid-West ECA argues that the imposition of a penalty on a federal agency will not provide an incentive to proactively comply with Reliability Standards, because the penalty costs may be readily passed through to customers or covered by taxpayers through appropriations.[52] Mid-West ECA likens this situation to that of RTOs and ISOs, where the Commission has recognized that the ready availability of such pass-through mechanisms can weaken compliance incentives.[53]

23. Mid-West ECA also asserts that the imposition of penalties on federal agencies, which then pass those costs on to preference customers, would frustrate the intent of the Flood Control Act and its encouragement of the distribution of power and energy to preference customers at "the lowest possible rates to consumers consistent with sound business principles."[54] Mid-West ECA asserts that the July 2012 Order incorrectly characterizes the congressional mandate of the Flood Control Act, and that any imposition of a monetary penalty on a covered federal entity is inconsistent with the

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[47] *Id.* at 22-25.

[48] *Id.* at 19-22.

[49] *Id.* at 20.

[50] *Id.* at 21.

[51] *See id.* at 25-32.

[52] *Id.* at 25-27.

[53] *Id.* at 26.

[54] *Id.* at 28 (quoting section 5 of the Flood Control Act, 16 U.S.C. § 825s (2006)).

Flood Control Act's directive to provide preference customers access to power at the "lowest possible price."[55]

24. Finally, Mid-West ECA and SE FPC argue that the Commission did not properly consider the potential conflict between its interpretation of FPA section 215 and the Anti-Deficiency Act,[56] asserting, *inter alia,* that payment of a penalty by a federal agency or federal officer could run afoul of the Anti-Deficiency Act if there is no clear waiver of sovereign immunity.[57] Mid-West ECA maintains that the Commission must consider and make a determination regarding all applicable statutory and appropriations authorities to assess whether a penalty payment by a specific federal entity is precluded by the Anti-Deficiency Act.[58] Mid-West ECA argues that the Commission failed to make these kinds of careful determinations regarding how penalty amounts can or should be paid, and otherwise to fully consider the potential conflicts under the Anti-Deficiency Act.[59]

25. Finally, DOE/SWPA and Interior include a motion for stay of the penalty against SWPA pending resolution of the rehearing requests, with DOE/SWPA noting the Commission's general policy of staying penalties under Commission review.[60] DOE/SWPA assert that a stay would prevent wasted government resources, particularly with respect to the pursuit of other penalty cases now pending before the Regional Entities.[61]

II. <u>Discussion</u>

26. We find, as we did in the underlying July 2012 order, that FPA section 215 unequivocally and unambiguously authorizes the imposition of monetary penalties on

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[55] *Id.* at 29.

[56] 31 U.S.C. § 1341 (2006).

[57] Mid-West ECA Rehearing Request at 30; SE FPC Rehearing Request at 17-18.

[58] Mid-West ECA Rehearing Request at 31.

[59] *Id.* at 32.

[60] DOE/SWPA Rehearing Request at 17 (citing *Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672,* 123 FERC ¶ 61,046 at P 12 (2008)); *see also* Interior Rehearing Request at 9-10.

[61] DOE/SWPA Rehearing Request at 18; Interior Rehearing Request at 9.

federal entities that are found to be in violation of a mandatory Reliability Standard. We reach that conclusion based on the explicit language of FPA section 215 in context and in its entirety, and we do not agree that the section can plausibly be interpreted as a grant of enforcement authority over federal entities that are users, owners, or operators of the Bulk-Power System for reliability-related purposes *other* than the imposition of monetary penalties, as the entities seeking rehearing maintain.[62]

27. We further find that no ambiguity arises as a result of the Commission's arguably more limited authority to impose a monetary penalty on a federal entity under FPA section 316A, and reject the notion that FPA section 215 does not serve as an independent source of authority to impose a monetary penalty. Nor do we agree that our findings with respect to such independent authority represents a departure from our prior rulings regarding the applicability of FPA section 316A's monetary cap to FPA section 215 penalties. As we found in the underlying order, our decision to allow the application of such monetary caps to FPA section 215 in no way suggested that any other limitations of FPA section 316A should supplant the plain language of FPA section 215 with respect to scope.

28. We reject arguments that the grant of enforcement authority under FPA section 215 is limited by the scope of the Commission's general civil penalty authority over federal entities, as set out in FPA section 316A, and instead find that the separate grant of penalty authority over federal entities under FPA section 215 is explicit and unambiguous. Accordingly, we find that the ERO, as well as the Commission, is imbued with the penalty authority granted under FPA section 215(e).

29. As in our underlying order, we find no policy basis for exempting federal agencies from the assessment of monetary penalties under section 215. While we acknowledge that federal agencies may not share the *same* incentive systems as privately-owned users, owners and operators of the Bulk-Power System, we believe that the imposition of penalties still acts as a significant incentive for future compliance. Finally, we again find no inconsistency with the Anti-Deficiency Act.

A. FPA Section 215 is Unequivocal and Unambiguous in Authorizing the Imposition of Monetary Penalties on Federal Entities

30. In the July 2012 Order, we found that the plain language of FPA section 215 explicitly conveys authority to assess a monetary penalty against a federal entity for violations of a mandatory Reliability Standard. We did so through an examination of the

[62] Given our findings in this Order Denying Rehearing, we dismiss as moot the motions for stay of the $19,500 penalty against SWPA.

specific statutory language of FPA section 215 (and the applicable definitional sections of the FPA), without recourse to any underlying policy objectives or legislative history, as some of the entities have suggested.[63] Nor did we rely on assumptions or implication in our analysis of FPA section 215. Rather, we considered the plain meaning of the statutory text, in the context of, and with reference to, the entirety of FPA section 215 and the rest of the FPA.

31. In the July 2012 Order, we explained that FPA section 215(b) defines the jurisdictional scope of FPA section 215 as extending to all users, owners and operators of the Bulk-Power System, "including but not limited to the entities described in section 201(f) for purposes of approving reliability standards under this section *and enforcing compliance with this section*."[64] We further explained that SWPA is an FPA section 201(f) entity and is a user, owner or operator of the Bulk-Power System.[65] Finally, we found that enforcement of compliance under FPA section 215 is covered under subsection 215(e), which explicitly includes the option of imposing a penalty on any user, owner or operator of the Bulk-Power System found to be in violation of a mandatory Reliability Standard.[66]

32. Notably, we reached our conclusion regarding the scope of FPA section 215's penalty authority using the same strict standards of statutory construction that DOE/SWPA and other entities claim is required in order to find a waiver of immunity,

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[63] *See, e.g.,* SE FPC Rehearing Request at 15 (stating that "[t]he Commission's reliance on arguments presented by NERC and its reference to the legislative history are equally unavailing to support a finding of a waiver of sovereign immunity" and citing to the July 2012 Order, 140 FERC ¶ 61,048 at P 14). Notably, SE FPC cites to a paragraph in our background discussion of the history of the case, not to findings or arguments made in the substantive sections of the order. Similarly, while Mid-West ECA correctly remarks that the July 2012 Order noted the potentially large regulatory gap if federal entities are not subject to penalties under FPA section 215 (*see* Mid-West ECA Rehearing Request at 24), we did so as part of our analysis of the policy arguments put forward *by commenters* in favor of our declining to impose penalties on federal entities and not as part of our statutory analysis regarding the clarity of the immunity waiver under FPA section 215.

[64] *See* July 2012 Order, 140 FERC ¶ 61,048 at P 39 (quoting 16 U.S.C. § 824o(b)(1) (emphasis added)).

[65] *Id.*

[66] *Id.* P 40.

i.e., that waiver "must be unequivocally expressed in statutory text and will not be implied."[67] Although we noted in our July 2012 Order that a less rigorous standard might be more applicable in this kind of case, involving the imposition of a penalty on a federal entity for violations of a federal statute, we found the language of FPA section 215 to be sufficiently clear to meet the highest level of scrutiny.[68]

33. As described above, DOE/SWPA and other entities seeking rehearing maintain that, under this strict standard for finding a waiver, any ambiguity must be resolved in favor of the government and that there can be no waiver if there is *any plausible* interpretation of the statute that would not authorize a monetary penalty on federal entities. These entities then argue for an interpretation of FPA section 215 that is *implausible* and requires that each subsection be considered without reference to any other subsection or the applicable definitional provisions of the FPA.

34. DOE/SWPA and other entities acknowledge that federal agencies "are subject to the Commission's jurisdiction 'for purposes . . . of enforcing compliance'" under FPA section 215(b).[69] However, they argue that the phrase "enforcing compliance" in FPA

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[67] *Id.* P 53, n.72.

[68] *Id.* As we stated in the July 2012 Order, a "less rigorous standard has been applied in cases involving the imposition of a penalty by one federal agency on another, i.e., whether there is a 'clear statement' of congressional intent to authorize the imposition of such a penalty against a federal entity or agency" (citing two opinions from the Office of Legal Counsel (OLC), *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conversation and Recovery Act,* 2000 OLC LEXIS 20 (2000) (OLC RCRA Opinion) and *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act,* 1997 OLC LEXIS 29, *slip op.* at 15-16 (1997) (OLC Clean Air Act Opinion)).

Notably, in the OLC RCRA Opinion, the OLC relied on both the plain text of the statute *and* its legislative history in finding a sufficiently clear statement of congressional intent to authorize the assessment of penalties against federal agencies for violations of RCRA's underground storage tank requirements. 2000 OLC LEXIS 20 at 6, n.3. Similarly, in the OLC Clean Air Act Opinion, the OLC relied on changes in the text of the Clean Air Act and House Reports explaining the reason for the change, as well as the plain text of the statute, in finding that "Congress clearly indicated . . . its intent to authorize EPA to use its section 113 enforcement authorities [including civil penalty authority] against federal agencies." 1997 OLC LEXIS 29 at 10-15.

[69] DOE/SWPA Rehearing Request at 7.

section 215(b) lacks the specificity necessary to constitute a waiver and that the Commission's reading of that term "greatly expands" on how the term is used elsewhere in the FPA.[70] This line of reasoning might have some merit (albeit limited) if there were no specific language elsewhere in FPA section 215 to explain the intended scope of enforcement authority. However, that is not the case, and any plausible interpretation of FPA section 215 must include a consideration of *all* relevant subsections. Thus, when FPA section 215(b) is read in conjunction with FPA section 215(e), we found that FPA section 215 *explicitly* contemplates the imposition of penalties by either the ERO or the Commission.[71]

35. DOE/SWPA and other entities requesting rehearing seek to avoid this result by arguing that (1) use of the word "penalty" in FPA section 215(e) is not explicit enough to allow the imposition of a monetary penalty or fine; and/or (2) FPA section 215(e) does not explicitly refer back to FPA section 201(f) entities (or to federal entities), and therefore cannot effectuate a waiver of immunity.

36. With respect to the first argument, DOE/SWPA and others fail to cite a single sovereign immunity case in which the word "penalty" was found to be insufficiently explicit to allow the imposition of a monetary penalty, nor is that term commonly understood to exclude a monetary fine. Indeed, the very provision of the FPA that these same entities point to as an example of a clear grant of authority to impose a monetary fine, FPA section 316A, uses the terms "penalty" and "civil penalty" but does not use the word "monetary."

37. SE FPC, in particular, overstates what is required under the caselaw to find that a monetary penalty can be imposed on a federal entity, asserting that the waiver of sovereign immunity "must explicitly reference monetary claims."[72] However, SE FPC's own example of statutory language sufficient to authorize the imposition of a monetary penalty on a federal agency demonstrates the fallacy of its argument. SE FPC sets out the following provision from the revised Resource Conservation and Recovery Act (RCRA), as an example of the kind of language necessary to effectuate a waiver of immunity that extends to a monetary fine:

> The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any

[70] *Id.*

[71] July 2012 Order, 140 FERC ¶ 61,048 at P 37.

[72] *See* SE FPC Rehearing Request at 11.

> such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative relief, administrative order or *civil or administrative penalty* or fine referred to in the preceding sentence, or reasonable service charge).[73]

Notably, this statutory provision, like 215(e)(1) and (e)(3), uses the word "penalty" to include a monetary penalty, without the explicit use of the word "monetary," "monetary claim," or "monetary damages."

38. Thus, contrary to the assertions of the entities seeking rehearing, the courts have not been overly concerned with the use of the term "monetary damage" or "monetary claim" in cases involving the imposition of penalties on a federal entity that violates a federal statute, as opposed to a private suit for damages.[74] As one example, the court in

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[73] SE FPC Rehearing Request at 12-13 (quoting from 42 U.S.C. § 6961, and explaining that the revised language was developed "in the wake of the *U.S. Department of Energy v. Ohio* decision," when "Congress passed the Federal Facilities Compliance Act of 1992 to clarify the scope of the sovereign immunity that was waived under [RCRA]"). *See also U.S. v. Colorado,* 990 F.2d 1565, 1569-70 at n.4 (10th Cir. 1993) (noting that Congress amended RCRA after the Court's decision in *DOE v. Ohio* to clearly provide that federal agencies are not immune from penalties thereunder).

SE FPC also argues that the failure to use explicit immunity "waiver" language (such as "notwithstanding any immunity") must be construed to mean no waiver was intended, but provides no support for that position other than to provide examples of cases in which such language happened to be part of the relevant statute. In fact, courts have found a waiver of sovereign immunity where the statute did not include language stating that "The United States hereby expressly waives any immunity . . . ." *E.g., U.S. v. Tennessee Air Pollution Control Board,* 185 F.3d 529 (6th Cir. 1999) (holding that the Clean Air Act's "state suit" provision, which empowers states to bring enforcement actions against the United States and to obtain administrative remedies or sanctions in the same manner as nongovernmental entities but does not include an express statement of waiver of sovereign immunity, is sufficient to allow the imposition of a $2,500 civil penalty on the U.S. Army).

[74] *See, e.g., Cudjoe v. Dept. of Veterans Affairs,* 426 F.3d 241 (3d Cir. 2005) (finding no waiver of immunity for private suits for money damages for failure to disclose lead paint contamination under the Toxic Substances Act, while noting the statute's express waiver of immunity with respect to EPA enforcement, including the imposition of fines and penalties). In making this distinction, the Court in *Cudjoe*

(continued…)

U.S. v. Tennessee Air Pollution Control Bd.[75] found that the Clean Air Act "unequivocally and unambiguously" effects a waiver of sovereign immunity that extends to the imposition of penalties for past violations of air quality standards. The court relied on the following savings clause in making that determination, with no apparent concern about its lack of the use of the word "monetary":

> Nothing in this section or in any law of the United States shall be construed to prohibit . . . any State . . . from . . . bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency . . . against the United States . . . .[76]

39. We further reject DOE/SWPA's claim that the use of the phrase "enforce compliance" in FPA sections 201(g) and 314(a) has any relevance to the proper interpretation of FPA section 215. FPA section 201(g) and 314(a) both relate to the enforcement authorities of the U.S. districts courts, in the former case giving the district courts authority to enforce compliance with any state commission order to examine the books and accounts of certain jurisdictional entities, and in the latter case to enforce compliance or to enjoin acts or practices that could constitute a violation of the FPA. The use of the term "enforce compliance" in those sections is simply not comparable to that of section 215, particularly when FPA section 215(e) goes on to specify that "enforcement" is intended to include "penalties" that the ERO or the Commission, not a court, would impose. That intent is made most clear in subsection 215(e)(3), which states that upon finding that a user, owner or operator of the Bulk-Power System has engaged in or will engage in acts that violate a Reliability Standard, the Commission "may order compliance with a reliability standard *and* may impose a penalty against [that] user or owner or operator of the bulk-power system."[77] If the term "enforcing compliance" in FPA section 215(b) was intended to cover injunctions or other equitable remedies only, as DOE/SWPA have argued, then there would be no reason for subsection (e)(3) to give the Commission the authority *both* to "order compliance" with Reliability Standards and to "impose a penalty" for violations of those standards.

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pointed out that the term "civil penalty" is defined in Black's Law Dictionary as "a fine assessed for a violation of a statute or regulation." *Id.* at 247.

[75] 185 F.3d 529 (6th Cir. 1999).

[76] *Id.* at 532.

[77] 16 U.S.C. § 824o(e)(3) (emphasis added).

40. With respect to the second argument of DOE/SWPA and others, that FPA section 215(e) does not explicitly refer to federal entities (or to 201(f) entities), we reject the notion that a waiver of sovereign immunity can only be effectuated if conferred under a single subsection of FPA section 215. We do not believe that the scope of the Commission's jurisdiction and obligations with respect to enforcing compliance, as described in FPA section 215(b), can be understood without reference to FPA section 215(e), and that the definition of the term "users, owners and operators of the Bulk-Power System" as set out in FPA section 215(b), which includes FPA section 201(f) entities, necessarily informs its use throughout the remaining sections of FPA section 215. Thus, we agree with DOE/SWPA when they argue elsewhere that statutory language which purports to effect a waiver of immunity must be read in context. Unlike DOE/SWPA, however, we believe this rule of construction rule applies not only to the FPA as a whole but also *within* the context of FPA section 215.

41. Finally, DOE/SWPA and others point out that the FPA section 215(b) description of jurisdictional scope and applicability refers only to the Commission's jurisdiction and not to the ERO's. We do not find this distinction to be meaningful in this context. First, as discussed above, we have held that FPA section 215(b) serves to define the scope of "all users, owners and operators of the Bulk-Power System" as that term is to be applied to the remainder of FPA section 215. Notably, the statute uses the exact same phrase -- "user or owner or operator of the bulk-power system" -- in the provision governing the Commission's enforcement authority (section 215(e)(3)), and in the provision governing the ERO's enforcement authority (section 215(e)(1)), without any indication that they are intended to have a different scope. We believe the only plausible approach to interpreting this language is to read "user or owner or operator of the bulk-power system" as having a consistent meaning throughout section 215 that encompasses entities, like SWPA, that are included in section 201(f).[78]

B. FPA Section 316A Does Not Otherwise Render Ambiguous the Grant of Authority to Impose Penalties on a Federal Entity Under FPA Section 215

42. We disagree with DOE/SWPA and other entities seeking rehearing that we failed to consider our FPA section 215 authority in the context of the rest of the FPA, and particularly that we failed to consider FPA section 316A, which grants the Commission the authority to impose a civil penalty on "persons" who violate any provision of Part II

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[78] We further note that an ERO-imposed penalty cannot take effect until the 31st day after it is filed with the Commission, and that each such penalty is subject to Commission review on its own motion or on application by the recipient of the penalty. *See* 16 U.S.C. § 824o(e)(2).

of the FPA. We fully considered whether the grant of authority to impose a penalty on a federal entity under FPA section 215 is inconsistent with or otherwise conflicts with FPA section 316A, and we found that it did not.

43. In their rehearing requests, DOE/SWPA and other entities make a number of arguments similar to those made in their initial comments in this proceeding, i.e., that FPA section 215 is merely a procedural provision,[79] that it cannot serve as an independent grant of penalty authority because it does not bear the indicia of such a grant, and that FPA section 316A is the sole source of civil penalty authority for violations of Part II of the FPA.

44. We find such a limited reading of FPA section 215 implausible. As we noted in the July 2012 Order, FPA sections 215(e)(1) and (3), separate and apart from FPA section 316A, authorize the ERO and the Commission to impose a penalty for violation of a mandatory Reliability Standard. Moreover, FPA section 316A does not mention the "ERO" and therefore cannot serve as a source of penalty authority for NERC. With respect to arguments about FPA section 215 lacking the "indicia" of a grant of penalty authority, we found, and reiterate, as follows:

> First, we note that FPA section 215(e)'s title – Enforcement -- signals the grant of enforcement authority, which includes the authority to impose a penalty . . . . Nor can we agree that the placement of FPA section 215(e) with the rest of FPA section 215 is a compelling reason to question its effect as a grant of penalty authority. Quite the contrary, if the intent was to draw a distinction between the penalty authority of the Commission under FPA section 215 (which extends to all 201(f) entities, regardless of their status as a "person" as defined in the FPA) and its penalty authority under FPA section 316A, it would be logical that Congress would have added the new enforcement authority as part of FPA section 215 and not through changes to FPA section 316A.[63]
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> [63] Indeed, the fact that FPA section 215(e) provides that "any penalty imposed *under this section* shall bear a reasonable relation to the seriousness of the violation . . . " further shows that any intended penalties for section 215 violations be

[79] *See, e.g.,* DOE/SWPA Rehearing Request at 12; Mid-West ECA Rehearing Request at 17 (describing FPA section 215 as a substantive regulatory provision that is enforced through 316A).

> imposed under section 215 and not another section or part. Similarly, FPA section 215(c), which governs certification of the ERO, indicates that Congress intended FPA section 215 to be an independent source of penalty authority for violations of FPA section 215. Specifically, FPA section 215(c)(2)(C) requires the ERO to establish rules to "provide fair and impartial procedures for enforcement of reliability standards through the imposition of penalties in accordance with subsection (e) . . . ." 16 U.S.C. § 824o(c)(2)(C). *See also* Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 570 (finding that the type of penalty contemplated by FPA section 215 includes monetary penalties).[80]

45. We also reject the notion that the failure to include a monetary cap in FPA section 215 indicates that the section was not intended to serve as a grant of penalty authority. As is discussed more fully in section II.C., below, we have determined that the monetary cap set out in FPA section 316A is applicable to FPA section 215 penalties. Despite this, we cannot plausibly read FPA section 215 as relying on FPA section 316A as the source for its penalty authority, and note that if FPA section 316A did not exist or were otherwise withdrawn from the FPA, the penalty authorities described in FPA section 215 would still exist and could be carried out (even if uncapped).[81]

46. Moreover, as we noted in the July 2012 Order, FPA section 215 may not place a specific dollar-value cap on penalties, but does include other significant limitations.[82] Among other things, all penalties assessed by NERC are "subject to review by the Commission, on its own motion or upon application by the user, owner or operator that is

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[80] July 2012 Order, 140 FERC ¶ 61,048 at P 47.

[81] As we found in the July 2012 Order, we find no merit in the argument that Congress would have modified FPA section 316A to refer to 201(f) entities, or section 201(b)(2) to include section 316A among the list of provisions of the FPA that are applicable to 201(f) entities if it had intended for federal entities to be subject to monetary penalties for violations of FPA section 215. On the contrary, any such modification explicitly would have made federal entities subject to penalties for *any* violation of FPA Part II. *See* July 2012 Order, 140 FERC ¶ 61,048 at PP 47, 51 ("By granting a separate penalty authority as part of FPA section 215, Congress limited federal entities' new exposure to penalties . . . to a very specific area of responsibility, *i.e.,* to violations of mandatory Reliability Standards and nothing further.").

[82] *Id.* P 48.

the subject of the penalty," and all are required to bear a reasonable relation to the seriousness of the violation and to consider remedial steps taken by the potential recipient of the penalty, as set out in FPA section 215(e)(6).

47. Thus, we maintain that FPA section 215 acts as a separate grant of penalty authority with respect to violations of mandatory Reliability Standards. Further, we are satisfied that the waiver of immunity effected through FPA section 215 is not rendered ambiguous by FPA section 316A or any limitations it may have to "persons" as defined under the FPA.[83]

C. The July 2012 Order is Not a Departure from Prior Commission Rulings Regarding the Applicability of FPA Section 316A Penalty Caps to FPA Section 215

48. Mid-West ECA argues that the July 2012 Order effectively denies the existence of Commission precedent, in Order No. 672 and elsewhere, that the monetary caps set out in FPA section 316A are applicable to penalties imposed under FPA section 215. To the contrary, we directly addressed that precedent and what it meant in our underlying order:

> We reject DOE/SWPA and other commenters' position that the Commission's prior holdings on the applicability of the monetary limits set out in FPA section 316A to penalties imposed under FPA section 215(e) require a finding that FPA section 316A thereby limits the scope of FPA section 215. In Order No. 672, the Commission found that penalties imposed under FPA section 215 are subject to the upper monetary cap on civil penalties as set out in FPA Section 316A, but in no way suggested that FPA section 316A was the source of the Commission's (or NERC's) authority to impose a penalty for violations of a Reliability Standard under FPA section 215. In other words, the scope of the Commission's penalty

[83] The legislative history of section 215, while not dispositive, supports the conclusion that Congress did not require section 316A to govern section 215 penalties. In September 2002, the first version of what subsequently became FPA section 215(e)(6) was included in a conference committee draft of House omnibus energy bill, H.R. 4. The first two offers of that bill (HR4 Offer 001 and Offer 002) explicitly provided that section 316A would govern section 215 penalties; the third removed any reference to section 316A. The explicit rejection of a provision linking a section 215 penalty to section 316A supports the conclusion that FPA section 215 was intended to act as a separate grant of penalty authority.

> authority under FPA section 215 is expressly set out under FPA section 215(b), and does not depend on the general penalty authority granted under FPA section 316A.
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> In pressing this argument, DOE/SWPA quote a statement in Order No. 672 that "[t]he 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." This statement was made in the context of the Commission's consideration elsewhere in Order No. 672 of whether a monetary penalty could be imposed on the ERO or a Regional Entity, to the extent they are not acting as users, owners, or operators of the Bulk-Power System, for violations under FPA section 215.[84]

49. Thus, we disagree that the Commission has indicated, in Order No. 672 or elsewhere, that FPA section 316A is "the source of 'empowerment'" to impose a penalty for violations of Reliability Standards under FPA section 215, as Mid-West ECA and other entities seeking rehearing argue. We note that the issue before us, and the issue on which entities commented in response to the Notice of Proposed Rulemaking (NOPR) that preceded Order No. 672, was whether or not the monetary caps contained in FPA section 316A should also apply to FPA section 215 penalties, and *not* the question of whether federal entities should be subject to monetary penalties under FPA section 215. Accordingly, when the Commission "interpreted" Section 316A as establishing limits on monetary penalties for violations of a Reliability Standard, that finding cannot be read to mean that we intended (or that Congress intended) for other aspects of FPA section 316A to *supplant* FPA section 215's grant of limited jurisdiction to impose penalties on 201(f) entities that violate a mandatory Reliability Standard.

50. Nor do we agree that our position on the relationship between FPA section 215 and FPA section 316A effectively reads the word "persons" out of FPA section 316A, as DOE/SWPA have argued, or that we have not responded to the argument that if FPA section 316A applies to the size of the monetary penalty it must also govern which entities pay.[85] DOE/SWPA and these other entities seek to expand our decision regarding the applicability of FPA section 316A far beyond anything included in our ordering language. The exact language of the relevant paragraph in Order No. 672 is as follows:

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[84] July 2012 Order, 140 FERC ¶ 61,048 at PP 49-50.

[85] *See* DOE/SWPA Rehearing Request at 15-16.

> The Commission confirms its interpretation that section 316A of the FPA establishes a limit on a monetary penalty for violation of a Reliability Standard that may be imposed by the Commission, the ERO, or a Regional RE pursuant to FPA section 215.[86]

Likewise, the Commission again held in a subsequent order that "[i]n Order No. 672, we interpreted section 316A *as setting a cap on the monetary penalties* that the Commission, NERC, and the Regional Entities could impose under FPA section 215."[87] Notably, the Commission did not hold that FPA section 316A is the source of penalty authority under FPA section 215, nor did the Commission find that language in FPA section 316A could or should supplant the specific language contained in FPA section 215 as to who is liable for enforcement and penalties pursuant to that section. Instead, the Commission determined that penalties imposed under FPA section 215, which are required to "bear a reasonable relation to the seriousness of the violation" but which are *not otherwise limited under FPA section 215 itself*, should be subject to the same monetary caps that apply to civil penalties for violations of Part II of the FPA.[88] FPA section 215 contains specific language addressing enforcement authority for violation of mandatory reliability standards as well as the universe of entities subject to 215 penalties, but does not provide for specific penalty caps. Under generally-accepted rules of statutory construction, the enforcement authority set forth in section 215 specifically addressing who is liable for penalties prevails over the more generalized penalty provision set forth in section 316A of the FPA. Likewise, under the same rule of statutory construction, it was appropriate for the Commission to interpret the more specific penalty cap set forth in Section 316A as applicable to section 215, which does not include any specific language on penalty amounts. But for the Commission to also apply the term "person" included in section 316A to replace the specific terms in section 215 identifying which entities are subject to compliance requirements and penalties as SWPA argues, would not constitute application of the statutory construction principle of the specific over the general but a revision of the specific terms in section 215 as to who is eligible for penalties, which the Commission cannot do.[89]

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[86] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 575.

[87] *North American Electric Reliability Corp.*, 119 FERC ¶ 61,046 at n.29 (2007) (emphasis added).

[88] *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 574.

[89] *See, e.g., Radlax Gateway Hotel, LLC v. Amalgamated Bank,* 132 S.Ct. 2065, 2071 (2012) ("The general/specific canon is perhaps most frequently applied to statutes

(continued…)

D. Policy Implications and Consistency with the Flood Control Act

51. Mid-West ECA relies on arguments almost identical to those raised in initial comments in this proceeding with respect to the policy implications of imposing monetary penalties on federal entities. As argued previously, Mid-West ECA suggests that the imposition (or threat of the imposition) of monetary penalties does not provide the same kind of incentive when imposed on federal entities as it does to other kinds of users, owners and operators of the Bulk-Power System, because federal entities can readily pass the penalty costs on to their preference customers.[90] Mid-West ECA also argues that the Commission's decision in the July 2012 Order is inconsistent with its stated position on the reduced compliance incentives for RTOs and ISOs if allowed to automatically pass on their penalty costs to all members.[91]

52. We reject the notion that the imposition of penalties on federal entities is inconsistent with our stated policies regarding the need to review the pass-through of penalty costs in cases where such a review is within our jurisdiction, as it is with RTOs and ISOs. In fact, the Commission has affirmed the appropriateness of assessing monetary penalties against RTOs and ISOs for violation of mandatory Reliability Standards and the Regional Entities have imposed penalties against RTOs and ISOs for such violations.[92] Moreover, excluding federal entities from the prospect of monetary penalties would, at least from a policy perspective, be in direct conflict with the imposition of such penalties on many other entities that may pass such costs on to their

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in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one."); *see also Morton v. Mancari,* 417 U.S. 535, 550-51 (1974).

[90] Mid-West ECA Rehearing Request at 25-26.

[91] *Id.* at 26.

[92] *See* Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 634; *In re California System Operator Corp.,* 141 FERC ¶ 61,209 (2012); *Midwest Independent Transmission System Operator, Inc.,* 135 FERC ¶ 61,118 (2011); *Electric Reliability Council of Texas, Inc.,* 137 FERC ¶ 61,088 (2011).

customers or members, including certain other publicly-owned or member-owned entities.[93]

53. We also disagree that an arguably "reduced" incentive to avoid penalties, due to the ability to pass-through the associated costs, equates to no incentive. As we noted in the July 2012 Order, "federal entities such as SWPA still have a strong incentive to develop a culture of compliance if subject to monetary penalties, whether in response to Congressional oversight or in response to the concerns of their preference customers."[94]

54. Mid-West ECA also resurrects its arguments regarding the inherent conflict between the imposition of monetary penalties on federal entities such as SWPA for Reliability Standard violations, and the Flood Control Act. Mid-West ECA notes that the Flood Control Act requires that power sold to preference customers by SWPA and similar entities must be sold "at the lowest possible rates to consumers." Mid-West ECA maintains that the imposition of a monetary penalty would necessarily "translate" into higher rates for preference customers, which they suggest inherently conflicts with the Flood Control Act's requirements.

55. We find no merit in these arguments, and find no support for such a narrow reading of the Flood Control Act. Among other things, we note that under the Flood Control Act, applicable federal entities are required to transmit and dispose of power "in such a manner as to *encourage* the most widespread use [of energy generated at applicable projects] at the lowest possible rates to consumers *consistent with sound business principles*."[95] We do not understand this to mean that federal entities are therefore exempt from exposure to a potential cost of doing business -- in the form of 215 penalties -- that is applicable to similarly-situated, private entities that are not covered by the Flood Control Act. Moreover, we believe that the interpretation of the Flood Control Act advanced by Mid-West ECA could, by extension, preclude the imposition of *any* regulatory requirement that imposes an additional compliance cost on an applicable covered federal entity, including requirements to protect water quality or fish and wildlife in the operation of a hydroelectric facility. We cannot find any support for this interpretation of the Flood Control Act, and affirm our position that the imposition of a monetary penalty on a federal entity for violation of a mandatory

[93] *See* July 2012 Order, 140 FERC ¶ 61,048 at P 56, n 74 (citing to *North American Electric Reliability Corp.,* 134 FERC ¶ 61,209 (2011) (affirming an $80,000 penalty against Turlock Irrigation District)).

[94] *Id.* P 56.

[95] 16 U.S.C. § 825s (emphasis added).

Reliability Standard does not impermissibly conflict with the policies stated in the Flood Control Act.

E. <u>The July 2012 Order Appropriately Found That Imposition of Monetary Penalties on Federal Entities Does Not Conflict with the Anti-Deficiency Act</u>

56. Mid-West ECA and SE FPC argue that the July 2012 Order "hastily dismissed" concerns raised about potential violations of the Anti-Deficiency Act if federal entities are required to pay monetary penalties. They maintain that the Commission was instead required to "research the entity's most recent congressional appropriation, as well as any previous legislation" that might prohibit payment of a penalty, and make specific findings related to laws affecting those appropriations to ensure no conflict with the requirements of the Anti-Deficiency Act.[96]

57. We reject the notion that the Commission is required to undertake an analysis of SWPA's (or other federal entities') congressional appropriations or other applicable legislation in order to find no conflict with the Anti-Deficiency Act. As we noted in the July 2012 Order, the Anti-Deficiency Act provides that an "officer or employee of the United States Government . . . may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."[97] With respect to the payment of administrative penalties, the Office of General Counsel of the United States General Accounting Office has concluded that "agency operating appropriations are available under the 'necessary expense' theory, to pay administratively imposed civil penalties," as long as there has been an express waiver of sovereign immunity.[98] While SWPA and the federal agencies participating in this proceeding may not agree that immunity has been expressly waived, SWPA can point to

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[96] *See* Mid-West ECA Rehearing Request at 31.

[97] 31 U.S.C. §1341(a)(1)(A).

[98] Government Accountability Office, GAO-04-261SP, Principles of Federal Appropriations Law, 3 Ed. Vol. 1, 4-144 - 4-145. *See also EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conversation and Recovery Act,* 2000 OLC LEXIS 20, 15-16 (2000) (OLC RCRA Opinion) (noting that an agency would "typically have authority to pay the penalties that have been lawfully assessed against it in the course of its conduct of agency business, pursuant to the 'necessary expense' principle of appropriations law," and that its findings with respect to the validity of a penalty in the OLC opinion served as a basis for concluding that agency appropriations would be available to pay the penalties).

our July 2012 Order and the instant Order Denying Rehearing to support the use of its operating appropriations to cover a penalty payment as a "necessary expense," with no consequent violation of the Anti-Deficiency Act.

The Commission orders:

The requests for rehearing are hereby denied, as discussed in the body of this order, and the motions for stay are dismissed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.