

135 FERC ¶ 61,226
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Monongahela Power Company,
West Penn Power Company,
The Potomac Edison Company, and
PJM Interconnection, L.L.C.

Docket No. RC11-3-000

ORDER ON PETITION TO INTERVENE IN REGIONAL ENTITY
ENFORCEMENT HEARING

(Issued June 10, 2011)

1. On May 13, 2011, as supplemented on May 26, 2011, Monongahela Power Company, West Penn Power Company and the Potomac Edison Company (collectively, FirstEnergy) and PJM Interconnection, L.L.C. (PJM) petitioned the Commission to authorize FirstEnergy to intervene in a Regional Entity Enforcement Hearing being conducted by ReliabilityFirst Corporation (ReliabilityFirst), for which PJM is the subject.¹ ReliabilityFirst's Hearing Procedures require Commission authorization for a third-party to intervene in a regional Enforcement Hearing. As discussed in this order, we authorize FirstEnergy to intervene in the Enforcement Hearing.

I. Background

2. Pursuant to section 215(e)(1) of the FPA, the Commission-certified Electric Reliability Organization (ERO) may impose a penalty on a user, owner, or operator of the Bulk-Power System for a violation of a Reliability Standard approved by the

¹ ReliabilityFirst is a "Regional Entity" pursuant to section 215(e)(4) of the Federal Power Act (FPA), 16 U.S.C. 824o(e)(4) (2006).

Commission.² In July 2006, the Commission certified the North American Electric Reliability Corporation (NERC) as the ERO.³

a. Delegation Agreements

3. The Commission-approved delegation agreements between NERC and each of the eight Regional Entities delegated enforcement authority to the Regional Entities, including *ReliabilityFirst*.⁴ NERC's Compliance Monitoring and Enforcement Program (CMEP),⁵ subject to approved deviations for particular Regional Entities, is incorporated into each delegation agreement. Under the CMEP, the Regional Entities are the primary first-line enforcers of Reliability Standards in the United States. The Regional Entities receive allegations of violations through, among other things, self-reports by registered entities subject to particular Reliability Standards. If a registered entity contests a violation alleged, or a penalty proposed, by a Regional Entity's compliance staff, the registered entity may request a hearing before the Regional Entity's hearing body.

4. Relevant to the immediate proceeding before us, in the Delegation Agreement Order, the Commission rejected arguments by commenters regarding the need for procedures addressing third party participation in Regional Entity enforcement hearings.⁶ The Commission explained that, generally, third parties should not be permitted to intervene because: (1) ERO and Regional Entity enforcement hearings will generally be non-public and (2) in most cases, third-party contributions to such hearings would likely be minimal because the record will have been compiled largely during the investigative process. Noting that there may be circumstances that justify a third-party intervention, the Commission stated "we will consider such matters on a case-by-case basis."⁷

² 16 U.S.C. 824o(e)(1) (2006).

³ *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 ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007), *aff'd sub nom. Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009).

⁴ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (2007) (Delegation Agreements Order), *order on reh'g*, 120 FERC ¶ 61,260, *order on compliance filing*, 122 FERC ¶ 61,245 (2008), *order on compliance filings*, 125 FERC ¶ 61,330 (2008).

⁵ NERC Rules of Procedure, Appendix 4C.

⁶ Delegation Agreement Order, 119 FERC ¶ 61,060 at P 150.

⁷ *Id.*

5. In a subsequent order addressing revisions to delegation agreements, the Commission accepted a revision to NERC's *pro forma* CMEP that limits participation in ERO and Regional Entity hearings to respondents and compliance staff, "[unless otherwise authorized by the [Commission]]."⁸ In response to commenters requesting additional specificity, the Commission responded that, "Interventions and other participation by third parties will be addressed by the Commission, as necessary, on a case-by-case basis pursuant to our existing filing procedures, which we find to be adequate for this purpose."⁹

b. Guidance Order on RTO/ISO Reliability Penalties

6. In a March 2008 order, the Commission provided guidance regarding the recovery of penalties assessed against regional transmission organizations (RTO) and independent system operators (ISO) pursuant to section 215(e) of the FPA for violation of a mandatory reliability standard.¹⁰ The Guidance Order indicated that an RTO or ISO could seek cost recovery for reliability-related penalties on a case-by-case basis. The Commission provided that an RTO or ISO could seek a direct assignment of a monetary penalty to another entity that the RTO or ISO deems responsible for the violation.¹¹ "However, to ensure due process to that targeted entity, the Commission will not entertain any such (FPA section 205) filing unless the targeted entity has been notified during the course of the investigation [or] other inquiry into, or hearing of that matter, that an RTO or ISO believes that the targeted entity may be responsible for a violation."¹² Further, the Commission made clear that a section 205 proceeding for a direct assignment should not function as a second, de novo review of the underlying investigation. Alternatively, if a direct assignment is not appropriate, the RTO or ISO can seek to pass on the costs of a monetary penalty for a FPA section 215 violation by spreading the costs among all members or customers of the organization.¹³

⁸ *North American Electric Reliability Corp.*, 122 FERC ¶ 61,245 at P 82.

⁹ *Id.* P 84. *ReliabilityFirst* uses NERC's *pro forma* CMEP.

¹⁰ *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008) (Guidance Order).

¹¹ *Id.* P 21.

¹² *Id.* P 23.

¹³ *Id.* P 25.

II. PJM and FirstEnergy Petition

7. The May 13, 2011 petition states that PJM is currently the subject of an Enforcement Hearing being conducted by ReliabilityFirst. PJM and FirstEnergy contend that, despite owning facilities implicated in the Enforcement Hearing, FirstEnergy was not identified in the Notice of Alleged Violation and Proposed Penalty (Notice) issued by ReliabilityFirst. The petition states that PJM notified FirstEnergy in a letter dated May 4, 2011 that ReliabilityFirst had issued the Notice and also explained that FirstEnergy may be implicated in the enforcement action as contributing to the alleged violations.

8. The petition asserts that, pursuant to ReliabilityFirst's CMEP, FirstEnergy cannot intervene in the Enforcement Hearing without first obtaining Commission authorization.¹⁴ The petition maintains that FirstEnergy should be allowed to intervene in the Enforcement Hearing because the findings in that proceeding could result in PJM seeking a direct assignment of any resulting penalties to FirstEnergy pursuant to the terms of the PJM Operating Agreement.¹⁵

III. Notice of Filing, Interventions, and Protest

9. Notice of PJM and FirstEnergy's filing was published in the *Federal Register*, 76 Fed. Reg. 29,744 (2011), with interventions and protests due on or before May 27, 2011. Timely motions to intervene were filed by Baltimore Gas & Electric Company and NERC. ReliabilityFirst filed a timely motion to intervene and protest. FirstEnergy and PJM submitted an answer to ReliabilityFirst's protest on June 3, 2011.

10. ReliabilityFirst protests that intervention by FirstEnergy is inappropriate and will cause unwarranted delay and disruption to the Enforcement Hearing. ReliabilityFirst argues that intervention is inappropriate because the petition does not satisfy the intervention standard set forth in Commission Rule of Practice and Procedure 214¹⁶ because: FirstEnergy does not have a "direct" interest in the Enforcement Hearing; FirstEnergy has no right to intervene in the Enforcement Hearing that is expressly

¹⁴ ReliabilityFirst's CMEP, attachment 2 (Hearing Procedures), Section 1.2.12 provides: "The Respondent(s) and Staff shall be Participants to the proceeding. Unless otherwise authorized by FERC, no other Persons shall be permitted to intervene or otherwise become a Participant to the proceeding."

¹⁵ *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,260 (2008) (accepting revisions to PJM Amended and Restated Operating Agreement to add new Schedule 11 - Allocation of Costs Associated with NERC Penalty Assessments.).

¹⁶ See 18 C.F.R. § 385.214(b) (2011) (contents of motion to intervene).

conferred by statute or by Commission rule, order or other action; and that FirstEnergy has not shown that intervention is in the public interest.

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed interventions parties to this proceeding.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or an answer, unless otherwise ordered by the decisional authority. We are not persuaded to accept PJM and FirstEnergy's answer and will, therefore, reject it.

B. Commission Determination

13. As discussed below, we grant the petition and authorize FirstEnergy to intervene in the Reliability *First* Enforcement Hearing.

14. We analyze the FirstEnergy petition "on a case-by-case basis," and look to the Commission's Rules of Practice and Procedure, Rule 214(b) regarding interventions, for guidance.¹⁷ Under Rule 214(b)(2), a motion to intervene must have sufficient factual detail to establish: (1) that the movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action; (2) the movant has or represents an interest which may be directly affected by the outcome of the proceeding; or (3) the movant's participation is in the public interest. In this case, we conclude that PJM and FirstEnergy have established that FirstEnergy represents an interest that may be directly affected by the outcome of the Enforcement Hearing. An application of the above factors to the immediate petition support FirstEnergy's intervention in the Reliability *First* Enforcement Hearing.

15. First, our Guidance Order regarding the assessment of a monetary penalty against an RTO or ISO for violation of a Reliability Standard reasonably contemplated that an entity "targeted" for a direct assignment of such a penalty, such as FirstEnergy in the immediate proceeding, should have an opportunity to participate in the underlying enforcement proceeding in which the RTO or ISO is a respondent.¹⁸ The Guidance

¹⁷ See *North American Electric Reliability Corp.*, 122 FERC ¶ 61,245 at P 84. See also *Delegation Agreement Order*, 119 FERC ¶ 61,061 at P 150.

¹⁸ Guidance Order, 122 FERC ¶ 61,247 at P 22-23.

Order, contemplating circumstances similar to that now faced by FirstEnergy, emphasized the need to ensure due process to a targeted entity.¹⁹ The Guidance Order specifically indicated that an entity that may be subject to a section 205 proceeding for a direct assignment of a reliability-related penalty should be given notice of an underlying ERO or Regional Entity investigation.²⁰ It is reasonable to infer that the targeted entity's due process rights also include the ability to participate in a regional Enforcement Hearing where its liability may be implicated.

16. Second, we find that FirstEnergy has adequately established that it represents an interest which may be directly affected by the outcome of the ReliabilityFirst Enforcement Hearing. According to the petition, PJM notified FirstEnergy in a May 4, 2011 letter that FirstEnergy may be implicated as contributing to the violations alleged in the Enforcement Hearing because FirstEnergy is the NERC-registered transmission owner and generation owner for Bulk-Power System components that were affected during the system disturbance arising from the alleged violations.²¹ The petition further states that FirstEnergy "believes that [its] actions, or inactions, arising from the same set of facts at issue in the subject investigation could be raised at the Enforcement Hearing . . . [and] [a]s such, certain findings of fact regarding . . . [FirstEnergy's] culpability made at the hearing could result in PJM proposing a direct assignment of a monetary penalty against [FirstEnergy]."²² ReliabilityFirst posits that FirstEnergy's interest in the Enforcement Hearing is speculative. However, we find that the PJM letter notified FirstEnergy that it may be the subject of a direct assignment of any monetary penalties resulting from the ReliabilityFirst enforcement action.²³

17. While the Enforcement Hearing may focus on PJM's alleged violations, PJM's alleged violations and FirstEnergy's actions (or inactions) share a common set of facts. Accordingly, we find that the petition provides enough factual detail to establish that the Enforcement Hearing may result in findings that lead PJM to seek an assignment of

¹⁹ *Id.* P 22-24.

²⁰ *Id.* P 23.

²¹ Petition at 6.

²² *Id.*

²³ ReliabilityFirst cites to Commission precedent indicating that the possibility of third-party liability is speculative and does not constitute a "direct interest." *Kansas-Nebraska Natural Gas Company*, 21 FERC ¶ 61,285 (1982). We believe that the current proceeding is readily distinguished from *Kansas-Nebraska* because, here, the PJM letter directly raises the prospect of a direct assignment.

penalties against FirstEnergy, thus demonstrating that FirstEnergy maintains an interest in the Enforcement Hearing.

18. Accordingly, based on these facts, we conclude that FirstEnergy and PJM have demonstrated that FirstEnergy's intervention in the Enforcement Hearing is appropriate in this instance.

19. While we grant the petition to intervene, we are mindful that the Reliability*First* hearing is ongoing, and set to conclude in July 2011. Whether the Reliability*First* hearing schedule should be modified to better accommodate the FirstEnergy intervention is left to the discretion of the hearing officer.²⁴

The Commission orders:

FirstEnergy is hereby authorized to intervene in the Reliability*First* Enforcement Hearing, as discussed in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁴ PJM and FirstEnergy also seek a stay of the Enforcement Hearing pending a Commission decision on their petition. In light of our determination, we dismiss the request for a stay as moot.