The Energy Bar Association
Announces
A Primer on Legal Practice and Administrative Procedure – Unlocking the Mysteries: Everything You Didn’t Know About FERC Practice for Lawyers and Energy Professionals

Co-Sponsors
American Association of Blacks in Energy (AABE)
Environment, Energy and Natural Resources Section of the District of Columbia Bar

December 2, 2011
Grand Hyatt Washington
1000 H Street, N.W., Washington, D.C.
This Primer will examine many aspects of effective practice before the Federal Energy Regulatory Commission (“FERC”). Panelists will discuss FERC’s statutory framework, the differing legal processes and substantive principles for the matters FERC decides, the effective presentation of cases and comments to the agency, how policies are developed and how to provide effective input into the shaping of those policies, Commission decision-making and judicial review. Substantial input from FERC decision-makers and senior lawyers who routinely practice before FERC will assist practitioners in crafting submissions that make sense and gain traction at the Commission.

**PROGRAM SCHEDULE**

**FRIDAY, DECEMBER 2, 2011**

8:00 a.m. **REGISTRATION**

8:15 a.m. **WELCOME AND INTRODUCTION**

Walter R. Hall II
Vice-Chair, EBA Programs & Meetings Committee

Derek A. Dyson
President, Energy Bar Association
Duncan, Weinberg, Genzer & Pembroke, P.C.

8:30 - 9:00 a.m. **KEYNOTE SPEAKER**

James A. Pederson
Chief of Staff
Federal Energy Regulatory Commission

Mr. Pederson will provide an overview of FERC’s structure, including its organic authorizing legislation and the acts it administers. Each of FERC’s major offices and functions will be discussed, and their relationship to the legislation FERC effectuates in regulating the electric, gas and oil industries.

9:00 - 10:15 a.m. **FERC Electric & Gas Filings, What Should They Contain and Where Do They Go at FERC?**

Rate and certificate proceedings are initiated at FERC under many statutory provisions including Federal Power Act (FPA) Sections 205 and 206 (rates), 203 (disposition of facilities, including mergers); and Natural Gas Act (NGA) sections 4, 5 (rates) and 7 (certificates). Complaint proceedings may be initiated under the FPA, NGA, or Interstate Commerce Act. This panel will discuss the most common types of FERC filings, what makes a good FERC filing and what happens when the filing comes in the door at FERC. Topics will include:

- How do pre-filing meetings fit into the process;
- Which office within FERC receives the filing;
- How is it reviewed;
- When is a case decided through delegated authority;
- How are small and large cases differentiated;
- What are the roles, pros and cons of various forms of responsive pleadings;
- How is it decided whether a matter should be sent to an administrative law judge for hearing; and
- Who writes the initial orders.

Moderator: Raymond W. Hepper
ISO New England Inc.

Speakers: Michael C. McLaughlin
Director, Office of Energy Market Regulation
Federal Energy Regulatory Commission

Carla J. Urquhart
Managing Attorney, Office of General Counsel
Federal Energy Regulatory Commission

Paul Korman
Van Ness Feldman, P.C.

Steven J. Ross
Steptoe & Johnson LLP

10:15 - 10:25 a.m. **BREAK**
<table>
<thead>
<tr>
<th>Time</th>
<th>Topic</th>
<th>Moderator</th>
<th>Speakers</th>
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<tbody>
<tr>
<td>11:45 a.m.</td>
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<td>Norman C. Bay, Office of Enforcement</td>
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<td></td>
<td>This panel will discuss the growing practices involving policy statements, rulemakings, enforcement and reliability. Topics will include:</td>
<td></td>
<td>John T. Carlson, Deputy Director, Office of Electric Reliability</td>
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<td></td>
<td>• How and why does FERC decide to begin a policy statement or rulemaking process;</td>
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<td>Harvey Reiter, Partner, Stinson Morrison Hecker LLP</td>
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<td></td>
<td>• Why do some proceedings begin with Notices of Inquiry and others go directly to Notices of Proposed Rulemaking;</td>
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<td>Daniel A. Hagan, Partner, White &amp; Case LLP</td>
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<td>• How do technical conferences fit into these proceedings, and what are the rules for technical conferences?</td>
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<td>• How do FERC enforcement actions begin and how do self-reported matters differ from those that are reported by others;</td>
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<td>• What is the typical time for an investigation and FERC action;</td>
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<td>• How do reliability proceedings commence;</td>
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<td>• What are the roles of NERC, the Regional Entities and FERC with regard to reliability matters; and</td>
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<td>• What role do face-to-face meetings play in each of these proceedings.</td>
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<td>Moderator: Paul B. Mohler, Law Offices of Paul B. Mohler PLC</td>
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<td>11:55 a.m.-</td>
<td>What Happens When Matters and Rules Get to the 11th Floor and Beyond?</td>
<td>Raymond W. Hepper</td>
<td>Michael G. Henry, Legal &amp; Policy Advisor, Office of Chairman Jon Wellinghoff</td>
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<td>1:15 p.m.</td>
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<td>ISO New England Inc.</td>
<td>Federal Energy Regulatory Commission</td>
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<td>This panel will discuss FERC's decision-making process and appellate review. Matters explored will include:</td>
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<td>Martin Kirkwood, Attorney Advisor, Office of Commissioner Marc Spitzer</td>
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<td>• Who sets FERC’s open meeting agenda;</td>
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<td>Federal Energy Regulatory Commission</td>
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<td>• How and why are items stricken from the agenda;</td>
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<td>Robert H. Solomon, Solicitor, Office of General Counsel</td>
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<td>• How are matters actually decided by the Commissioners;</td>
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<td>California Public Utilities Commission; former FERC Assist Solicitor</td>
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<td>• How are orders and rules reviewed before issuance;</td>
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<td>• How is it decided whether to join in or dissent from an opinion;</td>
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<td>• How are rehearing requests handled;</td>
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<td>• When is a decision final so that it can be reviewed by the courts;</td>
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<td>• Where can an appeal be filed;</td>
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<td>• Are there means by which non-final decisions can be reviewed;</td>
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<td>• How does the FERC Solicitor’s Office assign appeals;</td>
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<td>• What is the working relationship between the Solicitor’s Office and the original order writers;</td>
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<td>• When will FERC ask for a voluntary remand of a case;</td>
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<td>• What are the perspectives of an appellant seeking to overturn a FERC order;</td>
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<td>• What makes an effective brief and oral argument;</td>
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Keynote Speaker
James Pederson, Chief of Staff
Federal Energy Regulatory Commission
What is FERC

An independent Federal agency

- Up to 5 Commissioners
- No more than 3 from one political party
- Chairman serves as administrative head
- Chairman sets the Commission’s agenda but orders are developed by majority vote
FERC is a Creature of Statute

“As a federal agency, FERC is a ‘creature of statute’, having ‘no constitutional or common law existence or authority but only those authorities conferred upon it by Congress.’”

*Atlantic City Elec. Co v FERC, 295 F.3d 1, 8 (D.C. Circuit 2002)* (quoting *MI v EPA, 268 F.3d 1075, 1081 (D.C. Circuit 2001)*)
What FERC Does

- Regulates the transmission and wholesale sales of electricity in interstate commerce
- Regulates the transmission and sale of natural gas for resale in interstate commerce
- Regulates the transportation of oil by pipeline in interstate commerce
- Reviews certain mergers and acquisitions and corporate transactions by electricity companies
- Reviews the siting application for electric transmission projects under limited circumstances
- Approves the siting and abandonment of interstate natural gas pipelines and storage facilities
FERC’s Energy Projects Authority

- **Hydroelectric**
  - Licensing of nonfederal hydropower projects and oversee related environmental matters
  - Inspecting nonfederal hydropower projects for safety issues
  - Statute establishes comprehensive development /equal consideration standard

- **Natural Gas**
  - Approves construction of interstate natural gas pipeline and storage facilities and oversees related environmental matters
  - Oversees safety and environmental matters related to LNG facilities
  - Statute establishes “public convenience and necessity” standard

- **Electric Power**
  - Under Part II of the FPA
  - Backstop for transmission siting (designated corridor)
  - Statute establishes a “public interest” standard
FERC’s Reliability Authority


- Requires the Commission to certify and oversee an Electric Reliability Organization (ERO).

- Commission approves and oversees Regional Entity delegation agreements.

- Commission cannot write reliability standards, the ERO writes standards and submits for approval.

- Commission can approve or remand a standard.

- Commission can order the ERO to submit a new or modify an existing standard.
FERC’s Enforcement Authority

- EPAct 2005 added section 4A to the NGA (18 C.F.R. 1c.1) (18 C.F.R. 1c.2) and section 222 to the FPA which gives Commission explicit anti-manipulation authority.
- EPAct 2005 greatly expanded Commission’s penalty authority, up to $1 million per violation per day.
- EPAct 2005 gives Commission additional authority to provide for transparency in natural gas and electricity markets.
- FPA section 215 gives Commission jurisdiction over ERO, regional entities, and all users, owners, and operators of the bulk-power system to enforce reliability standards.
FERC’s Rate Authority

Natural Gas and Electric Power

- Under sections 4 and 5 of the NGA, regulates interstate natural gas transportation and storage rates and services
- Under sections 205 and 206 of the FPA, regulates interstate electric power transportation rates and services
- Rates and services must be “just and reasonable” and must be “not unduly discriminatory or preferential”

Oil

- Regulates interstate transportation rates and services for crude oil and petroleum products (not gasoline)
“Just and reasonable”
- Cost-justified or Market-justified

“Not unduly discriminatory or preferential”
- Similarly-situated customers must be treated similarly
FERC’s Section 203 Merger Authority

- Section 203(a)(4) of the FPA, requires Commission to approve a proposed merger if it determines the transaction is in the “public interest”

- Since 1996, the Commission has, pursuant to the Merger Policy Statement, made its determination on public interest through consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation

- A fourth factor, whether the transaction will result in the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, was added by EPAct 2005
FERC’s Other Authorities


FERC Does **Not** Regulate

- Sales of electricity or natural gas to end use customers (retail sales)
- Transmission in intrastate commerce
- Local distribution facilities for electric power or natural gas delivery
- Power plant siting (*except hydroelectric*)
- Non-public utilities such as municipal power systems, federal power marketing agencies, and most rural electric cooperatives
- Reliability of local distribution facilities, particularly vegetation management
- Construction of oil pipelines or abandonment of service
- Mergers and acquisitions of natural gas and oil companies
- Nuclear generation safety standards or waste disposal (Nuclear Regulatory Commission)
How FERC Acts

- Generic rulemaking
  - NOPRs and Final Rules
  - Changes to the Commissions regulations
    - 18 C.F.R Parts 1-390 (2011)

- Case-specific rate and infrastructure regulation
  - “Paper” and “trial-type” hearings

- Notational process

- Delegated authority
Serves as the official focal point through which all filings are made for all proceedings before the Commission.

The Secretary issues notices of all proceedings and all official actions taken by the Commission.
What the Office of the General Counsel does:

- OGC is led by General Counsel Michael A. Bardee and Deputy General Counsel David Morenoff.
- Collaborates with the Commission program offices in the development of draft orders, NOPRs, policy statements and final rules to be voted on before the Commission.
- Lead office on requests for rehearing, orders on initial decisions, reviewing proposed legislation, and preparing Congressional testimony/responses.
- Represents the Commission before the courts.
What the Office of the General Counsel does (cont.):

- Energy Market Divisions (Market 1, Market 2 and Market 3) generally perform the same functions in their respective geographical areas
- Market Division 1 handles the eastern RTOs (ISO-NE, NYISO and PJM), natural gas pipelines in the East and PURPA
- Market Division 2 handles MISO, FPA Southeast, Corporate, market-based rate filings, FPA 210.211, and PUHCA
- Market Division 3 handles CAISO, SPP, FPA West, natural gas pipelines in West and Oil
- Energy Projects handles all natural gas certificates and hydroelectric matters
- Newly created reliability-focused group within OGC
  — Martin Kirkwood is Principal Reliability Counsel and Jonathan First is Special Reliability Counsel
Office of Energy Market Regulation
Michael C. McLaughlin, Director
Anna V. Cochrane, Deputy Director

- Division of Electric Power Regulation – East
  Jignasa Gadani, Director
  Dan Nowak, Dep. Director

- Division of Electric Power Regulation – Central
  Penny Murrell, Director
  Michael Donnini, Dep. Director

- Division of Electric Power Regulation – West
  Steve Rodgers, Director
  Carlos Clay, Dep. Director

- Division of Pipeline Regulation
  Nils Nichols, Director
  Kerry Noone, Dep. Director
What the Office of Energy Market Regulation does:

- OEMR is led by Office Director Michael C. McLaughlin and Deputy Director Anna V. Cochrane
- Lead office for review and analysis of filings related to the economic regulation of the electric, natural gas and oil industries
- Prepares policy/issue papers with options and recommendations and proposes implementation procedure
- Exercises delegated authority
What the Office of Energy Market Regulation does (cont.):

- Three Electric Power Regulation Divisions (East, Central & West) generally perform the same functions in their respective geographical areas.
  - In addition, Central Division reviews rate schedules for transmission service filed by Federal Power Marketing Administrations for conformance with the Pacific Northwest Electric Power Planning and Conservation Act and other acts relevant to specific power marketing administrations and applications for certification of qualifying facilities (QF) and related waivers to ensure that the application is consistent with the Commission's regulations and precedent regarding certification.
  - In addition, West Division reviews applications for electric public utility corporate transactions, including public utility mergers, issuance of securities or the assumption of liabilities; reviews and evaluates electric public utility market-based rate applications; and analyze applications for interlocking directorates.
- Division of Pipeline Regulation handles all matters related to natural gas and oil pipeline rate regulation.
Office of Energy Policy and Innovation
Jamie L. Simler, Director
Mason Emnett, Associate Director

Division of Policy Development
Kevin Kelly, Director
Julie Simon, Dep. Director

Division of Economic and Technical Analysis
J. Arnold Quinn, Director
William Murrell, Deputy Director
What the Office of Energy Policy and Innovation does:

- OEPI is led by Office Director Jamie L. Simler and Associate Director Mason Emnett
- Lead office for long-term policy development, working closely with other offices, particularly OEMR
- Focuses on, among other things, such areas as:
  - Demand Response and Distributed Generation
  - Energy Efficiency
  - Integration of Renewable Energy
  - Transmission Issues (planning, cost allocation, siting)
  - Storage
  - Enabling Advanced Technologies (e.g., advanced metering)
What the Office of Energy Policy and Innovation does (cont.):

- Division of Economic and Technical Analysis focuses largely on operational efficiency, planning, emerging technologies and pricing.

- Division of Policy Development focuses on demand side resources, renewable resources, and operation of wholesale markets.
What the Office of Energy Projects does:

- OEP is led by Office Director Jeff Wright and Deputy Director Berne Mosley

- Engineering and environmental expertise to review and evaluate new gas pipeline projects (transmission and storage), licenses for hydroelectric projects and siting of LNG terminals
What the Office of Energy Projects does (cont.):

- Division of Hydropower Licensing reviews application to construct or relicense non-federal hydropower projects, including hydrokinetic projects.

- Division of Dam Safety has one critical mission, safety of jurisdictional dams.

- Division of Hydropower Administration and Compliance is responsible for, among other things, processing license transfers, surrender and extension of time filings and applications for conduit exemptions.

- Division of Certificates is responsible for, among other things, evaluating requests to abandon facilities, manage the Blanket Certificate program and make jurisdictional determinations for gathering companies.
Office of Enforcement
Norman C. Bay, Director
Larry D. Gasteiger, Deputy Director
Roger Morie, Reliability Enforcement Counsel

Division of Investigations
Larry Parkinson, Director
Lee Ann Watson, Dep. Director
Kathryn Kuhlen, Senior Counsel

Division of Audits
Bryan Craig, Director & Chief Accountant
Timothy Smith, Dep. Director

Division of Energy Market Oversight
Jerome Pederson, Director
Steven Reich, Dep. Director
Laura Vallance, Legal Counsel
What the Office of Enforcement does:

- OE is led by Office Director Norman C. Bay and Deputy Director Larry D. Gasteiger.
- OE provides market oversight and surveillance, auditing and investigation capabilities, information gathering, and crafting appropriate remedies including civil penalties and mitigation measures.
- OE’s priorities are fraud and market manipulation, serious violations of the reliability standards, anti-competitive conduct and conduct that threatens transparency.
- Goal of enforcement is compliance.
What the Office of Enforcement does (cont.)

- Division of Investigations conducts non-public investigations of potential violations of Commission’s rules, orders, regulations, tariffs, mandatory reliability standards, including market manipulation

- Division of Audits focuses on compliance issues associated with significant Commission initiatives

- Division of Energy Market Oversight conducts surveillance of energy market to identify market anomalies, supports analytic aspects of investigations conducted by DOI

- Newly created reliability-focused group within OE
  - Roger Morie is Reliability Enforcement Counsel and heads a team of reliability attorneys
What the Office of Electric Reliability does:

- OER is led by Office Director Joseph H. McClelland and Deputy Director John Carlson
- Monitoring and participating in standards development process and review and evaluating filed standards
- Monitoring compliance with reliability standards
- Conducting or assisting in audits of ERO, Regional Entities, and users, owners and operators of bulk power system to assess effectiveness of their reliability programs
- Conducting or assisting in incident and allegation inquiry/investigation
What the Office of Electric Reliability does (cont.):

- Division of Reliability Standards focus is standards development, with the exception of cyber and physical security standards

- Division of Compliance focus is audits and inquiry/investigations

- Division of Logistics and Security handles standards related to cyber and physical security, as well as ERO process filings (i.e., budget, rules of procedure, delegation agreements)

- Division of Engineering, Planning and Operations monitors bulk power system reliability, reviews reliability assessment and conducts reliability studies
Thank you!

For more information or to contact a FERC staff member directly, go to:
http://www.ferc.gov/about/offices.asp
FERC Electric & Gas Filings,
What Should They Contain and
Where Do They Go at FERC?
FERC Tariff Filing Process

Michael C. McLaughlin
Office of Energy Market Regulation
Federal Energy Regulatory Commission
Tariff Filing Flow

- **PreFiling**
  - Proposal Stakeholders

- **Filing**
  - OSEC Review

- **Analysis**
  - Offices Review & Draft Order

- **Order**
  - Commission Order
PreFiling

• Regulated Entities are the initiators of most filings
• Talk to your stakeholders
• Talk to FERC Staff
  – Informal prefiling process per section 35.6 of the Commission’s regulations
Informal PreFiling Discussions with Staff

• When appropriate?
  – Unique proposals
  – Likely to be controversial
  – Widespread impact
  – Challenge conventional wisdom

• Call the Division Directors for an appointment
  – Staff will assemble a team
  – Staff comments limited to personal opinion
  – Staff cannot commit Staff or the Commission
Address the Issues

• Address all identified issues
  – Do not rely on the Commission or the parties to support your proposal

• Plan for consequences
  – What if protested?
  – What if found deficient or suspended?
OSEC Processing of a Tariff Filing
OSEC Automated Process

Valid Filing?

Yes

- Docket Number
- Create Meta Data file for eLibrary
- Upload documents into eLibrary
- Email Acceptance for filing
- eTariff and Public Tariff Viewer
- Case Tracking
- Email Case Assigners
- Combined Notice

No

Reject

Home
FERC Analysis Process
Tariff Filing Process Flow

1-2 days Before Comments Due

OEMR Lead: Team Assignment

Deficient?

Identify/Research Issues & Draft Recommendations

OGC/OEMR Review Draft Order

No Issues

Delegated Letter Order

Can’t Delegate

Major issues

Reject/Deficiency

Senior Management Review

Draft Order

To Commissioners 1 – 2 weeks Before Statutory Action Date
Questions?
Section 203
of the Federal Power Act
Mergers, Acquisitions and
Dispositions

including Process and Procedures

Carla Urquhart
Office of the General Counsel
Federal Energy Regulatory Commission
Why and How FERC Looks at Electric Utility Mergers, Acquisitions and Dispositions of Jurisdictional Facilities

- Statutory authority and standard of review
- Mergers and competitive effects
- FERC policy and recent cases
FERC Merger Rules

• Merger Policy Statement (1996)
• Filing Requirements Rule (Order 642) (2000)
• Order 669 (2005) Revisions to Filing Requirements (Implementing Amended Section 203 EPAct 2005)
• Supplemental Merger Policy Statement (2007)
• Order No. 708 (2007)
• See FERC merger page:
  http://www.ferc.gov/industries/electric/gen-info/mergers.asp
Statutory Authority: Section 203, as amended by EPAct 2005

• **203(a)(1):** “No public utility shall, without first having secured an order of the Commission authorizing it to do so –

  • **(A)** sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000;
  
  • **(B)** merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;
  
  • **(C)** purchase, acquire, or take any security with a value in excess of $10,000,000 of any other public utility; or
Public Utility Acquisition of Generation Facilities

• 203(a)(1)(D) purchase, lease or otherwise acquire an existing generation facility-
  • (i) that has a value in excess of $10,000,000; and (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.”
Holding Company: Mergers and Acquisition of Securities

- 203(a)(2) “No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, or an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000 without first having secured an order of the Commission authorizing it do so.”
Cross-Subsidization

• 203(a)(4) “. . . . , the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company unless the Commission determines that the cross-subsidization, pledge or encumbrance will be consistent with the public interest.”
Conditioning Authority

- 203(b) [Unchanged by EPAct 2005: Paraphrase] The Commission may attach conditions to its approval of an application and may also issue supplemental orders as it deems necessary.
Standards of Review

- Effect on Competition – analysis under 1992 Federal Trade Commission/Department of Justice Horizontal Merger Guidelines
- Effect on Rates – focus on ratepayer protection
- Effect on Regulation – will the merger affect the Commission’s or states’ jurisdiction?
- Cross-Subsidization or Encumbrance of Utility Assets
Effect on Competition

• Delivered Price Test
  • Define relevant markets (i.e. those affected by the merger)
  • Evaluate market concentration
  • Evaluate additional factors (e.g. entry or efficiency gains)
  • Propose remedy if necessary
Horizontal and Vertical Mergers

• **Horizontal** – the merger combines firms with interests in the same level of production (e.g. electricity generation assets).

• **Vertical** – the merger combines firms with interests in inputs (e.g. coal, natural gas, transmission facilities) and output (e.g. electricity generation).
The role of native load

• Economic Capacity (EC) vs. Available Economic Capacity (AEC)

• Previous Commission Position - as retail choice expands, AEC and EC will converge

• Current Position - see, Nevada Power EC05-132
“Because of Nevada Power’s significant native load obligation, with no foreseeable prospect of that obligation being lifted, we agree that Available Economic Capacity is the more relevant measure in the Nevada Power market and, therefore, should be given more weight.”
Market Concentration Measures

1992 DOJ/FTC Merger Guidelines

- Herfindahl-Hirschman Index (HHI) = sum of squared market shares
- Degrees of Market Concentration
  - HHI < 1000, Unconcentrated Market
  - 1000 ≤ HHI < 1800, Moderately Concentrated
  - HHI ≥ 1800, Highly Concentrated
  - Horizontal screen violation:
    - If a merger increases the concentration in a highly concentrated market by 50 HHI or more
    - If a merger increases the concentration in a moderately concentrated market by 100 HHI or more
Types of Market Power Mitigation

- Divestiture – AEP/CSW
- Transmission Expansion – OG&E
- Market Monitoring – PSNM / TNMP
- RTO Membership
- Independent Transmission Operation
The Role of RTOs and other Independent Transmission Operators (ITOs)

• RTOs and ITOs should reduce vertical market power concerns regarding combining transmission and generation assets, because generation-owning utility does not control transmission.

• RTOs should increase access to electricity markets → broader geographic markets → increased competition
Effect on Rates

- Traditional focus has been on cost-based rates to wholesale customers and transmission customers
- Applicants encouraged to negotiate ratepayer protection
  - Open season for wholesale customers
  - Hold harmless provisions
  - Rate freezes or reductions
Effect on Regulation: Commission

- Repeal of Public Utility Holding Company Act of 1935 eliminates Ohio Power concerns
- Traditional ratemaking powers and market-based rate code of conduct addresses affiliate transactions involving power and non-power goods and services
Effect on Regulation: State

• If a state commission has authority to approve or disapprove the transaction, the Commission will not generally set this issue for hearing.

• Where the state commission lacks this authority, the Commission will consider the circumstances on a case-by-case basis and may set the issue for hearing.
Cross-subsidization

• Cross-subsidization (undefined in EPAct 2005) may be interpreted as an unjustified transfer of benefits and costs among associate companies that imposes added costs on captive wholesale or retail ratepayers served at cost-based rates.
Pledge or encumbrance of utility assets

- Pledge or encumbrance of utility assets may be interpreted as the pledge or encumbrance of utility assets of traditional, cost-regulated utility in order to secure financing of an associate company.
Commitments Applicants are encouraged to offer to protect captive customers against the effects of cross-subsidization

- Hold harmless commitment
- Rate freezes for a significant period
- Commission will address on a case-by-case basis and impose other conditions, complementing those imposed by state commissions
- Commission will periodically monitor and audit, where appropriate, compliance with commitments
Blanket Authorizations

• Internal Corporate Reorganizations that do not present cross-subsidization issues and that do not involve a traditional public utility with captive customers (no conditions)

• Holding company acquisitions of non-voting securities and any security of a subsidiary company (SEC reporting condition)
Blanket Authorizations, cont’d

• Holding company acquisitions of voting securities in aggregate of less than 10 percent of voting securities (SEC reporting condition)
• Holding company acquisitions of foreign utility companies (subject to conditions)
• “Parallel” blanket authorizations
Recurring Issues Under Section 203

Control/Affiliation

- Fact specific determination
- Non-controlling vs. passive
- Guidance provided in Supplemental Merger Policy Statement
- AES Creative: Non-voting securities; not yet extended to section 203
- Abundance of caution filings
Recurring Issues Under Section 203, cont’d

- Who/what/how
- Applicable subsection(s) of section 203
- Applicable blanket authorization(s)
- Passive ownership claims
- Hold harmless commitment
- Exhibit M
Procedure/Process

• Similar to section 205 procedure/process
• Timing
• Requests for expedited action or action by a particular date
• See FERC merger page:

http://www.ferc.gov/industries/electric/gen-info/mergers.asp
Pre-Filings

• Parties seeking to transact under section 203 initiate filings—not necessarily “regulated entities”

• After your research, consult with FERC staff—OGC, OEMR
  – Phone call
  – Pre-filing meeting
FERC Electric and Gas Filings: What Should They Contain and Where Do They Go at FERC

Paul Korman
Van Ness Feldman, PC
1050 Thomas Jefferson St., NW
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pik@vnf.com

EBA Primer
Washington, DC
December 2, 2011
Pre-Filing

- When:
  - Controversial proposals.
  - Creative ideas.

- Not necessary for routine filings.
Preparing

- Call in advance.
- Allow sufficient time to set the meeting.
- Ask for the amount of time you will need.
- Be ready to send in a PowerPoint the day before the meeting.
What Do I Say?

- Lay out your proposal.
- Be prepared for questions.
- Bring knowledgeable business people.
- Describe the real world impact.
Goals for the Meeting

- Explain your proposal.
- Get feedback.
- Listen! Listen! Listen!
- Receive constructive suggestions.
After the Meeting

- Try to accommodate suggestions and address Staff questions.
- Keep Staff informed if possible.
- Tell Staff a proposal or idea is out.
- Provide a copy when the filing is made.
- When filing is contested, stop calling.
Thank you!

For further questions and more information:

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Washington, DC 20007
202-298-1830
pik@vnf.com
FERC TARIFF FILING PROCESS

Steven J. Ross
Electric Tariff Filing Flow

- **Internal Issues**
  - Legal Considerations
  - Regulatory Requirements
  - Contractual Requirements
  - External Considerations
  - Timing

- **External Meetings**
  - Customers
  - State Commissions
  - FERC
  - RTOs
  - NERC

- **Pre-Filing Meetings**
  - FERC Staff
  - FERC Commissioners

- **Filing**
Internal Pre-Filing Issues

- **Legal Requirements**: Statutory standards: legal showings required and necessary supporting materials
- **Filing Requirements**: Testimony/affidavits: rate, economic or technical analyses (retention of experts)
- **Contractual Requirements**: Limitations on filing rights, notice and/or consent requirements
- **External Considerations**: Pending commercial litigation, regulatory proceedings, investigations
- **Timing**: Statutory requirements, tax considerations, competitive issues, pending or threatened litigation, policy considerations
External Meetings

- **Customers:** Customer relations; contractual requirements; can we reach a negotiated resolution up-front?

- **State Commissions:** Pre-filing requirements; impact on pending state and FERC proceedings; can we reach a negotiated resolution up-front?

- **FERC:** Pre-filing meetings with FERC Staff and/or the Commissioners

- **RTOs/NERC:** Discuss technical issues up-front, anticipate issues that may arise in the filing
FERC Pre-Filing Meetings

- Does the filing raise issues of first impression?
- Does the filing “push the envelope” or ask the Commission to revisit precedent?
- Does the filing raise complicated issues?
- Is the filing likely to be controversial?
- Does the filing involve a new industry player or new technology?
FERC Staff Meetings - Logistics

- Meet at FERC headquarters or by conference call?
- Who should attend/participate from the filing companies?
- Who should attend/participate from FERC Staff?
- Informal review of draft filings?
- Follow-ups: revised filings, follow-on calls, courtesy copies of the filing
Case Study: Incentive Rate Filing

- Negotiation of joint venture arrangement
- Preparation of engineering and economic studies
- Coordination with RTOs
- Discussions with state commissions
- Pre-Filing meeting with FERC Staff; discussions with eTariff Staff
- Tariff filing
Policy Statements, Rulemakings, Enforcement and Reliability Proceedings
2011 REPORT ON ENFORCEMENT

Docket No. AD07-13-004

Prepared by the Staff of the

Office of Enforcement
Federal Energy Regulatory Commission
Washington, D.C.

NOVEMBER 17, 2011
The matters presented in this staff report do not necessarily represent the views of the Federal Energy Regulatory Commission, its Chairman, or individual Commissioners, and are not binding on the Commission.
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INTRODUCTION

The staff of the Office of Enforcement (Enforcement) of the Federal Energy Regulatory Commission (Commission) is issuing this report as directed by the Commission in its Revised Policy Statement on Enforcement.¹ This report informs the public and the regulated community of Enforcement activities during Fiscal Year 2011 (FY2011),² including an overview of and statistics reflecting the activities of the three divisions within Enforcement: Division of Investigations (DOI), Division of Audits (DA), and Division of Energy Market Oversight (Market Oversight).

Enforcement recognizes the importance of informing the public of the activities of Enforcement staff and prepares this report with that objective in mind. Also consistent with the recognition of the public’s interest in Enforcement activity, the reader will find in the pages of this report how Enforcement implemented certain other measures in FY2011 designed to increase the transparency and consistency of the work of this Office. Because the investigative work of Enforcement is non-public, the majority of the information that the public receives about investigations comes from public Commission orders that approve settlements or release staff reports, or orders to show cause why conduct should not be sanctioned. However, not all of the duties Enforcement performs result in public actions by the Commission. As in previous years, the FY2011 report provides the public with more information regarding the nature of non-public Enforcement activities, such as self-reported violations and investigations that are closed without any public enforcement action. The report also highlights other Enforcement work in auditing companies subject to the Commission’s jurisdiction, compiling and monitoring data from forms and reports submitted by industry participants to the Commission, and monitoring wholesale electric and natural gas markets.

¹ Enforcement of Statutes, Regulations and Orders, 123 FERC ¶ 61,156, at P 12 (2008) (Revised Policy Statement). A current Enforcement organizational chart is attached as Appendix A to this report.

² The Commission’s fiscal year begins October 1 and ends September 30 of the following year. FY2011, the subject of this report, began on October 1, 2010 and ended on September 30, 2011.
OFFICE OF ENFORCEMENT PRIORITIES

The Commission’s Strategic Plan announced its mission of assisting consumers in obtaining reliable, efficient, and sustainable energy services at a reasonable cost through appropriate regulatory and market means. The Strategic Plan identifies two primary goals in order to fulfill this mission: (1) ensuring that rates, terms, and conditions are just, reasonable, and not unduly discriminatory or preferential; and (2) promoting the development of a safe, reliable, and efficient energy infrastructure that serves the public interest. In order to further those goals, Enforcement’s three divisions gather information about market behavior, market participants, and market rules to assist the Commission in its obligation to oversee regulated markets and will work to bring entities into compliance with the applicable statutes, Commission rules, regulations, and tariff provisions.

Enforcement has selected priorities for its three divisions. In FY2011, Enforcement continues its focus on matters involving:

- Fraud and market manipulation;
- Serious violations of the Reliability Standards;
- Anticompetitive conduct; and
- Conduct that threatens the transparency of regulated markets.

Enforcement does not intend to change its priorities in FY2012. Conduct involving fraud and market manipulation poses a significant threat to the markets overseen by the Commission. Such intentional misconduct undermines the Commission’s goal of providing efficient energy services at a reasonable cost because the losses imposed by such actions are ultimately passed on to consumers. Similarly, anticompetitive conduct and conduct that threatens market transparency undermine confidence in the energy markets and harm consumers and competitors. Such conduct might involve the violations of rules designed to limit market power or to ensure the efficient operation of regulated markets. Of particular concern to Enforcement are cases involving the greatest harm to the public, where there is often significant gain to the violator and/or loss to the victims of the misconduct.

The Reliability Standards established by the Electric Reliability Organization and approved by the Commission protect the public interest by requiring a reliable and secure Bulk-Power System. Enforcement enforces these standards and focuses primarily on violations resulting in actual harm, through the loss of load or otherwise. Enforcement also focuses on cases involving repeat violations of the Reliability Standards, violations of Standards that carry a high Violation Risk Factor, or violations that present a substantial actual risk to the Bulk-Power System. In addition, Enforcement enforces safety and environmental standards established by the Commission in order to promote the development of a safe, reliable, and efficient energy infrastructure with a particular emphasis on cases involving actual harm or a high risk of harm.

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DIVISION OF INVESTIGATIONS

A. Overview

DOI conducts public and non-public investigations of possible violations of the statutes, rules, orders, and tariffs administered by the Commission. Investigations may begin from self-reports, tips, calls to the Enforcement Hotline, referrals from organized markets or their monitoring units, other agencies, other offices within the Commission, or as a result of other investigations. During most investigations, DOI staff coordinates with other divisions in Enforcement and subject matter experts in other Commission offices. Where staff finds violations of sufficient severity, staff so reports to the Commission and attempts to settle the investigation for appropriate sanctions and future compliance before recommending that the Commission initiate a public show cause proceeding.\(^4\)

The Commission continues to increase the transparency of Enforcement activities and promote consistency in Enforcement actions. In FY2011, the Commission denied rehearing and clarified certain aspects of a FY2010 order that increases transparency in investigations by authorizing the Secretary of the Commission to publicly issue, upon direction from the Director of the Office of Enforcement, staff’s notice of alleged violations after staff preliminarily determines that a violation has occurred.\(^5\) The Secretary has issued several such notices. The notices identify the subject of the investigation and the alleged violations with a concise description of the alleged wrongful conduct. Also in FY2011, the Commission has begun implementation of the Penalty Guidelines, consistent with the Revised Policy Statement on the Penalty Guidelines,\(^6\) and applied them to its three most-recently issued settlements. Staff believes that application of the Penalty Guidelines to settlements of its investigations will yield greater consistency and clarity to the remedies and sanctions that resolve such investigations.

In FY2011, the Office of Enforcement led a multi-office task force, inquiring into significant power outages in the southwestern United States during the winter of 2011. Through an extensive fact-finding mission, the task force identified the causes of the outages and made recommendations for prevention of future widespread electricity failures and gas curtailments. The task force capitalized on the investigative skills of DOI to lead a team of FERC and North American Electric Reliability Corporation (NERC) experts to quickly issue a comprehensive report that was released in August 2011.

In FY2011, DOI has continued to focus on the enforcement of the Reliability Standards. Through Enforcement’s investigations, with the assistance of technical expertise from the Office of Electric Reliability (OER) and in conjunction with the investigative efforts of NERC, the Commission addressed and resolved findings of violations of Reliability Standards by two entities. Moreover, DOI staff continues its coordination with the compliance programs of NERC and the eight Regional Entities (REs) as to Reliability Standards. DOI played a central role in processing 270 Notices of Penalty (NOPs) that NERC filed with the Commission during FY2011, in which REs proposed monetary penalties totaling approximately $12 million for alleged violations of the Reliability Standards.

\(^4\) For a discussion of the processes by which Enforcement staff conducts and concludes investigations, see Revised Policy Statement, supra note 1.
\(^5\) Enforcement of Statutes, Regulations, and Orders, 134 FERC ¶ 61,054 (2011).
Notably, during this fiscal year the Commission affirmed an Initial Decision ordering an individual to pay a civil penalty of $30 million for violating the Commission’s Anti-Manipulation Rule. In another matter, the Commission affirmed an Initial Decision agreeing with DOI staff arguments that a complainant before the Commission failed to prove allegations of energy market manipulation.

The work of DOI this fiscal year included twelve Commission orders related to investigations. In addition to the two matters discussed in the foregoing paragraph, the Commission issued nine orders approving settlements reached by DOI staff with the subjects of investigations and one order assessing a $50,000 penalty following briefing by both staff and the investigative subject before the Commission. The nine settlements resolved investigations concerning market manipulation, submission of misleading information, Reliability Standards, OATT provisions, natural gas open access policies, and market based rate (MBR) regulations. The settlements from these matters resulted in the payment of over $2.9 million in civil penalties and more than $2.75 million in disgorgement of unjust profits, as well as compliance monitoring reporting requirements in most cases.

Furthermore, DOI staff appeared in federal district court with respect to two of its investigations during this fiscal year. Staff filed an action in the United States District Court for the District of New Jersey to enforce a subpoena against a non-cooperative witness. Staff also sought an injunction in the United States District Court for the Northern District of Indiana to enforce the terms of a compliance order issued under Part I of the FPA to address deficiencies under a Commission-issued hydropower license. In addition to investigation-related work, DOI continued its rigorous analysis of self-reports, Hotline calls, referrals, and other matters brought to staff’s attention.

B. Significant Matters

1. Southwest Inquiry Task Force Regarding February Outages and Curtailments

On February 14, 2011, the Commission ordered an inquiry into the causes of widespread electricity outages and gas curtailments in Texas and the Southwest that occurred during the first week of February 2011.7 Approximately 4.4 million electric customers within the footprints of the Electric Reliability Council of Texas (ERCOT) and the Western Electric Coordinating Council (WECC) lost power because of rolling blackouts. Over 50,000 gas customers had curtailed gas service in New Mexico, Arizona, and Texas, some for as long as a week. Working jointly with NERC, DOI led a task force, comprising members from each of the Commission’s program offices, which completed the inquiry in six months. The Commission and NERC released a joint report in August 2011.8 The task force concluded that extreme, prolonged cold weather caused the majority of the electric outages and gas curtailments subject to the inquiry.

In the report, task force staff and NERC made twenty-six recommendations to prevent future electrical outages, in the areas of planning and reserves, coordination with generator owners/operators, winterization, communications, and load shedding. As a result of the inquiry findings, NERC is considering the need for a new standard that directly requires generators to develop, implement, and maintain plans to winterize their units (such as inspecting and maintaining heat tracing and thermal insulation, and installing wind breaks and enclosures to protect equipment and lines vulnerable to freezing).

7 Inquiry into Recent Outages in Texas and the Southwest, 134 FERC ¶ 61,104 (2011).
8 The report is available at http://www.ferc.gov/legal/staff-reports/08-16-11-report.pdf
The report also set forth the FERC and NERC staff finding that additional gas storage could have prevented many of the gas curtailments. The report made six recommendations to prevent future gas curtailments. The report also encouraged lawmakers in Texas and New Mexico to work with state regulators and the gas industry to explore adopting uniform standards for the winterization of natural gas production and processing facilities. Further recommendations encouraged state commissions to work with gas utilities on curtailment plans, including how to prioritize retail gas customers versus gas-fired electric generators that serve retail electric load. On November 9, 2011, staff sent letters to the WECC Regional Entity, the Southwest Power Pool Regional Entity, and the Texas Reliability Entity asking them each to report on any efforts they have taken to assess preparedness in their respective regions for this winter. The letters specifically requested that their responses focus on the report’s recommendations, such as modifications to the planning and balancing authorities’ winter preparation processes.

2. Public Notice of Staff’s Preliminary Findings in Investigations

The Commission moved forward this fiscal year with its policy to promote transparency in investigations. On January 24, 2011, the Commission issued its order on rehearing confirming and clarifying its policy regarding issuance of public notices of alleged violations, which was first stated in a Commission Order dated December 17, 2009. In the order on rehearing, the Commission rejected rehearing requests but responded to concerns about providing transparency prior to Commission issuance of a show cause order. The Commission reaffirmed several benefits of the public notice. For example, the notice enables third parties to bring relevant information, either inculpatory or exculpatory, to the attention of staff, and also provides notice to the public of conduct that may be subject to penalties and should be self-reported. The order clarified that the public notices will only issue after an entity has had the opportunity to respond to preliminary findings and that response has not changed staff’s conclusions as to findings of violation; that the Director may issue a notice that an investigation has terminated if public notice of preliminary findings has previously issued; that staff will tell subjects in advance that the notice will be issued; and that third-party submissions will not be treated as interventions, but will be treated confidentially and subjects will have the opportunity to respond to those submissions. Since issuance of the order on rehearing, the public notices have issued in eleven matters.

3. Brian Hunter

In April 2011, the Commission affirmed in all respects the presiding judge’s Initial Decision finding that former Amaranth Advisors L.L.C. trader Brian Hunter violated the Anti-Manipulation Rule (18 C.F.R. section 1c.1) and assessed against Mr. Hunter a $30 million civil penalty. Significantly, the Commission’s issuance confirmed findings in the Initial Decision regarding the Commission’s personal jurisdiction over Mr. Hunter; the burden of proof; the manipulative scheme; “open market” trading as a violation of the Commission’s regulations where there is manipulative intent; and that staff need not show the scheme resulted in artificial prices or the absence of trades at prevailing prices. The Commission affirmed the findings of fact that Hunter sold significant numbers of futures contracts during the settlement periods of three at-issue months with the intent to depress prices and financially benefit Amaranth’s significant derivative positions held on other platforms. The Commission further concluded that Hunter’s manipulative scheme had a direct and substantial effect upon FERC-jurisdictional natural gas transactions. The Commission ordered Hunter to pay the full penalty recommended

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10 Brian Hunter, 135 FERC ¶ 61,054 (2011).
by DOI staff. This is the first fully litigated proceeding under Section 4A of the Natural Gas Act (NGA), and involves the largest civil penalty since EPAct 2005.\textsuperscript{11}

In May 2011, Hunter filed a request for rehearing, which is pending before the Commission.

4. ISO-NE Connecticut Parties’ Complaint Alleging Market Manipulation

In May 2011, the Commission affirmed the presiding judge’s Initial Decision agreeing with DOI staff’s position that a third-party complainant had failed to establish violations of the Anti-Manipulation Rule (18 C.F.R. section 1c.2).\textsuperscript{12} Complaints filed by the Connecticut Attorney General, the Connecticut Department of Public Utility Control and the Connecticut Office of Consumer Council (the Connecticut Representatives) against ISO-New England, Inc. (ISO-NE), Constellation Energy Commodities Group, Inc., Shell Energy North America (U.S.) LP, and Brookfield Energy Marketing Inc. related to the three market participants’ capacity imports into ISO-NE from capacity resources located in the New York ISO. After hearing and briefing, the ALJ issued an Initial Decision that found against market manipulation in September 2010. The Connecticut Representatives filed exceptions to the decision in October 2010 on a variety of grounds. Staff and the market participants filed briefs opposing the exceptions as without merit and the Commission agreed, affirming the findings of the Initial Decision. The Commission agreed with DOI that the complainants failed to demonstrate that the market participants acted with the requisite scienter for a finding of market manipulation, in part because the market participants “fully intended to deliver their capacity-backed energy in the unlikely event ISO-NE actually called on it.”\textsuperscript{13}

In June 2011, the Connecticut Representatives filed a request for rehearing. In July 2011, the Commission granted rehearing for further consideration and tolled the time period for rehearing. Two of the market participants subsequently filed answers to the Connecticut Representatives’ request for rehearing. These filings are pending before the Commission.

5. Enforcement Actions in Federal Court

Staff appeared in federal district court on behalf of two investigations this year. As mentioned above, staff pursued an injunction in the United States District Court for the Northern District of Indiana to enforce compliance with a Commission hydropower project license. After staff filed the complaint seeking enforcement of the terms of a compliance order issued by the Office of Energy Projects (OEP), and briefed issues raised by the licensee regarding the need to join other state and federal agencies as interested parties, the licensee resolved compliance issues that had been outstanding for several years. The action and investigation terminated with DOI’s withdrawal of the complaint upon confirmation by OEP staff that the licensee had cured its compliance deficiencies. DOI staff also filed an administrative subpoena enforcement petition in the United States District Court for the District of New Jersey. In Allegations of Market Manipulation of the Electric Energy Markets in the West, Commission Docket No. IN08-8-000, a witness in the investigation refused to comply with a Commission subpoena and, failed to appear at his deposition. The court issued an order to show cause compelling the witness to appear and explain his failure to comply with the subpoena. Upon issuance of the court order, the witness agreed to testify under oath and staff, in turn, withdrew its petition to enforce the subpoena.


\textsuperscript{13} Id. at P 36.
6. Moussa I. Kourouma

In June 2011, the Commission issued an order finding an individual, Moussa I. Kourouma, to have violated 18 C.F.R. section 35.41(b) by knowingly submitting misleading information and omitting material facts regarding ownership of Quntum Energy, LLC to the Commission and a Commission-approved regional transmission organization.\(^\text{14}\) The Commission’s order followed a non-public investigation and a paper hearing on an order to show cause. The order directed Mr. Kourouma to pay a penalty of $50,000. In August 2011, Mr. Kourouma filed a motion to stay enforcement of the civil penalty pending the outcome of his petition for review of the penalty assessment before the U.S. Court of Appeals for the District of Columbia Circuit. In September 2011, the Commission issued an order denying the motion for stay, but allowing briefing on Mr. Kourouma’s ability to pay, which issue remains pending.

C. Settlements

In FY2011, the Commission approved nine settlement agreements entered into by Enforcement for total civil penalty payments of over $2.9 million and disgorgement of more than $2.75 million plus interest.\(^\text{15}\) These settlements resolved OATT violations by two entities, a violation of 18 C.F.R. section 35.41 by one entity, Reliability Standards violations by two entities, violations of natural gas open access transmission rules by three entities, violations of regulations related to MBR authority regulations by one entity, and a violation of 18 C.F.R. section 1c.2 by one entity.

The graphs below compare settlements approved in FY2011, by type of violation, with settlements in prior years. Investigations resulting in settlements of violations of open access transmission policies, i.e., capacity release violations, continue to decrease. This trend is not surprising as those regulations, and related compliance programs, mature.

\(^\text{14}\) *Kourouma*, 135 FERC ¶ 61,245 (2011).

\(^\text{15}\) A table of FY2011 Civil Penalty Enforcement Actions, both those resolved through settlement and those resolved through agency proceedings, is attached to this report as Appendix B.
Types of Violations Settled, FY2011

- Natural Gas Transportation
- OATT/Tariff
- Reliability Standards
- Market Manipulation and/or False Statements (18 C.F.R. § 1c and § 35.41)
- Market Based Rate Violation
- Violation of Commission Order

Types of Violations Settled, FY2010

- Natural Gas Transportation
- OATT/Tariff
- Reliability Standards
The nine settlement agreements between Enforcement and the investigation subjects are described more fully as follows.

**North America Power Partners.** On October 28, 2010, the Commission approved a settlement between the Office of Enforcement and North America Power Partners (NAPP). NAPP is a curtailment service provider assisting individual resources participating in demand response programs in the PJM Interconnection, LLC (PJM). Upon referral by PJM, staff investigated NAPP’s compliance with the PJM Open Access Transmission Tariff (OATT) and with 18 C.F.R. section 1c.2 (2010). Staff determined that NAPP offered several resources into PJM’s Synchronized Reserve Market at times when those resources had reported to NAPP they were unavailable. In addition, during numerous Synchronized Reserve Events, NAPP failed to notify resources that they must respond. Enforcement also determined that NAPP submitted inaccurate information to PJM in the registration of resources and improperly registered 101 resources before obtaining authorizations or verifications of their willingness to be a resource. All of the foregoing conduct violated PJM’s tariff and 18 C.F.R. section 1c.2. Lastly, staff determined that NAPP engaged in two additional minor tariff violations. Under the settlement agreement approved by the Commission, NAPP agreed to pay a civil penalty of $500,000, disgorge $2,258,127, plus interest, in unjust profits, and undertake compliance monitoring. The size of the penalty took into account the financial instability of the company; otherwise the seriousness of the conduct would have resulted in a higher civil penalty.

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National Energy & Trade, L.P. On January 31, 2011, the Commission approved a settlement in the matter of National Energy & Trade, L.P. (NET). Enforcement discovered apparent flipping transactions involving NET and its affiliated intrastate natural gas pipeline, Mission Valley Pipeline Company, through another investigation into an unrelated entity’s potential violations of the open access transportation policies. Flipping transactions involve entering a series of consecutive, prearranged, short-term discounted releases alternating between affiliated shippers, to circumvent the bidding requirement that would apply to a longer-term discounted release. Enforcement concluded that NET engaged in prohibited flipping transactions between November 2006 and March 2007, involving approximately 4.2 Bcf of gas. Enforcement also concluded that between August 2005 and March 2008, Mission Valley violated the shipper-must-have-title requirement by transporting 17.6 Bcf of NET-titled gas on capacity held by Mission Valley. Under the settlement agreement, NET agreed to pay a civil penalty of $500,000. NET also agreed to submit to compliance monitoring by Enforcement staff.

Dartmouth Power Associates Limited Partnership. On February 3, 2011, the Commission approved a settlement between Dartmouth Power Associates Ltd. Partnership (Dartmouth) and Enforcement in which Dartmouth admitted to violations of ISO-NE’s tariff and 18 C.F.R. section 35.41 (2010). Dartmouth failed to timely report to ISO-NE an outage of its generating unit. ISO-NE withheld from Dartmouth the $231,952.50 capacity payment that would have followed from Dartmouth’s conduct. Dartmouth adopted compliance procedures enhancing its communications with ISO-NE and was fully cooperative with Enforcement’s investigation. The Commission accepted the settlement without requiring further payment, but noted that but for ISO-NE’s witholding of this payment, the Commission would likely have assessed a civil penalty.

National Fuel Marketing Company, LLC. On April 7, 2011, the Commission approved a settlement between Enforcement and National Fuel Marketing Company, LLC (NFM). This order resolved staff’s investigation into whether NFM and three of its affiliates’ (NFM Midstream, LLC, NFM Texas Pipeline, LLC and NFM Texas Gathering, LLC) bidding for, and use of, interstate natural gas pipeline transportation capacity in a 2007 open season on Cheyenne Plains Gas Pipeline Company, LLC (Cheyenne Plains) violated any Commission statutes, rules or requirements. In the settlement approved by the Commission, NFM neither admitted nor denied violation of the Commission’s shipper-must-have-title requirement and agreed to pay a $290,000 civil penalty. Because NFM experienced a net loss on the transactions at issue, it did not have unjust profits subject to disgorgement. NFM also agreed to submit compliance monitoring reports.

Seminole Energy Services, LLC. On April 7, 2011, the Commission approved a settlement between Enforcement and Seminole Energy Services, LLC (Seminole). This order resolved staff’s investigation into whether Seminole and four of its affiliates’ (Seminole Gas Company, LLC, Seminole High Plains, LLC, Lakeshore Energy Services, and Vanguard Energy Services, LLC) bidding for, and use of, interstate natural gas pipeline transportation capacity in a 2007 open season on Cheyenne Plains violated any Commission statutes, rules or requirements. In the settlement approved by the Commission, Seminole neither admitted nor denied violation of the Commission’s prohibition against buy/sell transactions and agreed to pay a $300,000 civil penalty.

20 In re Seminole Services, LLC, 135 FERC ¶ 61,010 (2011).
penalty. Seminole disgorged $271,315 of unjust profits arising from the transactions at issue, and also agreed to submit compliance monitoring reports.

Western Electricity Coordinating Council. On July 7, 2011, the Commission approved a settlement between the Office of Enforcement, NERC, and WECC related to a February 14, 2008, disturbance in Utah. Enforcement and NERC determined that the Pacific Northwest Security Coordinator (PNSC), the predecessor to WECC’s function as a reliability coordinator, violated nine requirements of five Reliability Standards. Enforcement and NERC determined that the Reliability Coordinator failed to respond adequately to the disturbance and thereby violated requirements related to the restoration of Area Control Error (ACE), issuance of energy emergency alerts and three-part communication. Enforcement and NERC further determined that PNSC violated requirements related to situational awareness. Accordingly, WECC agreed to pay a $350,000 civil penalty, divided equally between the U.S. Treasury and NERC.

Black Hills Power, Inc. On August 5, 2011, the Commission approved a settlement in the matter of Black Hills Power, Inc. (Black Hills) that addressed violations Black Hills committed in connection with posting, non-discrimination, and tariff requirements. In the agreement, Black Hills admitted that it (1) failed to make non-firm available transmission capacity (ATC) available on an AC/DC/AC converter tie facility (DC Tie); (2) failed to charge its customers the appropriate on-peak and off-peak transmission rates for non-firm transmission service over the DC Tie; (3) improperly provided and discounted firm transmission service to an affiliate, which discounted service Black Hills did not provide to non-affiliate customers; (4) provided brokering services without charge for an affiliate and did not disclose the services on its OASIS; and (5) failed to post an accurate list of designated network resources. Black Hills agreed to pay a civil penalty of $200,000 and undertake specific compliance measures to deter similar prospective violations.

Grand River Dam Authority. On August 29, 2011, the Commission approved a settlement between Enforcement and the Grand River Dam Authority (GRDA) in August 2011 resolving violations of fifty-two requirements of nineteen Reliability Standards. GRDA, as owner and operator of a transmission system within the Eastern Interconnection, agreed to pay a $350,000 penalty, one-half to the U.S. Treasury and one-half to NERC. GRDA also agreed to submit to compliance monitoring and a $2 million investment in compliance measures, as well as continued mitigation efforts. The violations related to visibility and control of GRDA’s transmission system, maintenance of protection system components, long term system planning, facility ratings, facility connection requirements, emergency operations in the event of a control center failure, and personnel training.

Duke Energy Carolinas, LLC. On September 30, 2011, the Commission approved a settlement between Enforcement and Duke Energy Carolinas, LLC (DEC), resolving an investigation of issues referred by the Division of Audits. DEC agreed to pay a $425,000 civil penalty and to submit compliance monitoring reports for at least one year for violations of a Commission order, DEC’s Commission-approved tariffs, and Commission regulations related to DEC’s MBR authority and the Commission’s Electric Quarterly Reports (EQR) filing requirements. Although the Commission had previously revoked DEC’s MBR authority by order and required DEC to provide cost-based rate sales in its control area, DEC entered into forty-two transactions in which it charged eight counterparties prices exceeding the maximum allowed rate in DEC’s

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cost-based rate tariff. The eight counterparties were entitled to obtain power from DEC at cost-based rates because Duke had market power in the area of the sales. DEC also misreported 134 transactions as MBR sales in its EQR filing reports. DEC admitted to its violations and refunded $97,591 plus interest to the counterparties before and independent of finalizing its settlement with Enforcement. Because DEC has already disgorged profits related to its violation, the settlement did not include a disgorgement provision.

D. Self-Reports

In the period from issuance of the first Policy Statement on Enforcement in 2005 through the end of FY2011, staff has received a total of 458 self-reports. Recent years’ reports are broken down by fiscal year as follows:

- FY2009 – 122 reports received
- FY2010 – 93 reports received
- FY2011 – 107 reports received

Of the 107 self-reports received in FY2011, staff closed 54 after an initial review and without opening an investigation. Staff’s review is still pending on 53 self-reports. Staff received self-reports from a variety of market participants, including power marketers, electric utilities, natural gas companies, and RTO/ISOs.

The Penalty Guidelines emphasize the importance of self-reporting, providing credit that could significantly mitigate a penalty if the violation came to staff’s attention through a self-report. Staff continues to encourage the submission of self-reports.

25 Penalty Guidelines, 132 FERC ¶ 61,216 at P 127.
The following charts depict the types of violations for which staff received self-reports from FY2009 through FY2011. As in previous years, Open Access Transmission Tariff (OATT) violations accounts for a significant portion of the self-reports received in FY2011.
Self Reports Closed in FY2011 by Type of Violation

![Bar Chart showing number of self reports closed in FY2011 by type of violation]

Type of Violation

Self Reports Closed in FY2010 by Type of Violation

![Bar Chart showing number of self reports closed in FY2010 by type of violation]

Type of Violation
1. Illustrative Self-Reports Closed with No Action

In a continuing effort to promote transparency while encouraging the compliance efforts of regulated entities, staff presents the following illustrations summarizing some of the self-reports that staff closed in FY2011. These illustrations are intended to provide guidance to the public and to regulated entities as to why staff chose not to pursue enforcement action, while still preserving the non-public nature of the self-reports.

**Tariff/OATT Violation.** A transmission provider self-reported its granting of transmission service requests within 20 minutes before the hour, which constituted an act of discretion because the tariff was silent as to this authority. The entity did not initially log and publicly disclose these acts of discretion as required by Commission regulations. Upon discovery of this violation, the entity posted a blanket statement on its OASIS stating that requests within the 20-minute period will be accepted when practicable. It also promptly filed with the Commission a proposed tariff modification stating that requests for transmission made within 20 minutes before the hour would be accommodated when practicable, which the Commission accepted. The transmission provider gave credible evidence that the requests for service in question were granted in a non-discriminatory manner. Because the conduct did not cause any harm to market participants and the entity took appropriate remedial measures, staff closed the self-report with no further action.

**Tariff/OATT Violation.** An electric utility’s tariff required it to assess penalties for generator and energy imbalances and make timely distribution of the money collected to non-offending customers. The utility had accumulated approximately $100,000 in such penalties over more than three years that it inadvertently failed to distribute. After reporting this violation, the utility filed a refund report, accepted by the Commission, and disbursed the accumulated amount with interest. The utility revised its procedures regarding satisfying this tariff requirement and provided additional training to its employees. Based on the self-report, the absence of wrongful
intent, the amount of disbursements at issue, the compensatory remedial measures, and the measures taken to prevent recurrence, staff closed the self-report without action.

**Tariff/OATT Violation.** An RTO/ISO self-reported four tariff violations due to its market operations; in each, the RTO/ISO did not adhere to the tariff requirements for market operations or price calculations due to software errors. These minor software errors affected prices in the following four ways: using a generation reference bus instead of a load reference bus in calculating the Locational Marginal Price (LMP) for certain intervals when there otherwise was no market solution; failing to periodically mitigate certain bids as required when conducting the Day-Ahead Market; calculating LMPs for zonal trading hubs based on an improper aggregation of LMPs within those hubs; and calculating default prices using lagging gas price indices. Staff determined that the RTO/ISO had remedied each matter promptly upon discovery, minimal market harm resulted, and the errors were inadvertent. To ensure that the RTO/ISO adhered to its market operations responsibilities, staff referred the four matters to the Division of Audits to examine as part of its audit of the RTO/ISO. The Division of Audits confirmed that the ISO had remedied the errors and found that it had established procedures to prevent similar tariff violations.

**Tariff/OATT Violation.** While preparing a compliance filing for its public utility commission, an investor-owned utility (IOU) discovered that, in violation of its tariff, it had neglected to file a Small Generator Interconnection Agreement (SGIA) for the interconnection of a pilot photovoltaic project it owned to its own wholesale distribution network. The IOU mistakenly believed that, because it was on both sides of the SGIA, the filing requirement did not apply to it. The IOU’s failure to file did not improperly benefit the IOU. Upon discovering the violation, the IOU found that it had filed interconnection agreements for all of its other photovoltaic projects. The IOU promptly remedied the violation by filing the SGIA and implementing additional training and work process documentation protocols that should prevent repeat violations. Staff closed the self-report with no further action.

**Standards of Conduct Violation.** A transmission provider self-reported a violation of the no-conduit rule of the Standards of Conduct for Transmission Providers, 18 C.F.R. section 358.6 (2011). During a storm, an employee sent out a company-wide email, received by marketing function employees, describing the outage caused by the storm amid a general description of company’s efforts to restore service. Within 20 minutes of the email, the company compliance officer posted the information on OASIS, as required by the transparency rule of the Standards of Conduct. Staff confirmed that the company’s marketing function did not undertake any bidding in reliance on the non-public information. Further, the company changed its policy for sending company-wide emails. Staff therefore closed the self-report with no action.

**Standards of Conduct Violation.** During the course of an internal audit of its Standards of Conduct training program, an electric company discovered that 14 of 30 newly hired employees or contractors completed the Standards of Conduct training outside the first 30 days of their employment. Further, 14 of 61 contractors (whose contracts expired before the end of the year) did not complete the required annual Standards of Conduct training. After this discovery, the company immediately revised its internal training procedures. Since the company quickly self-reported the problem, took immediate steps to remedy the situation, and no harm resulted from the error, staff closed the self-report with no action.

**Market-Based Rate Authority Violation.** A retail provider of electric power self-reported that it sold energy into two RTO/ISOs without first obtaining MBR authority. Additionally, the company failed to notify the Commission of (1) whether it reported to price index publishers, (2) its sales in quarterly Electric Quarterly Report (EQR) submissions, (3) its 20 largest retail purchasers, and (4) its designated corporate official, as required by regulation. The company did
not realize any unjust profits from these transactions, which likewise caused no harm to the market. The company obtained MBR authority, corrected its EQR and filing deficiencies, and implemented additional compliance measures to prevent recurrence. Based on the nature of the infractions and prompt remediation, staff closed the self-report without further action.

**Qualifying Facility and Market-Based Rate Authority Violations.** An electric company filed a self-report indicating it made sales without MBR authority from the Commission. Although the company is a Commission-approved exempt Qualifying Facility (QF), FERC Order No. 671 required QFs of certain sizes to obtain authorization from the Commission under Section 205 of the FPA prior to selling power at market-based rates. Upon discovering that it had failed to seek required MBR authority and had therefore made unauthorized MBR sales, the company immediately self-reported. After obtaining MBR authorization from the Commission, the company also refunded its customers approximately $1.25 million for the period it collected the rate without Commission authorization. To ensure future compliance with the Commission’s MBR requirements, the company designated a compliance officer whose job responsibilities include review of the company’s compliance with all applicable government regulations.

**Commission Filing Requirement Violation.** An electric utility self-reported that it had inadvertently failed to file required quarterly reports with the Commission reflecting progress on construction of jurisdictional distribution facilities built for its customers. The company identified these errors through a new compliance program and check system that staff concluded was sufficient to ensure that no similar violations occur in the future. The company did not profit from the error and submitted requisite notices with the Commission. Based upon these representations and a review of the construction contract provisions at issue, staff determined to close the self-report with no further action.

**Commission Filing Requirement Violation.** A fifty-three MW generator with MBR authorization under section 205 of the FPA was late in filing a request for Category 1 seller status, in violation of section 35.36 of the Commission’s regulations, and late in filing a change in status report regarding the acquisition of new generation capacity, in violation of section 35.42(d) of the Commission’s regulations. After submitting a self-report of these unintentional late filings, the generator promptly submitted the required filings to remedy the violations. The generator self-reported that it had discovered the late filings as part of a comprehensive regulatory compliance review and its personnel were unaware of these filing requirements. There was no economic benefit from the failure to timely file these submissions and the generator’s late filing of these submissions did not cause harm to the market as the volume of additional generation sites did not raise any vertical market power concerns. The generator has implemented compliance procedures to prevent future recurrence.

**Disclosure Violation.** An RTO/ISO self-reported that its electronic settlement support system, which allows market participants to access reports regarding their own settlement information, had inadvertently disclosed the confidential settlement information of another market participant. The recipient market participant immediately reported this error to the RTO/ISO and destroyed the information received. The RTO/ISO contacted the company whose information had been inadvertently released, and the entity was satisfied with the steps taken to correct the disclosure. The RTO/ISO determined that a software error was responsible for the disclosure and emailed its market participants alerting them to the situation. Because the violation was quickly remedied and no harm resulted from the disclosure, staff closed the self-report with no further action.

**Interlocking Directorate Violation.** An electric transmission provider reported that one of its employees held two officer or director level positions for two affiliated companies, in violation of the Commission’s interlocking directorate requirements. One of the companies was not engaged in wholesale sales at the time of the violation and has since filed to withdraw its MBR
authority with the Commission. Staff determined that no harm resulted from this violation. The employee resigned from one position, filed an interlock request with the Commission, and then was re-elected to his previous position. The companies likewise improved their compliance measures to prevent future violations of this nature. Staff closed the matter without further action.

**Shipper-Must-Have-Title Violations.** A company admitted violating the Commission’s shipper-must-have-title requirement through two isolated transactions. In the first transaction, the company and a supplier had purchased their own capacity on the same pipelines. The company acting as scheduling agent for the supplier violated the shipper-must-have-title requirement by confusing ownership of the gas and ownership of capacity during scheduling of specific shipments. In the second transaction, the company confused gas purchased for its retail supply business and for its affiliate-owned power plants when scheduling shipment. The company realized no profit from either of these impermissible transactions. Staff also determined that little to no harm occurred because of these violations, and the company improved its personnel training to prevent future violations. Staff closed the matter without further action.

**Natural Gas Act/Commission Order Violation.** An interstate pipeline self-reported that certain natural gas backhauls and displacement transportation transactions of limited volumes on its pipeline system violated section 3 of the NGA and the Presidential Permit authorizations associated with the importation of natural gas across the international border with Canada. The pipeline brought about deliveries of gas from the United States to direct or retail customers in Canada by displacement; gas did not flow physically from the United States to Canada and did not use any physical transportation capacity. Nevertheless, the pipeline did not have authorization to deliver gas to Canada. After reporting the violation, the pipeline filed for and received authorization from the Commission to export gas to Canada, including the previously unauthorized backhauls and displacement deliveries, thereby ensuring that no similar violations could occur. The company also voluntarily disgorged with interest the small profit it realized from the transactions. Staff closed the matter with no further action.

**Certificate Order Violation.** A gas company self-reported that it commenced service for five withdrawal wells without first obtaining Commission authorization as stipulated in its certificate order, which required specific approval for various phases and facilities. The company had described the five wells under construction in a request for authorization for service under Phase I, but approval may only be sought or granted after completion of construction. The pipeline did not specifically seek authorization to commence service from these five wells before placing them into service. The company’s customers were able to take advantage of the full withdrawal service via those wells, which helped ease gas supply needs during several cold weather events. Staff closed the matter without further action because the company’s failure did not harm the environment or the market; the company’s oversight was inadvertent and promptly corrected; the company implemented measures to prevent a reoccurrence; and the company implemented measures for future compliance.

**Material Deviations Violations.** Nine natural gas pipeline companies separately self-reported that they failed to ensure that a number of their transportation service agreements (TSAs) and transportation-related agreements adhere and conform to their currently effective pro-forma TSAs and tariff General Terms and Conditions of Service, as required by the Commission’s regulations. Following comprehensive internal reviews of over 7500 TSAs and transportation-related agreements, the companies determined that there were numerous deviations, some of which could affect the substantive rights of market participants. All of the companies promptly self-reported their findings to staff and cured all of these violations by (1) restating the non-conforming TSAs, (2) revising their pro-forma TSAs and tariff consistent with the non-
conforming TSAs, (3) terminating certain non-conforming TSAs pursuant to contractual provisions contained in such agreements, and (4) filing certain non-conforming TSAs and transportation-related agreements with the Commission for approval. All of the companies had compliance programs in place at the time of the violations and improved their compliance programs to account for the lapses that led to the violations. Staff found no evidence that the non-conforming TSAs or transportation-related agreements contained material deviations that were unduly preferential, discriminatory, or caused harm to similarly situated market participants. Furthermore, staff found no evidence that the failure to file the non-conforming TSAs was willful. Accordingly, staff closed these matters with no further action.

E. Investigations

During FY2011, DOI staff opened and closed approximately the same number of investigations as it did in FY2010. Staff opened 12 non-self-reported investigations and 2 inquiries (staff opened 15 investigations in FY2010). Staff closed 19 pending investigations through settlement, Commission order on an order to show cause, or without enforcement action (staff closed 16 investigations and 1 inquiry in FY2010).

1. Statistics on Investigations

Of the 12 investigations staff opened this fiscal year, some of which involve more than one type of violation or multiple subjects, 5 address RTO/ISO tariff violations, 8 involve market manipulation or false statements to the Commission or RTO/ISO, 2 relate to Commission-issued hydropower licenses, 1 involves a Standards of Conduct issue, and 1 involves the Commission’s authority under the Interstate Commerce Act. Additionally, DOI staff inquiries examined widespread power outages in the Southwest and are currently examining potential reliability concerns associated with the power outages in early September 2011 in parts of California, Arizona, and northern Baja California, Mexico.

Staff first learned of the issues in 6 investigations that it opened in FY2011 through referrals from RTO/ISO market monitoring units (MMUs). Pursuant to Commission policy, MMUs shall refer potential misconduct to the Commission for investigation. Staff opened 2 investigations this fiscal year upon referral from Market Oversight, and 1 other based on a referral from another program office within the Commission. One investigation resulted from a directive from the Commission. Two resulted from tips from outside callers through the Enforcement Hotline, and the Commission identified the need for the inquiries into significant disturbances on the Bulk-Power System through its own efforts.

Of the investigations closed this fiscal year, staff closed two upon finding no violations. In three investigations, staff found a violation, but determined not to pursue an enforcement action. Nine investigations concluded with settlement orders and one, the case against Moussa I. Kourouma discussed above, closed with an order of penalty following an order to show cause. Staff closed three investigations that related closely to a complaint resolved by a Commission settlement judge, concluding that the resolution addressed all concerns of Enforcement. Finally, one investigation, in which staff pursued an injunction in federal district court, closed upon withdrawal of the action after the entity had cured its compliance deficiencies.

The following charts show the disposition of investigations that closed in fiscal years 2008 through 2011.
Disposition of Investigations, FY2009

- Closed - Finding of Violation/No sanctions
- Closed - Insufficient evidence or no violation
- Settlement

Disposition of Investigations, FY2008

- Closed - Finding of Violation/No sanctions
- Closed - Insufficient evidence or no violation
- Settlement

Disposition of Investigations All to Date, FY2007 - FY2011

- Closed - Finding of Violation/No sanctions
- Closed - Insufficient evidence or no violation
- Settlement
- Proceeded to Order to Show Cause
- Other
The following charts provide the nature of the conduct at issue for those investigations that were closed without action in fiscal years 2009 through 2011.

**Types of Violation in Investigations Closed Without Action, FY2011**

- Market Manipulation/False Statement: 3
- Hydropower: 1
- Reliability: 1
- Natural Gas Transportation: 2
- Tariff/OATT: 5

**Types of Violation in Investigations Closed Without Action, FY2010**

- Market Behavior: 2
- Standards of Conduct: 1
- Natural Gas Transportation: 4
- Tariff/OATT: 1
2. Illustrative Investigations Closed with No Action

The following describes some of the circumstances of selected investigations in which staff found a violation, but did not take any enforcement action. Like the self-report illustrations, these are intended to provide guidance to the public while still preserving the non-public nature of DOI’s investigations.

Reliability. Staff investigated whether there were Reliability Standards violations committed by three companies related to a loss of transmission lines and generators. Staff found violations by two of the companies relating to requirements addressing protection system design and coordination, protection system maintenance and testing, and post emergency event reporting. After evaluating the risk presented to the Bulk-Power System, the mitigation completed by the companies, the remedial measures put into place, and the companies’ compliance programs, staff determined that these violations lent themselves more readily to resolution by the relevant RE. Staff referred the matter to the RE, who participated in two of the investigations, with a synopsis of staff’s findings. Staff found no violations by the third company.

18 C.F.R. § 35.41 and OATT Violation. A generator participating in an RTO/ISO capacity market, after taking a peaking unit out of service for annual maintenance, returned the unit to service as available for fast start and at full load. Shortly thereafter, the RTO/ISO called a test of the unit upon receiving an anonymous tip that the unit was not available at full load. The unit failed to perform consistent with its offer. Staff investigated the RTO/ISO’s referral of this matter to determine whether the generator offered the unit at full capacity and collected capacity payments knowing the unit could not perform if called upon, thereby violating the RTO/ISO’s tariff and Commission regulations requiring truth and accuracy in communications with the RTO/ISO. Because the generator did not test whether the unit could perform at full load after returning the unit to service, staff determined that the generator did not have a good faith basis to offer the unit as it did. Staff also determined, however, that the generator did not unjustly profit from its offer because it promptly repaired the unit and confirmed its performance such that the unit was available consistent with its offer the next time the RTO/ISO called upon it. Furthermore, staff concluded that the offer was based in part upon a lack of understanding by the plant operators as to how to comply with the relevant tariff provisions. The generator owner
conducted significant training of the operators and changed its procedures to test the unit for performance after annual maintenance outages and before returning the unit to the service of the capacity market.

**Right of First Refusal.** A municipal shipper on a small interstate natural gas pipeline contacted the Hotline to complain that the pipeline had refused to offer a right of first refusal (ROFR) in connection with a one-year firm transportation contract at maximum rates, in violation of the pipeline’s tariff and Section 284.221(d)(2) of the Commission’s regulations. When Hotline staff contacted the pipeline, it promptly extended a ROFR to the aggrieved shipper. Staff opened an investigation to determine whether the violations were widespread (i.e., whether the pipeline had improperly refused to offer ROFR to other shippers). Although the pipeline identified no similar violations, staff did identify a single, non-conforming contract that the pipeline failed to file in violation of Part 154 of the Commission’s regulations. Staff determined that the pipeline received no economic gain from the violations, and the violations did not cause any economic harm. After being made aware of the violation, the pipeline improved its compliance and training programs to prevent future violations. Staff accordingly closed the investigation without action.

**F. Reliability**

Pursuant to its Compliance Monitoring and Enforcement Program, NERC files Notices of Penalty (NOPs) with the Commission that reflect violations of the Reliability Standards found by NERC or one of the eight REs after investigation. Each NOP indicates resolution of a violation or potential violation through a penalty and mitigation plan, which may result from an assessment by the relevant RE or NERC, or from settlement negotiations with the registered entity. Pursuant to the Commission’s regulations, an NOP becomes effective by operation of law thirty days after filing with the Commission if the Commission takes no action within that time either to request more information or to open the matter for further review, or the entity does not file an application for review.

In FY2011, the Commission received 270 NOPs, encompassing 1,392 potential or confirmed violations. DOI staff, together with staff from the Office of Electric Reliability (OER) and the Office of General Counsel (OGC), reviewed the NOPs as they were filed and recommended whether the Commission should take action or decline further review. The Director of Enforcement extended the time period for consideration of 5 NOPs for the purpose of requesting additional information, and the Commission did so for 1 NOP. All 6 NOPs later became effective without further review by the Commission. In October 2010, the Army Corps of Engineers – Tulsa District initiated review of zero dollar penalties assessed against it in FY2010, asserting that the Commission does not have jurisdiction to enforce the Reliability Standards against federal agencies. The Commission issued its order in that proceeding in December 2010, finding in favor of Commission jurisdiction but declining to reach the question of whether the federal entities may be subject to monetary penalties for violations of the Standards. In July 28, 2011, NERC submitted an NOP assessing a $19,500 penalty against the Southwestern Power Administration (SWPA), a federal entity within the Department of Energy (DOE). Upon request by the DOE and SWPA that the Commission resolve the question of whether the Commission may enforce penalties assessed against another federal entity, the Commission

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28 Order on Review of Notice of Penalty, 133 FERC ¶ 61,037 (2010).

noticed its review of this NOP in August 2011. The SWPA NOP is the only NOP submitted to the Commission in FY2011 that remains pending as of the date of this report.

The NOPs that NERC filed with the Commission in FY2011 included 29 zero dollar penalties and 241 non-zero dollar penalties totaling $12,274,627. Nine of the NOPs consisted of compiled monthly submissions of lesser reliability violations, including both zero dollar and non-zero dollar penalties. Eight of these compilations were in the form of Administrative Citation NOPs and one was submitted as a “Spreadsheet NOP.” The largest single penalty assessed by an NOP submitted to the Commission in FY2011 was $650,000. In FY2011, the Commission received 522 potential or confirmed violations of the Critical Infrastructure Protection (CIP) Reliability Standards authorized by Order No. 706.

On September 30, 2011, NERC requested Commission approval for a new enforcement mechanism entitled Find, Fix, Track and Report (FFT). NERC proposes to dispose of certain possible violations that pose lesser risks to the Bulk-Power System and that the entity has mitigated by making monthly informational filings to the Commission advising of remediated issues. This filing would be in lieu of processing these same issues as NOPs. The FFT proposal, along with an initial FFT spreadsheet containing potential violations by Registered Entities, is pending before the Commission.

Also outstanding is the NOP in Docket No. NP10-18-000, filed in FY2010, which proposes an $80,000 penalty against Turlock Irrigation District (Turlock) pursuant to a settlement agreement between it and WECC RE. The penalty is for multiple violations, of which the most severe is a violation of FAC-003-1 R2 related to a vegetation-caused outage and loss of load of 270 MW for more than an hour on August 29, 2007. This NOP was the first in which a vegetation contact that led to the outage of a transmission line resulted in a loss of load. The Commission affirmed the penalty on March 17, 2011; the order is currently subject to a pending request for rehearing.

In addition, the Commission may investigate alleged violations of the Reliability Standards on its own or in coordination with NERC. Several such investigations are pending. In another significant reliability initiative, FERC and NERC are conducting a joint inquiry into the September 8, 2011 power outage that left more than 2 million customers in Southern California, parts of Arizona and northern Baja California, Mexico without electricity. FERC and NERC will coordinate with the California Independent System Operator, California and Arizona state regulators and the registered entities involved to assess the event. The inquiry will focus on the causes of the outages and potential recommendations to avoid similar outages.

34 See 2008 Florida Blackout, 122 FERC ¶ 61,244 (2008); Florida Blackout, 129 FERC ¶ 61,016 (2009); Florida Blackout, 130 FERC ¶ 61,163 (2010).
G. Enforcement Hotline

DOI staff operates the Enforcement Hotline. The Hotline is a means for persons to inform Enforcement staff, anonymously if preferred, of potential violations of Commission statutes, rules, regulations, and orders. The Hotline is also a means by which the public can obtain informal guidance and nonbinding opinions on matters within the Commission’s jurisdiction, including applicability of Commission orders and policies to particular circumstances. When staff members receive calls concerning possible violations, such as allegations of market manipulation, abuse of an affiliate relationship, or violation of a tariff or order, DOI staff researches the issue presented and consults other members of the Commission’s staff with expertise in the subject matter of the inquiry. In some cases, the Hotline calls lead to investigations by DOI. Hotline staff also provides informal dispute resolution services.

In FY2011, Enforcement received 161 Hotline calls and inquiries, and resolved 144 matters (including matters that remained open at the end of FY2010). The majority of these calls were requests for information that were successfully resolved through advice provided by DOI staff. In six instances staff informally assisted callers in resolving disputes, often with the assistance of subject matter experts from other Commission program offices. In FY2011, staff converted two Hotline calls to preliminary investigations. Every year, a significant fraction of the calls received relate to subjects outside of the Commission’s jurisdiction or contested matters pending before the Commission. DOI staff will advise those callers of where they may find the information they need, or direct them to the appropriate Commission docket.

35 See 18 C.F.R. § 1b.21 (2011).
DIVISION OF AUDITS

A. Overview

The Division of Audits (DA) within Enforcement operates and maintains the Commission’s audit program and administers the Commission’s accounting regulations.

DA conducts compliance, performance, and other types of audits and related activities to ensure that jurisdictional companies comply with Commission statutes, orders, rules, tariffs, and regulations. DA follows a rigorous audit process to promote and ensure compliance. During audit engagements, audit staff discusses and provides informal compliance guidance to audited entities.

Through the Chief Accountant, DA also administers the Commission’s accounting regulations to ensure compliance programs are robust. DA provides expert accounting advice to the electric, natural gas, and oil industries about compliance with the Commission’s accounting requirements. DA reviews and acts on proposed accounting submissions from jurisdictional companies involving a variety of accounting matters, including mergers and acquisitions, transmission rate incentives, regulatory assets, depreciation, formula rates, allowance for funds used during construction, and operating units or systems. DA also works with other Commission offices on various policy matters and advises the Commission on accounting issues affecting regulated industries. DA reviews exposure drafts and other publications of the U.S. Securities and Exchange Commission (SEC) and the Financial Accounting Standards Board (FASB) for items that may affect the Commission in its regulation of jurisdictional entities.

Transparency and outreach continue to be critical elements DA has used to educate and promote compliance with Commission rules and regulations. DA continues to promote audit transparency through public postings of audit commencement letters and final audit reports on the Commission’s eLibrary system, and information about the audit process on the Commission’s website. DA promotes accounting transparency by holding pre-filing and other periodic meetings with jurisdictional companies seeking to make filings with the Commission, by providing accounting guidance and publicly posting major accounting orders on the Commission’s website, and by staffing a phone line and email address for the public to make accounting inquiries. DA also participates in various formal speaking engagements, industry liaison meetings, discussions with audited entities and their outside counsel, and informal discussions of compliance matters with audited entities.

B. Significant Audit Matters

In FY2011, DA completed 72 audits and related activities. Of these, 56 were traditional, DA-directed audits of public utilities, natural gas pipelines, and storage companies. The remaining 16 audits were reliability oversight audits jointly conducted with the Office of Electric Reliability (OER). These oversight audits were undertaken to observe and provide feedback to the Regional Entities (REs) as they conduct audits of registered entities.

The 56 DA-directed audits consisted of nonfinancial and financial audits. The nonfinancial audits addressed compliance with requirements including provisions of an entity’s OATT,

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36 The Office of Enforcement audit process is described at www.ferc.gov/enforcement/audits/audit-process.pdf.

37 FERC accounting guidance, including a topic index, and accounting point-of-contact information is available at http://www.ferc.gov/legal/acct-matts.asp.
market-based rates (MBR) tariffs, electric quarterly reports, mergers and acquisitions, and pipeline postings. The financial audits addressed compliance of affiliated transactions with the Public Utility Holding Company Act of 2005 (PUHCA 2005), fuel cost recovery mechanisms, and reporting requirements of FERC Form Nos. 1 and 2. Several audits included both financial and nonfinancial areas of interest.

During FY2011, DA-directed audits resulted in 300 recommendations for corrective action and included $290,000 in refunds and the write-off of $95.8 million in regulatory assets for one company. Specifically, audit staff identified $177,000 in refunds resulting from misallocated costs between affiliates and $113,000 in refunds resulting from inappropriate accounting for lobbying costs. Additional refunds are likely because some companies are still in the process of determining refund amounts as a result of DA recommendations. The write-off of the $95.8 million in regulatory assets will preclude the company involved from seeking recovery of this amount in the future from ratepayers.

The reliability oversight audits provided the opportunity for OE and OER to participate in audits initiated and directed by the eight REs. During and at the conclusion of the oversight audits, OE and OER provide feedback to the REs’ audit teams concerning the audit process, techniques, and methods, as well as the technical rigor of the audit engagement.

DA continues to require that jurisdictional companies implement regulatory compliance plans, including comprehensive employee training, periodic self-auditing, and establishing and monitoring of processes, practices, and procedures. To assess whether jurisdictional companies and entities properly implement corrective action, DA staff often conducts a post-audit site visit to examine whether the subject of an audit has implemented DA’s audit recommendations. DA tracks and follows up on all audit recommendations to ensure that they are implemented.

1. **ITC Holdings Corporation**

At ITC Holdings, audit staff identified noncompliance with conditions established in the Commission’s December 3, 2007 order approving ITC Holdings’ acquisition of the transmission facilities of Interstate Power and Light Company (IPL). ITC Holdings did not obtain approval from its Board of Directors for dividend payments and equity infusions between ITC Holdings and ITC Midwest, as required by its own internal procedures. Also, ITC Holdings did not provide timely notification to the Commission when a shareholder or shareholder group had acquired five percent or more of its common stock. ITC Holdings has agreed to both these findings.

DA also had concerns with ITC Midwest’s determination to start including in its formula rate estimated tax benefits ($128 million) associated with goodwill related to the acquisition of IPL transmission facilities. In 2009 and 2010, ITC Midwest passed $18 million of the tax effect of amortized goodwill through its formula rate. This action was inconsistent with its application for authorization to purchase IPL’s transmission facilities and approval of proposed transmission service rates. ITC Holdings explicitly stated that it is not seeking recovery of any acquisition premium in rates, which the Commission reiterated in its order. DA concluded that ITC Midwest should not have included the tax benefits associated with goodwill in its formula rate and recommended accounting adjustments and refunds to ITC Midwest’s formula rate customers. ITC Holdings is contesting this audit finding and recommendations.

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38 *ITC Holdings Corp.*, 121 FERC ¶ 61,229 (2007).
39 *Id.* at P 110.
2. **Entergy Services, Inc.**

At Entergy, DA assessed Entergy’s compliance with the requirements of its Open Access Transmission Tariff (OATT) and practices related to Bulk-Power System planning and operations. DA identified seven areas of noncompliance and recommended thirty-two corrective actions. DA was concerned with Entergy’s reporting of Available Flowgate Capacity (AFC) errors, because Entergy experienced AFC-related errors during the course of the audit engagement. Additional concerns noted in the audit report include Entergy’s Weekly Procurement Process, use of secondary network transmission service, and transmission capacity reassignment.\(^{41}\)

3. **National Grid USA**

At National Grid, DA identified 12 areas of concern: (1) allocation of global information services costs for senior management personnel without an appropriate study; (2) improper allocation of merger-related costs to certain jurisdictional companies; (3) failure to properly allocate software license permit costs among affiliate companies; (4) improper accounting, allocation, and recovery through formula rates of certain costs; (5) inappropriate accounting and possible recovery of costs associated with compromise settlements resulting from discriminatory employment practices; (6) inability of National Grid’s accounting system to reconcile to certain FERC Form No. 60 accounts; (7) incorrect accounting classification of revenues for services rendered to non-associated companies; (8) improper use of clearing accounts; (9) deficiencies in FERC Form No. 60 notes to financial statements; (10) reporting of cost allocation information; (11) delinquent filings to the Commission; and (12) National Grid’s recovery of merger-related costs from its customers prior to achieving an equal amount of merger savings. National Grid refunded $177,000 to jurisdictional companies, and it is in the process of determining whether additional refunds are warranted for costs that may have been improperly recovered through its formula rate recovery mechanisms. DA staff coordinated this audit with the state commissions of Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

4. **ANR Pipeline Company**

At ANR, DA identified noncompliance with requirements related to the FERC Form No. 2 reporting, North American Energy Standards Board (NAESB) standards, and provisions of ANR’s tariff. DA identified six areas of noncompliance that resulted in 14 recommendations. Most significantly, DA recommended that ANR remove $95.8 million in environmental costs from its Other Regulatory Assets Account because ANR could not demonstrate that recovery of these costs was probable. DA also identified noncompliance related to accounting for cash-outs, reporting operational purchases and sales, FERC Form No. 2 filing requirements, NAESB standards, and the accuracy of its Index of Customers filings.\(^{42}\)

5. **Reliability Audits**

During FY2011, DA and the Office of Electric Reliability (OER) continued to conduct oversight audits of Regional Entities’ (REs’) compliance audits of owners, users, and operators of the Bulk-Power System. Specifically, DA and OER staff examined the audit resources, techniques, and technical rigor employed by the RE audit teams on compliance audits and spot checks for compliance with standards addressed in Order Nos. 693 and 706. The audit staff provided on-site guidance and recommendations during the review of evidence, the interviews of

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\(^{41}\) *Entergy Services, Inc.*, Docket No. PA10-1-000 (Oct. 29, 2010) (delegated letter order).

\(^{42}\) *ANR Pipeline Company*, Docket No. PA10-2-000, (Feb. 23, 2011) (delegated letter order).
subject matter experts, and the deliberations leading to the compliance determinations. In addition, DA staff made certain suggestions to NERC to improve the process, reach appropriate compliance determinations, and ensure consistency across regions. DA staff reviewed each RE audit team’s draft and provided formal feedback to each RE.

The insights that DA staff gained from its oversight of RA audits have also been used to facilitate Commission guidance to NERC. These efforts include:

- Periodic meetings between audit staff management and NERC managers
- Identification of the need for NERC to provide additional guidance on the appropriate interpretation of standards
- Development of appropriate application of audit techniques
- Participation at NERC and RE auditor training workshops

**Order No. 706 audits.** During FY2011, DA and OER participated in RE audits of owners, users, and operators of the Bulk-Power System pursuant to Order No. 706. These audits evaluate compliance with Critical Infrastructure Protection (CIP) Reliability Standards. Eight such audits were completed in FY2011:

- NPCC spot check of Niagara Mohawk Power
- MRO spot check of Minnesota Power
- WECC audit of Arizona Public Service
- SPP audit of Kansas City Power & Light

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• TRE audit of Bryan Texas Utilities
• FRCC audit of Tampa Electric Company
• SERC audit of Duke Energy Carolina

Order No. 693 audits. During FY2011, DA and the OER participated in RE audits of owners, users, and operators of the Bulk-Power System pursuant to Order No. 693.\textsuperscript{44} These audits evaluate compliance with Reliability Standards designed to ensure the reliable operation of the Bulk-Power System through requirements related to, among other areas, transmission planning and operation, vegetation management, and communications. Eight such audits were completed in FY2011:

• WECC audit of Imperial Irrigation District
• MRO audit of Northern States Power Company
• RFC audit of Detroit Edison Company
• FRCC audit of the City of Homestead (Florida)
• NPCC audit of New England Power Company
• SPP audit of Oklahoma Gas & Electric Company
• SERC audit of Duke Energy Carolinas
• TRE audit of Bryan Texas Utilities

6. Public Utility Holding Company Act and Affiliate Transactions

Ameren Corporation. At Ameren, audit staff evaluated compliance with Commission cross-subsidization restrictions on affiliate transactions; recordkeeping and reporting requirements for holding companies and service companies; preservation of records requirements; the USofA for centralized service companies; and FERC Form No. 60 Annual Report requirements. The audit identified 10 accounting and reporting deficiencies and recommended 18 corresponding corrective actions. To correct errors in accounting for lobbying costs and donations, Ameren effectively refunded $113,000 to its formula rate customers.

FirstEnergy Corporation. At FirstEnergy, audit staff evaluated compliance with Commission cross-subsidization restrictions on affiliate transactions; accounting, recordkeeping, and reporting requirements; the USofA for centralized service companies; preservation of records requirements; the FERC Form No. 60 Annual Report requirements; and cost allocation methods. Audit staff concluded that FirstEnergy did not submit FERC-61 filings for 13 affiliates for 2008.

The Toledo Edison Company. At Toledo Edison, a FirstEnergy affiliate, audit staff evaluated compliance with accounting regulations in the USofA; preservation of records requirements; and FERC Form Nos. 1 and 3-Q reporting regulations. Audit staff concluded that Toledo Edison did not report affiliate transactions with FirstEnergy Service Company in its 2009 FERC Form No. 1.\textsuperscript{45}

Pepco Holdings, Inc. At Pepco, audit staff evaluated compliance with the Commission’s cross-subsidization restrictions on affiliate transactions; accounting, recordkeeping, and reporting


\textsuperscript{45} FirstEnergy Corporation, Docket No. FA10-2-000 (Dec. 6, 2010) (delegated letter order); The Toledo Edison Company, Docket No. FA10-5-000 (Dec. 6, 2010) (delegated letter order).
requirements; preservation of records requirements for holding and service companies; USofA for centralized service companies; and FERC Form No. 60 Annual Report requirements. Audit staff identified seven areas of noncompliance, including incorrect accounting for charitable and political donations; incorrect pricing of affiliate transactions; reporting errors; failure to make FERC-61 filings; and untimely filed cash management plans.  

7. Natural Gas

Tennessee Gas Pipeline Company. At Tennessee Gas, audit staff evaluated compliance with nonconforming contract requirements; FERC Form No. 2 reporting requirements; NAESB standards; select reporting and accounting requirements in Order No. 581; and portions of the Company’s FERC gas tariff governing penalties, balancing, and tracking mechanisms. Audit staff identified seven issues, four of which were related to accounting for refunds of penalties, cash-outs, natural gas sales, and imbalances. Audit staff also found that more than half of a sample of 146 Tennessee Gas contracts were inconsistent with the form-of-service agreement in Tennessee Gas’ gas tariff. Audit staff also identified 55 NAESB posting errors and an inaccurate report of the number of miles of Tennessee Gas’s transmission line in its FERC Form No. 2.

Equitrans L.P. At Equitrans, audit staff evaluated compliance with NAESB standards; FERC Form No. 2 filing requirements; nonconforming contract requirements; and select reporting and accounting requirements in Order No. 581. Audit staff compiled 10 findings and 27 recommendations for corrective actions and identified several findings related to Order No. 581, including inappropriate accounting and reporting errors in its FERC Form No. 2. Audit staff also addressed issues of noncompliance with NAESB standards, posting and maintaining archives of interruptible transaction reports, and reporting errors in the Index of Customers.

8. Mergers and Acquisitions

GDF SUEZ Energy North America, Inc. At GDF SUEZ Energy, audit staff evaluated compliance with conditions established in the Commission’s November 20, 2008 order authorizing the acquisition of a 100 percent ownership interest in FirstLight Enterprises. As a result of the transaction, GDF SUEZ Energy acquired ownership of 13 hydroelectric generating facilities, a coal-fired plant, a kerosene-fired facility, and a gas-fired peaking plant under development. Collectively, these facilities have approximately 1,538 MW of capacity in the ISO New England market area. Audit staff concluded that GDF SUEZ Energy did not submit change-of-status filings for two entities with MBR authority, North Jersey Energy Associates and Northeast Energy Associates, LP, and filed two untimely change-of-status filings for subsidiaries Astoria Energy, LLC, and Green Mountain Power Corp.

LS Power Development, LLC and Luminus Wealth Management LLC. At LS Power and Luminus, audit staff evaluated compliance with conditions established in the Commission’s December 4, 2008 order authorizing the acquisition of up to 40 percent of the common stock of
Calpine Corporation.\textsuperscript{52} Transaction conditions included a requirement to file with the Commission any filings the Companies submit to the SEC regarding Calpine. Audit staff found that LS Power and Luminus filed a Schedule 13G report with the SEC on March 26, 2009, but failed to file the report with the Commission until December 17, 2010.\textsuperscript{53}

\textbf{9. Fuel Adjustment Clause}

\textit{Xcel Energy, Inc. (NSP-Minnesota and NSP-Wisconsin).} At Xcel, audit staff evaluated compliance by Xcel’s subsidiaries, Northern States Power-Minnesota (NSP-Minnesota) and Northern States Power-Wisconsin (NSP-Wisconsin), with their Commission-approved tariff, Commission accounting regulations for the calculation of the fuel adjustment clause (FAC), and Commission accounting regulations under the USofA. Audit staff found that NSP-Minnesota failed to file cost-based agreements, cancel portions of expired agreements on file, and update Minnesota Public Utility Commission-approved FAC rates. More significantly, audit staff identified an accounting misclassification of nuclear fuel-related costs at NSP-Wisconsin, which resulted in a refund of the wholesale portion of the $200,000 recovered through its FAC.\textsuperscript{54}

\textbf{10. Market-Based Rate Authority and Electric Quarterly Reports}

\textit{Credit Suisse Energy LLC.} At Credit Suisse, audit staff evaluated compliance with the requirements of its MBR authorization and Electric Quarterly Report (EQR) filing and reporting requirements. Audit staff determined that Credit Suisse incorrectly listed contract commencement and execution dates for several contracts and used a single, unique identifier for multiple contracts.\textsuperscript{55}

\textbf{D. Significant Accounting Matters}

The Commission requires that electric utilities, natural gas companies, centralized service companies, and oil pipelines subject to its jurisdiction keep financial and related records in accordance with the rules and regulations contained in the applicable Uniform System of Accounts (USofA) to aid in the establishment and monitoring of just and reasonable rates. DA develops and maintains uniform regulations and requirements for accounting, financial reporting, and preservation of records. In addition, DA advises the Commission on current accounting issues affecting jurisdictional industries and provides its accounting expertise to the Commission’s program offices in the development of Commission policies and proposed rulemakings, and advises the Commission on the disposition of electric and natural gas rate, merger, and natural gas certificate filings. In FY2011, DA reviewed approximately 190 filings to ensure that accounting was consistent with the applicable USofA.

DA also provides accounting advice to entities in the electric, gas, and oil industries subject to the Commission’s accounting requirements and participates in liaison meetings with these entities to stay abreast of current and emerging accounting and financial reporting issues. DA monitors and participates in projects initiated by FASB, the SEC, and the International Accounting Standards Board for issues that may impact the Commission or its jurisdictional entities.

\textsuperscript{52} \textit{LS Power Development, LLC, 125 FERC ¶ 61,267 (2008).}

\textsuperscript{53} \textit{LS Power Development, LLC and Luminus Wealth Management LLC, Docket No. PA11-12-000 (Aug. 8, 2011) (delegated letter order).}

\textsuperscript{54} \textit{Xcel Energy, Inc., Docket No. FA10-8-000 (Apr. 22, 2011) (delegated letter order).}

\textsuperscript{55} \textit{Credit Suisse Energy LLC, Docket No. PA10-38-000 (Feb. 24, 2011) (delegated letter order).}
1. Requests for Approval of the Chief Accountant

In FY2011, the Chief Accountant responded to 43 requests for approval submitted by jurisdictional companies. These requests spanned the breadth of Commission accounting and reporting requirements as well as regulations for electric, natural gas, oil, and centralized service companies. Such requests included statutorily required filings, issues of first impression, items of questionable interpretation, and implementation of new or evolving generally accepted accounting principles. Many of these filings included accounting requests related to Commission-approved mergers, transfers of jurisdictional assets, prior period adjustments, capitalization of transformer fluid retrofills, and depreciation.

2. Certificate Proceedings

In FY2011, the Chief Accountant reviewed 34 natural gas pipeline certificate applications. Pursuant to section 7 of the Natural Gas Act (NGA), natural gas pipelines must file for a certificate of public convenience and necessity from the Commission to construct or abandon natural gas facilities, and to initiate or abandon natural gas service. A certificate application contains, in part, cost and accounting information related to the construction and operation of natural gas facilities used to determine initial rates charged to customers.

Working with the Office of Energy Projects (OEP), Office of the General Counsel (OGC) and Office of Energy Market Regulation (OEMR), DA reviews all items used to determine initial rates, including operation and maintenance expenses, depreciation, depletion, amortization, taxes, and return on investment to assure the Commission will set “just and reasonable” rates that are in the public interest. In its review of these items, DA ensures the applicant follows the Commission’s accounting rules and regulations. DA frequently addresses accounting issues related to Allowance for Funds Used During Construction (AFUDC) calculations, contributions in aid of construction, regulatory assets and liabilities, capacity leases, and sale and lease-back transactions.

3. Merger and Acquisition Proceedings

During FY2011, DA reviewed 72 merger and acquisition filings. DA reviews all merger and acquisition filings made under section 203 of the Federal Power Act (FPA) to ensure that proposed accounting for business combinations conforms to the Commission’s regulations. DA works with OGC and OEMR to provide critical accounting direction to ensure accounting does not result in unjust and unreasonable rates. For example, DA provides direction on the proper accounting for merger transaction costs, acquisition adjustments, and goodwill; ensures that filers maintain appropriate original cost records of assets; and addresses emerging accounting issues (e.g., fair value accounting and reporting of long-term debt) for cost-of-service rate-regulated entities. Once the Commission approves a business combination, DA reviews and approves filings made by applicants under the Commission’s accounting regulations to ensure proper implementation of all accounting directions in the order.

4. Rate Proceedings

During FY2011, DA participated in 41 rate proceedings by providing accounting insight and support to OEMR in reviewing electric, natural gas, and oil pipeline rate filings before the Commission. These filings raised issues including, inclusion of pre-commercial costs, construction costs, carrying charges, and large acquisition premiums in the development of rates. DA also advises the Commission on how new accounting pronouncements issued by FASB and others affect the ratemaking process. DA’s input on these and other matters ensures uniform
accounting and financial reporting for new and emerging issues, and aids in the development of just and reasonable rates.

5. **International Financial Reporting Standards**

DA continues to actively participate in activities related to the potential incorporation of International Financial Reporting Standards (IFRS) into the financial reporting system of publicly traded companies in the United States. IFRS is a body of global accounting standards established by the International Accounting Standards Board used by the vast majority of industrialized countries for financial reporting. The potential incorporation of IFRS in U.S. financial reporting is very important to the Commission and its regulated entities because the Commission’s accounting regulations are based on U.S. Generally Accepted Accounting Principles (GAAP), and many accounting principles in IFRS differ from those in U.S. GAAP. The most significant divergence from U.S. GAAP involves the lack of an IFRS accounting standard for the economic effects of regulation, principally, regulatory assets and liabilities.

The SEC has the ultimate responsibility for deciding whether, when, and how to adopt IFRS for financial reporting in the United States. The SEC has promoted a single set of high quality, globally accepted accounting standards and begun to work towards establishing a timeline for a possible incorporation of IFRS into the U.S. financial reporting system. The SEC directed its staff to develop and execute a Work Plan regarding the potential adoption of IFRS for U.S. public companies. The Work Plan is intended to inform the SEC’s determination in 2011 about whether to incorporate IFRS into the U.S. financial reporting system.

DA is involved in ongoing discussions with SEC staff regarding the impacts of adopting IFRS on the Commission’s regulations and its regulated entities. DA has stressed the importance of an international accounting standard that permits reporting regulatory assets and liabilities for cost-based regulated entities. In March 2011, DA submitted a memorandum to SEC staff addressing implications of the major differences between U.S. GAAP and IFRS. The memorandum also explained that an international accounting standard permitting regulatory assets and liabilities in IFRS-based financial statements would ease the burdens and costs associated with adopting IFRS and ease the transition, should it occur.

In July 2011, the Chief Accountant participated in an SEC staff-sponsored roundtable to discuss the benefits and challenges of incorporating IFRS into the U.S. financial reporting system. During panel discussions, the Chief Accountant highlighted the regulatory implications of the adoption of IFRS and focused on the need for an accounting standard under IFRS to recognize the economic effects of regulation.

In July 2011, the Chief Accountant also submitted a comment letter to an SEC staff paper exploring a possible method of incorporating IFRS into the U.S. financial reporting system. Under the proposal, U.S. GAAP would be retained, but the FASB would incorporate IFRS into U.S. GAAP over a defined timeframe, with a focus on minimizing transition costs, pursuant to an established endorsement protocol. This endorsement protocol would provide the SEC and the FASB with the ability to modify or supplement IFRS when in the public interest and necessary.

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56 U.S. GAAP includes various standards, conventions, and rules for recording and summarizing transactions and in the preparation of financial statements. GAAP was first set forth by the Accounting Principles Board of the American Institute of Certified Public Accountants, which was superseded by the Financial Accounting Standards Board in 1973. GAAP has been the standard for accounting in the United States for more than half a century.


for the protection of investors. The Chief Accountant’s comment letter supported this approach and stated that it would provide regulators and rate-regulated entities time to understand and reconcile differences between U.S. GAAP and IFRS, and prevent unintended effects on rates. The Chief Accountant also stated that the proposed approach provides regulators, rate-regulated entities, the SEC, the FASB, and others with the much-needed platform to continue to press for an international standard that recognizes the economic effects of energy industry regulations.

6. Capitalization of Allowance for Funds Used During Construction (AFUDC)

On February 16, 2011, the Chief Accountant revised Accounting Release No. 5, *Capitalization of Allowance for Funds Used During Construction*, to be consistent with the Commission’s new policy on AFUDC capitalization. The revised accounting release was issued in Docket No. AI11-1-000 and explains that AFUDC may be capitalized on construction projects when the company has incurred capital expenses for the project and activities necessary to get the project ready are progressing. This new policy promotes infrastructure development by allowing jurisdictional entities to recover all money invested in the construction of interstate natural gas or electric facilities. Under the former policy, a natural gas pipeline could not capitalize AFUDC until after a pipeline filed an application with the Commission for a certificate of public convenience and necessity. Since many natural gas pipelines now engage in activities that require them to incur significant project-related expenditures while participating in pre-filing activities with the Commission and stakeholders but before filing a certificate application, it was necessary to revise DA’s accounting policy to reflect changes in the industry.

E. Division of Audits Compliance Program

DA continues its long-standing history of promoting compliance through transparency and outreach. DA publicly posts audit commencement letters and audit reports on the Commission’s eLibrary system, providing the public and jurisdictional entities with information about compliance areas that the Commission is emphasizing. In addition, DA has provided greater detail in its reports to enable entities to be better informed and prepared for similar audits of their operations.

DA also engaged in other outreach efforts to enable audit and accounting staff to provide compliance guidance to the public and jurisdictional companies. DA continues to respond to questions received directly from jurisdictional entities, industry stakeholders, and consultants, as well as questions arising through the Commission’s Compliance Help Desk, Office of External Affairs, Enforcement Hotline, or other offices within the Commission. During FY2011, DA responded to more than 120 such questions, providing informal advice on various aspects of Commission accounting, financial reporting, and record retention regulations.

DA also oversees accounting liaison activities with industry groups, such as the Edison Electric Institute, American Gas Association, Interstate Natural Gas Association of America, and the Association of Oil Pipelines. In meetings with industry groups and jurisdictional entities, and by responding to inquiries, DA staff helps provide regulatory certainty on accounting and reporting matters, thereby reducing regulatory risk to jurisdictional entities.

Collectively, transparency and outreach provide jurisdictional entities the information and tools needed for developing and enforcing their own compliance programs. This transparency takes the form of DA’s publicly available audit commencement letters, audit reports, audit process, detailed scope and methodology, frequently asked questions on the Commission website, and feedback from reliability observation audits.
In FY2011, DA continued to support the Commission’s goal of promoting internal compliance programs at jurisdictional entities. DA’s scrutiny of compliance programs during each of its audits has enabled Enforcement personnel to better evaluate the state of compliance in regulated industries. DA uses this understanding in its review of internal controls and compliance programs, and has provided feedback to companies regarding compliance shortcomings. DA also has shared the “best practices” of compliance programs, including the use of compliance help lines, annual certifications that managers have complied with compliance regulations, and the use of external consultants and auditors to evaluate compliance effectiveness.

DA has also observed innovative approaches to emphasizing compliance including a company-sponsored art competition among employees’ children with ethics as a theme culminating in an ethics-themed calendar featuring the children’s art and the designation of an “Ethics Week” where activities highlight compliance and ethics in the workplace. Audit staff has continued to see evidence of robust compliance programs in which companies have proactively and quickly implemented corrective actions, often before audit reports have been issued, or have even enhanced their compliance with Commission regulations before audit commencement. In some cases, companies brought in outside consultants to preemptively correct deficiencies. In addition, several companies have exceeded the requirements of the audit report recommendations in an attempt to craft a robust compliance program.
DIVISION OF ENERGY MARKET OVERSIGHT

A. Overview

The Division of Energy Market Oversight (Market Oversight) within the Office of Enforcement is responsible for monitoring and overseeing the nation’s wholesale natural gas and electric power markets. Market Oversight continuously examines and monitors the structure and operation of these markets to identify market anomalies, flawed or inadequate market rules, tariff and rule violations, and other illicit behavior. Staff performs daily oversight of the nation’s wholesale natural gas and electric markets and related fuel and financial markets, identifying market events and trends. Market Oversight analyzes and reports its observations to the Commission and, as appropriate, the public, and proposes policy options and regulatory strategies for addressing the issues identified. Staff assesses factors that relate to the competitiveness, fairness, and efficiency of wholesale energy markets, applies quantitative analysis to screen markets for anomalous behavior, and provides technical expertise to investigations of market participant behavior. Market Oversight administers, analyzes, and ensures compliance with the filing requirements for Electric Quarterly Reports (EQR) and various Commission financial forms. Market Oversight advises the Commission on the efficacy of its current regulatory policies in light of evolving energy markets and ensures the Commission has the information needed to effectively administer and monitor those markets.

B. Market Monitoring

Market Oversight staff continuously examines the structure, operation, and interaction of natural gas and electric markets. On an ongoing basis, Market Oversight staff accesses and surveils data from a variety of sources to review market fundamentals and emerging trends; staff holds daily meetings in its Market Monitoring Center to facilitate this process.

As developments warrant, Market Oversight staff initiates projects designed to evaluate market trends, to assess participant behavior, and to identify potential manipulation or fraud. During FY2011, such projects included analyses of bidweek natural gas prices and assessments of renewable portfolio standards. Staff may also present analyses at Commission meetings. During FY2011, such analyses included the following.

1. 2010 State of the Markets Report, April 21, 2011

   Each year, Market Oversight presents a State of the Markets report assessing the significant events of the past year. In 2010, staff observed that natural gas supply and demand set new records, while natural gas prices remained moderate through most of the year. The markets also reflected regional changes in natural gas production and new infrastructure changing utilization along some key pipeline routes. There was also increased demand in the power sector, but a decrease in the amount of power generation capacity added compared to prior years. Specifically, the addition of wind and natural gas-fired generation dropped off in 2010.59

2. Seasonal Market Assessments

   Market Oversight prepares seasonal assessments that are presented at Commission meetings and made available to the public on the Commission website. In FY2011, Market Oversight staff presented the following assessments:

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59 This presentation is available at http://www.ferc.gov/market-oversight/st-mkt-ovr/som-rpt-2010.pdf.
2010/2011 Winter Energy Market Assessment, October 21, 2010. Market Oversight staff presented the outlook for natural gas markets and noted that production had reached levels not seen in more than 35 years, that gas prices were moderate, and that storage was 90% full going into winter. Despite record demand for gas by power generators, new supply and infrastructure, combined with forecasts for a relatively mild winter, were expected to keep prices moderate. Staff also noted increased market transparency and efficiency as a result of the greater availability of market information following two transparency Orders, Nos. 704 and 720.60

Summer 2011 Energy Market and Reliability Assessment, May 19, 2011. This assessment reviewed the outlook for the electric market for the coming summer. The Office of Electric Reliability contributed a summary of the North American Electric Reliability Corporation’s (NERC’s) market review, which raised little concern for reliability for the coming season. On the market side, staff highlighted the abundant hydro conditions contributing to lower prices in Pacific Northwest and adjacent markets.61

3. 2009 Analysis of Physical Gas Market Transactions, December 16, 2010

Market Oversight staff presented the Office of Enforcement’s analysis of physical gas market transactions for 2009, using FERC Form 552 submissions. This information helps Market Oversight and the public understand the market’s level of reliance on published price indices. The data collected for 2009 showed that the respondents who reported fixed price transactions to index publishers accounted for just 11% to 13% of the total gas volumes reported by Form 552 respondents. Thus, the data indicated that index publishers were deriving their index prices from relatively small gas volumes, which may be of some concern as these indices may set the price of physical and financial gas contracts.

Form 552 submissions provide the approximate size of the wholesale market for physical gas in the U.S. Almost 56 Tcf of physical gas market transactions occurred in 2009, 2.5 times the volume of gas produced. Form 552 indicates the largest participants and details common transactions by buyers and sellers, allowing insight into the types of participants that contribute to and rely on those indices for pricing information. In 2009, the top ten gas sellers accounted for 33% of total reported volumes; monthly and daily index sales accounted for the majority of total reported volumes. The addition of this information to the market advances the goal of price transparency and provides a better understanding of the formation of price indexes. However, since the data are aggregated nationally, the actual leverage of index volumes on fixed price volumes by trading hub is not captured by the data.62

4. Reversal by United States Court of Appeals of Order No. 720 Rule on Natural Gas Market Transparency

On October 24, 2011, the U.S. Court of Appeals for the Fifth Circuit reversed an initiative by the Commission to improve transparency and monitoring of the natural gas market by vacating FERC’s Order No. 720 rulemaking on information reporting by intrastate pipelines. In Order No. 720, the Commission issued a final rule that required intrastate natural gas pipelines that deliver more than 50 million MMBtu per year to post scheduled flow information and to post information for each receipt and delivery point with a design capacity greater than 15,000 MMBtu per day. The data provided as a result of Order No. 720 recently helped Enforcement quickly assess many of the factors leading to the power outages in the southwestern United

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60 This presentation is available at http://www.ferc.gov/market-oversight/mkt-views/2010/10-21-10.pdf.
States after the gas well freeze-offs in February 2011. In *Texas Pipeline Association, et al. v. FERC*, No. 10-60066 (5th Cir. Oct. 24, 2011), however, the court held that the Commission lacks authority over purely intrastate pipelines and therefore cannot direct those pipelines to post scheduled flow information. Although the court did not question the merits of the Commission’s policy judgment on the importance of facilitating price transparency in the interstate market, the effect of the decision is to diminish significantly transparency in the interstate natural gas market.

**C. Technical Analysis and Investigation Support**

Market Oversight staff examines the structure, operation, and interaction of natural gas and electric markets. Staff performs technical analyses using available data that includes hourly prices at RTO nodes and hubs, pipeline nominations, electric and gas prices, open interest and volumes of physical and financial products traded on public exchanges, and data reported in compliance with the Commission’s filing requirements. On an ongoing basis, staff uses these and other data to appraise the markets, to assess the economics of market behavior, and to identify possible anomalies. Market Oversight also evaluates behavior of specific market participants, including detailed portfolio examinations and market event analysis.

Market Oversight continues to develop and improve automated surveillance tools to evaluate market activity efficiently and to identify possible illicit behavior. For example, in FY2011, staff applied screens to identify uneconomic trading of electric products traded on IntercontinentalExchange and developed programs to evaluate index divergence in natural gas markets.

Market Oversight works with Investigations throughout the lifecycle of market manipulation investigations, providing detailed portfolio analyses and subject matter expertise. Through the re-creation of positions and trading activities, staff reviews the interaction between physical and financial products within corporate portfolios to uncover improper uses of jurisdictional markets. Market Oversight serves a key role during investigations, providing critical market context, specific trading portfolio review, and subject matter support in the areas of trading and markets.

**D. Outreach and Communication**

Market Oversight makes available to the public its analyses by posting reports on the Market Oversight website and in monthly snapshot presentations. Staff also briefs visiting industry participants, state and federal officials, and foreign delegations.

**1. Website**

Market Oversight publishes data and analyses on the Market Oversight website at [http://www.ferc.gov/market-oversight/market-oversight.asp](http://www.ferc.gov/market-oversight/market-oversight.asp). The site is organized into pages for (a) national overviews of electricity and natural gas markets, and (b) ten regional electricity and five regional natural gas markets. The regional market pages provide charts, tables, and maps displaying market characteristics and outcomes. The Market Oversight website also has information on several other relevant markets, including liquefied natural gas (LNG), coal, and emissions markets.
2. Snapshot Calls

Market Oversight holds monthly conference calls with representatives of state agencies in four main regions of the country: Northeast, Midwest and SPP, Southeast, and West. These calls provide a current “snapshot” of energy markets.

Regional Snapshot Reports are compiled monthly and serve as the basis for discussion on the calls. The reports include data on electricity, natural gas, LNG, weather, and other market-affecting developments. In addition, the Snapshot Report occasionally incorporates reports on special topics. In FY2011, special reports included:

- Summary of Findings in the February Southwest Outages and Curtailment Report;
- Review of the Five Year Oil Index Update;
- Notes on Demand Response and Advanced Metering; and
- Highlights from the Natural Gas Capacity Release Report.


3. Domestic and Foreign Delegation Briefings

Market Oversight periodically hosts visitors, including foreign and domestic delegations of regulators and industry participants. In FY2011, Market Oversight conducted a number of briefings in the Market Monitoring Center (MMC) including:

- Thirteen domestic briefings. These included briefings to one Congressional delegation, five groups of federal or state agency officials, four industry groups, and five college or law school groups.
- Seven presentations to foreign delegations. These included delegations from India, China, Korea, Japan, Russia, and South Africa as well as a delegation from the International Gas Union. Each briefing was tailored to the particular interests of the visiting delegation.

Market Oversight briefs new Commission employees, summer interns, and special visitors on how Market Oversight maintains constant monitoring of market fluctuations and manages the Market Monitoring Center resources and applicable data to support oversight functions.

E. Forms Administration and Filing Compliance

Market Oversight staff administers and ensures compliance with the Commission’s filing requirements. The Commission requires companies subject to its jurisdiction to submit annual and quarterly reports regarding jurisdictional sales, financial statements, and operational data. The Commission uses these reports for analyses, including evaluation of whether existing rates continue to be just and reasonable. Industry participants also use these reports for a variety of business purposes. Accordingly, accurate reporting is a critical aspect of monitoring the markets. During FY2011, approximately 3,000 respondents submitted FERC forms as shown below:
<table>
<thead>
<tr>
<th>Form</th>
<th>Filing Frequency</th>
<th>Total Respondents in Last Collection</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form No. 1</td>
<td>Annually</td>
<td>209</td>
</tr>
<tr>
<td>Form No. 1-F</td>
<td>Annually</td>
<td>5</td>
</tr>
<tr>
<td>Form No. 2</td>
<td>Annually</td>
<td>86</td>
</tr>
<tr>
<td>Form No. 2A</td>
<td>Annually</td>
<td>57</td>
</tr>
<tr>
<td>Form No. 6</td>
<td>Annually</td>
<td>149</td>
</tr>
<tr>
<td>Form No. 60</td>
<td>Annually</td>
<td>35</td>
</tr>
<tr>
<td>FERC-61</td>
<td>Annually</td>
<td>6</td>
</tr>
<tr>
<td>Form No. 552</td>
<td>Annually</td>
<td>691</td>
</tr>
<tr>
<td>FERC-730</td>
<td>Annually</td>
<td>34</td>
</tr>
<tr>
<td>Form No. 3-Q major Electric</td>
<td>Quarterly</td>
<td>202</td>
</tr>
<tr>
<td>Form No. 3-Q non-major Electric</td>
<td>Quarterly</td>
<td>5</td>
</tr>
<tr>
<td>Form No. 3-Q major Gas</td>
<td>Quarterly</td>
<td>88</td>
</tr>
<tr>
<td>Form No. 3-Q non-major Gas</td>
<td>Quarterly</td>
<td>43</td>
</tr>
<tr>
<td>Form No. 6Q</td>
<td>Quarterly</td>
<td>144</td>
</tr>
<tr>
<td>Electric Quarterly Report (FERC-516)</td>
<td>Quarterly</td>
<td>1,523</td>
</tr>
<tr>
<td>Form No. 549D</td>
<td>Quarterly</td>
<td>108</td>
</tr>
</tbody>
</table>

Market Oversight performs a series of data validation checks for the various FERC forms to ensure compliance with filing requirements and to improve the accuracy and quality of the

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63 Form No. 1 is a comprehensive financial and operating report submitted for electric rate regulation and financial audits. The Form No. 1-F is a comprehensive financial and operating Report submitted by Non-major Electric Utilities and Licensees. Non-major is defined as having total annual sales of 10,000 megawatt-hours or more in the previous calendar year and not classified as Major.

64 Form No. 2 is a compilation of financial and operational information from major interstate natural gas pipelines subject to the jurisdiction of the FERC. “Major” is defined as having combined gas transported or stored for a fee that exceeds 50 million dekatherms. Form No. 2A is an abbreviated Form No. 2 filed by non-major interstate natural gas pipelines subject to the jurisdiction of the Commission. “Non-major” is defined as having total gas sales or volume transactions exceeding 200,000 dekatherms. Form No. 2A respondents must provide CPA Certification by an independent certified public accountant.

65 Form No. 6 is filed by oil pipeline carriers with annual jurisdictional operating revenues of $500,000 or more. Oil pipeline carriers with revenues more than $350,000 but less than $500,000 must file pages 1, 301, and 700; oil pipeline carriers with revenues less than $350,000 must file page 1 and page 700. Oil pipeline carriers submitting FERC Form No. 6 (annual jurisdictional operating revenues of $500,000 or more) must submit FERC Form No. 6-Q.

66 Form No. 60 contains financial information from centralized service companies subject to FERC jurisdiction.

67 FERC-61 is a filing requirement for service companies in holding company systems (including special purpose companies) that do not have to file FERC Form No. 60.

68 Form No. 552 provides information on natural gas transactions. Market participants must fill out the form annually if (1) their reportable natural gas sales were greater than 2.2 million MMBtu in the reporting year; or (2) their reportable natural gas purchases were greater than 2.2 million MMBtu in the reporting year.

69 FERC-730 is used by the Commission to determine the effectiveness of its rules and to provide it with an accurate assessment of the state of transmission investment by public utilities. This annual report includes projections, information that details the level and status of transmission investment, and the reason for delay, if any. Public utilities that have been granted incentive based rate treatment for specific transmission projects under provisions of 18 CFR § 35.35 must file FERC-730. The report must conform to the format prescribed in Order No. 679, Appendix A. Filers are strongly encouraged to submit the FERC-730 electronically via eFiling.

70 Form No. 3-Q is a comprehensive quarterly financial and operating report that supplements Annual Report Forms No. 1 and No. 2 and is submitted for all “Major” and “Non-Major” Electric Utilities, Licensees, and Natural Gas Companies.

71 All public utilities are required to electronically file Electric Quarterly Reports summarizing the contractual terms and conditions in their agreements for all jurisdictional services (including market-based power sales, cost-based power sales, and transmission service) and transaction information for short-term and long-term market-based power sales and cost-based power sales during the most recent calendar quarter.

72 Form No. 549D collects quarterly contractual information by shipper from Section 311 and Hinshaw Pipeline companies on a quarterly basis. Each intrastate pipeline company providing interstate services pursuant to section 311 of the NGPA or Hinshaw pipeline company that provides interstate services pursuant to a blanket certificate issued under § 284.224 of the Commission’s regulations must file a quarterly report with the Commission and the appropriate state regulatory agency.
submissions. During FY2011, Market Oversight contacted filers regarding issues with their submittals. The majority of issues were resolved, and, as appropriate, filings were resubmitted to address concerns. When a company fails to file as required and cannot be contacted, the Commission must take action to address noncompliance.

F. Agenda Items and Rulemakings

Market Oversight advises the Commission on the efficacy of its current regulatory policies in light of evolving energy markets and ensures the Commission has the information needed to administer and monitor the markets effectively. During FY2011, Market Oversight staff continued to support Commission efforts to increase electric market transparency under section 220 of the Federal Power Act (FPA). Market Oversight continuously reviews the monitoring program to ensure that it is comprehensive and systematic, and also reviews reporting requirements to ensure that appropriate and accurate information is collected. Market Oversight seeks to enhance effective market surveillance and analysis to prevent both the exercise of market power and market manipulation while balancing the regulatory burden on market participants. As such, Market Oversight initiated, or provided significant support for, the following.

1. Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines - Order Nos. 710-B and 710-C

   On January 20, 2011, the Commission issued a Final Rule revising its financial forms, statements, and reports for natural gas companies, contained in FERC Form Nos. 2, 2-A, and 3-Q, to include functionalized fuel data as well as amount of fuel waived, discounted, or reduced as part of a negotiated rate agreement. The revisions are designed to enhance the forms’ usefulness by providing greater fuel data transparency. On August 16, 2011 in Order No. 710-C, the Commission generally denied rehearing and reaffirmed the findings made in Order No. 710-B. In that denial, however, the Commission also revised the burden estimate to more accurately account for initial start-up costs, and granted additional time to comply.

2. Electricity Market Transparency Rulemaking - Docket No. RM10-12

   On April 21, 2011, the Commission issued a Notice of Proposed Rulemaking (NOPR) to facilitate price transparency in wholesale electricity markets under FPA section 220 by requiring certain market participants excluded from the Commission’s FPA section 205 jurisdiction (i.e., non-public utilities) to file Electric Quarterly Reports (EQRs). The proposal would give FERC and the public a more complete picture of prices in the wholesale electricity markets, thus increasing price transparency and improving the Commission’s ability to monitor wholesale electricity markets for market power and manipulation. Currently, public utilities must file EQRs summarizing contractual terms and conditions in their agreements for cost-based and market-based rate sales and transmission capacity reassignments. This NOPR would extend those requirements to non-public utilities with annual wholesale sales of more than 4

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million megawatt hours (MWh) and to non-public utility balancing authorities with 1 million MWh or more in annual wholesale sales. In addition to proposing that these non-public utilities file EQRs, the NOPR would refine the reporting requirements by directing all filers to report the following new information items: the transaction date and time; type of rate; indication of whether the transaction was reported to an index publisher; identity of any broker or exchange used for a sales transaction; and electronic tag ID data.

3. Availability of E-Tag Information to Commission Staff - Docket No. RM11-12

On April 21, 2011, the Commission issued a proposal requiring the North American Electric Reliability Corporation (NERC) to provide electronic tagging data (e-tags). E-tag data is used to schedule the transmission of electric power in wholesale markets. NERC collects e-tag data in near real-time to enable regional reliability coordinators to identify transactions that need to be curtailed to relieve overload. The Commission seeks to gain access to this information to strengthen market monitoring and help prevent manipulation, and seeks this information from NERC instead of market participants to avoid requiring market participants to submit the same data to both NERC and the Commission.

4. Storage Reporting Requirements of Interstate and Intrastate Natural Gas Companies - Docket No. RM11-4

On September 15, 2011, the Commission released a NOPR to solicit comments on the potential retirement of semi-annual storage reports for Interstate and Intrastate Natural Gas Pipelines required by 18 C.F.R. section 284.13(e) and 18 C.F.R. section 284.126(c), respectively. These reports now proposed for elimination are largely duplicative of other reporting requirements, including the new Form 549D for Intrastate Natural Gas Pipelines and the existing Form 549B Index of Customers.

5. Ongoing Electronic Delivery of Data from RTOs and ISOs - Docket No. RM11-17

Market Oversight staff also supported Commission efforts to require that regional transmission organizations (RTOs) and independent system operators (ISOs) electronically deliver to the Commission, on an ongoing basis, data related to the markets that they administer. Such data will facilitate the development and evaluation of policies and regulations, as well as enhance Commission efforts to detect market power abuse, market manipulation, and ineffective market rules. On October 20, 2011, the Commission issued a NOPR on the matter; comments are due December 27, 2011.
CONCLUSION

The information in this Report is provided to promote transparency and to encourage entities subject to Commission requirements to develop strong internal compliance programs. As discussed in this Report, Enforcement promotes compliance with the Commission’s statutes, orders, rules, and regulations by investigating a wide variety of matters, auditing regulated entities for both compliance and performance issues, and actively overseeing the gas and electric markets to assist the Commission in ensuring reliable, efficient, and sustainable energy for consumers. The Division of Investigations will continue to focus its efforts on keeping markets transparent and competitive and helping to ensure the reliability of the Bulk-Power System. The Division of Audits will continue to work closely with entities to improve compliance, while Market Oversight examines and monitors the structure and operation of natural gas and electric markets.
APPENDIX B: FY2011 CIVIL PENALTY ENFORCEMENT ACTIONS

<table>
<thead>
<tr>
<th>SUBJECT OF INVESTIGATION ORDER AND DATE</th>
<th>TOTAL PAYMENT</th>
<th>EXPLANATION OF PAYMENTS AND COMPLIANCE PLANS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grand River Dam Authority, 136 FERC ¶ 61,132 (August 29, 2011)</td>
<td>$350,000 Civil Penalty ($175,000 to each FERC and NERC) $2,000,000 Mitigation and Compliance Enhancement Measures</td>
<td>Civil penalty, mitigation and compliance enhancement measures and compliance monitoring resulting from violations of fifty-two requirements of nineteen Reliability Standards (R5, R6, R10, R11 and R19 of TOP-002-2a; R1, R2 and R4 of TOP-004-2; R2 and R4 of TOP-008-1; R16.1 of TOP-002-2a; R6 of TOP-006-2; R1, R2 and R5 of COM-001-1.1; R1.1 through R1.8 of EOP-008-0; R3 of EOP-004-1; R1 of FAC-008-1; R1 of FAC-009-1; R1, R2 and R3 of FAC-001-0; R1, R2 and R3 of the TPL-series; R1 and R4 of PRC-001-1; R1 of PRC-004-1; R2.2 of PRC-001-1; Requirements R1, R2.1 and R2.2 of PRC-005-1; R1 of PRC-018-1; R1 of PER-002-0; R3.4 of PER-002-0).</td>
</tr>
<tr>
<td>Black Hills Power, Inc., 136 FERC ¶ 61,088 (August 5, 2011)</td>
<td>$200,000 Civil Penalty</td>
<td>Civil penalty and compliance monitoring resulting from violations of 18 C.F.R. § 37.6(b) (Open Access Same Time Information Systems) and 18 C.F.R. § 35.39(f) (Affiliate Restrictions).</td>
</tr>
</tbody>
</table>

79 A list of all EPAct 2005 civil penalty orders is available at http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp.
<table>
<thead>
<tr>
<th>SUBJECT OF INVESTIGATION ORDER AND DATE</th>
<th>TOTAL PAYMENT</th>
<th>EXPLANATION OF PAYMENTS AND COMPLIANCE PLANS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Western Electric Coordination Council, 136 FERC ¶ 61,020 (July 7, 2011)</td>
<td>$350,000 Civil Penalty</td>
<td>Civil penalty and reliability enhancement measures resulting from violations of nine requirements of five Reliability Standards (IRO-005-1, R11; IRO-005-1, R8; EOP-002-2, R1; IRO001-1, R3; IRO-005-1, R13; EOP-002-2, R8; COM-002-2, R2; IRO-005-1, R12; IRO-002-1, R9) associated with a Bulk-Power System disturbance.</td>
</tr>
<tr>
<td>Moussa I. Kourouma D/B/A Quntum Energy LLC, 135 FERC ¶ 61,245 (June 16, 2011)</td>
<td>$50,000 Civil Penalty</td>
<td>Civil penalty resulting from violations of 18 C.F.R. § 35.41(b) (prohibition of submission of false or misleading information or the omission of material information in any communication with the Commission and certain jurisdictional entities)</td>
</tr>
<tr>
<td>Brian Hunter, 135 FERC ¶ 61,054 (April 21, 2011)</td>
<td>$30,000,000 Civil Penalty</td>
<td>Civil penalty resulting from violations of 18 C.F.R. § 1c.1 (Natural Gas Anti-Market Manipulation Rule)</td>
</tr>
<tr>
<td>National Fuel Marketing Company, LLC, 135 FERC ¶ 61,011 (April 7, 2011)</td>
<td>$290,000 Civil Penalty</td>
<td>Civil penalty and compliance monitoring resulting from violations of shipper-must-have-title requirements.</td>
</tr>
<tr>
<td>Seminole Services, LLC, 135 FERC ¶ 61,010 (April 7, 2011)</td>
<td>$300,000 Civil Penalty</td>
<td>Civil penalty, disgorgement and compliance monitoring resulting from violations of the prohibition on buy/sell transactions.</td>
</tr>
<tr>
<td>Dartmouth Power Associates LTD. Partnership, 134 FERC ¶ 61,085 (February 3, 2011)</td>
<td>Settlement determined that a civil penalty would be appropriate but for $231,952.50 penalty levied by ISO-NE</td>
<td>Compliance reporting resulting from violations of ISO-NE’s Open Access Transmission Tariff and 18 C.F.R. § 35.41(a) and 35.41(b) (2010).</td>
</tr>
<tr>
<td>National Energy &amp; Trade, L.P. and Mission Valley Pipeline Co., 134 FERC ¶ 61,072 (January 31, 2011)</td>
<td>$500,000 Civil Penalty</td>
<td>Civil penalty and compliance reporting resulting from violations of open access transportation policies, including competitive bidding requirements for long-term, discounted rate capacity releases, flipping, and the shipper-must-have-title requirement.</td>
</tr>
<tr>
<td>North America Power Partners, 133 FERC ¶ 61,089 (October 28, 2010)</td>
<td>$500,000 Civil Penalty $2,258,127 Disgorgement</td>
<td>Civil penalty, disgorgement, and compliance reporting resulting from violations of 18 C.F.R. § 1c.2 (2010) and various provisions of Open Access Transportation Tariff.</td>
</tr>
</tbody>
</table>
Policy Statements, Rulemakings, Enforcement & Reliability Proceedings

Staff Presentation
Federal Energy Regulatory Commission
Disclaimer

The views expressed in this presentation are those of the presenter and do not necessarily reflect the views of the Federal Energy Regulatory Commission, its Chairman, or any individual Commissioner.
Office of Enforcement

Priorities

- Fraud and market manipulation
- Serious violations of the reliability standards
- Anticompetitive conduct
- Conduct that threatens transparency

2011 Report on Enforcement
http://www.ferc.gov/legal/staff-reports/11-17-11-enforcement.pdf
Sources for Potential Investigations

- Other Enforcement Divisions: Market Oversight (Surveillance) and Audits
- Other FERC Offices and the Commission
- Tips from industry, such as from the Enforcement Hotline
- Market Monitoring Units (MMUs)
- Independent System Operators (ISOs) and Regional Transmission Organizations (RTOs)
- Self-reports
- Other federal and state agencies
Opening an Investigation

Prior to opening an investigation, staff analyzes the activity and consults data, expert staff, and the entity involved for explanations. This initial inquiry may preclude an investigation.

Decisions to open an investigation include consideration of:
- The nature and seriousness of the alleged violation
- The nature and extent of the harm, if any
- Efforts made to remedy the alleged violation
- Were the violations widespread or isolated
- Were the violations willful or inadvertent
- The significance of FERC policies affected
- The likelihood of violations recurring
- The compliance history of the alleged violator
- The remedial measures available to redress the alleged violation
- Staff resources
Investigative Process

• Discovery
  – Data and document requests
  – Interviews
  – Depositions

• During discovery, staff is in frequent contact with the subject being investigated, and will meet with company representatives to discuss facts, data, and legal theories

• Subjects are always free to contact staff to provide additional information

• Information received during an investigation is non-public
  – Public disclosure is only permitted at the Commission’s direction
Investigative Process Cont.

• Staff may close an investigation at any time when staff determines:
  – No violation occurred
  – Evidence does not warrant further investigation
  – No further action necessary (totality of circumstances)

• If staff determines a violation warrants sanctions, staff shares its preliminary findings with the subject and the subject may respond

• Based on the subject’s response, staff may reconsider its views

• If staff still feels sanctions are warranted, the subject will either pursue settlement or contest staff’s conclusions
Settlement

- Settlement is the Commission’s preferred resolution
  - Avoids litigation time, cost, and risks
  - Compliance problems remedied faster
- Can often result in lower penalties
- Staff requests settlement authority from the Commission
  - Staff will provide to the Commission the subject’s written response to staff’s views (if submitted)
- If staff and subject agree in principle on terms, staff drafts a proposed stipulation and consent agreement
- Once the agreement is finalized, it is submitted to the Commission for its consideration
- Upon approval, the Stipulation and Consent Agreement and the order approving the settlement are generally released publicly
Orders to Show Cause (OSC)

- If staff and the subject do not settle, staff may recommend that the Commission issue an OSC.
- Staff notifies a subject of its intent to recommend that an OSC issue and advises each subject that it may submit arguments against staff’s recommendation (1b.19 letter).
- An OSC may lead to litigation as a Part 385 proceeding or in Federal District Court (for electric cases).
- Settlement may still occur (Rule 602) if the Commission finds it fair, reasonable, and in the public interest.
Length of Investigations

- An investigation can be as short as six months and as long as several years.
- Manipulation or complex cases may take longer.

Factors affecting length include:

- The complexity of the case
- Nature of the allegations
- Number of parties and witnesses
- Quantity of the evidence
- Duration of the behavior

- Thoroughness and quality of the lead, self-report, or referral
- The cooperation of the subjects
- Whether the investigation is settled or contested
Self-Reports

• Self-reports of possible violations to Enforcement staff are strongly encouraged

• A good self-report should:
  – Be in writing
  – Contain a discussion of all relevant facts
  – Provide sufficient information for staff to understand how and why the violation occurred
  – Identify whether any harm resulted from the violation
  – Identify the key personnel involved in the violation
  – Detail any steps to cure the violation and to prevent its recurrence
  – Provide relevant documents
Self-Reports

• Roughly half of self-reports are closed without opening an investigation
• Most self-reports are closed with no sanctions
• Some self-reports do result in significant penalties
• Prompt reporting of violations are part of an effective compliance program
• The Penalty Guidelines emphasize the importance of self-reporting, providing credit that significantly mitigates a penalty
  – Failure to timely self-report eliminates all credit pursuant to the Penalty Guidelines for an effective compliance program
Penalty Guidelines

• Modeled on the U.S. Sentencing Guidelines
• Issued to promote fairness, consistency, and transparency
• Penalty Guidelines are generally applicable, but Commission can depart when appropriate
• Guidelines determine a penalty and settlement range
• Apply to “Organizations”
  – Only used as guidance against a natural person
• Penalty guidelines cannot exceed the maximum penalty authorized ($1MM per day)
• Penalty may be reduced based on the inability of the subject to pay
Reliability

Regional Entities (REs)
TRE, MRO, NERC, RFC, SERC, SPP, WECC, and FRCC

Users, Owners and Operators (Registered Entities)
NERC and Regional Entities (REs)

- REs are the front lines of enforcement and have delegated authority from NERC
- NERC ensures consistency among REs and oversees the bulk-power system (BPS)
- NERC and REs have a hearing and appeal process, may use remedial action directives, approve mitigation plans, and assess penalties
- NERC writes reliability standards; the Commission approves them or asks for modifications
  - First enforceable Reliability Standards in 2007
- NERC files Notices of Penalties (NOPs) with the Commission
FERC and Reliability

• Federal Power Act § 215 gives FERC an independent enforcement power and the ability to act against any user, owner, and operator of the BPS, as well as NERC and the REs
• FERC’s jurisdiction is original, concurrent, and appellate
• FERC reviews and approves NERC’s Reliability Standards, Rules, and Notices of Penalties (NOPs)
• The Offices of Electric Reliability, General Counsel, and Enforcement work together
  – Ensuring NERC’s compliance with statutory and regulatory requirements
  – Reviewing each NOP and recommending further action when necessary
  – Acting jointly with or overseeing NERC and/or REs on audits and investigations
  – Taking independent enforcement actions, including part 1b investigations
    • FERC applies its own sanctions and policies when it takes independent action
Enforcement Policy on Reliability

Enforcement focuses on violations of reliability standards with a significant risk of loss and/or a substantial loss of load.

• Part 1b investigations into significant reliability events, particularly those involving load loss
  – Grand River Dam Authority
  – 2008 Florida Blackout

• FERC and NERC joint inquiries into reliability events
  – Southwest Cold Weather Event
  – San Diego Blackout

• Reviewing NOPs and recommending further action
• Conducting oversight audits of REs with OER
Enforcement Statistics Since EPA Act 2005

- Commission orders approving settlements with civil penalties: 56
- Total amount of civil penalties: $154.1 million
- Orders to show cause: 5
- Total amount of disgorged profits: $36.2 million
- Self Reports received: 458*
- NOPs handled: 543*

*Through the end of fiscal year 2011.
FERC 101:
Electric Reliability Regulation

Office of Electric Reliability
Federal Energy Regulatory Commission
Energy Policy Act of 2005

- EPAct 2005 added section 215 to the Federal Power Act (FPA); adds reliability regulation to the Commission’s traditional economic regulatory responsibilities
- Provides for a system of mandatory and enforceable electric reliability standards applicable to the Users, Owners, and Operators of the Bulk-Power System
- Requires the Commission to certify and oversee an electric reliability organization (ERO) which shall develop and enforce reliability standards that provide for reliability of the bulk-power system
Reliability Enforcement Authority

• EPAct 2005 gave the Commission additional authority to assess civil penalties for violations of Commission-approved Reliability Standards
  – Penalty authority up to $1 million per violation per day
  – Penalty must bear a reasonable relation to the seriousness of the violation and consider timely remediation efforts
• The ERO may impose a penalty on a user, owner or operator of the bulk power system for a violation of a reliability standard, subject to Commission approval
• Commission’s jurisdiction is original, concurrent, and appellate
Order No. 672 - Framework

• RM05-30-000, issued February 3, 2006, established:
  – the criteria for an entity to qualify to be the ERO which will develop and enforce reliability standards
  – Procedures for proposing/approving standards
  – Processes to resolve conflicts with tariffs or state reliability rules
  – ERO funding and delegation of authority to REs
  – Standards enforcement by ERO, RE, and FERC
  – ERO’s authority to perform reliability assessments
  – Procedures to establish Regional Advisory Bodies
  – Codifies EPAct 2005 section 215 as section 39 of the Commission’s regulations
ERO Certification

- RR06-1-000, 116 FERC ¶ 61,062, issued July 20, 2006 certifies NERC as the ERO
- Order addresses:
  - Governance (*independence*)
  - Funding (*assured, reasonable*)
  - Reliability Standards Development (*open, inclusive*)
  - Enforcement (*clear, fair, and consistent*)
  - Regional Entity Delegation Agreements
    - ERO delegates authority to 8 Regional Entities to develop and enforce reliability standards, subject to ERO review and Commission approval
Approval of Reliability Standards

• A Reliability Standard is not mandatory and enforceable until it is approved by FERC

• FERC may approve a proposed Reliability Standard if it is just and reasonable, is not unduly discriminatory or preferential, and is in the public interest, section 215(d)(2)

• FERC will remand a standard if it does not meet that test, section 215(d)(4)

• FERC may order the ERO to submit a new standard or modify an existing standard, section 215(d)(5)
Key Reliability Standards Orders

• Order No. 693
  – Approved 83 standards as mandatory and enforceable and directed prospective modification of 56 standards, effective June 18, 2007 (March 2007)

• Order No. 706
  – Approved 8 mandatory reliability standards for critical infrastructure protection and directed NERC to modify CIP standards to address specific concerns (January 2008)

• Order No. 716
  – Approved Nuclear Plant Interface Coordination Standard (NUC-001) for safe nuclear plant operation and shutdown and system operating limits (October 2008)
Compliance and Enforcement

• ERO and REs are the front lines of enforcement
• The Commission’s oversight role/participation:
  – ERO Performance Assessment
    • 3rd year and then every 5 years
  – ERO Audits of REs for compliance and performance
  – Compliance Audits of Users, Owners, and Operators
  – Incident and Allegation Investigations
  – Notice of Penalty Review
Commission’s Reliability Staff

- The Office of Electric Reliability (OER) has a staff of more than 120, composed primarily of electrical engineers
- OER works closely with the Office of Enforcement, Office of the General Counsel, Office of Energy Market Regulation, and Office of Energy Policy and Innovation
- OER organization:

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Office of Electric Reliability

 Division of Reliability Standards
 Division of Compliance
 Division of Logistics and Security
 Division of Engineering Planning and Operations
```
Reliability Standards

• Monitor, and participate in, ERO and regional standards development process
• Technical analysis of standards filed for approval
• Assess proposed standards for approval, remand or modification
Compliance

• With Office of Enforcement, oversee user, owner and operator compliance with reliability standards and ERO compliance with statutory and regulatory requirements
  – Review ERO filed proposed Notices of Penalty and mitigation plans
  – Participate in event analysis and investigation (independent or jointly with ERO and REs)
  – Compliance audits (independent or oversight of NERC or RE compliance audit)
  – NERC Compliance Registry Appeals
  – Oversight of ERO
Logistics and Security

• Cyber and physical security
  – Reliability Standards
    • NERC Critical Infrastructure Protection
    • Compliance

• ERO Process Filings
  – Budget
  – Rules of Procedure
  – Delegation Agreements
Engineering, Planning and Operations

- Monitor bulk-power system reliability
- Review reliability assessments
- Technical analysis
- Review rate and market rule filings for reliability and engineering issues
ENERGY BAR ASSOCIATION

MID-YEAR MEETING

Some General Principles Governing the Role of Policy Statements, Rulemaking Proceedings and Adjudications

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December 2, 2011
What are the Difference Between a Policy Statement and a Substantive Rule?

- Substantive rules are judicially reviewable, policy statements are not.

- Substantive rules (and adjudications) have the “force of law.” “In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.”

*Pacific Gas & Electric Co. v. FPC*, 506 F. 2d 33, 38 (D. C. Cir. 1974)

- A general statements of policy “does not establish a binding norm”:

  The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued.

*Id.*
What Discretion Does an Agency Have to Implement Policy Changes by Adjudications vs. Rulemakings?

“An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.”


Agencies have broad discretion whether to proceed via adjudication or rulemaking to change or adopt substantive policies:

Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.

Rulemakings are Inappropriate for Addressing Problems that Exist only in “Isolated Pockets”

An administrative agency’s broad discretion to formulate substantive policy via adjudication does not support “an industry-wide solution for a problem that exists only in isolated pockets. In such a case, the disproportion of remedy to ailment would, at least at some point, become arbitrary and capricious.

*Associated Gas Distributors v. FERC*, 824 F.2d 981, 1019 (D. C. Cir. 1987).
Generic Rule is Not Inappropriate Simply Because There May be Circumstances in Which Application of the Rule Would Be Unfair – Provisions for Waivers and Exceptions Can Address that Concern.

Where a generic rule, otherwise lawfully authorized, is adopted based on substantial evidence and in accordance with notice and comment procedures, it is sufficient that the rule provide for a waiver of its provisions or procedures for granting exceptions. See, e.g., FPC v. Texaco, Inc., 377 U. S. 33, 39-40 (1964); United States v. Storer Broadcasting Co., 351 US 192, 205-06 (1956)
Are the Limitations on Changes to Agency Policy Different For Policies Adopted Via Adjudications Rather than Via Rulemaking?

Whether proceeding by rulemaking or adjudication, an agency can only change its substantive policies by acknowledging that it is doing so and offering a reasonable explanation for its change in policy.


While agencies can change substantive policies via adjudications or rulemakings, a substantive policy adopted via rulemaking can only be changed through a new rulemaking, i.e., via notice and comment procedures.

The Intersection of Enforcement & Reliability

The Energy Bar Association Primer on Legal Practice and Administrative Procedure – Unlocking the Mysteries: Everything You Didn’t Know About FERC Practice

December 2, 2011

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I. Background

- The Energy Policy Act of 2005 granted the Federal Energy Regulatory Commission (FERC) significant new responsibilities, including overseeing the reliability of the transmission grid.

- In July 2006, FERC certified the North American Electric Reliability Corporation (NERC) as the Electric Reliability Organization (ERO).

- On June 18, 2007, the Reliability Standards became mandatory.

- On June 4, 2008, NERC issued its first Notices of Penalty (NOPs) concerning violations of the Reliability Standards.

- NERC violations are subject to civil penalties up to US$1 million/day per violation, criminal penalties, and other sanctions.
II. NERC Notices of Penalty – A Brief Overview

- As of October 31, 2011, NERC has issued 534 Notices of Penalty involving approximately 2,500 violations.

- Two “omnibus” Notices of Penalty resolved 626 violations of 160 Registered Entities.

- Administrative Citation NOPs have been used to resolve 406 violations.

- FFT reports have been used to resolve 199 violations.
II. NERC Notices of Penalty – A Brief Overview (cont.)

Violation Data Through July 31, 2011

Source: NERC, Key Compliance Trends (Sept. 19, 2011)
Enforcement and compliance occurs on a regional basis. While maintaining an oversight role, NERC delegated its authority to monitor and enforce compliance with the Reliability Standards to eight Regional Entities:

- Florida Reliability Coordinating Council
- Midwest Reliability Organization
- Southwest Power Pool Regional Entity
- Western Electricity Coordinating Council
- ReliabilityFirst Corporation
- NorEast Power Coordinating Council
- Texas Regional Entity
- SERC Reliability Corporation

Serious violations of the Reliability Standards were identified as one of four top priorities for 2010 and 2011 in FERC’s Office of Enforcement 2009 and 2010 Reports on Enforcement.

Since the certification of NERC as the ERO, FERC has taken an increasingly proactive role in enforcing compliance.

Enforcement and compliance occurs on a regional basis while maintaining an oversight role, NERC delegated its authority to monitor.

III. Evolution of Enforcement and Compliance
III. Evolution of Enforcement and Compliance (cont.)

- FERC initiated, on its own motion, a review of a November 13, 2009 NERC Notice of Penalty concerning Turlock Irrigation District.
  - As part of a settlement agreement between Turlock and its Regional Entity, NERC proposed an $80,000 penalty against Turlock in response to multiple alleged violations of Reliability Standards.
  - FERC focused on the alleged violation of Reliability Standard FAC-003-1 R2, which involved a vegetation-caused transmission outage that resulted in the loss of load, but also noted that it believed other Reliability Standards in addition to those stated in the Notice of Penalty may have been violated.
  - The order compared, in detail, the nature of Turlock’s violation and proposed penalty amount to that approved in eleven prior Notices of Penalty involving FAC-003-1 R2. FERC was concerned that the negotiated penalty of $80,000 was too low.
  - FERC ultimately affirmed settlement, but issued guidance regarding the adequacy of the record filed by NERC, the assessment of penalties when load is and is not shed, and factors that will and will not mitigate penalty amounts.

- FERC stated that when deciding whether to further review a Notice of Penalty, it would evaluate:
  - the seriousness of the violation;
  - the potential risk and the actual harm to the bulk power system;
  - consistency in applying the penalties among Regional Entities; and
  - the role of the penalty in improving compliance with the Reliability Standards.

- Notices of Penalty provide valuable information on compliance, which can be used both to respond to current investigations and to strengthen compliance programs.
IV. Recent FERC Actions a) Civil Penalty Proceedings

- As of October 31, 2011, 2 of the 10 civil penalty actions in 2011 involved reliability, for a total of $700,000 in civil penalties, and $2 million in mitigation and compliance enhancement measures. For example:

  - **Entity:** Grand River Dam Authority, 136 FERC ¶ 61,132 (August 29, 2011)
  
  - **Penalty:** $350,000 Civil Penalty ($175,000 to each FERC and NERC), $2,000,000 in Mitigation and Compliance Enhancement Measures
  
  - **Explanation:** Civil penalty, mitigation and compliance enhancement measures and compliance monitoring resulting from violations of fifty-two requirements of nineteen reliability standards (R5, R6, R10, R11 and R19 of TOP-002-2a; R1, R2 and R4 of TOP-004-2; R2 and R4 of TOP-008-1; R16.1 of TOP-002-2a; R6 of TOP-006-2; R1, R2 and R5 of COM-001-1.1; R1.1 through R1.8 of EOP-008-0; R3 of EOP-004-1; R1 of FAC-008-1; R1 of FAC-009-1; R1, R2 and R3 of FAC-001-0; R1, R2 and R3 of the TPL- series; R1 and R4 of PRC-001-1; R1 of PRC-004-1; R2.2 of PRC-001-1; Requirements R1, R2.1 and R2.2 of PRC-005-1; R1 of PRC-018-1; R1 of PER-002-0; R3.4 of PER-002-0)

*Source: [http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp](http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp)*
IV. Recent FERC Actions b) Staffing

- In June 2010, FERC established a new team of attorneys in its Office of the General Counsel focused on NERC compliance issues.

- The group was created outside the Office of Enforcement in response to concerns that parties seeking legal advice from Enforcement Staff might become subject to an enforcement investigation as a result.

- The group offers legal advice and input on NERC compliance issues to entities subject to the Reliability Standards and also offers legal expertise to FERC’s Office of Electric Reliability.
IV. Recent FERC Actions c) Order No. 743

- **Order No. 743** [133 FERC ¶ 61,150 RM09-18-000 (2010), *reh’g denied*, Order No. 743-A, 134 FERC ¶ 61,210 (2011)].

  - Directed NERC to revise its definition of the Bulk Electric System through the Reliability Standards Development Process “to ensure that the definition encompasses all facilities necessary for operating an interconnected electric transmission network.” FERC suggested a bright-line approach whereby all facilities operated at or above 100 kV (except defined radial facilities) would be subject to a rebuttal presumption of regulation to reduce regional discretion and variability. The proposed revised definition is due to FERC on January 25, 2012.

  - New definition is currently under development with significant stakeholder participation.

  - Potentially expands the scope of registration and the responsibilities of registered entities.
IV. Recent FERC Actions d) Technical Conference

- FERC Reliability Technical Conference was held on Nov. 29-30 in Docket No. AD12-1-000 to discuss policy issues related to reliability, including:
  - identifying priorities for NERC activities;
  - incorporating lessons learned into a more reliable grid;
  - the current state of processes for identifying unit-specific local or regional reliability issues in response to final EPA regulations; and
  - coordination of multi-jurisdictional processes.
IV. Recent FERC Actions e) Penalty Guidelines

  - The Penalty Guidelines established ranges of FERC civil penalties based on a fact-intensive analysis of the nature and severity of a violation.
  - The Penalty Guidelines borrow heavily from the structure and format of the United States Sentencing Guidelines, arriving at a penalty range based on the calculation of a “violation level” multiplied by a “culpability score.”
  - As proposed, the “base violation level” for a violation of the Reliability Standards was set at sixteen points, much higher than the base violation level of six points for violations concerning fraud, manipulation or anticompetitive conduct.

- Numerous comments and complaints from the industry were filed in response to the Policy Statement on Penalty Guidelines.
  - NERC expressed concern that the Penalty Guidelines would cause entities to try to manage compliance risk instead of trying to mitigate reliability risk.
IV. Recent FERC Actions e) Penalty Guidelines (cont.)

- On September 17, 2010, FERC issued a Revised Policy Statement on Penalty Guidelines that clarified that “the Penalty Guidelines will apply to violations of the Reliability Standards only in the Commission’s Part 1b investigations and enforcement actions. We will not apply the Penalty Guidelines to our review of NERC’s Notices of Penalty.”

  - Reduced the base violation level for reliability violations from sixteen to six and increased the risk of harm enhancements for reliability violations.

  - Stated that FERC will “not attempt to conduct a specific, individualized assessment of the value of losses of load that result from reliability violations. Instead, we will use the quantity of load lost, in MWh, as one measure of the seriousness of the violation. We recognize, however, that shedding load may be necessary in certain circumstances to comply with the Reliability Standards, and no penalty would be sought for an operator’s decision to shed load in such circumstances.”

  - A copy of the Revised Policy Statement on Penalty Guidelines is attached as Attachment A.
V. NERC Sanction Guidelines

- Two factors are involved in the determination of the Base Penalty range.

1. Violation Risk Factor
   - Each requirement of every Reliability Standard has been assigned a VRF through the Standards development process.
   - Three levels: Lower Risk Factor, Medium Risk Factor, or High Risk Factor.
   - The VRF corresponds to the expected or potential impact of the violation to the reliability of the BPS.

2. Violation Severity Level
   - Defined measurements of the degree to which a violator violated a requirement.
   - Four levels: Lower, Moderate, High, and Severe.
V. NERC Sanction Guidelines (cont.)

Base Penalty Amount Table

<table>
<thead>
<tr>
<th>Violation Risk Factor</th>
<th>Lower</th>
<th>Moderate</th>
<th>High</th>
<th>Severe</th>
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<tbody>
<tr>
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<td>Range Limits</td>
<td>Range Limits</td>
<td>Range Limits</td>
<td>Range Limits</td>
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<td>$4,000</td>
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<tr>
<td>High</td>
<td>$3,000</td>
<td>$7,500</td>
<td>$15,000</td>
<td>$625,000</td>
</tr>
</tbody>
</table>

NOTE: The penalty amounts above are per violation for each day that the violation continues.

V. NERC Sanction Guidelines (cont.)

- **Adjustment Factors** – At a minimum, NERC or the Regional Entity must consider:
  
  - Repetitive violations and the violator’s compliance history;
  
  - Failure of the violator to comply with compliance directives;
  
  - Self-disclosure and voluntary corrective action by the violator;
  
  - Degree and quality of cooperation by the violator in the violation investigation and in any remedial action directed for the violation;
  
  - The presence and quality of the violator’s compliance program;
  
  - Any attempt by the violator to conceal the violation;
  
  - Intentional violations; and
  
  - Extenuating circumstances.
V. NERC Sanction Guidelines (cont.)

- **Setting of the Final Penalty Amount**
  
  - The Adjusted Penalty Amount is reviewed in light of the violator’s financial ability to pay the penalty.
  
  - If the violation was an economic choice, NERC or the Regional Entity must reconfirm that the penalty will disgorge any unjust profits or economic benefits.

- **Non-Monetary Sanctions**

  Non-Monetary sanctions may be applied with the objective of promoting reliability and compliance with the Reliability Standards. Non-monetary sanctions may include, but not be limited to, the following:

  - Limitations on activities, functions, or operations; and
  - Placing an entity on a reliability watch list composed of major violators.
VI. Recent NERC Actions - Find, Fix, Track and Report Initiative

- NERC filed a Petition requesting approval of a new “FFT” enforcement mechanism on September 30, 2011 in Docket No. RC11-6-000.
  - FFT addresses possible violations that pose a “lesser risk” to the reliability of the BPS and are remediated, as verified through a statement of completion of mitigation activities submitted by each entity.
- Now, three tracks for dealing with possible reliability compliance matters:
  - 1. Notice of Penalties;
  - 2. FFT; or
  - 3. dismissals.
- Disposition will be based on consideration of the following factors:
  - Underlying facts and circumstances – what, when, where and why;
  - The Reliability Standard at issue;
  - The applicable VRF and VSL;
  - The potential and actual level of risk to reliability, including mitigating factors;
  - The entity's compliance program, including preventative and corrective processes and procedures and internal culture of compliance; and
  - The entity's compliance history.
- A copy of NERC’s Petition is attached as Attachment B.
VI. Recent NERC Actions - Find, Fix, Track and Report Initiative (cont.)

- NERC filed a second FFT Report on Oct. 31, 2011, and plans to submit subsequent informational FFT reports to FERC on a monthly basis.

- Goal is to allow greater focus on more serious violations so that the time and resources spent on a possible violation is more proportionate to the risk posed to reliability.

- As of Nov. 15, 2011, NERC has used the FFT approach to resolve 199 possible violations.
  - Example of FFT spreadsheet is attached as Attachment C.
VII. NERC Database – www.whitecase.com/NERC

- The White & Case NERC Database contains summaries of:
  - Notices of Penalty;
  - Find, Fix, Track and Reports; and
  - Administrative Citation Penalties.
- The summaries are organized by Reliability Standard.
- The following is an example of a Notice of Penalty Summary from the NERC Database.

City of Tallahassee, FERC Docket No. NP11-181-000 (April 29, 2011)

- Reliability Standard: FAC-009-1
- Requirement: R1
- Violation Risk Factor: Medium
- Violation Severity Level: Moderate
- Region: FRCC

Issue: The City of Tallahassee (Tallahassee) was unable to produce documentation showing that the Facility Ratings for its generators, voltage transformers, shunt capacitors, auto transformers and temporary 115 kV transmission lines had been developed in accordance with its Facility Ratings Methodology.

Finding: FRCC and Tallahassee entered into a settlement agreement to resolve multiple violations, whereby Tallahassee agreed to pay a penalty of $11,000 and to undertake other mitigation measures. FRCC determined that the violation of FAC-009-1 only constituted a minimal risk to bulk power system reliability since Tallahassee had been operating its equipment according to the manufacturer's equipment ratings. The duration of the violation was January 1, 2009 through June 10, 2010.

- Penalty: $11,000 (aggregate for multiple violations)
- FERC Order: May 27, 2011 (no further review)
- NERC Notice of Penalty:
  http://www.nerc.com/filez/enforcement/FinalFiled_ACP_NOP_20110429.pdf and
  http://www.nerc.com/filez/enforcement/FinalFiled_A-1(PUBLIC_Non-CIP_Violations)_20110429.xls
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I. The Commission issues this Revised Policy Statement on Penalty Guidelines to address comments we received on our Policy Statement on Penalty Guidelines, which we issued on March 18, 2010. In addition to addressing these comments, the Commission describes modifications we have made to the Penalty Guidelines based on the comments. The Penalty Guidelines, in their modified form, are attached to this Revised Policy Statement. Enforcement staff will hold a technical conference one year from the issuance of these modified Penalty Guidelines to discuss how they have worked and to permit comments and questions from the industry.

2. The modified Penalty Guidelines will play a significant role in our determinations of civil penalties and will add greater fairness, consistency, and transparency to our enforcement program. These Penalty Guidelines continue to base penalties on the same factors as those present in our policy statements on enforcement, but do so in a more focused manner by assigning specific and transparent weight to each factor. For example, we will continue to base penalties on the seriousness of the violation, measured in large part by the harm or risk of harm caused, an organization’s efforts to remedy the violation, as well as other culpability factors, such as senior-level involvement, prior history, compliance, self-reporting, and cooperation. While these factors remain the same, organizations will now know with more certainty how each is applied. At the same time, the modified Penalty Guidelines do not restrict our discretion to make an individualized assessment based on the facts presented in a given case.

3. Further, our Penalty Guidelines are still modeled on the United States Sentencing Guidelines (Sentencing Guidelines), though we have departed from certain sections of that model based on some commenters’ recommendations and have made some important modifications to specific sections of the Penalty Guidelines.

4. The following points highlight our responses to some of the commenters’ recommendations:

- We continue to believe that it is appropriate to model the Penalty Guidelines on the Sentencing Guidelines.
- We clarify that the Penalty Guidelines will not affect Enforcement staff’s exercise of discretion to close investigations or self-reports without sanctions.
- The Penalty Guidelines will apply to violations of the Reliability Standards only in the Commission’s Part 1b investigations and enforcement actions. We will not apply the Penalty Guidelines to our review of NERC’s Notices of Penalty.
- We accept the commenters’ recommendation to reduce the base violation level for reliability violations from sixteen to six and to increase the risk of harm enhancements for reliability violations.

1. Enforcement of Statutes, Orders, Rules, and Regulations, Docket No. PL10-4-000

REVISED POLICY STATEMENT ON PENALTY GUIDELINES

(Issued September 17, 2010)

1. The Commission issues this Revised Policy Statement on Penalty Guidelines to address comments we received on our Policy Statement on Penalty Guidelines, which we issued on March 18, 2010. In addition to addressing these comments, the Commission describes modifications we have made to the Penalty Guidelines based on the comments. The Penalty Guidelines, in their modified form, are attached to this Revised Policy Statement. Enforcement staff will hold a technical conference one year from the issuance of these modified Penalty Guidelines to discuss how they have worked and to permit comments and questions from the industry.

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1. Enforcement of Statutes, Orders, Rules, and Regulations, Docket No. PL10-4-000

REVISED POLICY STATEMENT ON PENALTY GUIDELINES

(Issued September 17, 2010)
I. Background

5. On March 18, 2010, the Commission issued the Penalty Guidelines in an effort to provide greater fairness, transparency, and consistency in our civil penalty determinations. We explained that the Penalty Guidelines would provide more clarity and consistency by assessing civil penalties based on objective characteristics and a uniform set of factors weighted similarly for similar violations and similar violators. We emphasized further that the Penalty Guidelines would provide transparency by describing the factors we consider in our penalty determinations and the weight afforded to each factor. We also said that the Penalty Guidelines would provide us sufficient flexibility to depart from them whenever we deem appropriate.

6. We explained that the Penalty Guidelines were based on Chapter Eight of the Sentencing Guidelines related to organizations (Organizational Sentencing Guidelines). The Sentencing Guidelines, applied for over two decades in federal courts, were designed to provide certainty, fairness, and transparency, and examine many of the same factors that the Commission has considered in assessing penalties, such as the harm caused by violations and an organization's culpability.

7. After the Commission issued the Penalty Guidelines, Enforcement staff held workshops in Washington, DC, Houston, and San Francisco to provide a forum for interested participants to ask questions on the interpretation and application of the Penalty Guidelines. Staff invited interested parties to attend the workshops and accepted questions in advance of the workshops. At each workshop, staff gave a demonstration on the Penalty Guidelines, including the mechanics of how they would work. In addition, staff addressed a broad range of questions from both the electric and natural gas industries.

8. On April 15, 2010, the Commission suspended the Policy Statement on Penalty Guidelines and application of the Penalty Guidelines to allow sixty days within which comments could be submitted. We believed that the public interest would be served by affording entities the opportunity to submit written comments on the Penalty Guidelines.

9. The Commission has received forty-one sets of comments on the Penalty Guidelines addressing a broad range of issues, each of which we will address below. Many commenters endorse and support the comments of EEI and the joint comments of APPA, LPPC, and NRECA in addition to providing specific comments of their own. An appendix is attached to this Policy Statement with a complete list of commenters, including the abbreviations that we will use for each commenter throughout this Policy Statement.
between civil and criminal law that make it inappropriate to use the Sentencing Guidelines as a model for our assessment of civil penalties. Specifically, these commenters suggest that modeling the Penalty Guidelines on a criminal framework is wrong because, unlike in the civil and regulatory context, criminal cases require the government to prove, and an independent jury or judge to find, a defendant guilty beyond a reasonable doubt before imposing penalties on organizations.

11. Some commenters also believe that the Sentencing Guidelines' model is problematic because of the differences between the scienter requirements in the civil and criminal context. For example, EEl, APPA, ELCON, MISO, WIRAB, and PPC comment that using the Sentencing Guidelines as a model for the Commission's assessment of penalties is inappropriate because violations in the civil regulatory context are often unintentional, narrowly focused errors arising from complex and obscure regulations, whereas the Sentencing Guidelines focus on intentional or reckless behavior.8

12. This difference in scienter requirements is of particular concern to commenters with respect to reliability violations, which, the commenters point out, can result from unintentional, inadvertent errors, including documentation errors. For example, EEl believes that it is inappropriate to use a criminal model that results in severe penalties for public welfare offenses, like violations of the Reliability Standards.9 Similarly, APPA believes it is not appropriate to analogize “failures to achieve 100 percent compliance with the myriad, detailed (and in some cases unclear) mandatory reliability standards . . . to malum in se criminal behavior.”10 ELCON comments that “[u]s[ilike a civil regulatory context where violations generally are unintentional, narrowly focused missteps in following complex and sometimes obscure provisions, these considerations are not viewed as germane in the criminal context.”11 WIRAB asserts that few, if any, violations of Reliability Standards will occur as a result of intentional, fraudulent, or criminal behavior and states that the Sentencing Guidelines are geared to deter that kind of conduct.12

13. In addition, EEL, NERC, and ReliabilityFirst comment that the Sentencing Guidelines provide an inappropriate model because their use is in decline in federal courts.13 For example, EEL claims that the Sentencing Guidelines have been criticized by federal judges for their rigidity and harshness and, after the Supreme Court made them discretionary in United States v. Booker, 543 U.S. 220 (2005), federal judges sharply reduced their use of them.14 Furthermore, EEL asserts that a 1999 Department of Justice memorandum issued by then Deputy Attorney General Eric Holder, known as the “Holder Memo,” encouraged prosecutors not to prosecute organizations that engaged in specified good corporate conduct.15 According to EEL, following the issuance of the Holder Memo, prosecutors “increasingly chose not to prosecute firms [pursuant to the Sentencing Guidelines] if the crime occurred notwithstanding an effective compliance program, or, more commonly, if the firm reported wrongdoing and/or cooperated.”16 NERC and ReliabilityFirst state that use of the Sentencing Guidelines is controversial in the criminal context and NERC comments that they are merely advisory.17

14. Finally, Turlock comments that, unlike the Sentencing Guidelines, the Penalty Guidelines are not based on an extensive analysis of empirical evidence, such as years of sentencing data.18

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7 See Comments of EEl at 16-17; INGAA at 1-2; NERC at 14; MISO at 3; NorthWestern at 1; National Grid at 4-5; the Joint Municipal at 3-4; TANC at 8; and Turlock. Turlock did not provide page numbers with its comments.

8 See Comments of EEL at 16-18; APPA at 4; ELCON at 2; MISO at 6-7; WIRAB at 2; and PPC at 5.

9 Comments of EEL at 18-19.

10 Comments of APPA at 5.
2. **Commission Determination**

15. Although the Commission's guidelines approach to determine civil penalties is patterned after the Organizational Sentencing Guidelines, we do not intend to "criminalize" violations of our statutes, rules, and regulations in any manner. Rather, we believe "that the Sentencing Guidelines provide the best model to adapt to the Commission purposes because they focus on factors—such as the seriousness and remediation of a violation—that reflect the requirements of EPAct 2005 and that we believe are the centerpiece of our penalty regime." The Commission does not agree that our use of the Sentencing Guidelines' analytical structure reflects a failure to appreciate distinctions between criminal and civil law. There is nothing inherently "criminal" in the Sentencing Guidelines, just as there is nothing inherently "civil" or "regulatory" about the Penalty Guidelines. Neither the Sentencing Guidelines nor the Penalty Guidelines create or define prohibited conduct. Each is simply an analytical tool designed to provide objectivity, consistency, and transparency in penalty determinations. The prohibited conduct is supplied by statutes, rules, and regulations that exist independent of the guidelines. Although the Sentencing Guidelines and the Penalty Guidelines operate in different contexts, they share common purposes, including compliance and deterrence.

16. Furthermore, using the Sentencing Guidelines as an analytical model for the Penalty Guidelines does not affect our consistent practice in making our penalty determinations by focusing on the two statutorily-mandated factors: "seriousness of the violation" and "efforts to remedy the violation." Nor does our adopting these Penalty Guidelines alter the factors on which we have always focused in assessing a violation's seriousness, such as pecuniary loss or gain, harm and risk of harm, and intent. Also, by using the Sentencing Guidelines as a model, the Penalty Guidelines consider many of the same culpability factors that

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20 See Revised Policy Statement, 123 FERC ¶ 61,156 at P 51 ("[w]e implement [our] statutory mandates ... by taking into account numerous factors in determining the appropriate civil penalty for a violation, including the nature and seriousness of the violation and the company's efforts to remedy it.").

21 Id. P 55.

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22 See id. P 55-68. This point addresses the related concerns that the Sentencing Guidelines are an inappropriate model because they focus on intentional or reckless conduct, while some of the violations we address have no such requirements. We have chosen to employ the Sentencing Guidelines' analytical approach, not the substantive judgments they incorporate regarding the appropriate penalties for the criminal behavior to which they apply. Moreover, the Sentencing Guidelines are not applied exclusively to intentional criminal conduct. See, e.g., 33 U.S.C. § 1319(c)(1) (2006) (negligent violation of Clean Water Act); id. § 1319(c)(6) (responsible corporate officer is subject to criminal penalties without proof of criminal act or personal knowledge of criminal act).

23 In expanding the Commission’s civil penalty authority, Congress did not limit this authority to intentional violations. Moreover, Congress reserved criminal sanctions for intentional violations, see 16 U.S.C. § 825o (2006), confirming that unintentional violations are subject to the Commission’s civil penalty authority. Some of our cases involve violations that do not require proof of scienter, such as violations of most Reliability Standards. Others involve violations with a scienter requirement, such as violations of our anti-manipulation rules.

24 Comments of EEI at 18.
that supports the claim that violations of regulatory regimes were excluded from application of the Sentencing Guidelines.\textsuperscript{25}

19. EEI's suggestion that use of the Sentencing Guidelines has been reduced in recent years is refuted by the Supreme Court's decision in \textit{Gall v. United States}, 552 U.S. 38 (2007), in which the Court, considering the proper role of the Sentencing Guidelines in the determination of federal sentences post-\textit{Booker}, instructed that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."\textsuperscript{26} The Court also ruled that a district court "must make an individualized assessment based on the facts presented."\textsuperscript{27}

\textsuperscript{25} There is no exclusion of "regulatory offenses" from the plenary application of the Organizational Sentencing Guidelines. See U.S.S.G. § 8A1.1. Similarly, we find nothing to support this claim in EEI's citation of I. Nagel & W. Swenson, \textit{The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future}, 71 Wash. U.L.Q. 205 (1993). EEI's attempt to use the exclusion of environmental offenses from the fine provisions of the Organizational Sentencing Guidelines is equally unavailing to its argument that it is inappropriate to impose monetary penalties under the Penalty Guidelines on organizations that violate the "regulatory" statutes enforced by the Commission. Although the Sentencing Commission decided to exempt corporate environmental offenders from the Sentencing Guidelines' fine provisions, section §2C.10 of the Sentencing Guidelines instructs federal judges that they should use 18 U.S.C. §§ 3553 and 3572 (2006) in calculating monetary penalties for such offenses. The factors considered in calculating fines under these provisions are the same factors the Commission considers in applying the Penalty Guidelines. Furthermore, we note that corporate offenders are subject to the other types of penalties generally available under the Sentencing Guidelines, irrespective of the type of offense. Therefore, the treatment of "regulatory" offenses under the Sentencing Guidelines does not persuade us that we have erred in deciding to use a guidelines model to determine penalties for violations of the statutes we enforce.

\textsuperscript{26} \textit{Gall v. United States}, 552 U.S. 38, 49-50 (2007) (emphasis added).

\textsuperscript{27} \textit{Id.} at 50. Furthermore, while it may have been historically true, as EEI claims, that many federal judges felt unduly constrained by the pre-\textit{Booker} regime of mandatory guidelines, federal judges now regard the current discretionary use of guidelines—which is the model adopted by the Commission—as the one that (continued...)
suggests that the DOJ policy reflected in the Holder Memo supports its position that the Commission should not seek penalties for the violations of employees from corporations that engage in “specified good corporate conduct,” we reject both the argument and the suggestion that the Holder Memo endorses such a practice.31

B. The Penalty Guidelines’ Effect on Commission and Enforcement Staff Discretion

1. Comments

21. EEI recommends that the preamble to the Penalty Guidelines clarify when, how, or by whom, the discretionary nature of the Penalty Guidelines may be applied.32 EEI, INGAA, and TAPS recommend that the Commission clarify that civil penalties will not generally be assessed for minor, inadvertent violations, particularly those that are self-reported.33 EEI further recommends that the Commission clarify that: (1) Enforcement staff has discretion to dismiss investigations, recommend downward departures, and settle for less than the Penalty Guidelines’ range; and (2) the Commission alone has the discretion to authorize upward departures.34 EPSA asks the Commission to clarify that civil penalties will be reserved for cases with material harm or risk of harm and intentional or willful violations.35 EEI also encourages the Commission to clarify that penalties will not be imposed under the Penalty Guidelines in cases where there is a legitimate ambiguity over what the law requires.36 On this latter point, require a faithful and honest application of the Sentencing Guidelines.” Holder Memo § XI, Charging a Corporation: Selecting Charges.


32 Comments of EEI at 22.

33 See Comments of EEI at 21-22; INGAA at 3-4; and TAPS at 28.

34 Comments of EEI at 22.

35 Comments of EPSA at 8.

36 Comments of EEI at 21.

EEL states that in Order No. 693 the Commission held that “if a dispute arises over compliance and there is a legitimate ambiguity regarding a particular fact or circumstance, that ambiguity can be taken into account in the exercise of the Commission’s enforcement discretion.”37

22. Similarly, TANC believes that the Commission should revise its proposed penalty structure such that utilities will not be exposed to penalties for every violation.38 Accordingly, TANC comments that the Commission’s policy should not expose entities to penalties for non-serious violations, especially violations involving Reliability Standards where the entity already has a comprehensive compliance program in place and appropriately rectifies the condition that gives rise to the violation.39 TANC believes that the Commission should decline to impose a penalty for “non-serious” violations if the entity adopted reasonable preventive measures to deter misconduct, detected and reported the violation promptly, and took appropriate remedial action in response to the violation.40

23. ISO/RTO Council recommends that the Commission clarify that the use of the Penalty Guidelines is discretionary. Specifically, ISO/RTO Council urges the Commission to clarify that the Commission will apply the Penalty Guidelines only when it determines that a penalty is appropriate and that the Commission retains the discretion not to impose a penalty and, hence, not apply the Penalty Guidelines in the first place.41

24. NERC makes note of the Commission’s statement in the Policy Statement on Penalty Guidelines that we do not intend to depart from the Penalty Guidelines regularly but will not always adhere to a rigid application of them. NERC asks what criteria the Commission will consider in making such a determination and require a faithful and honest application of the Sentencing Guidelines.” Holder Memo § XI, Charging a Corporation: Selecting Charges.

37 Id. (quoting Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 275 (2007)).

38 Comments of TANC at 13.

39 Id.

40 Id. at 14-15.

41 Comments of ISO/RTO Council at 5.
whether the guidelines will be consistently applied if the Commission were to routinely depart from their application.\(^{42}\)

25. On a related note, SMUD urges the Commission to clarify that zero or low dollar penalties may be appropriate in certain circumstances.\(^{43}\) Although staff explained at the April 7, 2010, workshop that the Commission will retain the discretion to assess zero dollar penalties in certain circumstances, SMUD states that the Penalty Guidelines give little guidance as to when it would be appropriate to exercise such discretion. Without such clarification, SMUD fears the starting point for negotiations of any future violations of the Reliability Standards will be between $8,750 and $35,000.\(^{44}\)

26. Similarly, Cities/M-S-R comments that the Commission should revise the Penalty Guidelines to include the possibility of a zero dollar penalty result.\(^{45}\) Cities/M-S-R states that the Policy Statement on Penalty Guidelines indicates at P 32 that discretion will be applied within the range of penalties determined by the Penalty Guidelines, which never includes zero.\(^{46}\) National Grid and TANC also comment that a perfect score for cooperation, self-reporting, and a near perfect compliance plan cannot result in reduction to a zero dollar penalty.\(^{47}\)

2. Commission Determination

27. The Commission clarifies that the Penalty Guidelines will not affect enforcement staff’s exercise of discretion to close investigations or self-reports without sanctions. Staff will continue to close all investigations where no violation is found, and to close some investigations without sanctions for certain violations that are relatively minor in nature and that result in little or no potential or actual harm. Similarly, staff’s review of self-reports will continue to result in many instances where staff does not even open investigations, particularly for

\(^{42}\) Comments of NERC at 23.

\(^{43}\) Comments of SMUD at 9.

\(^{44}\) Id. at 11.

\(^{45}\) Comments of Cities/M-S-R at 12.

\(^{46}\) Id.

\(^{47}\) Comments of National Grid at 7; TANC at 16.
the Revised Guidelines. Generally, we recognize that the Penalty Guidelines may not always account for the specific facts and circumstances of every case. This is an inevitable feature of a guidelines-based approach to determining penalties. It may be appropriate to depart from applying the Penalty Guidelines where they do not account for significant circumstances surrounding a violation, which is why we include the flexibility to depart as necessary. When the Commission determines that it is appropriate to depart upward or downward from the Penalty Guidelines, we will set out on the record the considerations that caused us to conclude a departure was appropriate.

C. Reliability-Related Issues

I. Applicability of the Penalty Guidelines to Violations of the Reliability Standards

a. Comments

33. Many commenters from the electric industry argue that the Penalty Guidelines should not apply to violations of the Reliability Standards because there are already guidelines—the NERC Sanction Guidelines—that apply to reliability violations.52 Many of these commenters support and endorse the comments filed by EEI and APPA on this issue.

Guidelines could include an exhaustive list of factors, and each decision will depend on the particular facts and circumstances. As we emphasize throughout the Revised Policy Statement, our decision to adopt a guidelines-based approach does not restrict the discretion that we have always exercised and will continue to exercise in order to make an individualized assessment based on the facts presented in a given case.50 Generally, we recognize that the Penalty Guidelines may not always account for the specific facts and circumstances of every case. As we emphasize throughout, this is an inevitable feature of a guidelines-based approach to determining penalties. It may be appropriate to depart from applying the Penalty Guidelines where they do not account for significant circumstances surrounding a violation, which is why we include the flexibility to depart as necessary. When the Commission determines that it is appropriate to depart upward or downward from the Penalty Guidelines, we will set out on the record the considerations that caused us to conclude a departure was appropriate.

50 See supra P 2.

52 See e.g., Comments of EEI at 5-7, APPA at 7-10; BPA at 10; ELCON at 4; FRCC at 1; MRO at 5-6; National Grid at 12-13; NERC at 8; NPCC at 7; NCPA at 10-12; NorthWestern at 2; PPC at 11-12; ReliabilityFirst at 12; SMUD at 3-5; SCE at 1-2; Joint Municipal at 3-8; Cities/M-S-R at 7; TAPS at 2; TANC at 1-2; WIRAB at 1; and Xcel at 3-5. In addition, MISO comments that the Penalty Guidelines should apply only to serious reliability violations. Comments of MISO at 8.

34 EEI states that consistency and predictability are not achieved by having two sets of guidelines for the same type of violations.53 Specifically, EEI comments that the Commission has already approved the NERC Sanction Guidelines and argues that consistency is not achieved by layering a different set of guidelines on top of NERC’s existing framework.54 EEI and other commenters from the electric industry believe that having two sets of potentially conflicting guidelines will result in confusion and inconsistency.55 For example, APPA believes that “instead of bringing greater consistency, FERC’s proposal of a completely different set of Penalty Guidelines … increases uncertainty by overlaying a second penalty regime and much higher potential penalties in selected cases.”56 In addition, EEI believes that it weakens NERC and the regions to have them calculate penalties under one process only to have the Commission use another method.57

35 Similarly, PPC, EPSA, and National Grid are concerned that the Penalty Guidelines create confusion regarding when and how they will apply to violations already assessed under the NERC Sanction Guidelines.58 PPC states that because the Commission does not propose to eliminate the existing NERC and Regional Entity penalty structure, all the Penalty Guidelines would do is conflict with and potentially override the existing penalty structure.59

36 As an alternative argument, EEI, NERC, and NorthWestern argue that if we decide to adopt the Penalty Guidelines for reliability violations, we should clarify that they would apply only to the Commission’s own investigations conducted...
under Part 1b of our regulations. This clarification, EEI contends, will avoid conflict and uncertainty that would result from having NERC and the Regional Entities calculate penalties under one process but have the Commission review and potentially reverse their determinations under a different method.

37. Instead of applying the Penalty Guidelines to reliability violations, many commenters argue that the NERC Sanction Guidelines should govern enforcement of the Reliability Standards.

38. EEI states that the Commission approved the Sanction Guidelines to provide a predictable, uniform, and rational approach for determining penalties. EEI comments that the NERC Sanction Guidelines accomplish these goals through a detailed set of Violation Risk Factors (VRF) and Violation Severity Levels (VSL), which create a base penalty range. EEI states that aggravating and mitigating factors are then applied to select a penalty within that range.

39. NERC comments that its Sanction Guidelines are designed and applied to foster a proactive reliability risk management assessment by scaling base penalties to risks to the Bulk-Power System and by using technical judgment in applying mitigating and aggravating factors to arrive at the ultimate penalty. NERC states that the prospect of very high, rapidly escalating penalties, as set out in the Penalty Guidelines, will cause entities to make compliance risk management more important than reliability risk management when the first focus should be on reliability improvement and not penalty avoidance. NERC believes that such a risk averse posture will ultimately lead to the detriment of the reliability of the Bulk-Power System.

40. ReliabilityFirst comments that the Commission-approved NERC Sanction Guidelines provide an effective and transparent model to determine penalties because they utilize a straightforward Base Penalty Amount Table which has been consistently and fairly applied for almost three years.

41. MISO further argues that the Penalty Guidelines will likely cause confusion because they do not expressly incorporate VRFs or VSLs, which are the most important factors in calculating penalties under the NERC Sanction Guidelines. APPA also asserts that a dual penalty regime will substantially undermine NERC’s Commission-approved model for no good purpose.

42. Finally, in arguing that the NERC Sanction Guidelines should be the single and sole standard for violations of the Reliability Standards, SWTDUG asserts that the Commission’s role should be limited to an appellate function. Specifically, SWTDUG suggests that the Commission should assume the role of an appellate court if we deem it necessary to review NERC’s penalty assessment on a case by case basis in the future "but should also make it clear that [our] review will constitute acceptance or in the alternative remand to NERC on a basis, with instructions, that sets a clear and understandable national policy.

b. Commission Determination

43. The Commission disagrees with the commenters’ suggestion that we not apply the Penalty Guidelines to violations of the Reliability Standards. The Commission has decided that we will apply the Penalty Guidelines in enforcing...
our regulations and requirements and, because enforcement of the Reliability Standards falls under our direct enforcement authority, we see no reason to treat these requirements any differently than any of the other requirements that the Commission administers. In EPAct 2005, Congress granted the Commission explicit authority to directly enforce the Reliability Standards. This authority is separate from the authority of the Electric Reliability Organization (ERO) to enforce the Reliability Standards and the Commission’s authority to review the ERO’s enforcement determinations. 73

44. We have exercised our discretion to enforce the Reliability Standards and will continue to do so. 74

45. The commenters’ argument about having two sets of guidelines for enforcement of the Reliability Standards is unrelated to our issuance of the Penalty Guidelines. After all, there always have been two sets of standards governing the enforcement of the Reliability Standards. When investigating and settling reliability matters prior to issuance of the Penalty Guidelines, the Commission applied the enforcement factors enumerated in our Revised Policy Statement to determine an appropriate penalty. 75 Meanwhile, NERC applied the NERC Sanction Guidelines to its enforcement actions. Thus, the existence of two enforcement regimes for the Reliability Standards is not a new phenomenon created by the Penalty Guidelines.

72 See 16 U.S.C. § 824o(e)(3) (2006) (“On its own motion or upon complaint, the Commission may order compliance with a reliability standard and may impose a penalty against a user or owner or operator of the bulk-power system if the Commission finds, after notice and opportunity for a hearing, that the user or owner or operator of the bulk-power system has engaged or is about to engage in any acts or practices that constitute or will constitute a violation of a reliability standard.”).

73 See 16 U.S.C. § 824o(e)(1)-(2).

74 See, e.g., Florida Blackout, 129 FERC ¶ 61,016 (2009); Florida Blackout, 130 FERC ¶ 61,163 (2010).

75 See, e.g., Florida Blackout, 129 FERC ¶ 61,016 (settlement with FPL), Florida Blackout, 130 FERC ¶ 61,163 (settlement with Florida Reliability Coordinating Council (FRCC)). This has also been the approach while the Penalty Guidelines have been suspended.

46. The Commission is not persuaded by the commenters’ suggestion that there cannot continue to be two sets of guidelines for enforcement of the Reliability Standards. The Commission and NERC, the Commission-approved ERO, have complementary, but separate, authority to enforce the Reliability Standards. The Penalty Guidelines will apply to the Commission’s investigations conducted under 18 C.F.R. Part 1b (2010) as well as to its enforcement actions. These are separate from NERC’s enforcement processes. And, as we explain more fully below, we will not apply the Penalty Guidelines to our review of Notices of Penalty. 76

47. NERC comments that “there are cases in which the Commission and NERC have concurrent [Part] 1b and compliance violation investigation proceedings,” and “expects that [the Commission] and NERC will jointly work to determine the penalty” in such proceedings. 77 The Commission acknowledges that in many, if not all, instances where we have initiated Part 1b investigations, our staff works jointly with NERC staff. In such matters, the Commission will use the Penalty Guidelines in determining an appropriate penalty.

48. The Commission also rejects the commenters’ suggestion that we apply the NERC Sanction Guidelines in our own investigations and enforcement actions instead of applying the Penalty Guidelines. As we explained above, EPAct 2005 empowers the Commission to exercise direct enforcement authority over the Reliability Standards. We see no reason to treat these requirements any differently than any of the other conduct that the Commission regulates.

49. Applying the Sanction Guidelines to the Commission’s own Part 1b enforcement actions would be a significant and unwarranted break from Commission practice. We have previously recognized that when conducting our own reliability enforcement actions, we would proceed with a penalty calculation that would rely on our own policy statements on enforcement. 78 Perhaps more

76 See infra section II.C.2.b.
77 Comments of NERC at 10.
78 North American Electric Reliability Corporation, 118 FERC ¶ 61,030, at P 93 (2007) (“In any event, if NERC does not submit Violation Risk Factors and Violation Severity Levels in sufficient time for their use when NERC’s enforcement program is to become effective in June 2007, we reserve the ability to take appropriate action to ensure that the penalty-setting process described in the Sanction Guidelines is operative. Alternatively, the Commission is prepared to assess monetary penalties for violations of Reliability Standards itself, pursuant to

(continued...)
significantly, when we have actually sought civil penalties under our own authority in the past, we have not been bound by the Sanction Guidelines. We have not operated under the Sanction Guidelines, even when NERC participated in the enforcement action. The Commission, for example, instituted an investigation using its own authority into the events surrounding the 2008 Florida Blackout and entered into two settlements as part of the investigation, one with FPL and the other with the FRCC. Neither settlement order cited the NERC Sanction Guidelines as the basis for setting the penalty amount, though both of these investigations were conducted jointly with NERC. NERC was a signatory to both settlements and received a portion of the penalty dollars equal to the amount paid to the United States Treasury. The commenters have not provided a good justification for changing this approach.

50. Finally, the Commission rejects SWTDUG's suggestion that we limit our enforcement of the Reliability Standards to an appellate function. This suggestion ignores the statutory framework under which we operate. As we have stated, Congress granted the Commission explicit authority to enforce the Reliability Standards, and we have exercised this authority for serious violations of these standards. We also have authority to review NERC's and the Regional Entities' penalty determinations. We will continue to exercise both of these statutory functions, although, as explained below, when reviewing Notices of Penalty we will not apply the Penalty Guidelines.

2. Penalty Guidelines' Applicability to Notices of Penalty
   a. Comments

51. EEI, MRO, EPSA, and PNGC recommend that the Commission specify that the Penalty Guidelines will not be used to evaluate Notice of Penalties. NPCC further recommends that the Commission continue to utilize the NERC Sanction Guidelines and corresponding Commission case law when reviewing Notices of Penalty.

52. TANC, NERC, APPA, ISO/RTO Council, BPA, Joint Municipal, ReliabilityFirst, and Turlock state that, although the Commission has stated that the Penalty Guidelines will generally not apply during the Commission's review of Notices of Penalty, the Commission also said that we may consider the results of applying the Penalty Guidelines for "out-of-ordinary" Notices of Penalty that describe "serious" violations. These commenters believe that both "out-of-ordinary" and "serious," as used in the Penalty Guidelines, are vague and ambiguous terms. They state that these terms are not defined and it is not clear when and how they will be applied. These commenters assert that this lack of clarity will create confusion and inefficiencies. They claim that vagueness will create confusion at the regional level regarding whether the NERC Sanction Guidelines or the Penalty Guidelines must be consulted or govern a particular determination, and confusion, in turn, will result in inefficiencies. ISO/RTO Council further recommends that the Commission provide examples of "out-of-ordinary" circumstances when we might apply the Penalty Guidelines when reviewing Notices of Penalty.

53. Moreover, APPA interprets P 64 of the Policy Statement on Penalty Guidelines to mean that if the Commission thinks a penalty NERC has levied for a serious violation is "too low" as compared to the penalty the Commission itself would levy, it will review that penalty. APPA states that P 64 of the Policy Statement, taken together with the Commission's action to review the penalty levied against Turlock in Docket No. NP10-18-000 (Turlock Notice of Penalty) indicates that the Commission is reserving the right to second guess penalties NERC assesses under its own guidelines in all "serious" cases.

79 Id.
80 See Florida Blackout, 129 FERC ¶ 61,016, Florida Blackout, 130 FERC ¶ 61,163.
81 See Comments of EEI at 6; MRO at 6; EPSA at 11; and PNGC at 6.
82 Comments of NPCC at 5.
83 See, e.g., Comments of TANC at 18; NERC at 10; APPA at 8; ISO/RTO Council at 7; BPA at 6; Joint Municipal at 11; ReliabilityFirst at 4; and Turlock.
84 Comments of ISO/RTO Council at 7.
85 Comments of APPA at 8.
86 Id.
Docket No. PL10-4-000

54. WIRAB believes that use of the Penalty Guidelines could complicate and confuse the existing standards enforcement regime because the Policy Statement on Penalty Guidelines states that the Commission would apply its guidelines in "out-of-ordinary" cases, essentially adding a new and different enforcement regime to that applicable in "ordinary" cases. WIRAB presumes that NERC enforcement actions comprise the universe of "ordinary" cases, but states that it is unclear whether a Commission review of a Notice of Penalty would make a case "out-of-ordinary," or whether a case would become "out-of-ordinary" only if the Commission initiated the investigation.

55. APPA states that it takes no comfort in the fact that the Turlock Notice Of Penalty is the only Notice of Penalty the Commission has chosen to review thus far. It believes that the Commission's decision to review the penalty that the Regional Entity and NERC assessed in the Turlock Notice of Penalty is both inappropriate and unwarranted, and only heightens the commenters' concerns about the Penalty Guidelines' applicability. In light of the Commission's review of the Turlock Notice of Penalty, APPA believes that "no user, owner, or operator" of the Bulk-Power System is safe from arbitrary and capricious reviews of NERC-assessed penalties.

b. Commission Determination

56. The Commission agrees not to apply the Penalty Guidelines in our review of Notices of Penalty. In the Policy Statement on Penalty Guidelines we stated that we may consider the results of applying the Penalty Guidelines for out-of-the-ordinary Notices of Penalty that describe serious violations. The Commission now believes, however, that our use of the Penalty Guidelines should be reserved solely for our own Part I b investigations and enforcement actions and not for our review of NERC's Notices of Penalty. This will ensure consistent and predictable review of Notices of Penalty.

57. The Commission will continue to consider the same substantive factors that we have always considered in determining whether to review a Notice of Penalty, including the seriousness of the violation, as measured by the VRF and the VSL, as well as the potential risk to the reliability of the Bulk-Power System and any actual harm that resulted. We will also consider the need to ensure consistency of penalties and the need to improve compliance with the Reliability Standards.

3. Base Violation Level for Violations of Reliability Standards

a. Comments

58. Many commenters from the electric industry believe that a base violation level of sixteen for a violation of the Reliability Standards is too high and that the Commission has failed to explain and justify why the base violation level for a reliability violation should be set at sixteen. These commenters suggest that this base violation level is unjustified, particularly when compared to the base violation level of six for market manipulation, fraud, anti-competitive conduct, and other rule, tariff, and order violations. The commenters argue that violations of the Reliability Standards often involve documentation errors, negligence, and mistake, which are less culpable than the scienter required for market manipulation and fraud.

59. EEI believes that there is no basis to treat reliability violations with a sixteen base violation level, stating that such level is used for serious crimes under the Sentencing Guidelines. Similarly, Empire argues that the base violation

93 See, e.g., Comments of EEI at 23-24; BPA at 7-8; NERC at 14-15; Empire at 1; APPA at 6-7; NPC at 5; NCP at 6; PNGC at 2; SMUD at 12-14; TAPS at 9-10; TANC at 3; and Turlock.
94 Comments of EEI at 23.
level for reliability violations fails to appropriately assess the severity of particular violations. 65

60. EEI proposes a modification to the base violation level and reliability adjustments to better account for the varying types of reliability violations. 66 Specifically, EEI proposes that, in connection with a reduction of the base penalty to six, the enhancement for risk for violations involving a low risk of minor harm remain at zero, while the enhancements in cases involving either a low risk of substantial harm or a moderate risk of minor harm increase from +3 to +5, and that the enhancements for a moderate risk of substantial harm or a high risk of minor harm increase from +5 to +8. For cases involving either a low risk of major harm or a high risk of substantial harm, EEI proposes increasing the enhancement from +7 to +11, while in cases involving a moderate risk of major harm, EEI proposes increasing the enhancement from +9 to +14. EEI proposes increasing the enhancement from +12 to +18 in cases involving either a low risk of extreme harm or a high risk of major harm, while increasing the enhancement from +14 to +22 in cases involving a moderate risk of extreme harm. Finally, EEI proposes increasing the enhancement from +16 to +26 in cases involving a high risk of extreme harm. 67

61. EEI believes this to be a better approach because a high base violation level of sixteen is not appropriate for non-serious reliability matters, yet the modification to the enhancements still allows the Commission to assess significant penalties for more serious cases. 68 BPA similarly suggests that the Commission should lower the base violation level for Reliability Standard violations and increase the penalty level based on the type of conduct involved. 69

62. We agree to reduce the base violation level for the reliability guideline from sixteen to six. This reduction equates the base violation level for reliability violations to the violation level in section 2B1.1 for violations of other Commission requirements. Setting the violation level at six still reflects the seriousness with which the Commission treats all violations of the Reliability Standards without differentiating them from violations of other Commission rules, requirements, and orders.

63. With respect to the enhancements for risk of harm, we find merit in EEI's suggestion for the relatively less serious reliability violations. Thus, we agree to EEI's proposal that, in connection with a reduction of the base violation level to six, the enhancement for violations involving a low risk of minor harm remain at 0, while the enhancements in cases involving either a moderate risk of minor harm or a low risk of substantial harm increase from +3 to +5, and that the enhancements for a high risk of minor harm or a moderate risk of substantial harm increase from +5 to +8. We accept these suggestions as appropriately balancing the need for an adequate deterrent for reliability violations while recognizing that relatively less severe violations should receive relatively smaller penalties.

64. We do not accept EEI's proposal on the risk of harm enhancements for the more serious reliability violations because we believe that more significant enhancements are necessary. For cases involving either a low risk of major harm or a high risk of substantial harm, EEI has proposed increasing the enhancement from +7 to +11, while in cases involving a moderate risk of major harm, EEI proposes increasing the enhancement from +9 to +14. Instead, we set the enhancement for violations involving a high risk of substantial harm or a low risk of major harm at +13 and the enhancement for violations involving a moderate risk of major harm at +18. The resulting total violation level for these violations, however, is lower than would be imposed under the original Penalty Guidelines.

65. For the most serious violations of the Reliability Standards imposing the greatest risk to the system, i.e., those that threaten a high risk of major harm or pose any risk of extreme harm, we believe the original Penalty Guidelines reached an appropriate outcome. The EEI proposal would produce substantially lower violation levels in cases of extreme harm than those outlined in the original Penalty Guidelines even though the examples of "extreme harm" given in the Penalty Guidelines involve the type of widespread, cascading outages in the 2003 Northeast Blackout that led to the development of mandatory Reliability Standards...
in the first place. As a result, we have increased the risk enhancement for those violations by ten levels to compensate for the ten-level reduction in the base violation level. These levels reflect the need to communicate the seriousness with which the Commission takes its authority to protect against major blackouts and other significant reliability incidents.

66. The following table compares the base violation levels, risk of harm adjustments, total violation levels, and base penalties in our original Penalty Guidelines and the modified Penalty Guidelines:

<table>
<thead>
<tr>
<th>Risk of Harm</th>
<th>Original Guidelines</th>
<th>Modified Guidelines</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Base</td>
<td>Adj.</td>
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<tr>
<td>Low Risk-Minor Harm</td>
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<td>0</td>
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<tr>
<td>Low Risk-Sustantial Harm</td>
<td>16</td>
<td>3</td>
</tr>
<tr>
<td>Moderate Risk-Minor Harm</td>
<td>16</td>
<td>3</td>
</tr>
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<td>Moderate Risk-Sustantial Harm</td>
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<td>2</td>
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<tr>
<td>High Risk-Minor Harm</td>
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<tr>
<td>Moderate Risk-Major Harm</td>
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<td>High Risk Extreme Harm</td>
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4. Load Loss
a. Comments

67. Many commenters from the electric industry express concern over the Commission's consideration of load loss and, particularly, the value of such loss, in our penalty assessments. 108

68. Many of these commenters believe that factoring load loss into penalty determinations will have a perverse incentive on operators not to shed load when doing so would be necessary to maintain reliability and avoid cascading outages. 109 For example, NERC states that it and the Regional Entities have worked for decades to educate utility management and system operators on the importance of shedding load in a timely fashion when it is necessary to protect the integrity of the Bulk-Power System. 110 NERC and NARUC believe that the failure to shed load on a timely basis to protect overall system integrity was the root cause of the July 1977 blackout in New York City and the 2003 Northeast Blackout. 111 NERC states further that when shedding load is required, it must be done without hesitation or fear of penalty or other sanction and that the existence of Penalty Guidelines that emphasize increased penalties for shedding load could have a chilling effect on system operators' willingness to exercise their authority to shed load when necessary. 112

69. APPA believes that in addition to creating this perverse incentive, the load loss factor places "inappropriate stress on transmission system operators, who must often make decisions whether or not to shed load in very short order. These are engineers and other comparable professionals doing their best to carry out a difficult and very technical job." PPC comments that under the current penalty and compliance framework, member utilities are reporting that experienced engineers and technical staff are retiring or requesting transfers in order to avoid duties that involve compliance activities. PPC states that these employees fear that, despite their best intentions, judgment and actions, they will be held

108 See, e.g., Comments of ERI at 23; EPSA at 9; ELCON at 3-4; Empire at 1; ISO-NE at 3-9; APPA at 11-13; NARUC at 2; NERC at 15-20; NPCC at 6;

(continued...)
responsible for violations of Reliability Standards. PPC states that these employees play a key role in ensuring reliable system operation and maintenance. PPC believes that given the penalties that are possible under the Penalty Guidelines, member utilities expect to see employee reassignment requests, retirements, and departures from the industry to continue or accelerate. NorthWestern states that system operators “should be left to manage reliability, not penalty risk.”

70. Many commenters also believe that it is inappropriate, and contrary to well-established law, to hold utilities liable for consequential damages that result from electrical outages. EEl, for example, claims that holding utilities liable for such damages “conflicts with decades of settled law and threatens to embroil the Commission in wasteful litigation over food spoilage claims, lost sales by commercial customers, etc.” EEl maintains that a limitation on the liability of public utilities for outages lowers the electric rates paid by consumers, results in greater fairness between customer classes, and corresponds to the highly regulated nature of electric utilities. Xcel comments that it is neither cost effective nor in the best interest of customers to expose utilities to consequential damages associated with customer outages.

71. Other commenters state that there are complexities and problems that arise from trying to value load loss and the Commission’s failure to address how it would analyze such value adds confusion on this issue.

72. SMUD, TANC, and NorthWestern argue further that factoring load loss into penalty determinations will have a disparate impact on certain organizations. SMUD, for example, believes that the load loss factor “exposes transmission owners with load-serving obligations to significantly greater penalties than non-load serving transmission owners.” TANC believes that the load loss factor will have a disparate impact on smaller utilities and non-profit entities, and their customers. NorthWestern states that rural transmission networks are necessarily a different design than urban networks and to achieve the same degree of reliability for both types of networks would impose significant and unneeded costs on customers.

73. EEl and ISO-NE recognize that load loss can still be an appropriate factor for the Commission to consider when assessing the seriousness of the violation, but object to the use of value as the measuring tool. For example, ISO-NE asks the Commission to consider whether “quantity is a better measuring stick to utilize in order to arrive at consistent results that better align with how power systems are planned and operated when considering loss of load as a penalty factor.” ISO-NE believes that the quantity of lost load is a better factor than the value of lost load.
load because the use of value would result in different penalties for violations of the same standards for the same amount of load.\textsuperscript{120}

74. Finally, PJM and Cities/M-S-R, while not directly rejecting the Commission's consideration of load loss, seek clarification on the issue. First, PJM recognizes that load loss should be an element in calculating penalties that arise from a violation of a Reliability Standard, but it seeks clarification that "load shedding, which results in 'loss of load' is an entirely appropriate and prudent remedial action to take in certain circumstances to protect the larger interconnection as a whole."\textsuperscript{121} Second, Cities/M-S-R requests further information on how the Commission plans to calculate losses of load.\textsuperscript{122}

b. Commission Determination

75. We accept the suggestion that we not attempt to conduct a specific, individualized assessment of the value of the loss of load as a measure of the harm from the violation. While measuring value would allow enforcement actions to focus more specifically on the facts of the violation in any given case, such a calculation requires a substantial commitment of time and resources on behalf of the entity under investigation and Commission staff. Instead, we agree with the proposal of ISO-NE that we use the quantity of load lost as one measure of the seriousness of the violation. To reach this result, in the modified version of section 2A.1.1, we included escalating penalties for increasing quantities of lost load in place of the valuation of lost load as a measure of harm. We believe that such an approach provides additional clarity and transparency to our penalty calculations while avoiding the potentially difficult effort to assign a value to a particular quantity of lost load.

76. To the extent that commenters propose that we not consider the loss of load entirely in calculating a civil penalty for reliability violations, we reject that suggestion. The Commission has always made clear that it considers violations involving loss of load more seriously than similar incidents where no blackout occurred.\textsuperscript{123} Federal Power Act (FPA) section 215(e) requires the Commission to ensure that any penalty imposed for a violation of a Reliability Standard bears "a reasonable relation to the seriousness of the violation." We have interpreted this obligation as requiring us to consider any actual harm as well as the risk to reliability posed by a violation of a Reliability Standard.\textsuperscript{124} The role of loss of load has been especially significant in the Commission's exercise of its enforcement authority. As stated earlier, we instituted an investigation into the events surrounding the 2008 Florida Blackout based on the significance of that event.\textsuperscript{125}

77. We disagree with the commenters who suggest that increasing penalties when blackouts occur will increase the risk to the reliability of the Bulk-Power System. As we have emphasized previously, we recognize that "[l]oad shedding is not, alone, a violation, and... load shedding may sometimes be necessary or required."\textsuperscript{126} While some commenters suggest that factoring loss of load into penalty determinations will have a perverse incentive on operators not to shed load when doing so would be necessary to comply with the Reliability Standards, we emphasize that we do not intend the Penalty Guidelines to have a chilling effect on system operators' willingness to shed load. Indeed, load shedding is sometimes required by the Reliability Standards.\textsuperscript{127} Of course, neither the Commission nor

\textsuperscript{120} For example, the Commission recommended that the ERO revise its Rules of Procedure to state specifically that, in relation to an investigation of a blackout or other ongoing disturbance, the ERO will consider an enforcement action for any violation it finds. North American Electric Reliability Corp., 116 FERC \textsuperscript{\textcircled{2}} 61,062, at P 380 (Certification Order), order on reh'g and compliance, 117 FERC \textsuperscript{\textcircled{2}} 61,126 (2006).

\textsuperscript{121} See Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672, 123 FERC \textsuperscript{\textcircled{2}} 61,046, at P 11 (2008).

\textsuperscript{122} 2008 Florida Blackout, 122 FERC \textsuperscript{\textcircled{2}} 61,244, at P 2 (2008) ("Given the significance of the Florida Blackout, we believe that Commission staff should participate in the coordinated review being conducted by NBRC and the FRCC.").

\textsuperscript{123} North American Electric Reliability Corp., 130 FERC \textsuperscript{\textcircled{2}} 61,151, at P 12 (2010).

\textsuperscript{124} Under the Reliability Standards, load shedding can be required as a last resort after all other measures have failed. See, e.g., Reliability Standards EOP-
NERC can impose a civil penalty for conduct that does not violate the standards. We consider loss of load only in those situations in which there is a causal connection between a violation of a Reliability Standard and the loss of load. When an operator decides to shed load because of the consequences of an underlying violation, we will consider whether the decision to shed load was a separate violation or whether the decision to shed load was required by the Reliability Standards to avoid cascading outages that would have a broader effect on system reliability.

78. In the latter situation, an operator's first responsibility is to comply with the Reliability Standards. When an underlying violation requires an operator to shed load pursuant to a Reliability Standard, we emphasize that the operator's decision to shed load is not itself a violation and no penalty would be sought for that decision. In assessing the penalty for the underlying violation, where shedding load was necessary in order to comply with a Reliability Standard, we will not consider under section 2A1.1(b)(2) of the Penalty Guidelines the resulting MWh of load shed to comply with the Reliability Standards. We will, however, consider the fact that the underlying violation required load shedding in assessing the risk created by the underlying violation under section 2A1.1(b)(1) of the Penalty Guidelines. Indeed, given the statutory requirement that we consider the seriousness of the violation, we believe it is appropriate to consider the loss of load as a measure of the risk created by the underlying violation.

79. Several commenters assume that entities will face lower penalties if they inappropriately fail to shed load when such conduct would reduce the risk to the system than if they appropriately shed load when it is necessary to do so. The Penalty Guidelines are specifically designed to avoid that result. To ensure that registered entities face appropriate incentives, we have clarified the Penalty Guidelines by adding language to an application note in section 2A1.1 which now explicitly states that entities will always face lower civil penalties in situations where load is shed in compliance with a Reliability Standard. The Commission will always take steps to ensure that entities are not penalized unreasonably when they take steps to ensure the reliability of the Bulk-Power System consistent with the Reliability Standards. Also, the Penalty Guidelines incent the prevention of cascading outages by increasing penalties in proportion to the quantity of lost MWh.

5. Risk of Harm Examples

a. Comments

80. EEL recommends that the Commission delete the hypothetical "risk of harm" examples in the reliability section of the Penalty Guidelines. EEL states that there are no criteria for making the "risk of harm" determinations and that this is an example of how the Penalty Guidelines create numerical calculations that can offer the appearance of certainty, but often rest on subjective and unexplained criteria.

b. Commission Determination

81. The Commission declines to delete the hypothetical "risk of harm" examples in the reliability section of the Penalty Guidelines. We offer these as illustrative examples of the varying levels of risk of harm that could exist as a result of reliability violations. The examples do not provide an exhaustive list. They are meant to provide some guidance to industry of the types of violations that might fall within each risk of harm category.

6. Double Penalty Concerns

a. Comments

82. Hoosier urges the Commission to ensure that entities are not subjected to double penalties for the same violation of the Reliability Standards. Hoosier suspects that if entities are subjected to double penalties, they are likely to react by trying to eliminate the obligation to comply with Reliability Standards from future contracts, even where an express obligation to comply may be warranted. Hoosier argues such a development would not serve the interests of the owners, operators, or users of the Bulk-Power System, or of the Commission itself.

129 Comments of EEL at 16.
130 Id. at 7.
131 Comments of Hoosier at 4.
132 Id.
87. FirstEnergy comments further that while section 215 of the FPA authorizes the Commission to modify a NERC-approved penalty, section 215 does not allow the Commission to impose a second, additive penalty on top of a NERC-approved penalty. Accordingly, FirstEnergy recommends that the Commission’s determination of civil penalties should displace, and not be additive to, any determination of civil penalties by NERC.

88. The double penalty concerns of Hoosier and FirstEnergy are entirely hypothetical and, as a matter of enforcement policy and discretion, we are hard pressed to envision a situation in which we would penalize the same conduct for which we had already approved a penalty imposed by NERC.

7. Administrative and Documentation Violations of the Reliability Standards

a. Comments

85. SMUD comments that in the three years since the Reliability Standards became effective, SMUD has received approximately 300 Notices of Penalty involving a registered entity. Rather than a single Notice of Penalty, SMUD asserts that the vast majority of violations involved violations of documentation-related errors or misapplication of the requirements of a particular standard. Although SMUD recognizes that some reliability violations involve documentation and administrative errors, SMUD does not intend to investigate minor violations of documentation, administrative, or other similar errors. We do not intend to change course now. On the other hand, we believe that the Penalty Guidelines will be an effective tool in enforcing serious violations of the Reliability Standards that impact the reliability of the Bulk-Power System.

86. MISO requests that the Commission adopt an express distinction between serious Reliability Standard violations and inadvertent violations, particularly documentation and administrative-related errors. MISO states that the Penalty Guidelines apply only to violations of Reliability Standards that result from operator negligence or willful misconduct, and that directly adversely affect the reliability of the Bulk-Power System.

84. The Commission disagrees with SMUD that it is unreasonable to apply the Penalty Guidelines to violations of the Reliability Standards simply because they involve documentation or administrative-related errors. Although we recognize that some reliability violations involve documentation-related errors, we believe that the Penalty Guidelines are an effective tool in enforcing serious violations of the Reliability Standards that impact the reliability of the Bulk-Power System.

b. Commission Determination

89. We reiterate that we retain discretion under the Penalty Guidelines not to investigate and pursue penalties for every type of violation. Under the Penalty Guidelines, the Commission may not impose a penalty for every violation of the Reliability Standards.
Guidelines, we will continue to investigate serious reliability violations, not minor violations involving documentation or administrative errors that do not result in harm or significant impact to reliability. Therefore, we find it unnecessary to adopt a distinction, as MISO requests, between serious Reliability Standard violations and inadvertent violations that do not have a serious impact on reliability.

8. **Other Reliability Issues**

90. SCE states that reliability of the Bulk-Power System can be enhanced most effectively through a performance-based approach to the Reliability Standards rather than increasing penalty exposure. Therefore, SCE believes that we should remove the Reliability Standards from the Penalty Guidelines and instead take this opportunity to work with NERC and Bulk-Power System users, owners, and operators, to implement a more collaborative and performance-based approach to Reliability Standards development and compliance. In that regard, SCE states that the nuclear industry provides a useful starting point to develop a model of this approach based on the complementary roles of the Institute of Nuclear Power Operations (INPO) and the Nuclear Regulatory Commission (NRC).

91. Although the Commission believes that INPO serves a valuable function in the nuclear industry, it is not an enforcement function. INPO's mission is to promote the highest levels of safety and reliability, but it performs this function not to supplant the regulatory role of the NRC, but to provide the means whereby the industry itself can, acting collectively, make its nuclear operations safer. The NRC still uses its enforcement powers, like us, to assess penalties and undertake enforcement actions. Thus, while an INPO-like body could serve a valuable purpose in the electric industry, that purpose would not supplant, or in any way affect, our enforcement role. Therefore, we find SCE's request to be outside the scope of this proceeding.

92. NorthWestern states that the timing of the decision to adopt the Penalty Guidelines is particularly questionable because NERC is developing enhanced

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142 Comments of SCE at 3.
143 Id.
144 Id. at 4.

93. The Commission does not believe that NorthWestern's comment warrants further delay in our issuance of the Penalty Guidelines. Once approved by the Commission, NERC's development of enhanced VRFs will apply to NERC's enforcement processes, while the Penalty Guidelines will apply to our enforcement authority.

94. ISO/RTO Council argues that the Commission should clarify that activities on radial transmission facilities cannot constitute violations of Reliability Standards because, at present, radial facilities are excluded from NERC's definition of the Bulk-Power System.

95. The Commission believes that ISO/RTO Council's comment is beyond the scope of the Penalty Guidelines. This is not the forum to be making jurisdictional determinations on the applicability of the Reliability Standards.

96. BPA thinks penalties for violations of Reliability Standards should include both monetary and non-monetary penalties. BPA states section 215 of the FPA does not specify that penalties assessed for violations of the Reliability Standards need to be only monetary in nature. BPA claims that the NERC Sanction Guidelines recognize non-monetary sanctions as an important and preferred enforcement tool because the focus is improving reliability and preventing repeat violations. In contrast, BPA states that the Penalty Guidelines do not allow for non-monetary sanctions. BPA states that the Commission should make the Penalty Guidelines less restrictive to encourage entities to take proactive steps to avoid violations and improve reliability.
97. We clarify that the Penalty Guidelines do allow for non-monetary sanctions. The Commission has always had the discretion to assess non-monetary sanctions, instead of or in addition to monetary penalties, such as requiring entities to submit compliance monitoring reports and conduct audits. The Penalty Guidelines do not change this practice.

98. NERC comments that there are a number of places in the Penalty Guidelines that rely on undefined terms, subjective criteria, and missing formulas to make penalty determinations. NERC argues that failure to address these could lead to inconsistency and confusion in the application of the Penalty Guidelines. Examples suggested by NERC are as follows:

99. First, NERC comments that in the Penalty Guidelines the term “low risk” is meant to apply to cases where there was a significant, albeit small, chance of relevant level of harm. NERC states that use of terms “significant” and “small” when describing the chance of relevant harm is confusing. Specifically, NERC asks whether “low risk” means that there is a significant chance of relevant harm, a small chance of relevant harm, or a small chance of a significant risk of harm.

100. NERC’s comment refers to the Commission’s reference to “low risk” in Application Note 2 of section 2A1.1 related to reliability violations. As originally drafted, this Application Note stated that “low risk” is not meant to include cases where there was virtually no risk of harm. It is meant to apply to cases where there was a significant, albeit small, chance of the relevant level of harm. The Commission was not using the term “significant” in this note to refer to a particular degree of chance. Rather, the Commission meant that “low risk” refers to situations where there is a real chance of harm, albeit a small chance. To avoid any confusion, however, the Commission has revised this language in Application Note 2. The important point is that “low risk” does not include circumstances where there is no risk at all.

101. Second, NERC states that the Penalty Guidelines provide no explanation for why the different terms “minor,” “substantial,” “major,” and “extreme” are needed for reliability violations. NERC also comments that the Penalty Guidelines do not define these four new terms and do not provide criteria to evaluate the risk of harm.

150 See Comments of NERC at 21-22.

102. The Commission believes that these four terms help to differentiate varying degrees of harm that could result from reliability violations. The terms are not defined, but we have included illustrative examples to provide guidance on the types of violations that could be included in each category. Also, over time the Commission will apply these terms in our penalty determinations, thereby developing precedent, which will provide further guidance on their meaning.

103. Third, NERC raised several concerns with the Commission’s reliability violation example at P 56 of the Policy Statement on Penalty Guidelines. NERC states that the duration date is not identified in the example and that it is not clear whether the proposed penalty range is a per-day penalty or a cumulative penalty or how the per day issues are reflected in the penalty amount. NERC asks that the Commission provide more information on the duration of the violation as compared to the duration of the outage. In addition, NERC believes the Commission should explain whether the loss of load figure includes direct, indirect, special, consequential, or any other types of losses or damages. NERC states that the Commission should also explain whether and how it took into account state and federal limitations on liability with respect to outage costs, including those that preclude recovery of losses for lost profit and spoiled food.

104. The reliability example in the Policy Statement on Penalty Guidelines was purely hypothetical and not every fact was addressed. The purpose of the hypothetical was simply to illustrate how the Penalty Guidelines calculate penalty ranges. We recognize that the hypothetical raised concerns because it involved a $15 million penalty, but this figure does not have significance other than demonstrating the mechanics of a penalty calculation under the Penalty Guidelines. That said, the Penalty Guidelines treat multiple reliability violations that are related to the same conduct or event as a whole, and we would consider the per day duration only to ensure that the guidelines’ minimum penalty would not exceed the statutory maximum of $1 million per day per violation.

105. Finally, SUB submitted several comments, which, the Commission believes, are outside the scope of the Penalty Guidelines. SUB’s comments generally concern changes to the Reliability Standards over time, lack of clarity of some Reliability Standards, the costs to organizations of responding to alleged violations, and consulting services offered to organizations by former regulatory

151 We discuss this point in further detail infra at P 182-183.

152 These comments appear in SUB’s Comments at 5-12.
officials. Because these comments by SUB do not address the Penalty Guidelines, but rather focus on enforcement practices more generally, they are beyond the scope of this Policy Statement.

D. Compliance Credit

1. Compliance as a Central Goal of the Commission

a. Comments

106. Several commenters suggest that the Penalty Guidelines should do more to encourage and provide credit for strong compliance. For example, EEI recommends that the Commission explicitly state that we and our staff will be guided by the principle that “achieving compliance, not assessing penalties, is the central goal of our enforcement efforts,” as we stated in 2008 in our Policy Statement on Compliance.\(^{153}\) INGAA urges the Commission to place more emphasis on compliance through incentives rather than penalties.\(^{154}\) Similarly, BPA believes that the Penalty Guidelines are premised on the idea that the threat of large penalties, not providing sufficient incentives to mitigate penalties, promotes compliance.\(^{155}\) INGAA also suggests that our focus should remain on compliance with the Commission’s requirements and should not broaden the concept to include an ethics program or areas unrelated to the Commission’s regulations and requirements.\(^{156}\)

107. EEI argues further that the Sentencing Guidelines do not provide a good model on compliance, claiming that “federal prosecutors do not use them consistently because they provide such poor incentives for corporate compliance programs.”\(^{157}\) EEI relies on the Holder Memo to support this position, arguing that the memo “encouraged prosecutors not to prosecute firms that engaged in specified good corporate conduct” and that “[f]ollowing the Holder Memo, prosecutors increasingly chose not to prosecute firms [pursuant to the Guidelines] if the crime occurred notwithstanding an effective compliance program.”\(^{158}\)

108. In addition to the comments that generally urge the Commission to focus on compliance, some commenters suggest that we specifically modify the Penalty Guidelines to give greater weight to effective compliance programs. AGA, for example, recommends that the Commission increase the credit for an effective compliance program to five points instead of the three point credit provided under section 1C2.3.\(^{159}\) AGA believes that this increased credit would better reflect the importance the Commission places on compliance and would provide a significant incentive for organizations to develop robust programs.\(^{160}\) Similarly, INGAA comments that given the Commission’s focus on compliance, organizations should be entitled to a larger credit.\(^{161}\) INGAA acknowledges that the Penalty Guidelines’ three point credit stems from the Sentencing Guidelines, but believes that no independent rationale exists for the Commission to adopt this number.\(^{162}\) National Grid also comments that we should give more credit to organizations that strive for strong compliance.\(^{163}\) Finally, BPA suggests that extra compliance credit should be awarded to encourage organizations to adopt the best compliance programs rather than simply encourage them to meet the requirements listed in the Penalty Guidelines.\(^{164}\)

b. Commission Determination

109. The Commission agrees with the commenters that achieving compliance should remain the Commission’s main goal. Since EPAct 2005, the Commission has continually placed a heavy emphasis on promoting industry-wide

\(^{153}\) Comments of EEI at 20.

\(^{154}\) Comments of INGAA at 2.

\(^{155}\) Comments of BPA at 4.

\(^{156}\) Comments of INGAA at 8.

\(^{157}\) Comments of EEI at 16 (citing Arlen at 5).

\(^{158}\) Id. (quoting Arlen at 5).

\(^{159}\) Comments of AGA at 7.

\(^{160}\) Id.

\(^{161}\) Comments of INGAA at 6.

\(^{162}\) Id.

\(^{163}\) Comments of National Grid at 5.

\(^{164}\) Comments of BPA at 6.
compliance, and the Penalty Guidelines did nothing, either explicitly or implicitly, to change this emphasis. Indeed, the Penalty Guidelines served only to solidify the importance we place on compliance by providing substantial and transparent mitigation credit for effective compliance programs. Specifically, under the Penalty Guidelines, an effective compliance program could result in a ninety-five percent reduction in penalties when combined with other factors. For example, if the Commission finds that an organization had an effective compliance program at the time of a violation, this finding, together with other mitigating circumstances, could lead to a final culpability score of zero. A culpability score of zero, in tum, reduces an organization’s base penalty by ninety-five percent, for example, from $5 million down to $250,000. This is a significant credit, awarded, effective compliance under the 

Even if an organization fails to receive any reduction other than compliance credit, the compliance credit alone could still reduce a penalty by sixty percent, for example, from $5 million to $2 million.

110. Thus, the Commission agrees with the commenters that achieving compliance should remain a central goal for the Commission and, to clarify this point, we agree to adopt EEI’s proposal that we state explicitly in the Penalty Guidelines that “[a]chieving compliance, not assessing penalties, is the central goal of the Commission’s enforcement efforts,” as we have previously stated in our Policy Statement on Compliance. Given the substantial credit awarded for effective compliance under the Penalty Guidelines, however, the Commission declines the commenters’ request for a larger credit than the three point credit currently in the Penalty Guidelines.

111. Although we accept EEI’s general statement that compliance should remain our focus, we disagree with EEI’s argument that the Holder Memo somehow encouraged prosecutors not to use the Sentencing Guidelines because they provide poor incentives for compliance. First, as we stated supra in section II.A.2, the implication that prior to the Holder Memo prosecutors determined whether they should charge a corporation based upon the sanctions available under the Organizational Sentencing Guidelines is incorrect. As the Holder Memo itself points out, the Sentencing Guidelines are taken into account only after “a prosecutor has decided to charge a corporation.” Second, EEI’s reliance on this memo for its compliance argument ignores a central element of the memo’s treatment of the weight accorded to a corporation’s compliance program in the charging decision, specifically, that “the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents.” Third, EEI’s suggestion that the Holder Memo reflects a rejection of the Sentencing Guidelines’ treatment of compliance programs ignores the memo’s instruction that prosecutors should consult the Sentencing Guidelines “for a detailed review of [the factors to consider] concerning corporate compliance programs.”

112. The Commission does not view assessing civil penalties and encouraging compliance as mutually exclusive. This is not an “either/or” situation. Rather, civil penalties are an important tool to achieve compliance. It has been widely recognized that “regulators have an array of persuasive tools at hand, such as warnings, civil penalties including fines, and license suspension, with which to achieve compliance.” The Commission expects that civil penalties will prompt organizations to devote significant efforts and resources to compliance in order to avoid future penalties.

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165 See, e.g., 2005 Policy Statement, 113 FERC ¶ 61,068 at P 22 (“We encourage companies engaged in jurisdictional activities to take steps to create a strong atmosphere of compliance in their organizations.”); Revised Policy Statement, 123 FERC ¶ 61,156 at P 54 (listing the “strength of an entity’s commitment to compliance” as one of the most important factors in determining penalty amounts); Compliance with Statutes, Regulations, and Orders, 125 FERC ¶ 61,058, at P 8 (2008) (Policy Statement on Compliance) (“[T]he Commission places great emphasis on a company’s efforts to assure compliance with all applicable regulatory requirements.”).

166 See Policy Statement on Compliance, 125 FERC ¶ 61,058 at P 1.

167 Holder Memo § XI.

168 Id. § VII.

169 Id.

Finally, the Commission agrees with INGAA that our focus should remain on compliance with the Commission's requirements and that we should not broaden the concept to include an ethics program or areas unrelated to the Commission's regulations and requirements. The Commission is concerned about compliance with the statutory and regulatory requirements that we oversee. Thus, we have modified the language in section 1C2.3 to clarify that the compliance credit relates to compliance with the Commission's requirements and not an organization's ethics program or areas unrelated to the Commission's requirements.171

2. Partial Compliance Credit

a. Comments

Some commenters take issue with the Penalty Guidelines' lack of partial compliance credit for organizations that meet some, but not all, of the requirements listed in section 1B2.1(b) of the Penalty Guidelines. EEI, for example, proposes that the Commission change the "all or nothing" nature of the compliance credit so that organizations can receive partial credit for effective compliance programs that do not meet all of the requirements listed in section 1B2.1.172 EEI also proposes that an effective compliance program that meets all of the requirements in section 1B2.1 receive three points, while a program that meets most, but not all requirements, receive two points.173 INGAA comments that it is unreasonable not to award partial credit because many of the criteria listed in section 1B2.1 are subjective.174 Thus, INGAA proposes increasing the compliance credit to seven points, corresponding to the seven requirements listed in section 1B2.1, to give the Commission flexibility to award partial credit to those organizations that meet some of those requirements.175 Xcel also believes that partial compliance credit is warranted, but does not propose a specific range of credit.176

b. Commission Determination

The Commission believes there is merit to the commenters' proposal that organizations receive partial credit for effective compliance programs that do not meet every requirement in section 1B2.1 of the Penalty Guidelines. Section 1B2.1 lists seven factors we will consider to determine whether an organization has an effective compliance program.177 This section offers organizations a useful checklist for creating effective compliance programs, and organizations can receive the maximum amount of credit given (three points) for implementing and carefully following this guidance. The Commission recognizes, however, that an organization might achieve effective compliance without following every element and sub-element listed in the Penalty Guidelines. Therefore, we agree to award partial credit to organizations that have effective compliance programs, but that do not follow the section 1B2.1 requirements exactly.

In general, effective compliance programs should account in some fashion for the seven factors listed in the Penalty Guidelines. These seven factors are consistent with the four hallmarks we enumerated in our 2008 Policy Statement on Compliance: (1) active engagement and leadership by senior management; (2) effective preventive measures; (3) measures for the prompt detection and cessation of violations and voluntary reporting of violations; and (4) measures for remediation of the misconduct.178 The Commission would likely give some degree of compliance credit to organizations that achieve these four factors, even if the organization fails to specifically meet each of the requirements explicitly listed in the Penalty Guidelines.

Our decision to grant partial compliance credit is consistent with our prior statement that "the facts and circumstances of each situation should be evaluated to determine the appropriate amount of credit given."179 It also accords with our

171 References to "ethics" have been deleted from sections 1B2.1 and 1C2.3 of the Penalty Guidelines.

172 Comments of EEI at 36.

173 Id.

174 Comments of INGAA at 7.

175 Id.

176 Comments of Xcel at 5.

177 See Penalty Guidelines § 1B2.1(b).


179 Id. P 12.
continuing view that “there is no one template or approach for a good compliance program, and . . . market participants are in the best position to assess their regulatory risks and to devise the optimum mix of measures that will provide the best conditions for ongoing compliance.”

118. Although the Commission agrees to give organizations partial compliance credit, we reject EEI’s and INGAA’s proposal to specifically delineate the varying degrees of weight given. The Commission believes that the better approach is to assess the effectiveness of each compliance program individually and to decide the appropriate degree of credit warranted on a case-by-case basis. This approach will allow the Commission to consider the appropriate mix of compliance measures for each organization rather than simply looking at a list of factors in isolation.

119. Thus, the Commission has revised the section of the Penalty Guidelines providing compliance credit—section 1C2.3—to make explicit that: (1) a three-point credit is the maximum that an organization can earn for an effective compliance program, and (2) organizations can earn partial credit for compliance programs that do not meet every requirement listed in section 1B2.1, but, nonetheless, are effective.

3. Compliance Credit and Senior-Level Involvement

a. Comments

120. EEI, Xcel, and INGAA recommend that the Commission delete the provision in the Penalty Guidelines that would eliminate any compliance credit for violations where an organization’s high-level personnel, substantial authority personnel, or individuals with operational responsibility for compliance participated in, condoned, or were willfully ignorant of the violation.

EEI argues that this provision provides a disincentive to Boards of Directors to adopt compliance programs that monitor senior-level employees’ conduct because if such personnel engage in misconduct, no credit will be earned for compliance. EEI also states that Boards of Directors cannot eliminate the risk of hiring errant managers.

Xcel shares the views of EEI and states that effective compliance programs serve as a deterrent, not a guarantee.

121. Finally, INGAA encourages the Commission to adopt a current amendment proposed by the Sentencing Commission that could allow an organization to receive credit for an effective compliance program despite having high-level personnel involved in the violation.

Under the amendment, to receive compliance credit where high-level personnel were involved, the organization must meet certain criteria, including that no individual in operational responsibility for the compliance program participated in, condoned, or was willfully ignorant of the offense.

b. Commission Determination

122. The Commission agrees to delete the provision in the Penalty Guidelines that would automatically eliminate any compliance credit where an organization’s high-level personnel, substantial authority personnel, or individuals with operational responsibility for compliance (collectively referred to as “senior-level personnel”) participated in, condoned, or were willfully ignorant of the violation. In agreeing to adopt this change to the Penalty Guidelines, we recognize that despite devoting significant efforts and resources to compliance, organizations may still not be able to avoid a violation, particularly if the

\[186\] Id. at 37.


\[188\] While defining the type of activity by senior-level personnel that constitutes “condoning” improper behavior is difficult in the abstract, the Commission will review the actions of senior-level personnel on a case-by-case basis to determine whether to eliminate compliance credit. If we determine that senior-level personnel acted in good-faith after a deliberative process, we may choose not to eliminate the compliance credit even where senior-level personnel approved of conduct that violates Commission regulations.
organization is dealing with a rogue employee not adhering to clear direction from the company. In such situations, the Commission believes that it would be unfair to automatically withhold all compliance credit for an organization exercising diligence to comply with the law.

123. Thus, in situations where there is senior-level personnel involvement in a violation, the Commission will not automatically eliminate all compliance credit. Instead, we will consider whether the senior-level employee acted on his or her own or at the direction or supervision, or with tacit acquiescence of the organization's governing authority.188

124. The Commission emphasizes that although we will not automatically eliminate compliance credit where there is senior-level personnel involvement, we would likely find that compliance credit is not warranted where senior-level personnel involvement in a violation is so pervasive throughout the organization that it reflects the collective actions of the organization as a whole. Compliance credit also would not be warranted where there is evidence that an organization's governing authority knew of the senior-level involvement in a violation or failed to take timely remedial action.

4. **Compliance Credit and Self-Reporting**

   a. **Comments**

   125. EEI, Xcel, and INGAA also propose that the Commission delete the provision that eliminates compliance credit when an organization fails to timely report a violation.189 EEI and INGAA believe that an organization should not lose all compliance credit if it detects and remedies a violation on its own without also

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188 Under the Penalty Guidelines, “Governing authority” means “(A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.” Penalty Guidelines § 1B2.1 (Application Note 1).

189 See Comments of EEI at 37; Xcel at 5; and INGAA at 8. EEI uses the phrase “timely reported.” Under the Penalty Guidelines, an organization will not receive compliance credit “if, after becoming aware of a violation, the organization unreasonably delayed reporting the violation to appropriate governmental authorities.” Penalty Guidelines § 1C2.3(f)(2).

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190 Comments of EEI at 37; INGAA at 8.

191 Comments of Xcel at 5.

192 Comments of AGA at 6.

193 Id.

194 Policy Statement on Compliance, 125 FERC ¶ 61,058 at P 19 (emphasis added).

195 The Commission, however, has unbundled self-reporting credit from the credits for cooperation, avoidance of trial-type hearings and acceptance of responsibility. See infra section II.E.1.
129. The Commission will consider the particular facts and circumstances to
determine whether a self-report was “unreasonably delayed.” Among the factors
we will consider are: (1) the time between when the violation was discovered, or
reasonably should have been discovered, and the time of the report; (2) the steps
the organization took before reporting the violation; and (3) the nature of the
violation. The Commission recognizes that an organization’s inquiry into conduct
by its employees could, in some circumstances, take considerable time to
determine whether an act violates our regulations and requirements.196 It also
could take time for an organization to determine the nature and duration of
violations. An organization, however, can always inform Enforcement staff that it
is investigating a matter. In fact, the Commission encourages organizations that
discover violations to contact Enforcement staff before submitting a full report.
This contact could allow Enforcement staff to provide guidance to the
organization on the matters to explore and present in its written report. In turn,
this could lead to a more complete self-report and a more well-informed and
prompt conclusion to staff’s inquiry.

5. Upward Adjustment for the Lack of a Compliance Program

a. Comments

130. CPUC is concerned that the Penalty Guidelines do not address the lack of
any compliance program and recommend that the lack of an “effective” program
be considered as an upward adjustment in determining an organization’s
culpability score under section 1C2.3 197 Further, CPUC recommends that the
Application Notes to section 1B2.1 specifically reference record retention and
electronic recordkeeping policies as part of an effective compliance program. 198

b. Commission Determination

131. The Commission shares CPUC’s concern that entities might lack effective
compliance programs. We believe, however, that the Penalty Guidelines

196 The Penalty Guidelines “contemplate that the organization will be
allowed a reasonable period of time to conduct an internal investigation.” Penalty
Guidelines § 1C2.3 (Application Note 9).

197 Comments of CPUC at 2-3.

198 Id. at 4.

6. Size as a Relevant Factor for Compliance Credit

a. Comments

133. AGA comments that the commentary to section 1B2.1 on compliance
explains that size, including whether an organization is “large” or “small,” is
relevant to whether an organization meets the requirements for an effective
compliance program. AGA states, however, that the Commission fails to define
“large” or “small.” 199 AGA urges the Commission to: (1) define “large” and
“small”; (2) clarify whether size is determined based on the number of employees
and whether other factors may be relevant; and (3) specify the level and type of
employees or other criteria that would constitute a “large” or “small”
organization. 200

b. Commission Determination

134. The Commission will consider the size of an organization for purposes of
determining whether an organization has met the requirements for an effective
compliance program. We believe that size is an important factor because, for
example, a large organization should be able to devote more formal operations and
greater resources for compliance than a small organization. Small organizations,
while being equally devoted to compliance, might be able to meet their

199 Comments of AGA at 4-5.

200 Id. at 5.
compliance needs with less formality and fewer resources than large organizations.

135. The Commission has not defined "large" or "small" for purposes of
determining the size of an organization. A precise definition would not be helpful
to the Commission or industry because determining an organization's size for
compliance purposes is not as simple as fitting the organization into a pre­
determined definition of "large" or "small." Rather, size should be determined by
looking at multiple factors that might vary depending on the particular
organization. Among the factors that we will consider include: (1) the number of
employees; (2) the annual revenue, profits, and budget of the organization; (3) the
number of separate operating divisions or units within the organization; (4) the
number of senior-level employees; and (5) the corporate structure of the
organization. While not an exhaustive list, these factors provide a good indication
of what we believe to be relevant to size and to whether an organization has shown
sufficient commitment to warrant credit for an effective compliance program.

E. Credits for Self-Reporting, Cooperation, Avoidance of Trial-
Type Hearing, and Acceptance of Responsibility

1. Unbundling the Credits

a. Comments

136. Several commenters suggest that the Commission should unbundle the
credits for self-reports, cooperation, avoidance of trial-type hearings, and
acceptance of responsibility. EEI, National Grid, and TAPS, for example, state
that the Commission should unbundle the mitigation credits for self-reports and
cooperation because there is value from self-reporting that is separate from the
value of cooperation. Self-reports are valuable, EEI believes, because without them
the Commission may never know that a violation occurred. Cooperation, on the other hand, is valuable, EEI asserts, because it facilitates Enforcement
staff's review of misconduct. EEI and INGAA also argue that tying the credits
for self-reports and cooperation could create a disincentive to self-reporting in

204 See Comments of EEI at 38; INGAA at 13.
205 See Comments of EEI at 38-39; TAPS at 30.
206 Comments of EEI at 39.
207 Comments of INGAA at 13-14.
208 Comments of AGA at 7.
209 Id. at 7-8.
210 Comments of INGAA at 13-14.
b. Commission Determination

140. The Commission agrees to modify the Penalty Guidelines so that the mitigation credits for self-reports, cooperation, avoidance of trial-type hearings, and acceptance of responsibility are not tied together. Each of these factors carries independent value and should be credited accordingly.

141. Self-reports, for example, add significant value to overall industry compliance, and the Commission will continue to place great importance on self-reporting. As we stated in the 2005 Policy Statement, “[c]ompanies are in the best position to detect and correct violations of our orders, rules, and regulations, both inadvertent and intentional, and should be proactive in doing so.” Providing credit for self-reporting gives organizations an incentive to detect and correct violations early. Self-reporting also assists the Commission’s review of violations and facilitates the process of providing remedies to affected parties.

142. Cooperation also adds significant independent value. Specifically, cooperation that is in good faith, consistent, and continuing will help provide Enforcement staff with sufficient information to understand the circumstances of how and why the violation occurred as well as the identity of the relevant personnel involved in the violation. As is the case with good-faith self-reports, this type of cooperation should lead to a better informed and prompt conclusion of staff’s inquiry.

143. Finally, the Commission believes there is independent value in organizations avoiding trial-type hearings and accepting responsibility for their violations, both of which are factors under the Sentencing Guidelines. A willingness to resolve cases without the need for a trial-type hearing saves the Commission time and resources that can be spent on other matters. Moreover, the Commission believes that organizations should receive an additional credit for affirmatively admitting their violations. We understand that some organizations will continue to neither admit nor deny violations, but we think some credit should be given to organizations that accept responsibility for their misconduct.

144. Thus, the Commission believes there is sufficient independent value in self-reporting violations, cooperating, avoiding trial-type hearings, and accepting responsibility for violations, such that obtaining credit for these factors should be considered independently of each other. In most cases, however, when an organization self-reports a violation it also cooperates and settles.

145. Accordingly, the Commission has modified section 1C2.3(g) of the Penalty Guidelines so that organizations can now receive: (1) two points for self-reports that are made prior to an imminent threat of disclosure or government investigation and within a reasonably prompt time after becoming aware of the violation; (2) one point for full cooperation; (3) one point for resolving the matter without the need for a trial-type hearing; and (4) one point for affirmative acceptance of responsibility for their violations. We have made explicit that these credits operate independently of each other. Thus, as revised, organizations can still receive a five point credit to their culpability score for meeting each of the above factors, but they can now also receive a partial credit for meeting some, or even one, of these factors.

2. Credit for Self-Reports Versus Credit for Self-Certifications

a. Comments

146. EEI contends that self-certifications are “functionally the same” as self-reports and should be treated equally for purposes of mitigating civil penalties for reliability violations.

b. Commission Determination

147. The Commission disagrees with EEI that self-certifications are “functionally the same” as self-reports. We made clear in our July 3, 2008, Guidance Order on Reliability Notices of Penalty that there are critical differences between self-certifications and self-reports. We explained that “[u]nlike a self-certification in response to a Regional Entity’s questionnaire or inquiry, which is a required act, a self-report is a totally voluntary disclosure of a violation.”

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explained further that a "self-report occurs when a registered entity alerts a Regional Entity to a violation before the registered entity is required to disclose the violation to the Regional Entity in response to a self-certification questionnaire or to another directive from a Regional Entity to submit compliance-related information."\textsuperscript{1216}

We reiterate here that a self-certification is a required act whereas a self-report constitutes a voluntary disclosure. This distinction should be reflected in the mitigation credit afforded to organizations. By voluntarily disclosing information that otherwise would not have to be disclosed, organizations should receive some mitigation credit. \textsuperscript{217} On the other hand, if an organization is already required to disclose certain information, mitigation credit will not be provided. Thus, organizations will receive mitigation credit for good-faith, prompt self-reports, but will not receive any mitigation credit for self-certifications.

3. Additional Concerns Regarding Cooperation and Self-Reporting Credit

149. INGAA urges the Commission to clarify that an organization will not lose cooperation credit for a good-faith argument on the law or facts of a case.\textsuperscript{1218}

150. Under the Penalty Guidelines, organizations will not lose cooperation credit for good-faith legal or factual arguments. Similarly, organizations can make good-faith objections to data requests and still receive cooperation credit. And as stated in Application Note 11 of the culpability section, the "Commission will not require organizations to waive attorney-client privilege or work-product protections in order to qualify for a reduction under these subsections."\textsuperscript{1220}

151. NERC asks the Commission to explain what credit is provided in a case of exemplary cooperation as opposed to full cooperation.\textsuperscript{219}

\textsuperscript{1216}Id

\textsuperscript{217} As EEI itself urges, a self-report provides value to the Commission because without one the Commission may never learn that a violation occurred. Comments of EEI at 38.

\textsuperscript{218} Comments of INGAA at 13.

\textsuperscript{219} Comments of NERC at 24.

152. The Penalty Guidelines provide credit for full cooperation. An organization that provides exemplary cooperation does not receive any specific extra credit under the Penalty Guidelines,\textsuperscript{222} although it may be a relevant consideration, for example, in determining where within the range the ultimate penalty falls.

153. Finally, National Grid is concerned that the Penalty Guidelines do not provide sufficient credit for cooperation and self-reports.\textsuperscript{221}

154. We disagree with National Grid's concern. Organizations can receive substantial and transparent credit for cooperation and self-reporting. For example, if an organization receives credit for cooperation and self-reporting, its culpability score would be reduced by three points. Starting with a base culpability score of five, the three point reduction could lead to a final culpability score of two, which could lead to an eighty percent reduction in penalty when comparing the high end of the penalty range to the low end. For example, cooperation and self-reporting credit could reduce a penalty from \$2,000,000 to \$400,000. This is substantial and transparent credit.

F. Efforts to Remedy Violations

1. Comments

155. EEI comments that the Penalty Guidelines do not provide an independent credit for remediation which is inconsistent with FPA section 316A\textsuperscript{222} and marks an unexplained and unjustified departure from the Commission's Policy Statement on Compliance. EEI recommends that the Commission add a provision that a company will receive the minimum level of the penalty range if it adopts full

\textsuperscript{220} See, e.g., Revised Policy Statement, 123 FERC ¶ 61,156 at P 65 ("Since cooperation is expected of all entities, we do not give penalty mitigation credit for ordinary cooperation . . . . However, we do give credit for exemplary cooperation.").

\textsuperscript{221} Comments of National Grid at 5; 7-8.

\textsuperscript{222} Section 316A of the FPA states that "in determining the amount of a proposed penalty," the Commission must consider the severity of the violation as well as the efforts to remedy the violation in a timely manner. 16 U.S.C. § 825o-1 (2006).
remediation. Similarly, INGAA, NERC, and TAPS encourage the Commission to provide an independent credit for remediation, which would demonstrate the seriousness of the Commission’s intent to focus on achieving compliance through voluntary actions rather than penalty risk.

Further, SMUD questions the legality of applying the Penalty Guidelines to the NERC Reliability Standards without accounting for an organization’s remediation efforts. SMUD comments that FPA section 215(e)(6) provides that any penalty imposed by the Commission or the ERO “shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of such user, owner, or operator to remedy the violation in a timely manner.” SMUD states that the Penalty Guidelines do not take into account the efforts of a registered entity to remedy the violation in a timely manner.

2. Commission Determination

The Commission’s obligation to consider an organization’s efforts to remedy a violation is built into the Penalty Guidelines in multiple places. For example, it is built into the section on effective compliance programs, which states: “After a violation has been detected, the organization shall take reasonable steps to respond appropriately to the violation and to prevent further similar violations, including making any necessary modifications to the organization’s compliance program.” That section also provides, “in implementing subsection (b), the organization shall periodically assess the risk of violations and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of violations identified through this process.” In addition, to the extent the violation is causing harm, remedial action to limit the harm will reduce the penalty. Furthermore, the Penalty Guidelines provide us with enough flexibility to consider remedial measures in our penalty determinations.

158. The Commission, however, declines to adopt a bright-line rule that a company will automatically receive the minimum level of the penalty range if it adopts full remediation, as EEI requests, or to adopt a specific, independent credit for remediation, as the other commenters suggest. We expect organizations to comply with our requirements and to attain compliance within a reasonable time period after committing a violation. We generally consider that an organization’s efforts to achieve or maintain compliance with our requirements should not be the basis for an offset to or reduction in the penalty amount for a violation because the organization should have been in compliance before the violation. An organization’s significantly enhanced efforts in response to a violation that go beyond what is required to attain compliance may, however, be considered in determining a penalty amount.

G. Prior History

1. Prior History of Serious Violations

a. Comments

EEI and INGAA state that the Penalty Guidelines’ enhancement for prior history should apply only in the case of serious violations, claiming that it is difficult for organizations to achieve perfect compliance with many of the Commission’s regulations. EEI states, for example, that hundreds of OASIS posting requirements exist, making it unreasonable to expect perfection of these requirements. Also, EEI claims that hundreds or thousands of employees could be affected by the Standards of Conduct requirements, which govern multiple interactions on a daily basis. Similarly, INGAA asks the Commission to clarify that the prior history enhancement applies only to significant violations and not, for example, to erroneous NAESB postings.

223 Comments of EEI at 39.
224 See Comments of INGAA at 10, NERC at 24, and TAPS at 30.
225 Comments of SMUD at 5.
226 Id. (emphasis in original).
227 Id.
228 Penalty Guidelines § 1B2.1(b)(7).
229 Id. § 1B2.1(c).
230 Comments of EEI at 34-35; INGAA at 14.
231 Comments of EEI at 35.
232 Comments of INGAA at 14.
b. **Commission Determination**

160. The Commission declines to create a bright-line rule that the prior history enhancement applies only to serious violations. Although the Commission is most concerned with an organization's serious violations, we are also concerned with the number of prior violations committed by an organization and the frequency or rate at which the organization commits violations. For example, the Commission may be concerned with an organization that has committed many violations during a relatively short period of time, regardless of the seriousness of the violations. This situation might reflect an overall lack of commitment to compliance and would not be captured if we limited the prior history enhancement to serious violations. Rather than create a bright-line rule, we will consider the prior history of an organization on a case-by-case basis. This case-by-case approach will give us the flexibility to consider not only the nature and seriousness of past violations, but also other important factors, such as the number and frequency of prior violations.

2. **Prior Settlement as "Adjudication"**

a. **Comments**

161. EEI and INGAA assert that the Commission should not treat prior settlements as "adjudications" that would trigger the prior history enhancement under the Penalty Guidelines. In support of this point, EEI states that settlements, by definition, are not "adjudications," and most organizations settle to avoid litigation costs and risks, not to admit guilt. INGAA shares these views and states further that treating settlements as prior history will serve as a disincentive to settle.

b. **Commission Determination**

162. The Commission rejects the commenters' suggestion that we not treat prior settlements as "adjudications" that would trigger the prior history enhancement under the Penalty Guidelines. Pursuant to Commission practice and procedures, we do not reach the settlement stage of our investigations until we have received a recommendation from Enforcement staff and have independently concluded that it is appropriate to pursue settlement discussions. As we stated supra in section II.B.2., staff will continue to close investigations where no violation is found and to close some investigations without sanctions for certain violations that are relatively minor and that result in little or no harm. Thus, given that we assess penalties only after receiving a recommendation from staff and independently deciding that it is appropriate to pursue settlement discussions, we believe prior settlements should be treated as "adjudications."

163. We recognize that organizations are often not willing to admit liability in settlements because they do not want to increase their risk of liability to shareholders and others. We also recognize that organizations will continue to neither admit nor deny violations in settlements in order to preserve their ability to deny liability in parallel or subsequent private litigation. Commission practice since EPAct 2005, however, has not treated these statements as having precedential effect on the Commission's prior history determination in future investigations.

164. In fact, many of the Commission's past stipulation and consent agreements have made clear that organizations' "neither admit nor deny" statements do not affect the Commission's prior history determinations in future investigations.

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**233** Comments of EEI at 35; INGAA at 14.

**234** Comments of EEI at 35.

**235** Comments of INGAA at 14.

The Commission considers prior settlements for purposes of considering an organization's prior history and we will continue to do so under the Penalty Guidelines. The Commission believes that organizations will still have ample incentives to settle, including avoiding the cost of litigation and receiving mitigation credit for avoiding trial-type hearings.

3. Scope of Prior History
   a. Comments
   165. NERC states that the "Penalty Guidelines do not appear to make the distinction to require violations to be the same or closely related" in determining if they are repeat violations. NERC believes the "Commission should clarify if it is making changes with respect to treating all prior violations as repeat history." If the time period is less than five years, the score increases by two points. Thus, NERC is correct that the Penalty Guidelines do not require violations to be the same or closely related for prior Commission adjudications. If, however, the prior history involved another enforcement agency, it must be similar misconduct within the prior ten years for the enhancement to apply.

b. Commission Determination
   166. To clarify the issue NERC raises, an organization's culpability score increases by one point if there was a Commission adjudication of any violation less than ten years earlier or if there was an adjudication of similar misconduct by any other enforcement agency. If the time period is less than five years, the score increases by two points. Thus, NERC is correct that the Penalty Guidelines do not require violations to be the same or closely related for prior Commission adjudications. If, however, the prior history involved another enforcement agency, it must be similar misconduct within the prior ten years for the enhancement to apply.

167. AGA and INGAA comment that the Penalty Guidelines are not clear as to the nature of the order or injunction that would trigger a two-point increase in an organization's culpability score under section 1C2.3(d) of the Penalty Guidelines. AGA recognizes that an organization should be considered more culpable for repeat violations, but states that it is unclear whether an organization should be held similarly more culpable when the prior order is unrelated to the violation that is the subject of the instant penalty action. AGA believes that the type of order or injunction appropriately contemplated by this provision should be an enforcement or remedial order directly related to the violation that is the subject of the instant penalty action. AGA comments that Enforcement staff appeared to confirm that this was the case at the April 7, 2010, workshop.

2. Commission Determination
   168. AGA is correct that section 1C2.3(d) is intended to apply to violations of enforcement-related or other remedial orders directly related to the violation that is the subject of the instant investigation or enforcement action. Section 1C2.3(d) would not apply where the prior order is unrelated to the instant violation.

I. Section 2C1.1 Guideline for Misrepresentations and False Statements
   1. Intentional Misrepresentations and False Statements
      a. Comments
   169. EEI, AGA, and INGAA urge the Commission to limit application of section 2C1.1 to instances of intentional misconduct and not apply it to simple misunderstandings or unintentional miscommunications. EEI states that

240 Comments of AGA at 8; INGAA at 14.
241 Comments of AGA at 8.
242 Id.
243 See Comments of EEI at 31; AGA at 9; and INGAA at 4-6.
Enforcement staff’s investigations can turn on complex and contested facts, often leading to unintentional misunderstandings. These types of misunderstandings, EEI believes, do not merit the imposition of civil penalties. Similarly, AGA states that inadvertent reporting errors and unintentional misstatements, particularly in informal conversations with Commission staff, should not be penalized as if they were intentional acts of deception. AGA believes that penalties for misrepresentations or false statements should be limited to circumstances in which an entity has willfully, knowingly, or recklessly made a material misrepresentation or false statement to the Commission or staff and should not apply in instances of mere negligence or inadvertent error. AGA believes that some violations may occasionally occur despite an entity’s best efforts to prevent them and that these errors are corrected as a matter of course when discovered by Commission staff or the parties involved. INGAA also believes that the Commission should adopt a scienter requirement for violations of section 2C1.1.

**b. Commission Determination**

171. The Commission agrees to modify section 2C1.1 of the Penalty Guidelines to include a scienter requirement. Thus, this section is limited to instances of intentional or reckless misrepresentations and false statements. The Commission does not intend this section to apply to inadvertent errors or miscommunications in organizations’ filings or communications with the Commission and our staff.

172. The Commission has drawn clear distinctions between intentional and reckless misrepresentations and false statements aimed at misleading, or attempting to mislead, the efforts of the Commission or our staff and inadvertent errors or miscommunications that can easily be cured. We have always limited our enforcement efforts to the former instances.

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241 Comments of EEI at 32.
242 Comments of AGA at 9.
243 Id.
244 Comments of INGAA at 5.
3. Base Violation Level for Misrepresentations and False Statements

a. Comments

177. EEl recommends that the Commission lower the base violation level for misrepresentations and false statements from eighteen to fourteen, which is the base violation level for perjury under the Sentencing Guidelines.  

EEl comments that a base violation level of eighteen under the Penalty Guidelines corresponds to a base penalty of $350,000. EEl believes that this is an extreme penalty that is even more severe than the penalties for perjury in federal court. AGA similarly comments that the base penalty for misrepresentations and false statements may be excessive in certain cases.

b. Commission Determination

178. The Commission declines to modify the Penalty Guidelines to lower the base violation level for misrepresentations and false statements from eighteen to fourteen. EEl’s comparison to sanctions for perjury in federal court misses a critical point. Unlike an intentional or reckless misrepresentation to the Commission or staff, perjury could result in incarceration under the Sentencing Guidelines. Comparing the base offense level under the Sentencing Guidelines to the base violation level under the Penalty Guidelines is misleading because one is meant to calculate prison terms for criminal conduct, while the other is intended to formulate monetary penalties in civil matters. We believe that a base violation level of eighteen accurately reflects the seriousness with which we treat misrepresentations to the Commission and staff. Although the potential penalty is high, it is balanced by the increased evidentiary burden required to prove scienter.

J. Multiple Violations

1. Comments

179. Several commenters suggest that the Commission clarify that multiple violations falling in the same general category will be treated as one. EEl, for example, suggests that the preamble to the Penalty Guidelines should state that violations falling within the same general category will be treated as a single violation.

EPsA and CPUC recommend that the Commission treat multiple violations that are similar in nature as a single violation for purposes of applying the guidelines. FirstEnergy also recommends that the Commission treat multiple violations that arise out of the same transaction or set of events as a single violation for purposes of applying the guidelines.

INGAA expresses some concerns with how the Commission will count or divide violations under the Penalty Guidelines. In this regard, INGAA asks the Commission to confirm that the Penalty Guidelines apply to the conduct as a whole, not each separate infraction. INGAA also poses a specific hypothetical asking the Commission to show how it would analyze the following issue: “does a market manipulation violation involving false bids to obtain capacity constitute one violation for the day on which the false bid was made, or does it constitute multiple (i.e., “per day”) violations as long as the capacity thereby acquired is retained.”

2. Commission Determination

180. The Commission clarifies that where there are multiple violations falling under different Chapter Two guidelines, the Commission will determine the

253 Comments of EEl at 22.

254 Comments of EPSA at 14-15; CPUC at 6.

255 Comments of FirstEnergy.

256 Comments of INGAA at 17.

257 Id. at 17-18.

258 Comments of NERC at 23.
appropriate penalty on a case-by-case basis.\textsuperscript{259} For multiple violations that fall within section 2A.1.1 (guideline for violations of the Reliability Standards) and that are related to the same conduct or event, the Commission will apply the Penalty Guidelines based on the conduct as a whole.\textsuperscript{260} We have modified the Penalty Guidelines to emphasize this point.\textsuperscript{261}

183. Where, however, an organization has engaged in multiple acts of fraud, anti-competitive conduct, or other rule, tariff, and order violations, in which the penalty is determined under section 2B.1.1, or made multiple misrepresentations or false statements in which the penalty is determined under section 2C.1.1, the Penalty Guidelines treat each act as a separate violation. But in calculating the harm for purposes of determining the penalty, it is the cumulative harm of the multiple violations that is taken into account. Thus, the Penalty Guidelines would treat each false bid in INGAA’s hypothetical as a separate violation. The Penalty Guidelines would also consider the duration of the violation in INGAA’s hypothetical as part of the duration enhancement in section 2B.1.1(b)(2). Of course, the Commission would retain the discretion to depart from the Penalty Guidelines calculation, if appropriate, in this or any other factual scenario.

K. Organization Size and Status

1. Comments

184. Many commenters take the position that the Penalty Guidelines do not adequately address the size or status of organizations. For example, APPA states that the size of an entity is an explicit factor to be considered in calculating penalties for violations of Reliability Standards under the NERC Sanction Guidelines.\textsuperscript{262} In contrast, APPA comments that under the Penalty Guidelines, size would be explicitly considered only in the context of compliance programs, and would only serve to mitigate any increase in the culpability score under section 1.C.2.3(b).\textsuperscript{263} APPA and PPC are concerned that certain of their members could face potential fines jeopardizing their continued viability if the Commission applies the Penalty Guidelines as contemplated, and states that the financial harm to a smaller utility could be quite severe even if its continued viability is not at risk—its ability to undertake new capital improvements or programs could be impaired if its bond rating falls in the wake of a penalty levy.\textsuperscript{264} APPA states further that the Commission fails to explain how such a result, effectively stopping just short of placing a utility on “life support,” would enhance reliability or meet the purposes of FPA section 215.\textsuperscript{265}

185. Cities/M-S-R and Turlock also comment that the Commission should place more emphasis on entity size when determining the range of penalties.\textsuperscript{266} Cities/M-S-R states that despite the adjustment based on size under section 1.C.2.3(b), resulting penalties could remain unnecessarily and disproportionately large.\textsuperscript{267} In addition, Cities/M-S-R is not assuaged by staff’s assurance at the Washington, DC workshop that the threat of large penalties provides an incentive to both large and small entities to comply with our requirements.\textsuperscript{268} Cities/M-S-R believes that while this statement may be true, the impact of a large penalty on a small entity can be debilitating. Therefore, Cities/M-S-R urges the Commission to place more emphasis on reducing the penalty amount for smaller entities in its Penalty Guidelines.\textsuperscript{269} On the other hand, CPUC recommends that the Commission clarify that if an organization is unable to pay, the Commission is not

\textsuperscript{259} Penalty Guidelines § 1C2.1(b). For example, the Commission will consider on a case-by-case basis penalties for organizations that commit both OATT and reliability violations.

\textsuperscript{260} When treating multiple violations that relate to the same conduct or event as a whole under section 2A.1.1, we may also have to account for each violation to assure that the statutory cap for each violation will not be exceeded.

\textsuperscript{261} See Penalty Guidelines § 2A.1.1 (Application Note 5). We have also modified sections 2A.1.1(b)(1) and (b)(2) to make clear that section 2A.1.1 considers harm and risk of harm arising from multiple violations that relate to the same event.
precluded from taking other enforcement action, including, for example, limitation or revocation of market-based rate authority. 270

186. Several commenters are concerned that the Penalty Guidelines do not appropriately consider non-profit entities. 271 BPA states that as opposed to the NERC Sanction Guidelines, the Penalty Guidelines do not clearly allow for the consideration of an organization’s non-profit status. 272 Several commenters state that the Commission should consider the business model of a violator because non-profit companies, government-owned entities (such as a municipal utility), and ISO/RTOs do not have shareholders or excess funds from which to pay penalties, and any fines levied would be assessed to the company’s customers. ISO/RTO Council emphasizes that the Commission should reassert its previous findings that a company’s non-profit status should be considered in penalty determinations. 273 PPC states that the Commission has shown no intention of returning money collected from penalties to the customers that experienced the economic loss, nor is there a means of implementing a fair and equitable distribution of those funds, so the fine functions as a tax and not as a means of remediation. 274 PNGC states further that the disproportionate effect on small organizations creates unfair results for those organizations and their retail customers. PNGC recommends that the Penalty Guidelines be amended to recognize the disproportionate impacts that penalties can have on small utilities and should subject smaller entities to proportionally smaller penalty amounts. 275

187. TAPS recommends that the Penalty Guidelines expressly provide that, in assessing penalties: (1) the Commission will take into account an organization’s financial resources; (2) the burden that the fine will impose upon the organization or other affected entities, including the organization’s ratepayers; (3) the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the violation and to prevent a recurrence of such an offense; and (4) entity structure, including whether the organization is a public entity, whether members, customers, or other beneficiaries of the organization, other than shareholders, are direct victims of the offense, and whether the organization can pass on to consumers or others the expense of the fine. 276

188. APPA believes that the Commission’s Penalty Guidelines run afoul of the purposes and goals of the Regulatory Flexibility Act of 1980 (RFA) under which the Commission must analyze the impact of new rules that will have a significant economic impact on a substantial number of small entities as defined by the Small Business Administration. 277 APPA states that by our decision to seek comments from the industry in this docket, we have at least tacitly acknowledged that this proceeding bears many of the hallmarks of a rulemaking, to which the requirements of the RFA would apply. 278 APPA states that the Commission has an obligation when enacting new regulations and policies to consider their impact on small utilities and has failed to do so here. APPA recommends that the Commission undertake an RFA analysis if it proceeds with the Penalty Guidelines. 279

189. Finally, EPE urges the Commission to assess a penalty’s impact on each organization. Specifically, EPE requests that the Commission consider the addition of a third element to the model under which a civil penalty range is developed. 280 EPE states that this third element would work together with the existing combination of a “violation level” and a “culpability score” to generate a penalty range that would more effectively satisfy the Commission’s stated goal of basing penalties on factors that are “weighted similarly for similar types of violations and similar types of violators.” 281 EPE states that it is essential that some consideration be given to the impact of the penalty range on the targeted

270 Comments of CPUC at 5.

271 See e.g., Comments of PPC at 10; BPA at 9; PNGC at 4-5; and ISO/RTO Council at 3.

272 Comments of BPA at 9.

273 Comments of ISO/RTO Council at 3.

274 Comments of PPC at 10.

275 Comments of PNGC at 4-5.

276 Comments of TAPS at 25-26.

277 Comments of APPA at 15-16.

278 Id. at 16.

279 Id.

280 Comments of EPE at 1.

281 Id.
entity. EPE requests that the combination of the model described in P 37 of the Policy Statement not only incorporate the two elements described there, but also a third element as follows:

(3) An impact assessment, which considers whether a penalty range is both high enough to act as an effective deterrent to future misconduct by the particular company at issue and not so high as to have the unintended effect of threatening the viability of the company as a going concern.282

190. EPE states that without an impact assessment by the Commission, a penalty range that is generated simply by the first two factors could result in a slap on the wrist for Company A, but a devastating blow to Company B.283

2. Commission Determination

191. The Penalty Guidelines consider the size and non-profit status of organizations, including the impact that the guidelines' penalty range could have on a particular organization based on its size or non-profit status. First, under the Penalty Guidelines, the Commission retains the discretion to examine the facts and circumstances of a case, including the size and non-profit status of an organization, and to depart from the Penalty Guidelines based on these factors.284 In addition, the Penalty Guidelines take size into account in a variety of ways and, as a result, a smaller organization may receive a lower penalty than a larger organization. For example, the size of an organization is a factor in assessing whether it devoted sufficient resources and measures to develop an effective compliance program.285 Similarly, under the Penalty Guidelines, a small organization may be less likely to cause harm to the same extent as a large organization. The Commission can also reduce a penalty based on an organization's inability to pay.286 Finally, we retain flexibility to examine an organization's size and structure because the Penalty Guidelines produce a penalty range, rather than an absolute figure. Specific facts of each case, including organization size and structure, may affect where in the range the ultimate penalty falls.

192. Pursuant to the Commission's discretion to examine the facts and circumstances of a case and depart from the Penalty Guidelines where appropriate, we could examine a broad range of issues relevant to an organization's size or non-profit status, including the factors that TAPS recommends we consider: (1) an organization's financial resources; (2) the burden that the penalty will impose upon the organization; (3) the size of the organization; and (4) the structure of the organization. This is not an exhaustive list. The Penalty Guidelines are sufficiently flexible that we can consider multiple factors relevant to an organization's size and corporate structure and adjust the penalty accordingly.

193. APPA's and PPC's concerns about their members facing fines that could jeopardize their continued viability are specifically addressed in section IC3.2(b), which states that the "Commission may impose a penalty below that otherwise required if the Commission finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum [penalty]."287 Under the Penalty Guidelines, an organization is deemed unable to pay the minimum penalty if the payment of the penalty would "substantially jeopardize the continued existence of the organization."288

194. Built into the Penalty Guidelines, the Commission already has the ability to conduct an impact analysis as EPE proposes we do. Specifically, the Penalty Guidelines are designed to generate a penalty range that is high enough to serve to provide just punishment, deterrence, and incentives for organizations to develop and maintain sufficient compliance measures. On the other hand, through their discretionary nature and section IC3.2's consideration of ability to pay, the Penalty Guidelines take into account whether a penalty will be so high as to threaten the viability of an organization.

195. Finally, the Commission disagrees with APPA that the Penalty Guidelines run afoul of the RFA. The RFA does not apply to our Policy Statement because it is not a regulation promulgated by notice and comment rulemaking pursuant to

282 Id. at 2.
283 Id.
284 See Penalty Guidelines § 1A1.1 ("The Commission reserves the right to depart from these Guidelines where it deems appropriate.").
285 See id. § 1B2.1 (Application Note 2(A)).
286 Id. § 1C3.2(b).
287 As CPUC suggests, however, if an organization is unable to pay, we are not precluded from taking other, non-monetary enforcement actions.
288 Penalty Guidelines § 1C3.2 (Application Note 1).
section 553(b) of the Administrative Procedure Act (APA). Under the RFA, an agency must provide a description and analysis of the impact of any final rule that will have a substantial impact on small businesses. The RFA defines "rule" to mean "any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of [5 U.S.C.], or any other law." Section 553(b) does not apply "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice ... ." Thus, when the Commission issues a policy statement, we need not fulfill the section 553(b) requirement of issuing a proposed rulemaking because it falls into the exception in section 553(b)(3)(A). And, because we need not issue a proposed rulemaking, we are not subject to the requirements of the RFA. Nonetheless, as we stated above, we are cognizant of the impact of civil penalties on small businesses, and the Penalty Guidelines take such considerations into account.

L. Statutory Cap of $1 Million Per Day Per Violation

I. Comments

ISO-NE believes that the Commission should clarify how the Penalty Guidelines comport with the statutory limitation on the amount of a penalty per day per violation because this point was not clear in the Policy Statement's Reliability Standard violation example. Similarly, CPUC recommends that the Commission clarify that an organization is subject to the statutory maximum penalty and that when the minimum penalty is greater than the maximum allowed by statute, the guideline penalty will be reduced to the maximum authorized by statute.

2. Commission Determination

In response to Turlock's comments about duration, we note that we must consider duration to ensure that the Penalty Guidelines' minimum penalty does not exceed the statutory maximum of $1 million per day per violation.

M. Duration and Volume Enhancements

1. Comments

EEI and CPUC suggest modifications to the Commission's consideration of duration and volume under section 2B 1.1 of the Penalty Guidelines. EEI proposes converting the volumetric and duration enhancements to be floors, not enhancements. CPUC suggests that the enhancements under section 2B 1.1 for duration and volume should be cumulative.

294 National Grid recommends that the Penalty Guidelines be limited to the statutory maximum.

197. Turlock believes that it is unclear under the Penalty Guidelines how the Commission will assess a penalty based on the duration of the violation and whether the duration of the violation is a criterion which will be taken into consideration.

295 Comments of National Grid at 9-10.

296 Comments of Turlock.

297 Penalty Guidelines § 1C3.1(b). Thus, for example, if there was a single violation for which the Penalty Guidelines generate a penalty range of $2 to $4 million, but the violation lasted only one day, then the penalty would be reduced to the statutory maximum, $1 million.

298 Comments of EEI at 29.

299 Comments of CPUC at 2.

294 Comments of CPUC at 6.

295 Comments of National Grid at 9-10.

296 Comments of Turlock.

297 Comments of CPUC at 2.
2. Commission Determination

201. The Commission rejects EEI's proposal to convert the volumetric and duration enhancements in section 2B1.1(b)(2) to be floors, not enhancements. We believe that these are significant factors that warrant enhancements and are not designed to simply establish floors. Indeed, these factors are based on the statutory requirements that we consider the seriousness and duration of a violation.

202. Although the Commission believes the volumetric and duration factors are significant, we decline to apply these factors cumulatively, as greater of either the volume or duration enhancement.

N. Consideration of Loss Under the Penalty Guidelines

1. Comments

203. EEI "proposes[s] a change to the applicable standard" for calculating loss in cases involving market manipulation and other violations in which the civil penalties are calculated with reference to loss under section 2B1.1 of the Penalty Guidelines. EEI raises a particular concern that an entity will be responsible for losses that result from a violation if the entity reasonably should have known that a loss was a "potential" result of the violation. EEI suggests that the Commission adopt the definition of "reasonably foreseeable" losses in section 351 of the Restatement (Second) of Contracts, which limits a party's responsibility for losses to those that were "probable" rather than "potential." EEI also recommends that the Commission amend the standard for estimation of losses to provide that the "estimation of loss shall be based on substantial evidence regarding the specific violation" and that Commission staff "shall provide the subject of an investigation sufficient information to allow it to replicate any loss calculation on which [s]taff bases a proposed penalty." Instead of the statement that "[t]he Commission need only make a reasonable estimate of the loss," EEI suggests that operational penalties paid under a public utility's tariff count as diminishing the pecuniary gain/loss associated with a tariff violation.

2. Commission Determination

204. Further, TAPS recommends that operational penalties paid under a public utility's tariff count as diminishing the pecuniary gain/loss associated with a tariff violation.

205. The Commission rejects EEI's suggestion that we adopt the definition of "reasonably foreseeable" losses in section 351 of the Restatement (Second) of Contracts. With regard to loss, contract law considers theories of risk allocation between two contracting parties. These principles of contract law are not relevant to the Commission's enforcement program, which focuses on ensuring compliance with the statutes, rules, regulations, restrictions, conditions, and orders overseen by the Commission, not contractual relations between two entities. Therefore, it would be inappropriate to apply contract principles to violations of Commission requirements. Moreover, the Penalty Guidelines' definition of "reasonably foreseeable" comes from the definition in the Sentencing Guidelines, which have been applied in the enforcement context for over two decades by federal judges.

206. Regarding EEI's recommendation to base our estimates of loss "on substantial evidence regarding the specific violation," the Commission is, in fact, required under the APA to base imposition of any sanction on "substantial evidence." The Supreme Court in Steadman v. SEC, 450 U.S. 91, 102 (1981), equated the APA's "substantial evidence" requirement with the "traditional preponderance-of-the-evidence standard," and the Commission has been guided by this standard ever since. This "substantial evidence" requirement, however, does not preclude the Commission from making a reasonable estimate of loss under the Penalty Guidelines. Substantial evidence refers to "a certain quantity of

303 Comments of TAPS at 29.
304 See U.S.S.G. § 2B1.1 (Application Note 3(A)(iv)).
305 5 U.S.C. § 556(d)(2006) ("A sanction may not be imposed . . . except on consideration of . . . substantial evidence.").

301 Comments of EEI at 14, 28.
302 Id. at 29.
303 Id. at 28.
availability of evidence will likely vary from case to case. In certain situations, evidence. Also, staff will continue to provide the subject of an investigation evidence."

The Commission cannot predict how it will measure loss in every case. There may be circumstances when precise calculations cannot be made. Moreover, the availability of evidence will likely vary from case to case. In certain situations, the Commission may need to rely on a reasonable estimate of loss. We can do so without violating the requirement that our sanctions must be based on substantial evidence. Also, staff will continue to provide the subject of an investigation sufficient information to allow the loss calculations to be replicated.

207. In response to TAPS' recommendation about operational penalties, we note that in determining an appropriate penalty under the Penalty Guidelines, and in exercising our discretion under them, we could consider operational penalties that an organization has already paid under a utility's tariff for the same violation.

O. Rulemaking Versus Policy Statement

1. Comments

208. NERC argues that to the extent the Commission seeks to employ a different penalty framework than that envisioned by Congress for Reliability Standard violations, it must do so in a rulemaking proceeding under the Administrative Procedure Act, and not through a policy statement. NERC states that sections 215(e)(1) and (2) of the FPA give the ERO the authority to establish and impose penalties as an appropriate implementation of the penalty provisions of section 215 and that the Commission has approved NERC's Sanction Guidelines to be applied to Reliability Standard violations. NERC states that the NERC Sanction Guidelines were approved by the Commission through a lengthy and extensive notice and comment rulemaking proceeding, with reasoned consideration of industry input. NERC asserts that Congress established a very different framework with respect to the Commission's role in oversight of NERC's development and enforcement of the Reliability Standards than the Commission's role for other matters subject to its jurisdiction. NERC states that the Commission's prior orders implementing the section 215 program respect these roles and establish a workable mechanism by which penalties are, and have been, assessed.

209. National Grid recommends that the Commission's methodology for assessing penalties should be implemented by a rulemaking instead of a policy statement. Similarly, National Grid suggests that if we decide to adopt the Penalty Guidelines for reliability violations, we should provide a clear set of rules, developed with public input, for applying the Penalty Guidelines to violations of Reliability Standards.

2. Commission Determination

210. Issuing the Penalty Guidelines through a policy statement is consistent with the Commission's prior approaches to explain our processes for assessing civil penalties, such as with our 2005 Policy Statement and Revised Policy Statement in 2008. Moreover, in deciding to adopt the Penalty Guidelines, we considered the views of industry, including the wide-spread suggestions by industry since the Commission's November 2007 Conference on Enforcement Policy that the Commission adopt a guidelines approach to determine civil penalties. Also, as part of our industry and public outreach, enforcement staff held three workshops in April 2010, addressing a broad range of questions from industry. The Commission also has reviewed and carefully considered the forty-one sets of comments we received after our suspension of the Penalty Guidelines. Finally, as noted in our March 18, 2010, Policy Statement on Penalty Guidelines, we will hold a technical conference one year from implementation of the modified Penalty Guidelines we issue today to discuss how they have worked in practice and to permit comments and questions from industry.

211. This is a policy statement. Consistent with the APA, when the Commission applies the Penalty Guidelines in orders, we will present why it is appropriate to apply the Penalty Guidelines and will justify their application in the particular circumstances at hand. Moreover, where the Commission decides to depart

307 Steadman, 450 U.S. at 98.

308 Comments of NERC at 9.

309 Id. at 8-9.

310 Comments of National Grid at 13-14.

311 Id. at 13.


313 See Pac. Gas & Elec. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (an agency "cannot apply or rely upon [the policy] as law because a general statement of policy only announces what the agency seeks to establishing as policy"); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. (continued...))
from the Penalty Guidelines, it will support and justify that departure based upon the facts and circumstances of the specific case.

212. NERC’s suggestion that we should operate by rulemaking if we seek to employ a different penalty framework than that envisioned by Congress is misplaced. In issuing the Penalty Guidelines, we have not altered the reliability enforcement framework that Congress created in EPAct 2005. As we have made clear, the Penalty Guidelines will apply to our authority to enforce the Reliability Standards that Congress explicitly granted to us in EPAct 2005.

P. Other Issues

213. EEI comments that, although it does not recommend a change to the base culpability score, this does not eliminate the Commission’s burden, if the matter is contested, of showing that there is, in fact, culpability that warrants a civil penalty and a “base” culpability that could double the base penalty.314 Similarly, Turlock comments that the Commission has not justified its proposed use of either a culpability multiplier or the starting culpability base score of five points for the violation of a Reliability Standard. Turlock states that the use of culpability multipliers is inappropriate for violations of Reliability Standards because they generally do not involve scienter or culpability. Furthermore, Turlock emphasizes that the culpability score is not insignificant and is excessive and unjustified.315

214. EEI’s and Turlock’s comments misinterpret the purpose of the culpability score. Culpability refers to an organization’s blameworthiness and all violations will include some level of blameworthiness, even if minimal, for failing to comply with our requirements. The culpability score establishes a baseline multiplier for all violations, and allows for increases or decreases of the score based upon the conduct of the organization. Thus, it is possible for an organization (that is blameworthy for the violation) to have a zero culpability score after receiving credit for various mitigating factors.

215. EEI comments that minimum fairness and due process require that disgorged pecuniary gains either be offset against any Commission penalty imposed, or discounted for purposes of the determination of a base penalty level.316

216. The Commission rejects EEI’s assertion that disgorged pecuniary gains should be offset against any Commission penalty imposed, or discounted for purposes of the determination of a base penalty level. The Commission has always required disgorgement in addition to the assessment of civil penalties. They are entirely different concepts. Disgorgement involves relinquishing profits illegally obtained, and such profits are distributed to those who were harmed by the violations. Civil penalties, on the other hand, serve to provide just punishment, deterrence, and incentives for organizations to develop and maintain sufficient compliance measures. Funds from civil penalties go to the United States Treasury.

217. INGAA encourages the Commission to clarify that not every tariff or posting error constitutes a threat to market transparency.317

218. INGAA is correct that not every tariff or posting error constitutes a threat to market transparency to warrant a violation level of sixteen under section 2B1.1 (b)(3). Moreover, the Commission emphasizes that this section will not be triggered for all threats to market transparency, only for conduct that presents a serious threat to market transparency.318

219. Turlock asserts that if civil penalties resulting from the Penalty Guidelines are intended to do more than extract compensation and restore the status quo, the Seventh Amendment to the United States Constitution entitles organizations to a

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1970), Am Trucking Ass’n v. U.S., 642 F.2d 916, 920 (5th Cir. 1981) (court looks to see that the agency considered the relevant facts, avoided clear error, and had a rational connection between the facts and conclusions). The Commission, however, is not required to “repeat itself incessantly” in subsequent application of the Penalty Guidelines. Bechtel v. FCC, 10 F.3d 875, 878 (D.C. Cir. 1993).

314 Comments of EEI at 34.

315 Comments of Turlock.

316 Comments of EEI at 41.

317 Comments of INGAA at 15.

jury trial. Without such due process concerns, Turlock cautions that the Penalty Guidelines would be unconstitutional. 319

The Commission views Turlock’s Seventh Amendment argument as beyond the scope of the Penalty Guidelines, as our purpose in assessing civil penalties has always gone beyond extracting compensation and restoring the status quo. In any event, we disagree with Turlock that our assessment of civil penalties implicates the Seventh Amendment right to a jury trial. The Supreme Court of the United States has made clear that “Congress may effectively supplant a common law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial if that statutory cause of action inheres, in or lies against, the Federal Government in its sovereign capacity.”320 Congress created statutes that gave us the right to regulate the purchase and sale of electricity and natural gas in interstate commerce, and to do so in the public interest. Further, we operate under a framework in which our enforcement proceedings are heard by administrative law judges. As the Supreme Court states, “if Congress . . . assign[s] the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.”321

FirstEnergy states that, regardless of whether a civil penalty is remedial or punitive, the Eighth Amendment to the United States Constitution limits application of the Commission’s section 316A civil penalty authority to avoid fines that would be described as “excessive,” even if the particular circumstances seem to call for the appearance of rigorous punishment. FirstEnergy asserts that the Commission’s civil penalty assessment is further limited by the language in section 316A itself. Specifically, FirstEnergy argues that section 316A caps the total amount of any penalty to $1 million per day per violation and calls for the penalty to be reduced by consideration of the seriousness of the violation and the efforts to remedy the violation in a timely manner. For these reasons, FirstEnergy urges the Commission to return to the approach of assessing civil penalties on a case-by-case basis.322

222. The Commission acknowledges that our civil penalty determinations are subject to the Eighth Amendment’s prohibition on excessive fines, but the Penalty Guidelines do nothing to change this fact. These guidelines also do not change our requirements under section 316A of the FPA. We addressed FirstEnergy’s concerns about these requirements in our prior policy statements on enforcement. For example, we said that with our “expanded authority comes added responsibility to ensure that the Commission’s penalty authority determinations are fair and reasonable, and take into account the unique factors relevant to a given violation.”323 We went on to emphasize the language in section 316A of the FPA when we stated that it “requires us to ‘take into consideration the seriousness of the violation and the efforts . . . to remedy the violation in a timely manner.’”324 Finally, we clearly stated that “we implement these statutory mandates and our due process obligations by taking into account numerous factors in determining the appropriate civil penalty for a violation, including the nature and seriousness of the violation and the company’s efforts to remedy it.”325 The Penalty Guidelines do not change any of these considerations. Under the Penalty Guidelines, we continue to be limited by the statutory maximum of $1 million per day per violation and we continue to consider factors related to the seriousness of the violation and the organization’s efforts to remedy it. The only difference is that we now assign specific and transparent weight to these factors.

223. SCE asks the Commission to clarify whether and how penalties will be assessed to ISOs/RTOs in terms of these entities’ ability to pay and to pass through any fines or penalties. SCE believes that members of ISOs and RTOs might not be willing to enter into indemnification agreements, given the potential size of penalties under the Penalty Guidelines.326

224. The Commission addressed ISOs’ and RTOs’ ability to pass through penalties in our Order Providing Guidance on Recovery of Reliability Penalty Costs by Regional Transmission Organizations and Independent System Operators.327

319 See Comments of Turlock.
321 Id.
322 See Comments of FirstEnergy.
323 Revised Policy Statement, 123 FERC ¶ 61,156 at P 51.
324 Id. (quoting 16 U.S.C. § 825o-1 (2006) (as amended by EPAct 2005, § 1284(e)).
325 Id.
326 Comments of SCE at 8-9.
Operators. Specifically, we stated that "we will not allow RTOs and ISOs to adopt tariff mechanisms that provide automatic recovery of penalties incurred for Reliability Standard violations and will instead require that proposals to recover any such penalties be filed case-by-case." The Penalty Guidelines do not change our views on this issue.

225. Several commenters request a technical conference. SMUD asks the Commission to conduct a technical conference early next year to discuss potential improvement to the enforcement process, and to permit comments and questions from the industry. SCE and PPC request a technical conference before we issue a revised version of the Penalty Guidelines. Specifically, SCE comments that after the Commission has had sufficient time to consider the comments submitted on June 14, 2010, it should initiate a process with industry stakeholders to develop the Penalty Guidelines further. Rather than workshops with limited opportunities for input and participation, SCE states that the Commission should hold a series of technical conferences allowing for an open exchange of ideas and dialogue. SCE suggests that the process should focus in the near term on refinements in the substantive areas of: (1) fraud, manipulation, or anti-competitive conduct, and (2) misrepresentations or false statements to the Commission. Finally, SCE believes that future technical conferences should explore how the Reliability Standards can be incorporated into the Penalty Guidelines. PPC requests that the Commission refrain from issuing a final policy statement or a determination adopting the Penalty Guidelines. PPC requests that the Commission engange the industry to develop the best approach to oversight of penalty determinations and settlements by the reliability organizations.

226. As previously stated, we will hold a technical conference one year from the implementation of the modified Penalty Guidelines to discuss how they have worked in practice and to permit comments and questions from the industry. We decline, however, to hold a technical conference in advance of issuing the modified Penalty Guidelines, as SCE and PPC request. We believe that it makes more sense to hold a technical conference after we, and the industry, have had a chance to observe the actual application of the Penalty Guidelines.

227. PPC states that the Commission does not explain why the current enforcement program and its fines are inadequate to meet the Commission's enforcement needs or how greater compliance would be achieved by adoption of the Penalty Guidelines.

228. As stated earlier, the Commission believes that the Penalty Guidelines improve our enforcement program by adding greater fairness, consistency, and transparency. The Penalty Guidelines will provide more notice and certainty to the regulated community. The Penalty Guidelines will also provide detailed guidance to industry about how to best develop and maintain an effective compliance program. Under the Penalty Guidelines, the Commission will still consider many of the same factors that are present in our prior policy statements on enforcement, but we will do so in a more focused manner by assigning transparent values to the various factors. At the same time, the Penalty Guidelines still allow for the discretion and flexibility to depart from the indicated penalty range where necessary to account for facts and circumstances not considered by the guidelines.

III. Conclusion

229. Since Congress expanded our civil penalty authority in EPAct 2005, we have carefully considered our responsibility to implement our new authority and to improve our application of it in light of experience. To that end, we have continuously strived to add greater fairness, consistency, and transparency to our penalty determinations, and we have always sought to consider industry's
recommendations to achieve these goals. Our issuance of the modified Penalty Guidelines reflects these objectives. We have considered a broad range of comments and recommendations from various segments of the energy industry, and these comments have led to a number of important modifications to the Penalty Guidelines, which we have explained throughout this Revised Policy Statement.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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**Appendix**

1. American Gas Association (AGA)
2. Bonneville Power Administration (BPA)
3. Edison Electric Institute (EEI)
4. El Paso Electric Company (EPE)
5. Electric Power Supply Association (EPSA)
6. Electricity Consumers Resource Council (ELCON)
7. FirstEnergy Companies (FirstEnergy)
8. Florida Reliability Coordinating Council, Inc. (FRCC)
9. Hoosier Energy Rural Electric Cooperative (Hoosier)
10. Industry Stakeholder – Empire District (Empire)
11. Interstate Natural Gas Association (INGAA)
12. ISO New England (ISO-NE)
13. ISO RTO Council (ISO/RTO Council)
15. Joint Comments of Georgia Transmission Corporation (GTC) and Georgia Systems Operations Corporation (GSOC)
17. Midwest Reliability Organization (MRO)
18. National Association of Regulatory Utility Commissioners (NARUC)
19. National Grid USA (National Grid)
21. Northeast Power Coordinating Council (NPCC)
22. Northern California Power Agency (NCPA)
23. NorthWestern Corporation (NorthWestern)
24. Pacific Northwest Generating Cooperative (PNGC)
25. PJM Interconnection (PJM)
26. Public Power Council (PPC)
27. Public Utilities Commission of the State of California (CPUC)
28. ReliabilityFirst Corporation (ReliabilityFirst)
29. Sacramento Municipal Utility District (SMUD)
30. Southern California Edison Company (SCE)
31. Southwest Transmission Dependent Utility Group (SWTDUG)
32. Springfield Utility Board (SUB)
33. The Joint Municipal Registered Entities (Joint Municipal)
34. Joint Comments of M-S-R Public Power Agency, the City of Redding, California, and the City of Santa Clara, California (collectively, Cities/M-S-R)
35. Transmission Access Policy Study Group (TAPS)
36. Transmission Agency of Northern California (TANC)
FERC Penalty Guidelines

CHAPTER I

PART A - GENERAL APPLICATION PRINCIPLES

§1A1.1. Applicability of these Guidelines

1. This chapter applies to the penalties to be imposed on all organizations for violations of the statutes, rules, regulations, restrictions, conditions or orders overseen by the Federal Energy Regulatory Commission. The Commission reserves the right to depart from these Guidelines where it deems appropriate. Further, the Penalty Guidelines do not affect the Commission's Office of Enforcement staff's exercise of discretion to close investigations and self-reports without sanctions. These Penalty Guidelines apply only after staff has recommended, and the Commission determines, that a penalty is warranted and, even then, the Commission can depart from their application if appropriate.

2. The Commission views civil penalties as an important tool to achieve compliance. Achieving compliance, not assessing penalties, is the central goal of the Commission's enforcement efforts.

3. For multiple violations that fall under section 2A1.1 of these Penalty Guidelines for violations of the Reliability Standards and that are related to the same conduct or event, the Commission will apply the Guideline based on the conduct as a whole. Where an organization has engaged in multiple acts of fraud, anti-competitive conduct, or other rule, tariff, and order violations, in which the penalty is determined under section 2B1.1 of these Penalty Guidelines, or made multiple misrepresentations or false statements in which the penalty is determined under section 2C1.1 of these Penalty Guidelines, each act will be treated as a separate violation. But in calculating the harm for purposes of determining the penalty, it is the cumulative harm of the multiple violations that is taken into account.

Commentary

Application Notes:

1. "Organization" means any entity other than a natural person. The Commission will determine the appropriate penalty for natural persons based on the facts and circumstances of the violation but will look to these Guidelines for guidance in setting those penalties.

2. The definitions in the United States Sentencing Guidelines are persuasive authority in interpreting these Guidelines unless otherwise specified.

3. The following are definitions of terms used frequently in this chapter:

(a) "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual
"Agent" means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

"Prior adjudication" means any resolution, whether by trial or settlement, regardless whether the settlement included an admission of the violation.

"Similar violations" means prior conduct that is similar in nature to the conduct underlying the instant violation, without regard to whether or not such conduct violated the same provision.

"Pecuniary gain" is derived from 18 U.S.C. § 3571(d) and means the additional before tax profit to the entity resulting from the relevant conduct of the violation. Gain can result from either additional revenue or cost savings. For example, a violation involving an unreported outage by an organization receiving capacity payments can produce additional revenue. In such a case, the pecuniary gain is the additional revenue received because the outage was not reported. A violation involving a failure to comply with the reliability standards requiring vegetation management can produce pecuniary gain resulting from cost savings. In such a case, the pecuniary gain is the amount saved over time as a result of the failure to implement an appropriate vegetation management program.

"Pecuniary loss" is equivalent to the term "loss" as used in Chapter Two (Violation Conduct).

An individual was "willfully ignorant of the violation" if the individual did not investigate the possible occurrence of violative conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether violative conduct had occurred.

"Violation" means a violation of any statute, rule, regulation, restriction, condition or order overseen by the Commission. "Compliance with the law" means compliance with a statute, rule, regulation, restriction, condition or order overseen by the Commission.
The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in violations or other conduct inconsistent with an effective compliance program.

The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance program, to the individuals referred to in subdivision (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

The individuals referred to in subdivision (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

The organization shall take reasonable steps—

(A) to ensure that the organization's compliance program is followed, including monitoring and auditing to detect violations;

(B) to evaluate periodically the effectiveness of the organization's compliance program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual violations without fear of retaliation.

The organization's compliance program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance program; and (B) appropriate disciplinary measures for engaging in violations and for failing to take reasonable steps to prevent or detect violations.

After a violation has been detected, the organization shall take reasonable steps to respond appropriately to the violation and to prevent further similar violations, including making any necessary modifications to the organization's compliance program.

In implementing subsection (b), the organization shall periodically assess the risk of violations and shall take appropriate steps to design, implement, or modify each requirement set forth in subsection (b) to reduce the risk of violations identified through this process.

Application Notes:

1. Definitions.—For purposes of this guideline:

"Compliance program" means a program designed to prevent and detect violations.

"Governing authority" means the (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization. "High-level personnel of the organization" and "substantial authority personnel" have the meaning given those terms in the Commentary to §1A.1 (Application Instructions-Organizations).

"Standards and procedures" means standards of behavior and internal controls that are reasonably capable of reducing the likelihood of violations.

2. Factors to Consider in Meeting Requirements of this Guideline.—

(A) In General.—Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that should be considered include: (i) applicable industry practice; (ii) the size of the organization; and (iii) similar violations.

(B) Applicable Industry Practice.—An organization's failure to incorporate and follow applicable industry practice weighs against a finding of an effective compliance program.

(C) The Size of the Organization.—

(i) In General.—The formality and scope of actions that an organization shall take to meet the requirements of this guideline, including the necessary features of the organization's standards and procedures, depend on the size of the organization.

(ii) Large Organizations.—A large organization generally shall devote more formal operations and greater resources in meeting the requirements of this guideline than shall a small organization.

(iii) Small Organizations.—In meeting the requirements of this guideline, small organizations shall demonstrate the same degree of commitment to compliance with the law as large organizations. However, a small organization may meet the requirements of this guideline with less formality and fewer resources than would be expected of large organizations.
organizations. In appropriate circumstances, reliance on existing resources and simple systems can demonstrate a degree of commitment that, for a large organization, would only be demonstrated through more formally planned and implemented systems.

Examples of the informality and use of fewer resources with which a small organization may meet the requirements of this guideline include the following: (i) the governing authority’s discharge of its responsibility for oversight of the compliance program by directly managing the organization’s compliance efforts; (ii) training employees through informal staff meetings, and monitoring through regular “walk-arounds” or continuous observation while managing the organization; (iii) using available personnel, rather than employing separate staff, to carry out the compliance program; and (iv) modeling its own compliance program on existing, effective compliance programs and best practices of other similar organizations.

3. Application of Subsection (b)(2).—High-level personnel and substantial authority personnel of the organization shall be knowledgeable about the content and operation of the compliance program, shall perform their assigned duties consistent with the exercise of due diligence, and shall promote an organizational culture that encourages a commitment to compliance with the law.

If the specific individual(s) assigned overall responsibility for the compliance program does not have day-to-day operational responsibility for the program, then the individual(s) with day-to-day operational responsibility for the program typically should, no less than annually, give the organization’s governing authority or an appropriate subgroup thereof information on the implementation and effectiveness of the compliance program.

4. Application of Subsection (b)(3).—

(A) Consistency with Other Law.—Nothing in subsection (b)(3) is intended to require conduct inconsistent with any Federal, State, or local law, including any law governing employment or hiring practices.

(B) Implementation.—In implementing subsection (b)(3), the organization shall hire and promote individuals so as to ensure that all individuals within the high-level personnel and substantial authority personnel of the organization will perform their assigned duties in a manner consistent with the exercise of due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law under subsection (a). With respect to the hiring or promotion of such individuals, an organization shall consider the relatedness of the individual’s violations (including other conduct inconsistent with an effective compliance program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual’s violations; and (ii) whether the individual has engaged in other such violations.

5. Application of Subsection (b)(6).—Adequate discipline of individuals responsible for a violation is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.

6. Application of Subsection (c).—To meet the requirements of subsection (c), an organization shall:

(A) Assess periodically the risk that violations will occur, including assessing the following:

(i) The nature and seriousness of such violations.

(ii) The likelihood that certain violations may occur because of the nature of the organization’s business. If, because of the nature of an organization’s business, there is a substantial risk that certain types of violations may occur, the organization shall take reasonable steps to prevent and detect that type of violation. For example, an organization that, due to the nature of its business, has employees where compensation is dependent on the final settlement price of a certain product shall establish standards and procedures designed to prevent market manipulation of that final settlement price.

(iii) The prior history of the organization. The prior history of an organization may indicate types of violations that it shall take actions to prevent and detect.

(B) Prioritize periodically, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b), in order to focus on preventing and detecting the violations identified under subsection (A) of this note as most serious, and most likely, to occur.

(C) Modify, as appropriate, the actions taken pursuant to any requirement set forth in subsection (b) to reduce the risk of violations identified under subsection (A) of this note as most serious, and most likely, to occur.

PART C – CIVIL PENALTIES

1. GENERAL

§1C1.1

This Part governs the determination and implementation of civil penalties.

2. DETERMINING THE PENALTY

§1C2.1. Violation Level

(a) Use the applicable Chapter Two guideline to determine the base violation level
and apply, in the order listed, any appropriate adjustments contained in that guideline.

(b) Where there are multiple violations falling under different Chapter Two guidelines, e.g., a case involving both anticompetitive conduct and reliability violations, the Commission will determine the appropriate penalty on a case-by-case basis.

§1C2.2. Base Penalty

(a) The base penalty is the greatest of:

(1) the amount from the table in subsection (b) below corresponding to the violation level determined under §1C2.1 (Violation Level); or

(2) the pecuniary gain to the organization from the violation; or

(3) the pecuniary loss from the violation caused by the organization.

(b) Violation Level Penalty Table

<table>
<thead>
<tr>
<th>Violation Level</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>6 or less</td>
<td>$5,000</td>
</tr>
<tr>
<td>7</td>
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<td>$17,500,000</td>
</tr>
<tr>
<td>33</td>
<td>$22,000,000</td>
</tr>
</tbody>
</table>

§1C2.3. Culpability Score

(a) Start with 5 points and apply subsections (b) through (g) below.

(b) Involvement In or Tolerance of Violations

If more than one applies, use the greatest:

(1) If--

(A) the organization had 5,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the violation; or

(ii) tolerance of the violation by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the violation was committed had 5,000 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the violation; or

(ii) tolerance of the violation by substantial authority personnel was pervasive throughout such unit,

add 5 points; or

(2) If--

(A) the organization had 1,000 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the violation; or

(ii) tolerance of the violation by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the violation was committed had 1,000 or more employees and
(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the violation; or

(ii) tolerance of the violation by substantial authority personnel was pervasive throughout such unit,

add 4 points; or

(3) If--

(A) the organization had 200 or more employees and

(i) an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the violation; or

(ii) tolerance of the violation by substantial authority personnel was pervasive throughout the organization; or

(B) the unit of the organization within which the violation was committed had 200 or more employees and

(i) an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the violation; or

(ii) tolerance of the violation by substantial authority personnel was pervasive throughout such unit,

add 3 points; or

(4) If the organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the violation, add 2 points; or

(5) If the organization had 10 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the violation, add 1 point.

(c) Prior History

If more than one applies, use the greater:

(1) If the organization committed any part of the instant violation less than 10 years after a prior Commission adjudication of any violation or less than 10 years after an adjudication of similar misconduct by any other enforcement agency, add 1 point; or

(2) If the organization committed

any part of the instant violation less than 5 years after a prior Commission adjudication of any violation or less than 5 years after an adjudication of similar misconduct by any other enforcement agency, add 2 points.

(d) Violation of an Order

If the commission of the instant violation violated a judicial or Commission order or injunction directed at the specific organization by the Commission or other Federal and state enforcement agencies that adjudicate similar types of matters as the Commission, add 2 points.

(e) Obstruction of Justice

If the organization willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation or resolution of the instant violation, or, with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impediment, add 3 points.

(f) Effective Compliance Program

(1) If the violation occurred even though the organization had in place at the time of the violation an effective compliance program, as provided in §182.1 (Effective Compliance Program), subtract up to 3 points.

(2) Subsection (f)(1) does not apply if, after becoming aware of a violation, the organization unreasonably delayed reporting the violation to appropriate governmental authorities.

(g) Self-Reporting Cooperation, Avoidance of Trial-Type Hearing, and Acceptance of Responsibility

(1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the violation, reported the violation to the Commission, subtract 2 points.

(2) If the organization exhibited full cooperation in the investigation, subtract 1 point.

(3) If the organization resolved the matter without need for a trial-type hearing, subtract 1 point.

(4) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its violation, subtract 1 point.

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline, "condoned," "prior adjudication,"
"similar violations," "substantial authority personnel," and "willfully ignorant of the violation" have the meaning given those terms in the Commentary to §1A.1 (Applicability of these Guidelines).

For purposes of subsection (b), "unit of the organization" means any reasonably distinct operational component of the organization. For example, a large organization may have several large units such as divisions or subsidiaries, as well as many smaller units such as specialized manufacturing, marketing, or accounting operations within these larger units. For purposes of this definition, all of these types of units are encompassed within the term "unit of the organization."

"High-level personnel of the organization" is defined in the Commentary to §1A.1 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set the policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in a violation, three points would be added under subsection (b)(3). If that organization had 1,000 employees and the managing agent of the unit with 200 employees were also within high-level personnel of the organization in its entirety, four points (rather than three) would be added under subsection (b)(2).

Pervasiveness under subsection (b) will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the violation. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. For example, if a violation were committed in an organization with 1,000 employees but the tolerance of the violation was pervasive only within a unit of the organization with 200 employees (and no high-level personnel of the organization participated in, condoned, or were willfully ignorant of the violation), three points would be added under subsection (b)(3). If, in the same organization, tolerance of the violation was pervasive throughout the organization as a whole, or an individual within high-level personnel of the organization participated in the violation, four points (rather than three) would be added under subsection (b)(2).

Under subsection (c), in determining the prior history of an organization with separately managed lines of business, only the prior conduct or record of the separately managed time of business involved in the instant violation is to be used. A "separately managed line of business" is a subset of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately managed lines of business.

Under subsection (c), in determining the prior history of an organization, the conduct of the underlying economic entity will be considered without regard to its legal structure or ownership. For example, if two companies merged and became separate divisions and separately managed lines of business within the merged company, each division would retain the prior history of its predecessor company. If a company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company. In contrast, if one company purchased the physical assets but not the ongoing business of another company, the prior history of the company selling the physical assets would not be transferred to the company purchasing the assets. However, if an organization is acquired by another organization in response to solicitations by appropriate federal government officials, the prior history of the acquired organization will not be attributed to the acquiring organization.

Under subsection (c)(1), the adjudication(s) must have occurred within the specified period (ten or five years) of the instant violation.

Adjust the culpability score for the factors listed in subsection (c) whether or not the violation guideline incorporates that factor, or that factor is inherent in the violation.

Under subsection (f)(1), an organization can receive partial credit (one or two points) for a compliance program that is effective, yet does not follow section 182.1 in its entirety. Subsection (f)(2) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by subsection (f)(2) if the organization reasonably concluded, based on the information then available, that no violation had been committed.

If an organization’s high-level personnel, substantial authority personnel, or individuals with operational responsibility for compliance participate in, condone, or are willfully ignorant of the violation, the organization will not automatically be disqualified for compliance credit under subsection (f)(1). The organization, however, may not receive the compliance credit if the senior-level employee acted at the direction or supervision, or with tacit acquiescence of the organization’s governing authority.

To qualify for a reduction under subsection (f)(2), cooperation must be both timely and thorough. To be timely, the cooperation must begin essentially at the same time as the organization is notified by the Commission or Commission staff of an investigation. To be thorough, the cooperation should include the disclosure of all pertinent information known by the organization. A prime test of whether the organization has disclosed all pertinent information is whether the information is sufficient for the Commission to identify the nature and extent of the violation and the individual(s) responsible for the violation. However, the cooperation so measured is not the cooperation of the organization itself, nor the cooperation of individuals within the organization. If because of the lack of cooperation of particular individual(s), neither the organization nor the Commission are able to identify the culpable individual(s) within the organization, the Commission must either prioritize the organization's ability to cooperate fully, the organization may still be given credit for full cooperation. The Commission will not require organizations to waive attorney-client privilege or work-product protections in order to qualify for a reduction under these subsections.

12. The Commission has not always required organizations to admit responsibility in settlement agreements. This Guideline is designed to provide a reduction in the culpability score to organizations willing to resolve cases without the need for a trial-type hearing that is comparable to the reduction in the Sentencing Guidelines for acceptance of responsibility with an additional incentive for companies willing to affirmatively recognize their violations.

Background: The increased culpability scores under subsection (b) are based on three interrelated principles. First, an organization is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of violations. Second, as organizations become larger and
their management becomes more professional, participation in, condonation or willful ignorance of violations by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of violations beyond that reflected in the instant violation also increases whenever management’s tolerance of that violation is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.

§IC2.4. Minimum and Maximum Multipliers

Using the culpability score from §IC2.3 (Culpability Score) and applying any applicable special instruction for penalties in Chapter Two, determine the applicable minimum and maximum penalty multipliers from the table below.

<table>
<thead>
<tr>
<th>Culpability Score</th>
<th>Minimum Multiplier</th>
<th>Maximum Multiplier</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 or more</td>
<td>2.00</td>
<td>4.00</td>
</tr>
<tr>
<td>9</td>
<td>1.80</td>
<td>3.60</td>
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</tr>
<tr>
<td>3</td>
<td>0.60</td>
<td>1.20</td>
</tr>
<tr>
<td>2</td>
<td>0.40</td>
<td>0.80</td>
</tr>
<tr>
<td>1</td>
<td>0.20</td>
<td>0.40</td>
</tr>
<tr>
<td>0 or less</td>
<td>0.05</td>
<td>0.20</td>
</tr>
</tbody>
</table>

§IC2.5. Guideline Penalty Range - Organizations

(a) The minimum of the guideline penalty range is determined by multiplying the base penalty determined under §IC2.2 (Base Penalty) by the applicable minimum multiplier determined under §IC2.3 (Minimum and Maximum Multipliers).

(b) The maximum of the guideline penalty range is determined by multiplying the base penalty determined under §IC2.2 (Base Penalty) by the applicable maximum multiplier determined under §IC2.3 (Minimum and Maximum Multipliers).

3. IMPLEMENTING THE PENALTY

§IC3.1. Imposing a Penalty

(a) Except to the extent restricted by the maximum penalty authorized by statute or any minimum penalty required by statute, the penalty range will be that determined under §IC2.5 (Guideline Penalty Range - Organizations).

(b) Where the minimum guideline penalty is greater than the maximum penalty authorized by statute, the maximum penalty authorized by statute will be the guideline penalty.

§IC3.2. Reduction of Penalty Based on Inability to Pay

(a) The Commission will reduce the penalty below that otherwise required to the extent that imposition of such penalty would impair its ability to disgorge profits.

(b) The Commission may impose a penalty below that otherwise required if the Commission finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum required by §IC2.5 (Guideline Penalty Range - Organizations) and §IB1.1 (Disgorgement).

Provided, that the reduction under this subsection will not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

Application Notes:

1. For purposes of this section, an organization is not able to pay the minimum penalty if, even with an installment schedule, the payment of that penalty would substantially jeopardize the continued existence of the organization.
CHAPTER 2: VIOLATION CONDUCT

Guideline for Violations of Commission-Approved Reliability Standards

§2A1.1
(a) Base Violation Level: 6
(b) Specific Violation Characteristics. Apply the greatest of the following:

(1) Risk of Loss
   (A) If the violation or event created a low risk of minor harm, no increase.
   (B) If the violation or event created either a moderate risk of minor harm or a low risk of substantial harm, add 5.
   (C) If the violation or event created either a high risk of minor harm or a moderate risk of substantial harm, add 8.
   (D) If the violation or event created either a high risk of substantial harm or a low risk of major harm, add 12.
   (E) If the violation or event created a moderate risk of major harm, add 18.
   (F) If the violation or event created a high risk of major harm or a low risk of extreme harm, add 22.
   (G) If the violation or event created a moderate risk of extreme harm, add 24.
   (H) If the violation or event created a high risk of extreme harm, add 26.

(2) Loss of Load
   (A) If the violation or event caused the loss of less than 10 MWh of firm load, no increase.
   (B) If the violation or event caused the loss of 10 or more MWh of firm load, add 6.
   (C) If the violation or event caused the loss of 20 or more MWh of firm load, add 9.
   (D) If the violation or event caused the loss of 50 or more MWh of firm load, add 11.
   (E) If the violation or event caused the loss of 100 or more MWh of firm load, add 13.
   (F) If the violation or event caused the loss of 250 or more MWh of firm load, add 16.
   (G) If the violation or event caused the loss of 500 or more MWh of firm load, add 19.
   (H) If the violation or event caused the loss of 1000 or more MWh of firm load, add 22.
   (I) If the violation or event caused the loss of 2500 or more MWh of firm load, add 26.
   (J) If the violation or event caused the loss of 5000 or more MWh of firm load, add 29.
   (K) If the violation or event caused the loss of 10000 or more MWh of firm load, add 32.

Commentary
The following chart reflects the enhancements for risk of harm described in this Guideline:

<table>
<thead>
<tr>
<th>Minor harm</th>
<th>Substantial Harm</th>
<th>Major Harm</th>
<th>Extreme Harm</th>
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<td>Low Risk</td>
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<td>Moderate Risk</td>
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</tr>
<tr>
<td>High Risk</td>
<td>&gt;8</td>
<td>&gt;13</td>
<td>&gt;22</td>
</tr>
</tbody>
</table>

Illustrative Examples:

(1) Risk of harm.

(A) Low risk of minor harm

Example: A Transmission Owner fails to produce evidence of maintenance and testing for 37 days after requested by its Regional Entity, i.e., 7 days after the 30-day deadline for production, creating a risk that no documentation exists to show the entity’s adherence to its maintenance and testing program for protection systems.

(B) Moderate risk of minor harm

Example: A medium-sized utility registered as a Balancing Authority has a documented and adequate training program, but the training plan does not address all the knowledge and competencies required for reliable system operations and the entity has provided 90% of its operators with sufficient training time, creating a risk that a small percentage of operators have not received sufficient time for training to maintain all competencies needed for reliable system operations.

(B.1) Low risk of substantial harm

Example: A Generator Operator fails to, without any intentional time delay, notify its Balancing Authority and Transmission Operator of equipment failure that would limit the output of its 510 MW generator, which may make it difficult for the Generator Operator’s Balancing Authority to replace the power in a timely period of high demand or low supply availability.

(C) High risk of minor harm

Example: A small utility registered as a Transmission Owner is three months behind on testing and maintaining 1% of its relays, all on its 115 kV radial transmission lines, meaning the entity faces a high risk of losing a small amount of radial load through an inability to isolate a fault in response to a contingency.

(C.2) Moderate risk of substantial harm

Example: Over a weekend when the system is lightly loaded, operating personnel for a small utility registered as a Transmission Owner fail to use three-part communication of directives, which leads to the wrong breaker being opened. Because there was sufficient capacity on a looped line, there was moderate risk that a substantial, otherwise unnecessary loss of load could occur because the breaker opened.

Docket No. PL10-4-000
(D.1) **High risk of substantial harm**

Example: A medium to large utility registered as a Transmission Operator fails to have on duty NERC-certified operators for 50 hours per month for the last 2 years, placing the utility at an elevated risk of an operator error during any emergency while the non-certified operator is on duty that could lead to a substantial, otherwise unnecessary loss of load.

(D.2) **Low risk of major harm**

Example: A Reliability Coordinator’s modeling tool does not include several recent changes to the transmission system. Should an emergency occur, the Reliability Coordinator would lack situational awareness of its Reliability Coordinator Area and, as a result, issue improper directives that exacerbate the emergency.

(E) **Moderate risk of major harm**

Example: A medium to large utility registered as a Balancing Authority has an event occur on its system and fails to take actions necessary to return its area control error (ACE) to zero for more than 1.5 minutes, and while it has the necessary amount of reserves through a reserve sharing group, the full amount of reserves cannot be delivered to the BA due to transmission constraints resulting from the event. This violation threatens unnecessary losses of load within the Balancing Authority and in neighboring Balancing Authorities should another contingency occur.

(F.1) **High risk of major harm**

Example: A large Transmission Owner has a transmission vegetation management program that requires first, vehicle and aerial patrols annually along rights-of-way for transmission lines having a capacity of 138 kV and above. The Transmission Owner decides to save $2 million by deferring the annual aerial patrols for two years. During that time period, a tree located within the right-of-way of a 500 kV line grew sufficiently to contact the line. An aerial patrol timely would have identified the tree as a potential threat of a vegetation contact or flashover that would cause an outage of the line. Such an outage likely would result in major harm through significant, unnecessary losses of load, as well as severe transmission constraints between neighboring Transmission Operators and Balancing Authorities.

(F.2) **Low risk of extreme harm**

Example: A utility registered as a Balancing Authority does not have any required procedures for the recognition of and for making its operating personnel aware of sabotage events on its facilities and multi-site sabotage affecting larger portions of the Interconnection, and its operating personnel have received no training on recognizing sabotage events. Because of the Balancing Authority’s configuration and facilities, its lack of these procedures and training make it more likely that a large-scale sabotage attempt focused on the Balancing Authority’s facilities would be successful, causing widespread, unnecessary losses of load on the systems of the Balancing Authority and its neighboring Balancing Authorities.

(G) **Moderate risk of extreme harm**

Example: A medium-sized utility that serves native load and is registered as a Balancing Authority and Transmission Operator does not have sufficient manually-operated load shedding capability to shed load within fifteen minutes in the amount of the Balancing Authority’s most severe single contingency. The failure to shed sufficient load as a last resort in an emergency could cause the utility to lean on the Interconnection for too long and, were an Adjacent Balancing Authority to have a contingency, it could lead to widespread blackouts in either or both Balancing Authority Areas.

(f) **High risk of extreme harm**

This situation could occur as a result of multiple violations (vegetation contact, frequency oscillations, poor operator training and situational awareness, etc.) that are similar to the causes of the 2003 Northeast blackout.

**Application Notes:**

1. The Guideline increases the violation level at the expected harm from the reliability violation increases. As a result, the violation level goes up as both the risk of harm and the severity of the potential harm increase. Many cases may involve multiple risks of multiple levels of harm. For instance, a case might involve a moderate risk of major harm and a high risk of substantial harm. The Guideline takes the greater of the two violation levels. In this case, the increase in the base violation level would be 9.

2. In this context, "low risk" is not meant to include cases where there was virtually no risk of harm. It is meant to apply to cases where there is a real chance of harm, albeit a small chance.

3. The risk of the relevant harm is to be determined based on all of the facts and circumstances surrounding the violation. As an initial starting point, the violation risk factors will be considered in determining the relevant risk. However, the VRF might understate or overstate the actual risk resulting from the violation. For instance, a violation or combination of violations of Low VRF standards might, under certain circumstances, pose a high risk of harm. Alternatively, a violation of a standard with a High VRF might present little or no real risk of harm. Under such circumstances, the actual risk from the violation should be used to determine the violation level. The fact that little or no loss of load occurred is, by itself, evidence that the violation involved a low or moderate risk.

4. In certain circumstances, the Reliability Standards may require the shedding of firm load. When an underlying violation requires an operator to shed load pursuant to a Reliability Standard as a necessary means to avoid a further risk to the Bulk-Power System, the operator’s decision to shed load is not itself a violation and no penalty would be sought for that decision. However, the fact that the underlying violation required load shedding will be considered in assessing the risk created by the underlying violation under section 2AI.1(b)(1) of the Penalty Guidelines. Organizations will face lower civil penalties in situations when load is shed in compliance with a Reliability Standard.
5. For multiple violations that fall within the section 2A.1 Guideline for violations of the Reliability Standards and that are related to the same conduct or event, the Commission will apply the Guideline based on the conduct as a whole.

§2A.1

(a) Base Violation Level: 6

(b) Specific Violation Characteristics

(1) If the loss exceeded $5,000, increase the violation level as follows:

<table>
<thead>
<tr>
<th>Loss (Apply the Greatest)</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) $5,000 or less</td>
<td>no increase</td>
</tr>
<tr>
<td>(B) More than $5,000</td>
<td>add 2</td>
</tr>
<tr>
<td>(C) More than $10,000</td>
<td>add 4</td>
</tr>
<tr>
<td>(D) More than $30,000</td>
<td>add 6</td>
</tr>
<tr>
<td>(E) More than $70,000</td>
<td>add 8</td>
</tr>
<tr>
<td>(F) More than $120,000</td>
<td>add 10</td>
</tr>
<tr>
<td>(G) More than $200,000</td>
<td>add 12</td>
</tr>
<tr>
<td>(H) More than $400,000</td>
<td>add 14</td>
</tr>
<tr>
<td>(I) More than $1,000,000</td>
<td>add 16</td>
</tr>
<tr>
<td>(J) More than $2,500,000</td>
<td>add 18</td>
</tr>
<tr>
<td>(K) More than $7,000,000</td>
<td>add 20</td>
</tr>
<tr>
<td>(L) More than $20,000,000</td>
<td>add 22</td>
</tr>
<tr>
<td>(M) More than $50,000,000</td>
<td>add 24</td>
</tr>
<tr>
<td>(N) More than $100,000,000</td>
<td>add 26</td>
</tr>
<tr>
<td>(O) More than $200,000,000</td>
<td>add 28</td>
</tr>
<tr>
<td>(P) More than $400,000,000</td>
<td>add 30</td>
</tr>
</tbody>
</table>

(2) If more than one of the following enhancements applies, use only the greatest.

If the violation—

(A) involved more than 70,000 MMBtu of natural gas or more than 10,000 MWh of electricity, or equivalent volumes of natural gas related or electricity related transactions, increase by 2 levels

(B) involved more than 140,000 MMBtu of natural gas or more than 20,000 MWh of electricity, or equivalent volumes of natural gas related or electricity related transactions, increase by 4 levels

(C) involved more than 700,000 MMBtu of natural gas or more than 100,000 MWh of electricity, or equivalent volumes of natural gas related or electricity related transactions, increase by 6 levels

If the violation—

(D) continued for more than 10 days, increase by 2 levels

(E) continued for more than 50 days, increase by 4 levels

(F) continued for more than 250 days, increase by 6 levels
If the violation involved conduct that presented a serious threat to market transparency and the total violation level is less than level 16, increase to level 16.

**Commentary**

**Application Notes:**

1. This Guideline is based on United States Sentencing Guidelines Section 2B1.1 and terms used in this Guideline are intended to have the same meaning as they do in Section 2B1.1. Section 2B1.1 (b)(2) provides various enhancements for the scope and extent of the violation. If more than one of the enhancements is applicable, only the greatest enhancement should be used.

2. **Loss Under Subsection (b)(1).**—This application note applies to the determination of loss under subsection (b)(1).

   (A) **General Rule.**—Subject to the exclusions in subdivision (1), loss is the greater of actual loss or intended loss.

      (i) **Actual Loss.**—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the violation.

      (ii) **Intended Loss.**—"Intended loss" (i) means the pecuniary harm that was intended to result from the violation; and (ii) includes intended pecuniary harm that would have been impossible or unlikely to occur.

      (iii) **Pecuniary Harm.**—"Pecuniary harm" means harm that is monetary or otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.

      (iv) **Reasonably Foreseeable Pecuniary Harm.**—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the entity knew or, under the circumstances, reasonably should have known, was a potential result of the violation.

   (B) **Gain.**—The Commission will use the gain that resulted from the violation as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.

   (C) **Estimation of Loss.**—The Commission need only make a reasonable estimate of the loss.

   (D) **Exclusions from Loss.**—Loss does not include the following:

      (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.

      (ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and investigation of a violation.

   (E) **Credits Against Loss.**—Loss will be reduced by the following:

      (i) The money returned, and the fair market value of the property returned and the services rendered, by the entity or other persons acting jointly with the entity, to the victim before the violation was detected. The time of detection of the violation is the earlier of (i) the time the violation was discovered by a victim or the Commission; or (ii) the time the entity knew or reasonably should have known that the violation was detected or about to be detected by a victim or the Commission.

      (ii) In a case involving collateral pledged or otherwise provided by the entity, the amount the victim has recovered at the time of penalty from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of penalty.
Guideline for Intentional or Reckless Misrepresentations and False Statements
To the Commission or Commission Staff

§2C1.1

(a) Base Violation Level: 18

(b) Specific Violation Characteristics

(1) If the violation resulted in substantial interference with the administration of justice, increase by 3 levels.

(2) If the violation (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by 2 levels.

Commentary

Application Notes:

1. This Guideline requires a showing of scienter. It applies to intentional or reckless misrepresentations and false statements that mislead, or attempt to mislead, the Commission's or staff's efforts.

2. Definitions.—For purposes of this guideline:

"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"Substantial interference with the administration of justice" includes a premature or improper termination of a Commission investigation; any official action based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or Commission resources.
The North American Electric Reliability Corporation's ("NERC") mission is to ensure and improve the reliability of the bulk power system ("BPS"). Reliability excellence is achieved through the ongoing identification, correction and prevention of reliability risks, both big and small. Yet, accountability for reliability excellence is broader than just penalizing violations.

This filing describes NERC's decision to shift how it deals with Possible Violations that pose lesser risks to the BPS. Toward this end, NERC and the Regional Entities are employing a more comprehensive and integrated risk control strategy that differentiates and addresses compliance issues according to their significance to the reliability of the BPS. In addition, NERC and the Regional Entities are increasing the utilization of their inherent enforcement discretion in the implementation of compliance and enforcement activities.

This new initiative is not about whether Possible Violations should or will be addressed. In all cases and regardless of the filing format, such matters are expected to be found, fixed, tracked and reported to the Regional Entities, NERC and the Federal Energy Regulatory Commission ("FERC" or "Commission"). Lesser risk issues that have been corrected will be presented as Remediated Issues in a Find, Fix, Track and Report ("FFT") spreadsheet format that will be submitted to FERC in an informational filing on a monthly basis. More serious risk violations will be submitted in a new Spreadsheet Notice of Penalty ("NOP") or Full NOP, as warranted.

NERC believes this new approach is fully consistent with NERC's existing rules and authority and the Commission's rules, orders and regulations; however, to the extent the Commission believes otherwise, NERC requests waiver of such rules, regulations and orders to put this new initiative and associated reporting tools in place starting now. Specifically, NERC requests that the Commission notice this filing for public comment and issue an order approving the compliance enforcement initiative and mechanisms described herein and providing any additional guidance that the Commission believes is appropriate. Additionally, NERC is submitting its first informational filing of Remediated Issues as an attachment to this filing. NERC is not requesting Commission action on the FFT informational filing itself.

NERC is concurrently filing NOPs in the new Spreadsheet NOP format as well as others as Full NOPs. It is NERC's expectation that the Commission will process all of those NOPs in accordance with the Commission's regulations set forth in 18 C.F.R. Part 39.7. While NERC describes the new Spreadsheet NOP format herein, NERC requests that the Commission take action on the Spreadsheet NOP format and specific Spreadsheet NOP violations in the NP11-270-000 docket, rather than this docket.

NERC commits to report back to the Commission and industry stakeholders at six months and one year following this initial filing on experience gained and the results from implementation of the new mechanisms and tools.
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I. Executive Summary

In the first four years as an enforcement organization, the Compliance Monitoring and Enforcement Program ("CMEP") implemented by NERC and eight Regional Entities has been very successful in transitioning the industry from voluntary compliance to mandatory compliance with NERC Reliability Standards. This initiative represents an evolution of this process.

Commencing with this compliance enforcement initiative filing, there will be three tracks for dealing with possible compliance matters: (i) NOPs; (ii) FFT informational filings; and (iii) dismissals. Decisions regarding the proper disposition will be based upon consideration of the following factors: (1) the underlying facts and circumstances, including what happened, why, where and when; (2) the Reliability Standard at issue; (3) the applicable Violation Risk Factor ("VRF") and Violation Severity Level ("VSL"); (4) the potential and actual level of risk to reliability, including mitigating factors during pendency of the Possible Violation; (5) the Registered Entity's compliance program, including preventive and corrective processes and procedures, internal controls and culture of compliance; and (6) the Registered Entity's compliance history. Moreover, a Regional Entity's determination that a penalty or sanction is warranted and the deterrence value of a penalty or sanction also will be considered.

A key feature of this initiative is a change in the way lesser risk issues of NERC Reliability Standards are processed in order to enable Registered Entities subject to the Reliability Standards, the Regional Entities, NERC and the Commission to focus on more serious risk issues. Until today, lesser risk issues have been treated in essentially the same fashion as more serious violations, consuming time and resources disproportionate to the risk posed to reliability.

This is not reasonable or efficient, and the consequences are detrimental to reliability. Specifically, employees of Registered Entities have become focused on the minutia of compliance and penalty avoidance rather than on best practices and excellence. Those who draft Reliability Standards have become focused on avoiding what they view as compliance pitfalls. Status quo processing requirements will continue to produce the results we now have: (i) little to no differentiation of process treatment until the filing stage; (ii) significant paperwork, man-hour and administrative burdens for lesser risk issues; (iii) lengthy processing times for all issues; (iv) delays in information dissemination and transparency; and (v) potentially unintended signals and results that industry stakeholders should manage compliance risks rather than reliability risks.

As a result, it is imperative that CMEP implementation efforts be reevaluated, redirected and rebalanced to ensure that reliability is maintained and enhanced in accordance with NERC's mission. This initiative promotes reliability excellence by ensuring all issues are fixed and by enabling substantially greater resources and attention to be devoted to matters that pose a more serious threat to reliability of the BPS. It facilitates efforts to: (i) identify other unknown and unmitigated risks, (ii) address known serious risks; and (iii) discern trends and patterns that warn of impending risks of harm. It also aligns record development and resolution based on the risk posed, thereby reducing undue administrative and regulatory burdens on Registered Entities and improving caseload processing. As part of this initiative, NERC will continue to compile trend data and keep historical records on Registered Entities, which will allow NERC to target areas for increased education and attention as needed.

Under the process proposed in this filing, lesser risk issues will be found, fixed, tracked and reported to Regional Entities, NERC and FERC, instead of being processed in a NOP as violations subject to penalties or sanctions. Those responsible for enforcement must exercise the
discretion to determine that, once fixed, no additional compliance resources will be expended on a particular matter, given other demands and priorities. Therefore, the formal regulatory process will be used for violations that pose a more serious threat to the reliability of the BPS and will not be clogged up by lesser risk issues that have already been fixed.

Records will be kept of all find and fix actions to be sure that the process is being properly implemented. Once fixed and the Registered Entity has provided the Regional Entity with a statement of completion of mitigation activities, NERC and the Regional Entity will consider the Possible Violation to be a Remediated Issue. Inclusion of the Remediated Issue in an informational filing supplied to FERC on a monthly basis will conclude the processing of that Remediated Issue by NERC and Regional Entities, subject to verification at an Audit, Spot Check, random sampling or otherwise, as warranted.

Another key feature of this initiative is a refinement of the NOP reporting tools, which builds upon the successful implementation of the Administrative Citation NOP. NERC is concurrently filing certain Notices of Penalty in a proposed new Spreadsheet NOP format as well as others as Full NOPs.

The oversight roles of Regional Entities, NERC and FERC are respected and reinforced in this initiative and ensure that Registered Entities remain accountable, in all cases, for compliance with NERC Reliability Standards. If the Commission has concerns with NERC’s implementation of its FFT program, such concerns can be addressed promptly on a prospective basis in response to NERC’s planned six-month and one-year reports on the FFT process.

II. NERC Is Refocusing Efforts On How Issues Are Resolved To Reduce Reliability Risks And Promote Reliability Excellence.

Following the FERC-led Reliability Technical Conference in February 2011, NERC and Regional Entities have substantially increased efforts to review their existing processes and procedures in order to determine if there are more efficient and effective ways to implement them. This filing sets forth new and improved compliance enforcement tools and mechanisms to meet reliability objectives, in accordance with existing FERC rules, regulations and orders. NERC is pleased to present them to the Commission and industry and looks forward to their successful implementation.

A. The Commission Has Repeatedly Recognized the Importance of Re-examining Processes and Procedures, Redirecting Efforts to Ensure Mission Success and Reducing Undue Regulatory Burdens.

In developing this compliance enforcement initiative, NERC has carefully considered the individual and collective statements of the Commissioners in meetings, technical conferences, testimony and orders. Three FERC-led Technical Conferences conducted in 2010-2011 have focused on addressing issues related to development and enforcement of NERC Reliability Standards (July 6, 2010), exploring issues associated with reliability monitoring, enforcement and compliance (Nov. 18, 2010) and priorities for addressing risks to the reliability of the BPS (Feb. 8, 2011). Commissioner Cheryl LaFleur said it well, "As the old maxim goes, if everything is a priority, then nothing is a priority." In each of those meetings, NERC, Regional Entities and industry stakeholders expressed near-universal support for reevaluating, refocusing

\(^1\) Technical Conference on Priorities for Addressing Risks to the Reliability of the Bulk-Power System, Docket No. AD11-6-000 (Feb. 8, 2011)
\(^2\) Id.; Technical Conference to Address Industry Perspectives on Certain Issues Pertaining to the Development and Enforcement of Mandatory Reliability Standards for the Bulk-Power System, Docket No. AD10-14-000 (July 6, 2010); and Technical Conference on Reliability Monitoring, Enforcement and Compliance Issues, AD11-1-000 (Nov. 18, 2010).
\(^3\) Statement of Commissioner Cheryl A. LaFleur on NERC’s 3-Year Assessment, Docket Nos. RR09-7-000 and AD10-14-000 (Sept. 16, 2010).
and re-prioritizing reliability compliance enforcement efforts. This initiative is complementary to NERC’s prioritization efforts that have been underway since 2010.

Chairman Jon Wellinghoff recently testified as to the ongoing need for, and appropriateness of, ensuring efficiency and effectiveness of processes and procedures:

The Commission regularly reviews its regulations to ensure that they achieve their intended purpose and do not impose undue burdens on regulated entities or unnecessary costs on those entities or their customers. 4

With respect to reliability matters specifically, the Commission has recognized NERC’s need and efforts to reevaluate and develop flexible approaches and more streamlined processes that result in differentiation of violations by risk:

The Commission recognizes that NERC and the Regional Entities expend substantial efforts and resources monitoring compliance with the Reliability Standards and building adequate records to support findings of violations for Commission review. On numerous occasions, the Commission has encouraged NERC and the Regional Entities to develop flexible approaches and more streamlined processes to achieve efficiency in the enforcement process, especially with regard to more minor violations. [footnote omitted]5

In approving the Administrative Citation NOP spreadsheet format earlier this year, the Commission recognized that it would be "a successful tool in improving efficiency of NERC’s enforcement process, thereby reducing the time and resources expended by the Regional Entities, NERC, and the Commission staff while still achieving transparency and consistency in penalty determinations.” 6 NERC agrees. The simple and streamlined spreadsheet helped significantly improve the end state processing and filing of issues. The instant effort effectuates implementation improvements commencing at the outset of the process.

B. NERC is Redirecting Efforts to Ensure Mission Success in Reliability Excellence.

1. Significant Work Has Been Accomplished To Date.

NERC’s refocusing efforts build upon the experience gained through, and successful implementation of, the CMEP to date and represent the natural progression of the program from a nascent state to a more mature level. Over 1,900 entities are responsible for compliance with over 100 mandatory and enforceable NERC Reliability Standards that contain 1,500 requirements. More than 12,300 compliance issues have been identified to date.

Nearly 5,100 of those issues were self-reported by Registered Entities pre-June 18, 2007, which was the effective date of the NERC Reliability Standards. There were incentives to industry to perform self-assessments to find issues, to report them to Regional Entities, NERC and FERC and to fix them prior to the effective date of the Reliability Standards. Entities that self-reported violations and corrected them or put in place mitigation plans to correct the issues were not subject to enforcement actions. There was appropriate oversight by Regional Entities and NERC and regulatory backstops if the corrective actions were not completed or ultimately were not successful. Of the pre-June 18 issues, over 7,100 issues were dismissed because they did not constitute violations. The remaining 3,000 issues that were self-reported have already been corrected, certified by Registered Entities as corrected and verified by Regional Entities as completed.

4 Written Testimony of Chairman Jon Wellinghoff before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, July 7, 2011, at p. 2. Subsequently, on July 11, 2011, President Barack Obama issued an Executive Order to independent agencies, such as FERC, to develop and release a plan to review rules that may be outdated, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. President Barack Obama’s Executive Order 13570, Regulation and Independent Regulatory Agencies at Section 2 (July 11, 2011). Chairman Jon Wellinghoff announced that same day that the Commission would implement President Barack Obama’s Executive Order. FERC News Release, "FERC To Institute Public Review of Regulations” (July 11, 2011). While NERC is not subject to the Executive Order, NERC has been conducting a retrospective analysis of its rules, regulations, processes and procedures to determine what needs to be modified, streamlined, expanded or repealed that is consistent with the spirit of the Executive Order. This initiative is in response to that review.


6 Id.
Over 7,500 issues were identified post-June 18, 2007. Of those, over 70% were self-identified by Registered Entities in Self-Reports, Self-Certifications, Exception Reports and Periodic Data Submittals. Approximately 1,750 issues were dismissed because they did not constitute violations or because they were duplicates of issues already in process. More than 2,500 violations have been filed in NOPs with FERC. FERC has reviewed only one NOP on its own motion and has not overturned the ultimate disposition of any violations filed to date.

2. Significant Work Remains To Be Done.

Currently, NERC and the Regional Entities have approximately 3,300 active issues in process. New issues are being reported to NERC and Regional Entities at a rate of approximately 200 per month. The intake process for all violations is largely the same, although great strides have been made in streamlining the processing of violations and filing documents in accordance with the seriousness of the violations. The intake process represents a significant time and resource commitment, and it essentially results in all violations being treated equally at least in the initial stages up to the end state filing stage. However, experience has shown that the vast majority of the issues processed to date pose a lesser risk to the reliability of the BPS.

Continuing to process a large number of relatively minor violations in such a manner has the effect of diverting valuable resources of the industry, NERC and the Regional Entities from compliance efforts to address the more serious violations.

The current approach to compliance and enforcement processing is inconsistent with the prioritization efforts underway in other reliability areas such as standard development, audit practices and the final steps of the enforcement process. As discussed in greater detail below, this also is inconsistent with the way FERC and other agencies handle their respective caseloads.

Rather than pursuing large numbers of small issues extensively, the credibility of NERC’s CMEP will be enhanced by more efficient and effective processing of issues throughout the entirety of the process.

Under the current processing regime, NERC and the Regional Entities are processing issues at a rate of 176 per month, which includes dismissals and NOPs. If left unchanged, it will take approximately 2 to 3 years or more to process the issues in the caseload from intake to final disposition either in a dismissal or a NOP.


The issues in the ERO caseload include the full spectrum of those posing a minimal to a serious and substantial risk to the reliability of the BPS. However, as noted above, experience has shown that the vast majority of the violations represent a minimal risk to the reliability of the BPS.

Since the inception of the ERO, the Commission’s orders have recognized the need for, and importance of, prioritizing and devoting attention to the issues that present the greatest risk to reliability of the BPS. FERC Orders issued over the last several years also recognize the continued need for, and importance of, streamlining and administrative efficiency in the processing and resolution of violations by focusing on serious violations and by allowing a scaled record development in relation to the nature of the violation.

In 2009, the Commission recognized that the record in a NOP should be proportional to the complexity and relative importance of the violations it addresses. It stated that a NOP need not include more information than necessary to support the rationale for the penalty, given the...
nature of the violations at issue. The Commission expressed support for an abbreviated format for NOPs that conforms to the limited significance of particular types of violations, stating that this could provide transparency and predictability more quickly for certain categories of violations and allow Regional Entities and NERC to concentrate their compliance resources on more significant alleged violations.10

In 2010, in its Three-Year Performance Assessment Report Order, the Commission encouraged NERC and the Regional Entities to develop flexible approaches to align the record and format of notices of penalty to the relative significance of violations, such as pro forma settlements and proposals that could minimize the administrative burden of performing each step in the CMEP for every violation.11 The Commission also invited NERC to continue to develop further streamlining efforts.12

According to Commissioner Moeller in recent testimony before Congress, “Ultimately, our intent is not to assess penalties, but instead, to increase compliance with our regulations.”13 Commissioner John Norris has acknowledged the importance of lessons learned, “While addressing compliance and enforcement is necessary in a mandatory reliability standards regime, I am glad we are giving attention to the value of lessons learned as well.”14 They correctly recognize the need to balance compliance, enforcement and educational tools to meet reliability objectives. The Commissioners’ individual and collective perspectives have helped to inform the review process and shape NERC’s initiative.

4. Undue Regulatory Burdens Must Be Eliminated.

In contrast to the sentiments reflected in the above referenced orders, application of formal and informal guidance has resulted in unintended and undue administrative, paperwork and regulatory burdens in the day-to-day execution of the CMEP. Such an approach, however, does not work to achieve excellence in reliability and does not amount to effective and efficient administration of the program. Some examples will illustrate:

- A small entity failed to have on file and available to its staff a record of the local FBI office to aid in reporting possible sabotage events, a violation of CJP-001 Requirement (R) 4. The resulting NOP and supporting material for this single issue violation was over 40 pages long and took 2 1.5 months to process from discovery to the filing of the NOP.
- The Omnibus I NOP was initiated to resolve a large number of relatively lesser risk issues discovered from June 2007 to July 2008. Because the violations occurred during the start-up phase of the CMEP, the records for the individual cases were not as well-developed as the records of later cases. NERC utilized a spreadsheet format to convey the available information. The filing ended up being over 20,000 pages long and required significant time and effort by NERC, Regional Entities and Registered Entities to compile and produce. NERC is informed that its Omnibus I filing set a new record for the length of an electronic filing at the Commission.
- From time to time, when NERC and a Regional Entity have proposed to dismiss or otherwise dispose of a Possible Violation in a NOP, they receive requests for evidence that the Registered Entity did not violate other standards or requirements. This is, in effect, a requirement that NERC and a Regional Entity prove the negative.

It is not necessary or wise to use the occasion for processing of one potential issue for exhaustive pursuit of every other potential issue. Where there are violations in process, NERC and Regional Entities should not be required to establish that other violations did not occur. Indeed, as the Commission orders properly recognize, not every event on the system is a result of

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12 Id.
a violation of a standard. While there is the potential risk that some violations could go undiscovered and therefore not sanctioned, such risk is very small given that there are eight potential monitoring and discovery methods of issues, four of which are self-identification of issues by Registered Entities.

NERC rules and processes do not foreclose the possibility of further investigations by Regional Entities, NERC or FERC of issues when necessary. Importantly, NERC and Regional Entities do not make findings that an entity is “compliant.” Rather, they determine, based on evidence reviewed, whether there is an issue of noncompliance. Because each NOP resolves a particular set of violations, such notice does not foreclose processing of other issues separately that are identified in any of the eight compliance monitoring methods or that already may be pending before NERC and the Regional Entity.

The Administrative Citation NOP was expected to facilitate greater administrative efficiency in processing lower risk (minimal to moderate) issues. Ultimately, the possible candidate pool included only minimal risk issues and particularly those that related to very minor, administrative or documentation issues.

What was intended by NERC to be a relatively straightforward mechanism for disposing of issues that did not pose serious risks to BPS reliability did not come to fruition. This points to the need for, and importance of, avoiding arbitrary, preconceived limits that can be counterproductive and additional clarity and direction from the Commission to ensure that Possible Violations and resources are appropriately prioritized. The Commission can provide feedback on NERC’s implementation in response to monthly FFT submittals to help guide future application. In addition, the Commission can provide feedback in response to the six month and one year reports to be submitted by NERC on implementation of the initiative.

It is important to remember that NERC, Regional Entities, industry stakeholders and FERC share the same goal, which is to ensure reliability of the BPS. As Commissioner Marc Spitzer properly has acknowledged:

The starting point for me on any discussion with the industry on reliability is to acknowledge that FERC and the regulated community have the same goal: to ensure the reliable operation of the Nation’s transmission grid. I know the industry and NERC take their obligations seriously. I commend the industry and NERC for their hard work on these critical matters and I am committed to working with the industry and NERC to achieve our common goal. 16

NERC, Regional Entities and industry stakeholders recognize the importance of attending, on a daily basis, to the details of planning and operating the most complex machine that humans have yet designed and built. The anatomy of major disturbances, such as the August 2003 blackout, reveals it is often a combination of relatively lesser mistakes and problems occurring simultaneously that precipitate a major disturbance. That is why it is important to identify and correct potential violations of Reliability Standards. However, it is not necessary that each of those corrected items must also be formally prosecuted as a violation and run through the full gamut of the CMEP. Indeed, as we have indicated, overzealous prosecution of lesser risk issues undermines the long-term effort to improve the reliability of the BPS.

Significantly, Registered Entities that have robust internal compliance programs are likely to find more issues to fix. Because their programs result in identification of a large numbers of small issues, they may view themselves as being penalized for coming forward as compared to their peers who may have mediocre or no programs that do not result in ongoing issue identification.

16 Statement of Commissioner Marc Spitzer on Priorities for Addressing Risks to the Reliability of the Bulk-Power System, Docket No. AD11-6-000 (Feb. 8, 2011).
The focus on finding and penalizing violations appears to be leading to an undesirable, increasing focus on control and management of compliance risk and penalty liability, rather than control and management of reliability risk. This philosophy is evident in some standard development projects in which the teams are considering proposals to limit the scope or applicability of a given standard or requirement which would thereby reduce potential compliance penalty risk. It is evident in the annual business plan and budget cycle each year, when calls are made by stakeholders for reductions in statutory activities, especially compliance and enforcement activities. It is evident in the context of the rising number of registration appeals and contested hearings. Considered separately and taken together, these issues clearly evidence a need to refocus the CMEP. By rebalancing the program, the emphasis can once again be on achieving reliability excellence.

There are many ways of approaching enforcement. The following example is illustrative, despite the fact that it deals with law enforcement, which is a different framework. A police officer may choose to pull a driver over for a burned out tail light. From the moment he approaches the car, he is assessing risk to himself and to the public. He will assess the risk based on his experience, his general understanding of the situation, as well as factors such as the time of day, location and the driver’s dress, demeanor and responses to his requests. The police officer can run the drivers license and car tag to determine if there are issues not otherwise apparent in assessing the situation. If the initial check does not reveal an issue, the police officer, in disposing of the issue, has discretion to issue a warning ticket or a citation, along with directing the issue to be fixed. In either case, that could be the end of his review of the situation.

Certainly, if the initial check had not revealed any issues, it was within the discretion of the police officer to use the burned out tail light as an opportunity to conduct a broader review of the circumstances and investigate each and every possible thing related to the driver. Although he had the discretion, he would not likely have done so unless the specific circumstances of the case warranted.

III. NERC’s Initiative Properly Refocuses the Compliance Enforcement Program.

A. What Has Been Done Up Until Today – Current Processing Of Possible Violations Has Not Permitted Significant Differentiation According To Risk.

Until today, unless an issue warranted dismissal as discussed below, the ultimate disposition of every Possible Violation has been submitted in a Notice of Penalty. Four filing formats have been utilized most recently to differentiate the risk posed by a given issue.

Administrative Citation NOPs and Deficiency NOPs include minor, administrative or documentation issues to the Commission. The Administrative Citation NOP format, used for the last eight months, presents the relevant record information in a spreadsheet format and does not include supporting attachments, such as Settlement Agreements, Mitigation Plans, Registered Entity Certifications of Completion of Mitigation or Verifications by Regional Entities. Deficiency NOPs and Abbreviated NOPs, which resolve issues that pose minimal to moderate risks to the BPS, have included such supporting attachments and range in pages from ten pages to well over one hundred pages depending on the nature and number of issues. Full NOPs have typically been used to resolve issues that pose serious or substantial risks to the reliability of the BPS or to highlight corrective or other actions undertaken by Registered Entities to address issues. With the exception of the Administrative Citation NOP format, these NOP formats result in significant paperwork requirements.
The Commission’s regulations, at 18 C.F.R. Part 39.7(b), require NERC and the Regional Entities to report all issues of potential noncompliance and their ultimate disposition. This initiative does not seek to change that requirement. Because everything must be reported to Regional Entities, NERC and FERC, prior to a substantive review, the Commission’s orders properly recognize that some issues ultimately may be dismissed. Indeed, approximately twenty-five percent of all issues reported to Regional Entities, NERC and FERC are dismissed. Dismissals are communicated to FERC through a non-public portal.

As noted below, the Commission’s orders recognize that NERC and Regional Entities have inherent enforcement discretion with respect to the ultimate disposition of issues. While NERC and Regional Entities have typically exercised that discretion in the application of penalties or sanctions, such discretion and available compliance and enforcement tools are actually much broader.

NOPs are one of many tools to convey important information to the industry. NERC and Regional Entities utilize Lessons Learned, Compliance Application Notices, Compliance Application Reports, Case Notes and other bulletins, reports and newsletters. Webinars, workshops and meetings hosted by NERC and Regional Entities also provide forums for discussions and dissemination of information. NERC and the Regional Entities are promoting the learning organization concept, and greater efforts are being devoted to educating the industry on expectations for compliance. NERC and Regional Entities are committed to ongoing outreach and educational opportunities.

Over the last four years, the industry stakeholders have greater experience in developing and implementing compliance programs to meet the standard requirements. The CMEP works in parallel with the compliance workshops and outreach programs hosted by NERC and the Regional Entities. In addition, NERC and the Regional Entities are placing greater emphasis on industry participation in standard development, compliance monitoring activities and accountability for more significant violations.

B. What Is Not Changing In Connection With The Proposal

Under this initiative, just as today, violations of NERC Reliability Standards are expected to be found. They must be corrected. The Registered Entity must submit to Regional Entities and NERC a statement of completion of mitigation activities undertaken to correct the issue and prevent recurrence. Such activities are subject to verification by the Regional Entity at an Audit, a Spot Check, random sampling or otherwise. The Remediated Issues will be included in, and taken into account as part of, the entity’s compliance history. All issues, regardless of the ultimate disposition, must be reported to Regional Entities, NERC and FERC. In addition, penalties and other sanctions will continue to be determined based on the NERC Sanction Guidelines.

This initiative, therefore, does not effectuate a change in the fundamental tenets of the CMEP itself. As a result, it is being implemented in accordance with existing rules, regulations and orders.

C. Overview Of The Initiative

Going forward, NERC and Regional Entities will differentiate treatment for a given issue according to the risk posed to the reliability of the BPS. NERC and Regional Entities will utilize all available compliance and enforcement tools in dispositioning a given matter. NERC and Regional Entities also are refining the reporting mechanisms and filing formats to eliminate unnecessary paperwork burdens.
This filing walks through each step of the process and identifies where enhancements or adjustments are being made.

1. Intake – Initial Receipt and Report of Possible Violations; Achieving Greater Uniformity Regarding Self-Reports

At present, there are eight compliance monitoring methods by which potential non-compliance with a NERC Reliability Standard may be identified. These include: (1) Self-Reports; (2) Self-Certifications; (3) Exception Reporting; (4) Periodic Data Submittals; (5) Complaints; (6) Compliance Investigations; (7) Compliance Audits; and (8) Spot Checks. This initiative does not effectuate changes to these monitoring methods.

Because seventy percent of all issues are self-identified by Registered Entities, NERC and Regional Entities believe it is important to provide greater clarity on the nature, scope and quality of the information Registered Entities should include in Self-Reports. NERC will be posting, on its website, a list of questions that Registered Entities should address in filling out a Self-Report that covers all aspects including the factual description of the issue, identification of the risk posed by the issue, a description of the actions taken or to be taken to correct and prevent future recurrence, identification of the evidence demonstrating such actions were taken (if completed), and requirements for a statement of completion (if completed). Registered Entities are expected to continue to utilize the self-reporting portal mechanisms already in place. Over time, NERC will evaluate whether and what changes to those reporting forms may be desirable.

On January 1, 2011, NERC’s Preliminary Screen provisions in the Rules of Procedure became effective. Under Appendix 4C to the NERC Rules of Procedure, a Possible Violation is identified after the application, by the CEA, of a Preliminary Screen. The Preliminary Screen is defined as "an initial evaluation of evidence indicating potential noncompliance with a Reliability Standard that has occurred or is occurring, conducted by the [CEA] for the purpose of determining whether a Possible Violation exists, and consisting of an evaluation of whether (1) the entity allegedly involved in the potential noncompliance is registered, and (2) the Reliability Standard requirement to which the evidence of potential noncompliance relates is applicable to the entity and is enforceable."16

Currently, within five days of intake of an issue of potential noncompliance, the Regional Entities verify that an entity is included on the NERC registry and is required to comply with the particular NERC Reliability Standard requirement. Section 5.1 of the CMEP provides that if a Preliminary Screen results in an affirmative determination with respect to the above criteria, a Possible Violation exists and the CEA shall issue a Notice of Possible Violation to the Registered Entity. Upon issuing a Notice of Possible Violation, the CEA enters the Possible Violation into the NERC compliance reporting and tracking system. All Possible Violations are assigned a unique Regional Entity and NERC tracking number, which remains unchanged by this initiative. These are currently referred to as a Violation Identification Tracking Number and is unchanged by this initiative. Pursuant to 18 C.F.R. Part 39.7(b), “The Electric Reliability Organization and each Regional Entity shall have procedures to report promptly to the Commission any self-reported violation or investigation of a violation or an alleged violation of a Reliability Standard and its eventual disposition.” NERC reports the Possible Violation to the NERC BOTCC and submits a Notice of Possible Violation, on a confidential basis, to FERC.

16 NERC Rules of Procedure, Appendix 4C CMEP at Sections 1.122. See also id. at Section 5.1.
17 There is a compliance filing pending at FERC, which is separate from the instant filing, that would require the Preliminary Screen to be applied within five business days of identification of potential noncompliance or obtaining evidence of noncompliance. See North American Electric Reliability Corp., Compliance Filing, Docket No. RR10-11-000 at p. 22 (Feb. 18, 2011).
Regional Entities are required to keep a list of all issues that do not pass the Preliminary Screen and must provide it upon request to NERC and FERC. This initiative does not change that requirement.

The Notice of Possible Violation will be issued for every item regardless of whether it is ultimately included in an FFT, Full NOP or Spreadsheet NOP. With respect to items identified to be processed as an FFT, Registered Entities will be afforded an opportunity to opt out of the FFT process and to choose to proceed down the NOP path.

2. Treatment of Possible Violations – Selecting the Appropriate Enforcement Track for each Possible Violation According to Specified Criteria

For those issues that do not warrant dismissal as discussed below, NERC and the Regional Entities will assess risk and differentiate Possible Violations in the initial stages of review as well as at the end of the process. This initiative will allow NERC and the Regional Entities to focus their time, efforts and resources on the issues that pose the greatest risks to reliability. Issues that pose more serious risks will continue to be included in NOPs. Lesser risk issues will be processed as Remediated Issues in a new FFT format described below.

Based upon an initial review of evidence indicating a Possible Violation, NERC and Regional Entities may exercise enforcement discretion to determine whether the issue should be dispositioned in a NOP or a new FFT report. Relying on their technical expertise, experience and judgment, they will: (1) evaluate the risk posed by the issue; (2) consider whether a penalty or sanction is warranted, taking into account the deterrence value of the mechanism chosen for the entity specifically and for third parties generally; and (3) determine if important information needs to be conveyed to industry stakeholders and/or FERC.

Factors taken into account during that initial review include, but are not limited to, the following: (1) the underlying facts and circumstances, including what happened, why, where and when; (2) the Reliability Standard at issue; (3) the applicable Violation Risk Factor (VRF) and Violation Severity Level (VSL); (4) the potential and actual level of risk to reliability, including mitigating factors during pendency of the Possible Violation; (5) the Registered Entity’s compliance program, including preventive and corrective processes and procedures, internal controls and culture of compliance; and (6) the Registered Entity’s compliance history.

Specific underlying facts and circumstances drive different results, even if two situations appear the same or similar on the surface. For example, the Registered Entity’s size, nature of facilities and location on the grid are relevant in this review. The impact of the Possible Violation on third parties, including load, neighboring utilities, other Registered Entities must be considered. The time horizon (i.e., real time, on or off peak or planning period) affects the risk posed by the Possible Violation. The specific act or omission and the likelihood of recurrence also are relevant.

The Reliability Standard at issue must be taken into account. However, in considering this initiative, NERC urges the Commission to decline to require or impose a list of Reliability Standard requirements that warrants issuance of a NOP.

VRFs and VSLs are not the deciding factor in a risk determination, but they do provide a starting point for review. For NOPs going forward, Regional Entities will consider whether a Medium to High VRF and a Moderate to Severe VSL are involved as part of the risk consideration and whether that resulted in a moderate to serious risk to the reliability of the BPS. Based on experience to date, there have been issues with High VRFs and Severe VSLs that had a
minimal risk to the reliability of the BPS. It is NERC’s expectation that these would not necessarily warrant inclusion in a NOP, unless the facts and circumstances suggest otherwise.

A risk determination is multi-faceted. It requires consideration of the potential and actual risks to the reliability of the BPS, as well as factors that mitigate the risk during the pendency of the violation. In all events, risk assessments will continue to be made in accordance with the FERC-approved Sanction Guidelines. Over the last five years, there has been a marked increase in the rigor and quality of risk assessments, which has been facilitated by standardized compliance practices that are in use by NERC and the Regional Entities.

The following are examples of the most serious risk issues: (i) those involving or resulting in (a) extended outages, (b) loss of load, (c) cascading blackouts, (d) vegetation contacts and (e) systemic or significant performance failures; and (ii) those involving (a) intentional or willful acts or omissions, (b) gross negligence and (c) other misconduct. These have typically been included in Full NAPs to date. Other more serious risk issues have been included in abbreviated NAPs.

Lesser risk issues, defined as minimal and moderate risks, include administrative, documentation and certain maintenance or testing program implementation failures. These have typically been included in Deficiency NAPs, Administrative Citation NAPs and abbreviated NAPs.

An entity’s compliance history, including prior or repeat issues by the entity or its affiliates, the entity’s internal compliance program, internal controls and culture of compliance, are other factors that will be taken into account. NERC recognizes that a large number of Remediated Issues in an entity’s compliance history could reflect an aggressive compliance program or could be evidence of a systemic problem, depending on the underlying facts and circumstances. Accordingly, there is no one-size-fits-all formulaic approach.

The deterrence value and need for a penalty or sanction, based on the Regional Entity’s examination of the matter, also will weigh in on whether a NAP is warranted. All cases involving a penalty or sanction will be included in a NAP.

Based on experience with the short-form settlement agreement and the Administrative Citation NAP candidates, NERC is not establishing rigid criteria as to other matters that should be included in a NAP. In the case of the short-form settlement agreement, significant time and effort was expended by Regional Entities, NERC and FERC staff. However, the list of eligible candidates turned out to be so limited that it resulted in no candidates. In the case of Administrative Citation NAP candidates, NERC staff’s expectation was that the Administrative Citation NAP approach would provide administrative efficiency for the disposition of minimal to moderate risk issues. Ultimately, Administrative Citation NAPs contained only a subset of minimal risk issues which included only very minor, documentation or administrative issues. Thus, the Administrative Citation NAP never achieved the expected efficiencies or results in processing both minimal to moderate risk issues.

a. Notices of Penalty

As is the case today, NAPs will generally include issues posing a moderate to serious or substantial risk to reliability of the BPS, although there may be occasions where issues posing a minimal risk may also warrant NAP treatment.

Once a decision is made to include an issue in a NAP, there are two possible NAP formats: a new abbreviated, Spreadsheet NAP and a Full NAP. For all issues included in a NAP, NERC expects the documentation of the record to be commensurate with the risk. A sufficient
record may not require an exhaustive record where the issues are uncontested. This is consistent with prior Commission guidance:

the record in a Notice of Penalty should be proportional to the complexity and relative importance of the violations it addresses. A Notice of Penalty need not include more information than necessary to support the rationale for the penalty, given the nature of the violations at issue . . . an abbreviated format for Notices of Penalty that conforms to the limited significance of particular types of violations . . . could provide transparency and predictability more quickly for certain categories of violations and allow Regional Entities and NERC to concentrate their compliance resources on more significant alleged violations. 20

Building on what was learned with the Administrative Citation NOP format, a new abbreviated, Spreadsheet NOP21 has been developed. It includes: (1) The name of the entity; (2) Identification of each Reliability Standard violated; (3) A factual description of the issue resulting in the violation of each Reliability Standard; (4) A statement describing any penalty or sanction imposed; (5) The description of the risk assessment; (6) A statement of corrective actions taken or to be taken to mitigate the issue and prevent recurrence; and (7) Identification of any other mitigating or aggravating factors taken into consideration. The Spreadsheet NOP has been further expanded to ensure relevant prior compliance history of the entity or its affiliate and internal compliance program elements are included. As is the case with Administrative Citation NOPs, no record documents will be submitted as part of the filing. Relevant information regarding the findings and ultimate disposition will be included in the Spreadsheet NOP. NERC intends to post the Spreadsheet NOP on its Web site in a searchable format, which will provide greater transparency. The majority of NOP candidates are expected to be included in this format.

Second, Full NOPs will continue to be filed just as they are today. Full NOPs are generally expected to include violations that pose the most serious risk to the reliability of the BPS. The following issues are expected to be included in Full NOPs: (i) those involving or resulting in (a) extended outages, (b) loss of load, (c) cascading blackouts, (d) vegetation contacts and (e) systemic or significant performance failures; (ii) those involving (a) intentional or willful acts or omissions, (b) gross negligence and (c) other misconduct. However, Full NOPs may also be filed for an entity that has a large number of less serious issues that could be indicative of a systemic issue.

Full NOPs need not have a negative connotation. They also may be used to provide detailed information regarding exemplary cooperation, a robust internal compliance program and above and beyond actions.

b. Find, Fix, Track and Report (FFT) 22

A key feature of this implementation initiative is the new FFT spreadsheet approach for resolving lesser risk issues and reporting their disposition as Remediated Issues to FERC. The name says it all. Things are found, fixed, tracked and reported.

The FFT spreadsheet is adapted from the successful implementation of the Administrative Citation NOP format in use over the last eight months. The FFT approach is consistent with the spirit of the Three-Year Performance Assessment Report Order, in which the Commission invited NERC to continue to develop further streamlining efforts. Consistent with the guidance provided in that Order,23 FFT treatment includes both a reporting requirement and inclusion of the FFT resolution in an entity’s compliance history. Although the FFT approach does not adopt one of the elements identified in that Order – a statement by the Regional Entity and the Registered Entity as to whether or not a violation occurred24 – that omission should not

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21 These types of issues have typically been included in Abbreviated NOPs to date.
22 By way of example, these could include, but are not limited to, issues that have been included in the Administrative Citation NOPs. Deficiency NOPs and zero and lower dollar minimal to moderate risk issues in the Abbreviated NOPs. In all events, risk assessments will be made in accordance with the FERC-approved Sanction Guidelines. For example, risk assessments will take into account size, location and characteristics of BPS facilities that are owned, operated or used by an entity.
23 132 FERC ¶ 61,217 at PP 218-219.
24 Id. at P 219.
be considered a barrier to implementation of FFT because FFTs are considered Possible
Violations that are resolved as Remediated Issues and because of FFT’s other safeguards. Once
Remediated Issues are included in an FFT informational filing, those Remediated Issues may not
be contested in subsequent enforcement actions.

In particular, the strong remediation feature of FFT, with every issue resolved by
mitigating actions before FFT treatment is reported to the Commission, more than makes up for
omission of a further step to decide, definitely, that a violation has, or has not occurred. Going
beyond the Possible Violation stage for lesser risk matters would cause more delay and
controversy on issues that do not warrant expenditure of significant enforcement time and
resources and is not required by NERC’s rules. In addition, the mitigating activities will be
subject to verification and taken into consideration if future auditing efforts reveal continued
concerns. As an added enhancement, the FFT approach not only tracks specific FFT issues and
mitigation activities within each entity’s compliance history, but also provides for systematic
NERC tracking of region- and industry-wide trends in possible violations/issues to ensure
continued reliable operations and compliance with standards, as well as consistency in
implementation. Further, the experience of NERC and the Commission in the year since
issuance of the Three-Year Performance Assessment Report Order has heightened the need to
take a more flexible approach to enforcing compliance in a manner that truly fosters enhanced
reliability rather than draining resources on minutia. Thus, the FFT approach provides the means
to provide for prompt remediation of Possible Violations, accountability and tracking. It

therefore avoids the pitfalls of a simple “warning ticket” approach and furthers the intent of the
Three-Year Performance Assessment Report Order.

Commissioner Moeller recently testified to the work done to date to streamline violation
processing and the Commission’s direction to NERC to continue to develop more efficient and
effective ways to resolving lesser risk issues:

We have endeavored to create a more streamlined system of reviewing violations
and at our direction NERC is working to develop a more efficient way to
address minor violations and to develop a “lessons learned/best practices”
informational resource for regulated entities. But clearly we have a lot of
work ahead of us to reduce the backlog at the Regional Entities and at NERC in
order to improve the effectiveness of this area of regulation.

This initiative is the next step in the evolution of violation processing.

NERC and Regional Entities will conduct reviews and assess risks of FFT candidates,
with appropriate rigor. For lesser risk issues, NERC and Regional Entities generally have
sufficient information to make a determination after an initial review of the record without the
need to develop an exhaustive record. The extent of the record will vary according to the
specific Possible Violation. If an issue is discovered in an Audit, there may be Reliability
Standard Audit Worksheets, draft and final Audit Reports and possibly Requests for Information.
If an issue is self-reported, the record may include the submittal by the Registered Entity as well
as additional information developed by the Regional Entity as necessary. Issues do not require

26 Id. at PP 218-219 (“At this time, we cannot accept the proposed development of a “warning ticket” that would not
require a Regional Entity and a Registered Entity to state their conclusions about whether a violation has occurred.
As we stated in the Omaha Notice of Penalty Order, the Commission expects an increasing level of compliance
with the Reliability Standards as Registered Entities gain more experience with mandatory Reliability Standards.
This expectation emphasizes an important consideration for penalty determinations: a Registered Entity’s
compliance history. We are concerned that an improperly designed ‘warning ticket’ mechanism may allow a
Registered Entity to receive a warning for practices that violate a Reliability Standard requirement, thereby resulting
in an insufficient recognition of a Registered Entity’s compliance history in a subsequent penalty matter. If NERC
still wants to pursue a ‘warning ticket’ mechanism, it must explain how the mechanism would work without
running afoul of the concerns raised above. NERC is free to provide that explanation in the informational filing or,
if it chooses to take additional time to develop the mechanism, in a later filing.”).
27 Written Testimony of Commissioner Philip D. Moeller before the U.S. House of Representatives Committee on
the same level of detail. A Registered Entity’s failure to have the Federal Bureau of Investigation phone number should not require development of a treatise. The record could quite simply be a few sentences or a paragraph to describe the deficiency and corrective action. It also should not require tens or hundreds of man-hours to write it up. This does not mean, however, that NERC and Regional Entities will essentially “rubberstamp” a Registered Entity’s own self-assessment without further review. To the contrary, NERC and Regional Entities will continue to make informed decisions, as they always have, taking into account the facts and circumstances and applying enforcement discretion, expertise and professional judgment.

Applying the factors discussed above, FFT candidates include Possible Violations that pose a lesser risk (minimal to moderate risk) to the reliability of the BPS. Each and every such lesser risk issue must be corrected and reported to Regional Entities, NERC and FERC. Upon correction and submittal of Registered Entity’s statement of completion of mitigating activities, the lesser risk Possible Violations will become, and be referred to as, Remediated Issues. The Remediated Issue is included in, and considered a part of, the entity’s compliance history, which could be positive or negative depending on the underlying situations. Remediated Issues will be included in FFT spreadsheet format provided monthly to FERC as an informational filing. The FFT spreadsheet template requires inclusion of a factual description of the underlying issue, a description of the mitigating activities and a description of the risk assessment. The submittal to FERC of the informational filing will conclude NERC and Regional Entity processing of Remediated Issues, subject to verification activities as warranted.

While an entity must correct the underlying Possible Violation and take actions to prevent recurrence, no penalty or sanction will be assigned to a Remediated Issue in a FFT. As a result, NERC recognizes that the thirty-day clock applicable to NOPs does not apply to FFT informational filings.

Repeat issues of same, similar or different standards do not foreclose FFT treatment, but they could be taken into account in future actions. In the event a repeat issue is due to the fact that an entity failed to complete the required mitigating activities, NERC and the Regional Entities will assign a new tracking number to the issue, rather than reopening a former number. Regardless of the ultimate disposition format, the relevant information from the former record will be captured as background for the new matter.

Formal Mitigation Plans will not be required for the FFT Remediated Issues, but a Registered Entity must demonstrate that the issue has been addressed, corrective actions must be described and evidence must be delineated to facilitate later verifications through an Audit, Spot Check, random sampling or otherwise.

Issues identified in any one of the eight monitoring methods are possible FFT candidates. Determinations for FFT treatment may be made at any time and may be based on an initial review of the record information. Registered Entities and Regional Entities may provide a reasonable time period for the entity to gather facts and information and to determine appropriate mitigation activities.

As in the case of NOPs, no rigid criteria, parameters or guidelines are being established. Based on experience to date, there has been a high volume of lesser risk issues even with respect to top violated standards that would benefit from the FFT approach. As a result, violations of priority Reliability Standards and top violated Reliability Standards may qualify for this treatment, provided the risk assessment reveals the violation is a lesser risk issue. This is
appropriate because the number of violations does not necessarily implicate the severity of the risk. Moreover, some violations occur by even the most vigilant organizations.

VRFs and VSLs also will be taken into account in considering whether an issue warrants FFT treatment. Low to Medium VRFs, even if there are High or Severe VSLs, still qualify for consideration. Moreover, based on experience to date, there have been issues with High VRFs and Severe VSLs that had a minimal risk to the reliability of the BPS.

Other factors taken into account are whether there was prompt, robust self-reporting by a Registered Entity of the issue, risk and mitigating activities that demonstrates the issue has been fixed. In evaluating the promptness of reporting, NERC and Regional Entities will consider the time of discovery to the time of notification to the Regional Entity and/or NERC. Other factors that will be considered are the Registered Entity’s internal compliance program, compliance history, mitigation and corrective action plans, internal controls and culture of compliance.

Depending on the facts and circumstances, prior compliance history could be indicative of a robust compliance program seeking out improvements or an indication of poor implementation of compliance efforts. Entities with the most robust internal programs may actually detect and report substantially more issues than entities that do not conduct similarly thorough internal reviews. NERC does not seek to discourage self-reporting. Toward this end, the existence of previous Self-Reports and violation findings associated therewith does not preclude the use of the FFT option.

Entities will be eligible for the FFT option even for repeat violations provided that they do not pose a more serious risk to reliability of the BPS. The identification of repeat issues of same, similar or different standards may lead the CEA to use its discretion to discontinue the use of the FFT process and escalate the processing of these issues as Possible Violations as described in the CMEP.

c. Dismissals

This initiative does not change how dismissals are processed or reported to FERC. Dismissals of a Possible Violation occur at any time after the CEA determines the particular issue does not constitute a violation of a NERC Reliability Standard, the entity is not subject to compliance with the standard at issue or the particular issue is a duplicate of one already in process. Dismissals are, and will continue to be, submitted in reports to FERC via a non-public portal.

One enhancement to the existing program is that NERC will be publicly posting certain dismissal information on its website. NERC will update this information on a periodic basis. The first posting occurred on September 15, 2011 and is available at http://www.nerc.com/files/Dismissal%20Analysis%209-15-11.pdf.

3. Monitoring of and Reporting on Mitigation Activities

Whether an issue is included in an FFT or Spreadsheet NOP, mitigation activities must be recorded in the spreadsheet. The formal Mitigation Plan template and milestone reporting requirements will not be required for FFT. Nevertheless, it will be paramount that corrective actions be tracked to completion by the Registered Entity and will be subject to verification by the Regional Entity.

They will be assigned a Mitigation Identification Tracking Number. Mitigation activities included in FFT or Spreadsheet NOP submittals to FERC will be deemed as accepted by Regional Entities and approved by NERC at the time of filing.
NERC already has in place precedent where separate, formal Mitigation Plans and processing are not required. For example, both Administrative Citation NOPs and Settlement Agreements include a description of mitigation activities but they do not necessarily result in separate Mitigation Plans.

Consequences for Failure to Complete FFT Mitigation Activities

For any Remediated Issue that has been reported in an FFT and mitigation activities were not completed, the Regional Entity will not reopen the former Remediated Issue. Rather, the Regional Entity will record it as a new issue and will take the facts and circumstances into account in determining whether FFT or Spreadsheet NOP treatment is warranted.

4. Mechanisms Exist To Ensure Consistency of Outcomes in Similar Situations

With respect to consistency in outcomes, specific underlying facts and circumstances drive different results, even if two situations appear the same or similar on the surface. A Registered Entity’s prior compliance history, culture of compliance, size, nature of facilities and location on the grid are among the considerations factored into an enforcement decision. NERC intends to post searchable spreadsheets for both FFTs and Spreadsheet NOPs that will help provide faster dissemination of information and more transparency in results. That format also will help NERC, Regional Entities and industry stakeholders identify potential consistency issues that need to be addressed. NERC cautions that consistent approaches do not equate to identical outcomes.

Utilization of common forms, letters and spreadsheets will help promote consistency in processing issues. Ongoing training and guidance also will further promote consistency in implementation. NERC and Regional Entities will pay particular attention to consistency in outcomes and due process and will realign as necessary.

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D. Outreach Efforts Have Been Instrumental In The Development Of The Initiative And Will Continue Through The Implementation.

When the initiative was rolled out at the Vancouver Board meeting, the importance of outreach efforts was clearly recognized. NERC and Regional Entities have conducted outreach efforts to explain the initiative and obtain support. While NERC has developed the initiative in concert with the Regional Entities, it has encouraged input and feedback from all stakeholders. As the initiative was being developed, NERC hosted a Registered Entity focus group meeting to obtain first-hand information about current program implementation areas of improvement and success. Additional meetings and conference calls have been held with NERC, Regional Entities, trade associations and industry stakeholders. Trade associations and industry stakeholders also were provided an opportunity to provide written comments to NERC for consideration in finalization of the initiative. NERC and Regional Entities also separately and collectively met with Commission staff in advance of this filing. NERC values all of the input and will continue to solicit input and feedback on program implementation.

Specifically, monthly calls/meetings with Regional Entities, Compliance and Certification Committee representatives and trade associations will be held to gain feedback on the program. Ongoing ERO review of the initiative will occur over the next nine to twelve months to determine further areas of improvement or efficiency gains and to track success of the program. Another focus group meeting may be held to assess progress of the initiative. In addition, NERC is willing to engage in discussions with Commission staff about program implementation.

E. Implementation of the Initiative.

1. Implementation Timing and Phases

There are two projected phases for implementation.
In Phase I, CEA compliance staff may make recommendations to enforcement staff as to whether an issue warrants FFT, Full NOP or Spreadsheet NOP processing. CEA enforcement staff will continue to make determinations as to the ultimate disposition of an issue. Enhanced training of both enforcement and compliance staff will occur throughout Phase I. This ongoing training and guidance will address consistency in due process and implementation of the program across the Regions.

NERC and Regional Entities have existing, ongoing mechanisms to train staff on the initiative. In addition to regularly scheduled calls and meetings, other periodic meetings will be scheduled from time to time to align efforts. Scheduled workshops hosted by NERC and Regional Entities provide another opportunity to coordinate and collaborate on the successful implementation of the program.

As Phase I progresses, data and information will be gathered and analyzed to support Phase II. During Phase I, CEA field staff is also encouraged to identify potential candidates for the FFT while out conducting Compliance Audits, Spot Checks and Compliance Investigations.

Phase II is targeted to occur after twelve to eighteen months of the implementation of the initiative. In Phase II, CEA compliance staff and CEA enforcement staff both may determine the ultimate disposition track for processing an issue of noncompliance.

Phase II will involve CEA Compliance field staff, auditors and investigators making determinations, during Compliance Audits, Spot Checks and Compliance Investigations, as to the treatment categories. In Phase II CEA field staff will be authorized to make determinations without CEA Enforcement oversight. However, it is envisioned that there will be close and constant collaboration between enforcement and field staff throughout the development and initiation of the initiative. This field staff determination will not preclude determinations by CEA Enforcement staff as to particular facts and circumstances for items the field staff passes to enforcement staff for NOP processing.

The Phase II transition will occur over a period of time and is targeted to be fully implemented within 12 to 18 months after initiation of Phase I. Data and information gathering and analysis as Phase I is implemented and matures in the enforcement realm will inform the refinement and execution of Phase II. In addition to development of a rigorous training and certification program, consideration of the CEA field staff and their areas of expertise is important.

This phase will be predicated on an increased training and certification/qualification program for CEA Compliance staff that will commence during Phase I for auditors and investigators in the field. The training and certification plan for CEA staff will be comprised of 2 pillars: 1) standardized audit and compliance monitoring practices and 2) in depth assessment of the FFT candidates deemed eligible for the discretion process to inform CEA field staff discretion. Certification in this context should not be confused with individual certification as a NERC system certified operator or certification as regards to the top three functions of Balancing Authority, Reliability Coordinator or Transmission operator but certification to exercise discretion.

Determinations regarding compliance issues made in the field will be based on guidance developed during Phase I and a significant body of knowledge regarding the candidates for FFT that have been validated. Coupled with thorough preparation for and conduct of the audit greater rigor and consistency will be achieved. Spot Checks and Compliance Investigations must also have an appropriate plan that considers risk and appropriately scopes the compliance monitoring.
activity. The Compliance Audit, Spot Check or Compliance Investigation plan should be the first point of coordination between enforcement and field staff.

2. Enhancements in Audit and Compliance Monitoring Practices

NERC also is taking other steps in conjunction with FFT to ensure consistency of application within and across regions, transparency to stakeholders and FERC, and more effective administration of the CMEP. The implementation of the initiative will coincide with the implementation of certain enhancements to the audit and compliance monitoring practices. Consistent use of audit practices, procedures and tools are paramount and will be core to the training program to ensure consistent application of the discretion guidance in the field.

The Rules of Procedure direct the ERO to “have a program to monitor the compliance enforcement program of each Regional Entity that has been delegated authority. The objective of this monitoring program shall be to ensure that the Regional Entity carries out its compliance enforcement program in accordance with these rules and the terms of the delegation agreement, and to ensure consistency and fairness of the Regional Entity’s compliance enforcement program. Oversight and monitoring by NERC shall be accomplished through an annual compliance enforcement program review, program audits, and regular evaluations of Regional Entity compliance enforcement program performance as described below.”

One such tool is the ERO Sampling Methodology that provides for a clear statistically-proven method for determining sample size. The sampling methodology also provides for the appropriate qualitative assessment for ensuring a sample set is consistent with the intent of the program.

Rigorous standardized audit and compliance monitoring practices that ensure quality assessments and assurance, reliability enhancement and risk mitigation are essential for CEA field staff. Before conducting one of these compliance monitoring methods, the audit being the primary compliance tool, both Regional enforcement and field staff must first assess a Registered Entity’s compliance program and internal controls linked to reliability performance in order to understand the risk posed by the entity and appropriately scale the scope to be applied in the compliance process. The assessment must also include a review of the entity’s compliance history.

As part of the 2012 CMEP Implementation Plan, the ERO is developing an entity assessment that will be used for exactly this type consideration as to the posture of an entity and its potential risk. The risk of individual situations and Possible Violations should be considered in the broader context of the entity’s posture over all. The five components of the entity assessment are: 1) a technical and risk profile of the entity, 2) considerations of reliability metrics where feasible and relevant, 3) review of the internal compliance program, 4) review of the entities compliance history and 5) an assessment by the Regional Entity that deals with the entity on a day to day basis.

This entity risk assessment will inform the analysis of individual situations and Possible Violations and can be used to modify compliance monitoring activities. Where an entity has a higher degree of risk, increased compliance monitoring may be in order either by frequency or level of effort. Increased Self Certifications and or Periodic Data Submittals could provide emphasis on particular standards to ensure an entity is monitoring standards that may be of concern. Should more serious concerns be identified an entity could be subject to increased Spot Checks or Audits with increased scope. Where an entities profile indicates a lesser overall risk there could be lesser compliance monitoring. This allows for greater flexibility for the Regional
Entities to deal with trends, issues and adapt compliance monitoring to support reliability efforts with focused efforts.

The review of the Registered Entity's internal compliance program and internal controls of Regional staff could also provide an assessment and make recommendations on how the Registered Entity could improve its controls and procedures, including the identification of material weaknesses in those controls and procedures. Neither NERC nor the Regional Entities will prescribe the makeup of internal compliance program, internal controls or processes. Registered Entities would have the responsibility to demonstrate the effectiveness of their compliance programs; and here, model program(s) established by the industry would be very helpful. Further an evaluation of the strength of the internal procedures and controls would be completed upfront to determine whether the procedures and controls are sufficient to proactively address possible violations and risk before they become more material or significant to reliability, an essential component to continuous improvement in a “learning” environment.

The ERO does not follow the Generally Accepted Government Accounting Standards (GAGAS) to the letter but does use GAGAS to inform its compliance monitoring activities. No compliance monitoring method can guarantee absolute compliance on the part of an entity. Compliance Audits, Spot Checks and Compliance Investigations can provide reasonable assurance of compliance. Consideration of risk and significance must be considered in the compliance monitoring activities. Risk on both the part of the entity and the compliance monitoring activity are to be considered in the planning of Compliance Audits, Spot Checks and Compliance Investigations.

Clearly issues that prove feasible to dispose of via the discretion option during Phase I will be the base of training and education to develop the appropriate level of judgment and authority field staff will be allowed to exercise in Phase II. As noted above, issues that are identified, fixed and reported provide a base for consistent implementation and improvement. This will also provide for a level of openness and transparency as the ERO provides periodic reports to FERC and industry on the implementation of the program. The discretion that field staff exercises will at the outset be with constant communication with enforcement staff and as the discretion is more defined and validated in the field this will serve to allow enforcement staff more time to focus on higher risk issues that pose a threat to the reliability of the BPS.

CEA field staff, auditors and investigators are recruited based on industry and/or auditing experience; a significant number of the CEA auditors possess certifications such as NERC Certified System Operator, or are credentialed in the Information Technology (“IT”) or auditing fields. As such CEA staffs are expected to exercise judgment; fundamental auditing principles clearly state this along with the concept that individual expertise and professional qualifications are to be considered in compliance monitoring programs. A competent and judicious CEA field staff will be able to make discretion determinations made in the field allowing enforcement staff to focus on the critical issues impacting/affecting reliability that require their level of effort.

Registered Entities with strong internal compliance programs would experience less invasive oversight from the Regional Entities commensurate with an informed, assessment of risk. With higher rigor and more discretion, Regional Entities and NERC will have more flexibility to keep up with the ever changing threats and new technologies to mitigate risks to the system – we can be more responsive, less prescriptive and “mechanical.” Elimination of or modification to the annual implementation plan, coupled with the introduction of a level of randomness and the emphasis on internal compliance programs (cultural and procedural) would substantially reduce the number of Self-Certifications for those entities with top notch internal
compliance programs. "Annual Self-Certification programs" could be customized based on a variety of risk factors.

In summary, the proposed changes would acknowledge that compliance with standards is only part of maintaining reliability and the emphasis on System Reliability Management would provide the proper scope and context to NERC's and the Regional Entities' work.

IV. There Is Ample Legal Authority for NERC to Exercise Enforcement Discretion.

A. The Commission Has Acknowledged NERC's Enforcement Discretion.

NERC and the Regional Entities are subject to Commission oversight. Nonetheless, the Commission has long-recognized that NERC and the Regional Entities are enforcement entities and have the same inherent enforcement discretion and authority as any other enforcement entity would have. In Order No. 693, the Commission stated that:

The Commission agrees that, separate from our specific directive that all concerned focus their resources on the most serious violations during an initial period, the ERO and Regional Entities retain enforcement discretion as would any enforcement entity. Such discretion, in fact, already exists in the guidelines; as we stated in the ERO Certification Order, the Sanction Guidelines provide flexibility as to establishing the appropriate penalty within the range of applicable penalties.30

In accepting the eight delegation agreements between NERC and the Regional Entities, the Commission explained that NERC's CMEP and Rules of Procedure, including the Sanction Guidelines, equip NERC and the Regional Entities with the requisite tools to exercise their inherent enforcement discretion:

In Order No. 693, we determined that the ERO and Regional Entities will retain ongoing enforcement discretion as would any enforcement entity [citing Order No. 693, 118 FERC ¶ 61,218 at P 225]. NERC and the Regional Entities should evaluate whether to issue a notice of alleged violation, find violations, and impose appropriate sanctions based on the facts presented, rather than erect blanket exemptions from potential enforcement actions in advance of considering individual cases. NERC's Uniform Compliance Program will provide Regional Entities and NERC with sufficient tools to ascertain the relevant facts and to find, or decline to find, violations. The NERC Sanction Guidelines, as we have modified them, allow for the informed discretion necessary for the Regional Entities and the ERO to apply appropriate remedies and sanctions for violations.31

The Commission also has made clear that it does not intend to review every NOP or even most. Rather, recognizing the Commission's own limited resources and the enforcement powers of NERC and the Regional Entities, the Commission determined it had no general need to review NOPs that have records developed by Regional Entities and reviewed by NERC for sufficiency and consistency.

We believe that entities that are subject to Reliability Standards should have notice of the general criteria the Commission will use to determine whether it will review particular notice of penalty on its own motion. We will use the following principles in this matter. First, the Commission does not anticipate moving to review every notice of penalty that NERC files, or even most. While the Commission is required to review every notice of penalty for which a Registered Entity files an application for review, the Commission's limited resources would likely preclude review of all uncontested notices of penalty. Second, as described earlier, the Commission has approved NERC's CMEP as the framework for NERC's enforcement authority under section 215 of the FPA, as well as NERC's delegation of enforcement powers to Regional Entities through the Delegation Agreements. The Commission sees no general need to review each notice of penalty for which a Regional Entity has developed a record and which it has approved, and which NERC has reviewed for sufficiency and consistency. Third, the Commission recognizes that, on a continuing basis, Regional Entities and NERC retain an element of enforcement discretion similar to our own discretion in enforcement matters.32

Significantly, the Commission's regulations, at 18 C.F.R. Part 39.7, require that NERC and Regional Entities file reports on the disposition of all violations. However, neither NERC nor Regional Entities are required, in every instance, to impose a penalty for violations. Where

31 North American Electric Reliability Council et al., 119 FERC ¶ 61,060 at P 133, order on reh'g 120 FERC ¶ 61,260 (2007) (emphasis added).
they seek to impose a penalty, they must meet certain conditions precedent. First, they must find

a violation of an enforceable NERC Reliability Standard. Second, a NOP must be filed.

The Commission’s regulations, at 18 C.F.R. Part 39.7(b), provide:

(b) The Electric Reliability Organization and each Regional Entity shall have

procedures to report promptly to the Commission any self-reported violation or

investigation of a violation or an alleged violation of a Reliability Standard and its

eventual disposition. 33

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(4) Each violation or alleged violation shall be treated as nonpublic until the

matter is filed with the Commission as a notice of penalty or resolved by an

admission that the user, owner or operator of the Bulk-Power System violated a

Reliability Standard or by a settlement or other negotiated disposition. The

disposition of each violation or alleged violation that relates to a Cybersecurity

Incident or that would jeopardize the security of the Bulk-Power System if

publicly disclosed shall be nonpublic unless the Commission directs otherwise.

They further state, at 18 C.F.R. Part 39.7(c):

(c) The Electric Reliability Organization, or a Regional Entity, may impose,

subject to section 215(e) of the Federal Power Act, a penalty on a user, owner or

operator of the Bulk-Power System for a violation of a Reliability Standard

approved by the Commission if, after notice and opportunity for hearing:

(1) The Electric Reliability Organization or the Regional Entity finds that the

user, owner or operator has violated a Reliability Standard approved by the

Commission; and

(2) The Electric Reliability Organization files a notice of penalty and the record of

its or a Regional Entity’s proceeding with the Commission. Simultaneously with

the filing of a notice of penalty with the Commission, the Electric Reliability

Organization shall serve a copy of the notice of penalty on the entity that is the

subject of the penalty. 34

The Commission’s regulations identify the required contents of a NOP, if filed, and establish the

timing for Commission action. Any penalty imposed for the violation of a Reliability Standard

must bear a reasonable relation to the seriousness of the violation and must take into

consideration efforts of such user, owner or operator of the BPS to remedy the violation in a
timely manner. 35

While NERC and Regional Entities have previously implemented their processes to

submit every Possible Violation in a NOP, this is not required by a plain reading of the Energy


or applicable Commission orders. Rather, the Commission’s regulations, at 18 C.F.R. Section

39.7(d) set forth the basic requirements of what must be included in a NOP, if one is filed, which

include:

   (1) The name of the entity on whom the penalty is imposed;
   (2) Identification of each Reliability Standard violated;
   (3) A statement setting forth findings of fact with respect to the act or practice resulting in
       the violation of each Reliability Standard;
   (4) A statement describing any penalty imposed;
   (5) The record of the proceeding;
   (6) Other matters the Electric Reliability Organization or the Regional Entity, as
       appropriate, may find relevant.

While a NOP must contain these basic elements, the Commission has not mandated the form or

format of a NOP. The forms and formats utilized by NERC and the Regional Entities have

evolved significantly over the last four years. The first NOPs included, as an attachment, every

notice issued by a Regional Entity for a given matter. Over time, those attachments were

eliminated as not being necessary to support the NOP. With the Omnibus filings I and II and the

eight Administrative Citation NOPs, over one-third of all issues have been dispositioned in a

33 18 C.F.R. Part 39.7(b).
34 18 C.F.R. Part 39.7(c) (emphasis added).
spreadsheet format. The Administrative Citation NOPs do not include supporting material attachments or settlement agreements.

Notably, the Commission has accepted, without review, seven Administrative Citation NOP submittals. The eighth Administrative Citation NOP was filed on August 31, 2011. To date, the Commission has set only one NOP for review on its own motion. Significantly, the Commission has not rejected, modified or remanded any violation findings or penalties.

In the case of FFTs, NERC and Regional Entities are not finding or confirming violations beyond the Possible Violation state and are not assessing penalties or sanctions. This is different than a zero dollar penalty. Section 5.1 of the CMEP recognizes the ability of NERC and Regional Entities to dispose of a Possible Violation without it becoming a Confirmed Violation:

If the Compliance Enforcement Authority dismisses or disposes of a Possible Violation or Alleged Violation that does not become a Confirmed Violation, the Compliance Enforcement Authority shall issue a Notice of Completion of Enforcement Action to the Registered Entity.

The Commission’s regulations, at 18 C.F.R. Part 39.7(b)(4), also recognize that there can be a settled disposition that is different from a settlement agreement or a notice of penalty:

Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk-Power System violated a Reliability Standard or by a settlement or other negotiated disposition.

As noted above, the NERC and Regional Entities can decline to find a violation. In addition, the Commission approved Sanction Guidelines recognize the need for flexibility in the administration of the program:

However, absolute adherence to the compliance programs, to the exclusion of other options, may not be the most appropriate, efficient or desirable means by which to achieve the end goal in all circumstances, to all entities party to a violation.

To fully appreciate the nature and scope of enforcement discretion authority that NERC and Regional Entities have, it is instructive to see how the Commission has defined and applied enforcement discretion itself.

B. The Commission’s Own Experience Provides Support For NERC’s Increased Exercise of Enforcement Discretion.

The Commission explained the exercise of enforcement discretion in its 2010 Revised Policy Statement on Penalty Guidelines. According to the Commission, enforcement discretion is the ability of FERC Enforcement staff to choose what to pursue and how to pursue it. FERC Enforcement has broad prosecutorial discretionary powers. FERC Enforcement staff may decline to open an investigation and may dismiss a violation at any stage of an enforcement action:

The Commission clarifies the Penalty Guidelines will not affect Enforcement staff’s exercise of discretion to close investigations or self-reports without sanctions. Staff will continue to close investigations where no violation is found, and to close some investigations without sanctions for certain violations that are relatively minor in nature and that result in little or no potential or actual harm. Similarly, staff’s review of self-reports will continue to result in many instances where staff does not even open investigations, particularly for minor violations that do not cause harm and where preventive measures have been implemented to avoid reoccurrences.

In response to EEI’s specific requests for clarification on this issue, we emphasize that Enforcement staff has discretion to dismiss investigations and to recommend both downward and upward departures from the Penalty Guidelines’ penalty range.

The Commission has recognized the importance of not pursuing penalties for every type of violation and to focus on those issues that pose more serious risks:

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38 Id. at ¶ 27, 29.
39 Id. at ¶ 29 (emphasis added).
40 Id. at ¶ 30 (emphasis added).
We reiterate that we retain discretion under the Penalty Guidelines not to investigate and pursue penalties for every type of violation. Under the Penalty Guidelines, we will continue to investigate serious reliability violations, not minor violations involving documentation or administrative errors that do not result in harm or significant impact to reliability. Therefore, we find it unnecessary to adopt a distinction, as [Midwest Independent Transmission System Operator Inc.] requests, between serious Reliability Standard violations and inadvertent violations that do not have a serious impact on reliability.

Enforcement discretion extends to reliability matters:

This chapter applies to the penalties to be imposed on all organizations for violations of the statutes, rules, regulations, restrictions, conditions or orders overseen by the Federal Energy Regulatory Commission.

In making decisions to close matters without further action, Enforcement staff is afforded significant discretion. FERC Enforcement discretion may be exercised before an investigation has occurred and may be based on an initial review. FERC Enforcement has discretion not to investigate when initial review establishes that investigation is not warranted. Discretion to take no action exists even when a violation has occurred. FERC Enforcement discretion may be exercised without Commission prior approval.

Matters investigated by staff but closed without action fall into many categories. Some are allegations of a serious nature, such as market manipulation, but are investigations in which staff concludes no manipulation occurred. In others, there is insufficient evidence to proceed, or ambiguity as to the requirement which was allegedly violated. Other investigations present issues where significant Commission goals or policies are not implicated and no demonstrable harm occurred. In such investigations, staff frequently closes investigations after action by the company to remedy the violation and to take steps to assure future compliance.

[The Commission's Office of Enforcement's Division of Investigations ([DOI]) reviews each self-report to determine whether the matter is of sufficient gravity to open an investigation, or whether the matter be disposed of with correction and compliance. Often, DOI staff determines that the self-reported matter is a violation of a minor nature and does not warrant an investigation, such as where the company brings its conduct into compliance and/or voluntarily undertakes increased internal procedures, training, and oversight to prevent the reoccurrence of the misconduct. In these situations, staff resolves the self-report without considering civil penalties or monetary sanctions.]

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Ultimately, staff may determine that no violation occurred, or may conclude that the evidence is insufficient to warrant further investigation, or that based on all of the circumstances no further action is warranted. If so, staff notifies the company that the investigation is closed, and discusses with or otherwise advises the Commission of its decision.

In addition, with respect to self-reports, the Commission has explained the considerations it takes into account as to whether or not to proceed with or close the matter:

After receiving each self-report, staff reviews the report to determine whether the matter is of sufficient gravity to warrant an investigation or whether the matter may be disposed of with correction and compliance. Staff regularly considers whether (1) there is an explanation for the conduct; (2) the self-reported matter caused any harm; (3) corrective action has been taken; and (4) the company has adopted measures to prevent future violations. If the violation was inadvertent or isolated, did not cause harm, was corrected, and preventative measures have been taken, then the Enforcement staff closes the self-report without an investigation or sanctions.

Other factors the Commission has identified in deciding how to resolve a matter or whether to initiate an investigation include:

- Nature and seriousness of the alleged violation
- Nature and extent of the harm, if any
- Efforts made to remedy the violation
- Whether, if known, the alleged violations were widespread or isolated
- Whether, if known, the alleged violations were willful or inadvertent
- Importance of documenting and remediying the potential violation to advance Commission policy objectives
- Likelihood of the conduct reoccurring

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40 Id. at P 99 (emphasis added).
41 Id., FERC Penalty Guidelines, Chapter 1, Part A, §1A1.1 at P 1 (emphasis added).
• Amount of detail in the allegation or suspicion of wrongdoing
• Likelihood that staff could assemble a legally and factually sufficient case
• Compliance history of the alleged wrongdoer
• Staff resources

The applicable rules governing penalty determinations do not even come into play until after a decision has been made by Enforcement staff to process an issue of noncompliance as a violation and to pursue penalties or sanctions.

[The Penalty Guidelines do not affect the Commission's Office of Enforcement staff's exercise of discretion to close investigations and self-reports without sanctions. These Penalty Guidelines apply only after staff has recommended, and the Commission determines, that a penalty is warranted and, even then, the Commission can depart from their application if appropriate.]

FERC has provided guidance on when elimination of a civil penalty is appropriate.

Thus, for complete elimination of a civil penalty, a company must affirmatively demonstrate (1) that its violation was not serious and (2) that its senior management has made a commitment to compliance, that the company adopted effective preventive measures, that when a violation is detected it is halted and reported to the Commission promptly, and that the company took appropriate remediation steps. All of the components must be present for complete elimination of a civil penalty; reduction of the penalty will be considered where the company meets some but not all of the requirements. The Commission retains discretion to determine whether the actions taken by a company are sufficient to meet the requirements.

Thus, the Commission affords significant deference to its Enforcement staff in decisions not to further pursue a matter. As set forth below, FERC Enforcement staff has exercised its prosecutorial discretion to dismiss, or to decide not to initiate an extensive investigation, even when a violation clearly exists.

Commission oversight is exercised in those cases in which Enforcement staff pursues violations and associated penalties. The Commission retains authority to depart from Enforcement staff recommendations and its own penalty guidelines with respect to penalty determinations.

NERC finds it instructional that the Commission itself has found it appropriate to close or decline to pursue a number of matters under its jurisdiction. As reported in the 2010 Report on Enforcement prepared by Commission staff, of the 93 Self-Reports received in FY2010, staff closed 54 of them after an initial review and without opening an investigation. In FY2009, staff received 122 Self-Reports and closed 62 of them after an initial review, and one was closed without sanctions after conducting an investigation. For comparison, in FY2008, staff received 68 Self-Reports. Staff closed 25 of them after an initial review, and three were closed without penalties after conducting an investigation.

With respect to investigations closed in FY2010, in eight, or 50 percent of the investigations, staff found a violation, but the investigation was closed with no sanctions. During FY2009, eight investigations, or 22 percent, were closed with a finding of a violation, but closed with no sanctions. In FY2008, staff opened more investigations than it had in the previous year, 48 as compared to 35. In addition, staff closed a total of 22 investigations during FY2008. Of these 22 closed investigations, eight, or 36 percent, were closed with a finding of a violation, but without the Commission imposing any sanctions. Seven investigations, or 32 percent, were closed...
with staff finding there was not sufficient evidence of a violation. 59 Seven investigations, or 32 percent, were concluded through settlement. 60 By comparison, in 2007, staff closed eight investigations, or 27 percent, with a finding of a violation, but without the Commission imposing any sanctions. 41 Eight investigations, or 27 percent, were closed with staff finding there was not sufficient evidence of a violation. 62 Thirteen investigations, or 43 percent, were closed through settlement. 63 As in FY2007, staff closed eight investigations in which it found violations but closed the investigation without pursuing enforcement action. 64

In addition, it is informative that:

As noted in the Staff Report, between 2005 and 2007, Enforcement staff closed approximately 75 percent of its investigations without any sanctions being imposed, even though Enforcement staff found a violation in about half of those closed investigations. Only the remaining one-quarter of the total investigations completed during the study period resulted in civil penalties. Additionally, more than half of the self-reports submitted to Enforcement staff were closed with no action. The information provided in the Staff Report demonstrates that Enforcement staff frequently exercises prosecutorial discretion to resolve minor infractions with voluntary compliance measures rather than with penalties. 65

Factors cited by FERC Enforcement as the basis for no action following an initial review or subsequent to an investigation and frequency of citation. Based on a review of the 2007 - 2010 Enforcement Reports, there is no set list of factors that are evaluated in an enforcement action and FERC often focuses on one or two of the below factors as the basis for no action.

<table>
<thead>
<tr>
<th>Factor</th>
<th>Frequency</th>
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<tbody>
<tr>
<td>Correct the violation quickly</td>
<td>35</td>
</tr>
<tr>
<td>Isolated incident</td>
<td>2</td>
</tr>
<tr>
<td>No harm</td>
<td>36</td>
</tr>
</tbody>
</table>

Factors cited by FERC Enforcement as the basis for no action following an initial review or subsequent to an investigation and frequency of citation. Based on a review of the 2007 - 2010 Enforcement Reports, there is no set list of factors that are evaluated in an enforcement action and FERC often focuses on one or two of the below factors as the basis for no action.

No economic benefit | 14
Inadvertent violation | 9
Short violation duration | 10
Not a serious violation | 4
Not intentional violation | 11
No senior management involvement | 3
Prompt action to prevent future reoccurrence | 18
Ambiguous rule | 1
Human error | 2
Scope of violation is narrow | 15
Compliance program | 5

As discussed below, NERC’s refocused implementation of its CMEP emulates FERC Enforcement staff’s application of enforcement discretion.

C. Other Agencies Similarly Exercise Enforcement Discretion.

In evaluating NERC’s proposal, the Commission should be mindful that nearly all federal regulatory agencies, including FERC, exercise enforcement discretion in cases of minor issues or where the regulated entity agrees to remediate noncompliance without penalty. Treating all instances of noncompliance with regulations in the same manner is not a source of strength for an agency’s enforcement program. Not exercising enforcement discretion dissipates the effectiveness of compliance and enforcement programs by overburdening the resources of the enforcement body and the regulated entities. Thus, less emphasis can be placed on avoiding instances of noncompliance with the regulatory requirements intended to prevent conduct that has the most harmful impacts under any particular regulatory scheme. Under federal judicial precedent, federal agencies are given wide latitude to decide where its investigatory and prosecutorial resources are best applied. Fleaszer v. U.S. Dept. of Labor, 598 F.3d 912 (C.A. 7 2010).

The enforcement policies of the Nuclear Regulatory Commission and Environmental Protection Agency illustrate “formalized” enforcement discretion processes.

Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 at P 9 (emphasis added).
1. Nuclear Regulatory Commission (NRC)

Recognizing that the regulation of nuclear activities does not lend itself to mechanistic
treatment, the NRC exercises judgment and discretion in determining the severity levels of
violations and the appropriate enforcement sanctions applied to violations. Since some of its
regulatory requirements have a bigger impact on nuclear plant safety than others, the NRC
strives to use a risk-informed approach when applying NRC resources to the oversight of
licensed activities, including enforcement activities. Indeed, the NRC has authority to permit the
continued operation of licensed nuclear units — despite the existence of a noncompliance — where
the noncompliance is not significant from a risk perspective and does not, in the particular
circumstance pose an undue risk to public health and safety.66

The NRC applies a “layered” approach to the disposition of violations depending on the
level of risk involved. Minor violations generally do not warrant documentation in inspection
reports, but they must be corrected. The NRC typically disposes of the next level of low risk
violations through noncited violations (NCVs). An NCV disposition would require minimal
documentation of inspection (audit) reports and brief descriptions of corrective actions. A
violation above the lowest levels of risk are disposed by issuance of a Notice of Violation
(NOVs), which has a disposition process akin to the NERC CMEP NOV procedures. A civil
penalty may be issued in conjunction with an NOV.

The following chart illustrates the structure of the NRC enforcement process:67

![NRC Enforcement Process Diagram]

2. Environmental Protection Agency (EPA)68

EPA enforcement programs incorporate enforcement discretion features to “triage”
resources so that the most significant violations are acted on. The following are examples of
how EPA enforcement programs provide for the exercise of enforcement discretion:

a. Civil Enforcement Policy Under the Resource Conservation and
Recovery Act (RCRA)

EPA’s Hazardous Waste Civil Enforcement Response Policy (ERP)69 provides a general
framework for classifying violations and violators of concern and describes timely and

66 NRC Enforcement Policy, Nuclear Regulatory Commission, (July 12, 2011) at p. 6. See also id. at Section 3.0
Use of Enforcement Discretion. This document can be found at http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-ppl.html. See also http://pbadupws.nrc.gov/docs/ML0934/ML09348003.d.pdf.
68 All of the EPA enforcement policy documents described below are available at http://cfpub.epa.gov/compliance/resources/policies/civil/en/erp.
69 http://cfpub.epa.gov/compliance/resources/policies/civil/erp/rcra
appropriate enforcement responses to RCRA noncompliance. The ERP also establishes the priorities for compliance monitoring and enforcement activities. This is accomplished by establishing a comprehensive monitoring and inspection program, and addressing the most serious violators with timely, visible and effective enforcement actions. The EPA establishes enforcement Response Time Guidelines for the activities subject to its jurisdiction to ensure that more serious violations are dealt with expeditiously.

RCRA violators are classified into two categories: Significant Non-Compliers (SNCs) and Secondary Violators (SVs). SNCs are violators that have caused actual exposure or substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from permit, statutory, or regulatory requirements. SNCs generally are subject to the full EPA civil enforcement process.

SVs are violators which do not meet the criteria for SNCs and pose no actual threat or a low potential threat of exposure to hazardous waste. The nature of SV violations are de minimis such that a prompt return to compliance with applicable rules is likely. Thus, the full EPA civil enforcement process is not followed. Often issuance of a warning letter with subsequent EPA follow-up without penalty is all that is involved.

In marginal cases of significant noncompliance, EPA may consider any steps the violator has taken to expediously come into compliance prior to discovery by the government and to mitigate any risks resulting from its violation. In some circumstances, the deviation from the requirements may not be considered substantial if the violator, on its own initiative, identifies the violation soon after the violation begins, takes steps to resolve the violation as expeditiously as possible, and mitigates any potential harm to the environment or the regulatory program.

b. Clean Air Act (CAA) Enforcement Response Policy

EPA's CAA ERP follows established guidelines for timely and appropriate action. An appropriate enforcement response may include non-penalty actions (warning letter, finding of violation or preliminary determination), penalty actions (civil administrative action, civil judicial referrals) and criminal sanctions.10

The EPA may issue a warning letter in the event that problems are found with CAA source. No penalties are attached to a warning letter. Warning letters may be an appropriate response for easily correctable deficiencies which do not warrant further action. In the event that a source does not address the deficiencies noted in a warning letter, EPA will generally pursue an elevated enforcement response.

The EPA may issue a finding of violation (FOV) when any CAA violation is found. FOVs are an appropriate response to violations of a more significant nature but which do not rise to the level of a penalty action.

A preliminary determination is issued as a result of an audit conducted under EPA regulations. The determination consists of a written notice detailing any deviations from statutory or regulatory requirements, describing deficiencies in a source and an explanation for the basis of the findings, reflecting, if applicable, industry standards and guidelines. Failure to address the deficiencies identified in a preliminary determination will result in a penalty action by EPA.

An administrative order (AO) is a formal action ordering compliance with the CAA. As with an FOV, an AO cites the relevant statutory or regulatory requirements not being met. Similarly, failure to address the deficiencies identified in an AO will also result in a penalty action.

Issuing only a warning letter, preliminary determination, FOV, or AO is the appropriate enforcement response for easily correctable violations. For significant violations of the CAA, the EPA has a Policy on Timely and Appropriate Enforcement Response to High Priority Violations.

Thus, it is clear that other agencies also exercise enforcement discretion and judgment in the administration of their compliance and enforcement programs. While they monitor risks in their respective industries, they devote their time, attention and resources on those that pose the greatest risks. This approach is what NERC is seeking to emulate in its new initiative.

V. Request For Action

NERC believes that this filing is fully consistent with NERC’s existing rules and authority and the Commission’s rules, orders and regulations; however, to the extent the Commission believes otherwise, NERC requests waiver of such rules, regulations and orders to put this new initiative and associated reporting tools in place starting now. Specifically, NERC requests that the Commission notice this filing for public comment and issue an order approving the compliance enforcement initiative and mechanisms described herein and providing any additional guidance that the Commission believes is appropriate. Additionally, NERC is submitting its first informational filing of Remediated Issues as an attachment to this filing. NERC is not requesting Commission action on the FFT informational filing.

NERC is concurrently filing NOPs in the new Spreadsheet NOP format as well as others as Full NOPs. It is NERC’s expectation that the Commission will process all of those NOPs in accordance with the Commission’s regulations set forth in 18 C.F.R. Part 39.7. While NERC describes the new Spreadsheet NOP format herein, NERC requests that the Commission take action on the Spreadsheet NOP format and specific Spreadsheet NOP violations in the NP11-270-000 docket, rather than this docket.

NERC commits to report back to the Commission and industry stakeholders at six months and one year following this initial filing on experience gained and the results from implementation of the new mechanisms and tools.

A. Commission Approval Of Compliance Enforcement Initiative And Associated Reporting Tools Is Appropriate.

The Commission has repeatedly and properly recognized that NERC is an enforcement organization and has many compliance and enforcement tools at its disposal. Inherent in NERC’s enforcement discretion is the ability to choose what to pursue and how to pursue it. While the Commission has an oversight role, it has made clear that it will not generally conduct reviews of uncontested matters or records developed by Regional Entities that were reviewed by NERC for sufficiency and consistency.

After four years of operation as the ERO, NERC has reassessed its existing policies and procedures to ascertain areas of improvement and identify undue administrative, regulatory or paperwork burdens. Based on this review, NERC has determined that implementation improvements can be made within the confines of existing rules, orders and regulations to ensure efforts are effective and efficient. The Commission has repeatedly recognized the importance of prioritizing issues and focusing on those issues that pose a more serious risk to the reliability of the BPS. This initiative achieves those goals. By identifying, mitigating and resolving issues that do not pose a serious or substantial risk to the reliability of the BPS on a more streamlined basis, more resources can be focused on violations that pose a greater risk to the reliability of the BPS.
The Commission has consistently endorsed and encouraged NERC's ongoing efforts to develop and utilize streamlined reporting mechanisms, such as use of spreadsheet formats for the submittal of NOPs. Most recently, the Commission commended the use of Administrative Citation NOP as "a successful tool in improving efficiency of NERC's enforcement process, thereby reducing the time and resources expended by the Regional Entities, NERC, and the Commission staff while still achieving transparency and consistency in penalty determinations." Both the FFT and NOP formats build upon the Administrative Citation NOP format. For NOPs, the spreadsheet format has been expanded to ensure requisite record information is provided.

By making disposition decisions based on an initial review as warranted, tailoring and alignment of records to the seriousness of an issue and utilizing further streamlined reporting mechanisms, NERC and Regional Entities to eliminate undue administrative, paperwork and regulatory burdens and to continue to encourage self-reporting and corrective actions from Registered Entities.

NERC's initiative makes clear that all risks to reliability are expected to be found, fixed, tracked and reported, thereby ensuring that Regional Entities, NERC and FERC have situational awareness. Registered Entities are certainly encouraged by this effort to continue to self-identify their noncompliance with Reliability Standards. Where Registered Entities cannot or do not identify the issues, Regional Entities and NERC will continue to do so.

B. Commission Acceptance Of The FFT Reporting Format Is Appropriate.

The FFT informational filing is closure of the enforcement action by Regional Entities and NERC of certain Possible Violations that pose a lesser risk (minimal to moderate risk) to the reliability of the BPS. NERC recognizes that the thirty-day clock applicable to NOPs does not apply to FFT informational filings.

While the FFTs will be reported to FERC for informational purposes, they are not submitted as a Notice of Penalty, subject to Commission review pursuant to FPA Section 215(e)(1) and 18 C.F.R. Parts 39.7(c) and (d). Pursuant to 18 C.F.R. 39.7(b), an issue addressed through the FFT process would continue to be promptly reported to FERC in a non-public Notice of Possible Violation (e.g., soon after it is self-reported), with the "eventual disposition" reported through the public FFT informational filing. FFTs would not be submitted to FERC as a Notice of Penalty because they do not satisfy the statutory and regulatory prerequisites for treatment as a NOP.

In the case of FFTs, NERC is neither finding a violation nor imposing a penalty, as required by 18 C.F.R. 39.7(c). NERC does not believe NOP filings are required by statute or regulation, or are appropriate where, as in the FFT context, there is no finding of a violation. For these reasons, it is fully consistent with FPA Section 215 and the Commission's regulations for FFTs to be submitted only informationally, without submission as a NOP and without triggering the 30-day Commission review process under 18 C.F.R. Part 39.7(e).

If the Commission has concerns with NERC's implementation of its FFT program, such concerns can be addressed promptly on a prospective basis in response to NERC's planned six-month and one-year reports on the FFT process, or otherwise.

While NERC is not seeking approval of the FFT candidates in the submittal, NERC believes that Commission acceptance of the reporting tool is appropriate and would provide

\(^{57}\) As described below, the identity of the Registered Entity will be submitted to the Commission but will not be publicly disclosed in the informational filing.
certainty to the industry, Regional Entities, NERC and Commission staff as to the disposition of the Remediated Issues and the value of the tool.

Because the Commission's regulations do not appear to permit public disclosure of confidential information that is not included in a NOP, NERC is submitting public and non-public versions of the FFT spreadsheet. The name of the Registered Entity and identifying information is being withheld from the public version. NERC recognizes that the Commission may, on its own accord, authorize the release of the entities' names subject to applicable regulations and orders.

Therefore, information in and certain attachments to the instant filing include privileged and confidential information as defined by the Commission's regulations at 18 C.F.R. Part 388 and orders, as well as NERC Rules of Procedure including the NERC Appendix 4C CMEP. Specifically, this includes non-public information related to certain Reliability Standard violations, certain Regional Entity investigative files, Registered Entity sensitive business and confidential information exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, and should be withheld from public disclosure. In accordance with the Commission's Rules of Practice and Procedure, 18 C.F.R. Part 388.112, a non-public version of the information redacted from the public filing is being provided under separate cover. In addition, a copy of this filing is being provided to each Registered Entity involved in a Remediated Issue included in the FFT.


NERC has concurrently submitted certain NOPs for Possible Violations that pose more serious risks to the reliability of the BPS, in the new Spreadsheet NOP format announced above. The Administrative Citation NOP's simple and streamlined spreadsheet has been expanded to ensure the requisite level of detail and information is provided with respect to more serious risk issues so an informed decision on the merits can be made. As in the case of the Administrative Citation NOP, no supporting material or attachments will be submitted to eliminate duplicative or unnecessary voluminous information. NERC respectfully requests that the Commission approve the use of this new tool as a means to report final disposition of certain serious risk issues, in accordance with 18 C.F.R Part 39.7 and applicable orders. The most serious risk issues will continue to be included in the Full NOP format in use today.

Notably, NERC has submitted approximately one-third of all violations in spreadsheet formats. These filings include Omnibus I and II\(^{78}\) and eight Administrative Citation NOPs that were filed in 2011.\(^{77}\) Utilization of the Administrative Citation NOP, Deficiency NOP, Abbreviated NOP and Full NOP formats helped to segregate and highlight issues based on the risk posed at the processing end state. The use of Disposition Documents and other standardized forms helped industry stakeholders, Regional Entities and NERC focus on information needed to dispose of an issue in a NOP.

\(^{77}\) The last Administrative Citation NOP filing was made on August 31, 2011.


\(^{79}\) See North American Electric Reliability Corporation, Docket Nos. NP11-104-000; NP11-133-000; NP11-162-000; NP11-181-000; NP11-199-000; NP11-228-000; NP11-253-000; and NP11-266-000.
Conclusion

For the foregoing reasons, NERC respectfully requests that the Commission grant the requests for action set forth herein.

Respectfully submitted,

/s/Rebecca J. Michael

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Attachment 1

SUMMARY DESCRIPTION OF THE FFT

1. Find, Fix, Track and Report (FFT):76

A. FFT treatment occurs when:

1) The Possible Violation poses a lesser risk (minimal to moderate risk) to BPS reliability.
   a) Priority reliability standards/top violated standards may qualify for this treatment taking into account the particular facts and circumstances.
      i. There has been a high volume of lesser risk violations even with respect to top violated standards that would benefit from the FFT approach.
      ii. Some violations occur by even the most vigilant organizations.
      iii. Some violations do not implicate the severity of the risk.
      iv. Specific facts must be considered to ascertain the significance of the issue with respect to actual/potential risk and/or harm to reliability of the BPS.
   b) VRF/VSL
      i. This will apply to Possible Violations of Lower to Medium VRFs even if the VSLs are High or Severe.
      ii. Based on experience to date, there have been issues with High VRFs and Severe VSLs that had a minimal risk to the reliability of the BPS.
   c) Risk Assessment that indicates the Possible Violation is not a serious risk to BPS reliability.
   d) Prompt, robust self-reporting by a Registered Entity of the violation, risk and mitigating activities that demonstrates the violation has been.
      i. NERC will evaluate the time discovered to the time reported.

76 By way of example, these could include, but are not limited to, Possible Violations that have been included in the Administrative Citation NOPs, Deficiency NOPs and zero and lower dollar minimal to moderate risk Possible Violations in the Abbreviated NOPs. In all events, risk assessments will be made in accordance with the FERC-approved Sanction Guidelines. For example, risk assessments will take into account size, location and characteristics of BPS facilities that are owned, operated or used by an entity.
1. This does not exclude from eligibility violations discovered in quarterly or annual reviews or mock audits encompassed in some entities' programs.

2. NERC urges Registered Entities to notify Regional Entities right away upon discovery.

3. Registered Entities and Regional Entities can then allot a reasonable time period for the entity to gather facts and information and to determine appropriate mitigation activities.

e) Registered Entity Compliance program, mitigation and corrective action programs, internal controls and culture of compliance

f) Entity Compliance History
   i. Depending on the facts and circumstances, prior compliance history could be indicative of a robust compliance program seeking out improvements or an indication of poor implementation of compliance efforts.
   1. Entities with the most robust internal programs may actually detect and report substantially more Possible Violations than entities that do not conduct similarly thorough internal reviews. NERC does not seek to discourage self-reporting.
   ii. The existence of previous self-reports and violation findings associated therewith does not preclude the use of the FFT option.
   iii. Companies will be eligible for the FFT option even for repeat violations that do not pose high risks to BPS reliability.

2. For lesser risk Possible Violations, the emphasis will be on identifying them and ensuring they are corrected, without subjecting the Registered Entity to the full panoply of the CMEP. Upon correction and submittal of Registered Entity's statement of completion of mitigating activities, such Possible Violations will become, and be referred to as, Remediated Issues.

B. The issue is considered a part of the entity's compliance history.
   1) The Possible Violation and related facts and circumstances are taken into account as part of this consideration, and in consideration of future Possible Violations, but a finding of a violation has not been made. Rather, there is simply a determination that it is a Possible Violation.

D. No penalty or sanction will be assigned to an issue addressed using the FFT approach.
E. Repeat Possible Violations of same, similar or different standards do not foreclose use of the FFT approach.
   1) The identification of repeat Possible Violations of same, similar or different standards may lead the CEA to use its discretion to discontinue the use of the FFT process and escalate the processing of these Possible Violations as Possible Violations as described in the CMEP.

F. Formal Mitigation plans will not be required for Possible Violations addressed through the FFT approach but there must be a demonstration that the issue has been addressed and corrective actions must be described and evidence delineated to facilitate later verifications.
   1) The formal Mitigation Plan template and milestone reporting requirements will not be required for FFT; it will be paramount that corrective actions will be tracked to completion and will be subject to verification by the Regional Entity.
   2) NERC already has in place precedent where formal Mitigation Plans and processing are not required. Currently, Administrative Citation NOP and Settlement Agreements do necessarily result in separate mitigation plans.
   3) Where they are recorded in the spreadsheet, they will be assigned a Mitigation Identification Tracking Number. Mitigating activities included in FFT submittals to FERC will be deemed as accepted by Regional Entities and approved by NERC at the time of filing.
The North American Electric Reliability Corporation (NERC) hereby provides the attached Find Fix and Track Report (FFT) in Attachment A regarding 59 Registered Entities. This FFT resolves 117 possible violations. These FFT remediated issues are being submitted for informational purposes only. The Commission has encouraged the use of streamlined enforcement processes for occurrences that posed lesser risk to the BPS. Resolution of these lesser risk possible violations in this reporting format is appropriate disposition of these matters, and will help NERC and the Regional Entities focus on the more serious violations of the mandatory and enforceable NERC Reliability Standards.

Statement of Findings Underlying the FFT

The descriptions of the remediated issues and related risk assessments are set forth in Attachment A.

This filing contains the basis for approval by the NERC Board of Trustees Compliance Committee (a) of the findings reflected in Attachment A. In accordance with Section 39.7 of the Commission’s regulations, 18 C.F.R. § 39.7 (2011), each Reliability Standard at issue in this FFT is identified in Attachment A.

Text of the Reliability Standards at issue in the FFT may be found on NERC’s web site at http://www.nerc.com/page.php?oid=2120. For each respective remediated issue, the Reliability Standard Requirement at issue is listed in Attachment A.

Status of Mitigation

As noted above and reflected in Attachment A, the possible violations identified in Attachment A have been mitigated. The respective Registered Entity has submitted a statement of completion of the mitigation activities to the Regional Entity. These mitigation activities are subject to verification by the Regional Entity via an audit, spot check, random sampling, or a request for information. These activities are described in Attachment A for each respective possible violation.
Statement Describing the Resolution

Basis for Determination

Taking into consideration the Commission's direction in Order No. 693, the NERC Sanction Guidelines and the Commission's July 3, 2008 Guidance Order, the October 26, 2009 Guidance Order and the August 27, 2010 Guidance Order,9 the NERC BOTCC reviewed the remediated issues included in this FFT on September 19, 2011. The NERC BOTCC approved the FFT based upon its findings and determinations, the NERC BOTCC's review of the applicable requirements of the Commission-approved Reliability Standards, and the underlying facts and circumstances of the remediated issues.

Request for Confidential Treatment of Certain Attachments

Certain portions of Attachment A include confidential information as defined by the Commission's regulations at 18 C.F.R. Part 388 and orders, as well as NERC Rules of Procedure including the NERC CMEP Appendix 4C to the Rules of Procedure. This includes non-public information related to certain Reliability Standard possible violations and confidential information regarding critical energy infrastructure.

In accordance with the Commission's Rules of Practice and Procedure, 18 C.F.R. § 388.112, a non-public version of the information redacted from the public filing is being provided under separate cover.

Because certain of the information in the attached documents is deemed "confidential" by NERC, Registered Entities and Regional Entities, NERC requests that the confidential, non-public information be provided special treatment in accordance with the above regulation.

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9 See 18 C.F.R. § 39.7(d)(4).


10 See 18 C.F.R. § 39.7(d)(6).

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Notices and Communications

 Notices and communications with respect to this filing may be addressed to the following as well as to the entities included in Attachment B to this FFT:

<table>
<thead>
<tr>
<th>Gerald W. Cauley</th>
<th>Rebecca J. Michael*</th>
</tr>
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</tbody>
</table>

*Persons to be included on the Commission's service list are indicated with an asterisk. NERC requests waiver of the Commission's rules and regulations to permit the inclusion of more than two people on the service list. See also Attachment B for additions to the service list.

NERC FFT Informational Filing
September 30, 2011
Page 5

Conclusion

Handling these remediated issues in a streamlined process will help NERC, the Regional Entities, Registered Entities, and the Commission focus on improving reliability and holding Registered Entities accountable for the more serious violations of the mandatory and enforceable NERC Reliability Standards. Accordingly, NERC respectfully requests that the Commission accept this FFT as an informational filing compliant with its rules, regulations and orders.

Respectfully submitted,

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cc: Entities listed in Attachment B
Fix and Track Report Spreadsheet (Included in a Separate Document)
ATTACHMENT B

REGIONAL ENTITY SERVICE LIST FOR SEPTEMBER 2011 FIND FIX AND TRACK REPORT (FFT) INFORMATIONAL FILING

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*Attorney or affiliated individual
ATTACHMENT C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation Docket No. RC11---000

NOTICE OF FILING
September 30, 2011

Take notice that on September 30, 2011, the North American Electric Reliability Corporation (NERC) filed a FFT Informational Filing regarding fifty-nine (59) Registered Entities in eight (8) Regional Entity footprints.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission’s Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.


This filing is accessible on-line at http://www.ferc.gov, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, D.C. There is an “eSubscription” link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: [DLANK]

Kimberly D. Bose, Secretary
UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corp. ) Docket No. RC11-__-00

NOTICE OF PETITION REQUESTING APPROVAL OF NEW ENFORCEMENT MECHANISMS AND SUBMITTAL OF INITIAL INFORMATIONAL FILING REGARDING NERC’S EFFORTS TO REFOCUS IMPLEMENTATION OF ITS COMPLIANCE MONITORING AND ENFORCEMENT PROGRAM

( )

Take notice that on September 30, 2011, North American Electric Reliability Corp. ("NERC") filed a Petition Requesting Approval of New Enforcement Mechanisms and Submittal of Initial Informational Filing Regarding NERC’s Efforts to Refocus Implementation of Its Compliance Monitoring and Enforcement Program.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission’s Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent’s answer and all interventions, or protests must be filed on or before the comment date. The Respondent’s answer, motions to intervene, and protests must be served on the Complainants.


This filing is accessible on-line at http://www.ferc.gov, using the “eLibrary” link and is available for review in the Commission’s Public Reference Room in Washington, D.C. There is an “eSubscription” link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on (insert date).

Kimberly D. Bose
Secretary
<table>
<thead>
<tr>
<th>Topic</th>
<th>Description</th>
<th>Result</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Florida Reliability Coordinating Council (FRCC) Unidentified Registered Entity (FRCC_URE1) NCREXXXX</td>
<td>FRC-001-1</td>
<td>12</td>
<td>The entity self-reported that it had mis-identified one (1) unit of a total of 109 Protection System devices on its relays based upon its Protection System maintenance and testing program to be a microprocessor type relay with a 6-year testing and maintenance interval instead of properly identifying it as a solid state based relay with a 3-year testing and maintenance interval. The entity failed to test the relays within the project cycle of 3 years, missing the testing by 11 days. This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the entity was operating in equipment within manufacturer and design specifications and relay devices. Breaker and switches were determined not to be a limiting factor. The entity changed the designation of the relay to the correct type based upon its Protection System maintenance and testing program. The entity performed the required testing and maintenance immediately upon discovery of the mis-classification of the relay.</td>
</tr>
<tr>
<td>Florida Reliability Coordinating Council (FRCC) Unidentified Registered Entity (FRCC_URE1) NCREXXXX</td>
<td>FRC-001-1</td>
<td>3</td>
<td>The entity self-reported that it mod 571 current limit protection system changes to its relays in a one-month period without coordinating protective system changes with neighboring TOPs and Balancing Authorities (BAs). This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the entity was operating in equipment within manufacturer and design specifications and relay devices. Breaker and switches were determined not to be a limiting factor. The entity communicated the protective system changes to the neighboring TOPs and BAs. The entity modified its change request, and coordination procedure to include requirements for coordination of system protective system changes with its neighboring TOPs and BAs.</td>
</tr>
<tr>
<td>Florida Reliability Coordinating Council (FRCC) Unidentified Registered Entity (FRCC_URE1) NCREXXXX</td>
<td>EOP-008-1</td>
<td>57</td>
<td>The entity was found during a compliance audit that it has failed to document a verification of its restoration procedure by actual testing or by simulation for a three-year period. This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the entity had a documented restoration procedure in place that was used in telephonic training on operators. The entity's staff verified its restoration procedure using power flow simulation.</td>
</tr>
<tr>
<td>Florida Reliability Coordinating Council (FRCC) Unidentified Registered Entity (FRCC_URE1) NCREXXXX</td>
<td>FAC-010-2</td>
<td>61</td>
<td>The entity was found during a compliance audit that it did not include in its Facility Ratings Methodology the following: design criteria (R1.32), ambient conditions (R1.33), operating limitations (R1.34), and other assumptions (R1.35) for transmission, protective relay devices, breakers and switches for a 27-month period. This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the entity was operating in equipment within manufacturer and design specifications and relay devices. Breaker and switches were determined not to be a limiting factor. The entity revised its Facility Ratings Methodology prior to the compliance audit to include relay protective devices to meet the requirement.</td>
</tr>
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<td>Florida Reliability Coordinating Council (FRCC) Unidentified Registered Entity (FRCC_URE1) NCREXXXX</td>
<td>FAC-010-2</td>
<td>62</td>
<td>The entity was found during a compliance audit that it has failed to ensure the receipt of a directive (Gen Operator (GOPS) or TOPs) to install information back protection (insufficient) and acknowledged the response as correct or reject to resolve any misunderstandings during three occurrences for bulk adjustments. This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the TOPOs installation was issued in a clear, concise and definitive manner and the directive was limited to the entity's own generator which was continuously monitored and alarmed by the entity's Energy Management System (EMS). The entity is a generating facility connected to the BPS at 230 kV with a total BPS generating capacity of less than 750 MW, which represents less than 1% (one percent) of the FRCC regional generation. The entity provided training to its TOPs and GOPs in addition to performing a follow-up review of communications to ensure the recipient adhered to the requirements of the standard.</td>
</tr>
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<td>Florida Reliability Coordinating Council (FRCC) Unidentified Registered Entity (FRCC_URE1) NCREXXXX</td>
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</tr>
</tbody>
</table>

October 31, 2011
The entity was found during a compliance audit that it failed to demonstrate verification of its restoration procedure by actual testing or by simulation for a 30-month period. This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the TOP operates less than 50 miles of 138 kV transmission with no black start capability. The entity had a documented restoration procedure in place that was used in testing its operation.

The entity had a document that provided a verification of its restoration procedure using power flow simulation.

The entity's planning engineering staff verified its restoration procedure using power flow simulation.

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Reliability

The reliability of the bulk power system is essential for maintaining the stability and security of the electrical grid. A recent audit by the Florida Reliability Council (FRC) found that a certain entity did not comply with the required standards for reliability.

The FRC is a coordinating council responsible for ensuring the reliability of the bulk power system in Florida. This entity was found to lack compliance with the required standards, specifically in the area of access to Cyber Physical System (CPS) plans. The entity's self-reported compliance with these standards was verified by the FRC.

The entity, identified as Florida Unidentified Council (FRCC), had a documented failure to access the required CPS plans. The entity was also found to have systemic access issues with the Cyber Physical System (CPS) plans, which are critical for maintaining grid stability.

The entity's failure to provide access to the CPS plans indicates a potential for significant risk to the stability of the grid. The FRC requires that all entities have a system in place to ensure that Cyber Physical System plans are accessible and can be shared with the FRC in a timely manner.

In conclusion, the entity's non-compliance with the FRC's requirements for access to CPS plans highlights the importance of maintaining robust systems for grid reliability. The FRC has taken steps to address this issue, and the entity is required to implement corrective actions to ensure compliance with the reliability standards.
The entity self-reported that one of its employees was not trained prior to being granted physical and logical access to the entity’s Critical Cyber Assets (CCAs). This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the training was delayed by five days only and the concerned person was in the control room environment and was being trained under constant supervision of higher person. During the investigation, the concerned person did not operate the CCA (BPS control) independently without supervision. All failure activities were reviewed and verified by the concerned person who were trained under the CIP program.

Mitigation measures included completion of training by the concerned person and revision of procedures for granting authorized access to the CCA and to include exact code of the required training modules to limit any conformity with completion of other NERC and FReC related training which were recognized as the original root cause of the remediated issue. Mitigation was completed by the entity and verified by FReC.

The entity self-reported that it did not update the list of all authorized users with electronic or unsecured physical access within seven days from date of change as required by CIP-004-R1. One duplication entry for a person who had retired was erroneously left on the list because the concerned person was listed twice on the list with the same access status that had been denied. The record with correct access status was removed during the three-day update window, but the other entry was not removed due to oversight. The error was recognized in a quarterly review 50 days after the required date and was corrected immediately.

This issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because all access cards were physically destroyed and access was revoked timely but only the list was not updated. The identified person could not have gained access without completing the complete process for gaining authorized access with an access card, which would involve a reason check by a supervisor and the Critical Cyber Asset access control department.

Mitigation included steps to ensure all users profile on the list and remove any duplicate entries. Further, the entity modified the procedure to ensure that any new access or login and logout events are tracked as new access request and all controls and verifications are applied. Mitigation also included further training of the staff involved with the verification and access provisioning process. The identified person’s duplicate entry was removed from the list. Mitigation was completed by the entity and verified by FReC.

The entity self-reported non-compliance with CIP-007-R1 because it failed to ensure that user accounts were implemented as required by R5.1.1, and did not maintain logs for 90 days as required by R4.1.2. During a quarterly performed access review, the entity discovered that access for one individual (X%) was granted without documented authentication in accordance with CIP-007 R5.1. One of the entity’s administrators discovered that during reporting, user operations system level user activity logs had not been capturing failed authentication attempts. Since successful authentications were still being captured, more than 90% of logs were available for review. The issue was reported the same day it was discovered and failed authentication attempts were captured again. The total number of days for which failed authentication was not logged was 40 calendar days.

The remediated issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS). The entity had the following protective measures in place: (1) system access configuration changes were verified for the detection of the log and no exceptional observation was noted during that period, (2) the number of accounts with login rights to the server is limited, (3) group policy object limits the number of failed login attempts before the account is locked, (4) firewall rules and ports are setup to only allow necessary communication, (5) the anti-malware monitors and corrects malicious events on the servers, (6) the intrusion-detection system monitors and corrects malicious actions on the network, (7) a system manager manages interconnection to the network and detects and reports any changes to the hardware on the server, and (8) the entity’s physical security limits physical access to the server.

The entity performed the following actions to mitigate the remediated issue: (1) added screen shot in process which limits number of failed login attempts before account is locked out, (2) fixed the script, and (3) tested for known errors were not received, and that monitoring and alerting functionality were operational. Mitigation had been completed and verified by MRO.

The entity self-reported non-compliance with CIP-007-R1 because it failed to ensure that user accounts were implemented as required by R5.1.1, and did not maintain logs for 90 days as required by R4.1.2. During a quarterly performed access review, the entity discovered that access for one individual (X%) was granted without documented authentication in accordance with CIP-007 R5.1. One of the entity’s administrators discovered that during reporting, user operations system level user activity logs had not been capturing failed authentication attempts. Since successful authentications were still being captured, more than 90% of logs were available for review. The issue was reported the same day it was discovered and failed authentication attempts were captured again. The total number of days for which failed authentication was not logged was 40 calendar days.

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During a regularly scheduled compliance audit, MRO determined that the entity’s security system included the implementation of its Mitigation analysis and Corrective Action Plan for the Protection System Misoperations of a relay which experienced a Misoperations August 29, 2009.

The remediated issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the access was appropriate for the affected individual and the access remained configured in the server. Additionally, the entity granted verbal approval, and the individual had personal and work accounts (P&A) and other security requirements as required by CIP-004-R1-R2 and R3.

The entity performed the following actions to mitigate the remediated issue: (1) verified that NERC CIP 003-R1 and P&A requirements were met, (2) ensured that subject matter experts understood the requirements for formal, documented approval of NERC CIP cyber access. Mitigation has been completed and verified by MRO.

The entity self-reported non-compliance with CIP-004-R1 because it failed to ensure a Critical Cyber Asset (CCA) access list during the first quarter in which the entity was required to comply under the CIP Implementation Table. The CCA access list was reviewed starting in the next quarter.

The remediated issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because only one CCA access list was not reviewed for one quarter. Additionally, upon review, the entity did not identify any individuals that had access during that time that should have been removed from the list.

This remediated issue was mitigated when the entity reviewed the CCA access list for the second quarter of 2010.

The entity self-reported non-compliance with CIP-004-R1 because it did not have a monitoring process documented or implemented for one category of Critical Cyber Asset (CCA) access requests. Logs were generated on a daily basis and the daily log was required to comply with the standards under the CIP Implementation Table; however, they were not being monitored until three months later. The accuracy in access and logging procedures for these devices were formally documented and published on review after the compliance date.

The remediated issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the entity had the following protective measures in place: (1) system access configuration changes were verified for the detection of the log and no exceptional observation was noted during that period, (2) the number of accounts with login rights to the server is limited, (3) group policy object limits the number of failed login attempts before the account is locked, (4) firewall rules and ports are setup to only allow necessary communication, (5) the anti-malware monitors and corrects malicious events on the servers, (6) the intrusion-detection system monitors and corrects malicious actions on the network, (7) a system manager manages interconnection to the network and detects and reports any changes to the hardware on the server, and (8) the entity’s physical security limits physical access to the server.

The entity performed the following actions to mitigate the remediated issue: (1) verified that NERC CIP 003-R1 and P&A requirements were met, (2) ensured that subject matter experts understood the requirements for formal, documented approval of NERC CIP cyber access. Mitigation has been completed and verified by MRO.
<table>
<thead>
<tr>
<th>Organization</th>
<th>Registered Entity</th>
<th>CIP No.</th>
<th>Description of Noncompliance</th>
<th>Remediated Issue</th>
<th>Related Risk</th>
<th>Original Findings</th>
<th>Mitigation</th>
<th>Status of Mitigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Midwest Reliability Organization (MRO)</td>
<td>Unidentified Registered Entity (MRO_URE)</td>
<td>CIP-040-3</td>
<td>The entity self-reported noncompliance with CIP-040-3 because it failed to update its Critical Cyber Assets (CCA) access list for 31 days from when the construction of the bulk power system (BPS) began.</td>
<td>The remediated issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the bulk power system (BPS) because the entity’s final loads that would be affected by the 5 UFLS station battery devices were 1% of the total UFLS load ideal for which the entity is responsible.</td>
<td>The entity performed the following actions to mitigate the remediated issue:</td>
<td>The entity has completed review of its security logs and implemented procedures to ensure regular security log review.</td>
<td>Mitigation has been completed and verified by MRO.</td>
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</table>

October 31, 2011
Northeast Power Coordinating Council, Inc. (NPCC)

Unidentified Registered Entity (NPCC_URE1)

NPCCXXX

CIP-002-1

R1: R1.4

During an NPCC CIP compliance audit it was found that the entity was in noncompliance with CIP-002-1 R1. NPCC determined that the entity had no NERC cyber security policy and statement of management commitment not signed by the senior manager assigned pursuant to CIP-003 R2. The entity reviewed and received approval of the cyber security policy by the senior manager assigned pursuant to CIP-003 R2. The entity completed its mitigation activity as verified by NPCC.

Northeast Power Coordinating Council, Inc. (NPCC)

Unidentified Registered Entity (NPCC_URE1)

NPCCXXX

CIP-002-2

R3

During a NPCC CIP compliance audit it was found that the entity was in noncompliance with CIP-002-2 R3. NPCC determined that the entity had no NERC cyber security policy. This was done 70 days after the obligations to meet the 30-day requirement. The entity reviewed and received approval of the cyber security policy by the senior manager assigned pursuant to CIP-003 R2. The entity completed its mitigation activity as verified by NPCC.

Northeast Power Coordinating Council, Inc. (NPCC)

Unidentified Registered Entity (NPCC_URE1)

NPCCXXX

CIP-005-1

R4

During a NPCC CIP compliance audit it was found that the entity was in noncompliance with CIP-005-1 R4. NPCC determined that there was no documentation in the entity’s disaster recovery procedures that addressed a process for backing up and storage of information required to successfully restore Critical Cyber Assets (CCAs). The entity reviewed and received approval of the cyber security policy by the senior manager assigned pursuant to CIP-003 R2. The entity completed its mitigation activity as verified by NPCC.

ReliabilityFirst Corporation (ReliabilityFirst)

Unidentified Registered Entity (ReliabilityFirst_URE1)

RPCCXXX

CIP-004-1

R2: R4

During a Spot Check ReliabilityFirst identified an issue concerning CIP-004-1 R2. The entity failed to address an issue in training programs, in effect from July 1, 2009 to July 5, 2009, the protocol of Critical Cyber Assets (CCAs) as required by CIP-004-1 R2.1, as the action plans and procedures to recover CCAs following a Cyber Security Incident, as required by CIP-004-1 R2.4. The entity revised its cyber security training program to include training material about the proper use of CCAs and to include action plans and procedures to recover CCAs following a Cyber Security Incident. The entity mitigated the issue as verified by ReliabilityFirst.

ReliabilityFirst Corporation (ReliabilityFirst)

Unidentified Registered Entity (ReliabilityFirst_URE2)

RPCCXXX

CIP-005-1

R4

The entity submitted a Self-Report to ReliabilityFirst indicating an issue with CIP-005-1 R4. The entity has a documented information protection program to identify, classify, and protect information associated with Critical Cyber Assets (CCAs). This program requires that the entity encrypt all information associated with CCAs before digitally transmitting this information outside of the company. The entity, contrary to this program, submitted an unrecovered Partial Failure/Exception (PFE) report, which included information associated with CCA, to ReliabilityFirst. The entity revised its cyber security training program to include training material about the proper use of CCAs and to include action plans and procedures to recover CCAs following a Cyber Security Incident. The entity mitigated the issue as verified by ReliabilityFirst.
### Attachment A-1

October 31, 2011 Public - Find Fix and Track Informational Filing of Remediated Issues Spreadsheet

**PRIVILEGED/CONFIDENTIAL INFORMATION HAS BEEN REMOVED FROM THIS PUBLIC VERSION (CIP and NON-CIP)**

<table>
<thead>
<tr>
<th>Registered Entity</th>
<th>RFC-Unpublished</th>
<th>RFC-004-1</th>
<th>CIP-005-1</th>
<th>RFC-005-1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Identified</strong></td>
<td>NCRXXXXX</td>
<td>RFC10000058</td>
<td>CIP-004-1</td>
<td>RFC10000067</td>
</tr>
<tr>
<td><strong>R3.1</strong></td>
<td></td>
<td>CIP-005-1</td>
<td>RFC-004-1</td>
<td>NCRXXXXX</td>
</tr>
<tr>
<td><strong>R3.6</strong></td>
<td></td>
<td>RFC10000044</td>
<td>CIP-005-1</td>
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</tr>
</tbody>
</table>

**ReliabilityFirst Corporation (ReliabilityFirst):**

**RFC-Unpublished**

The entity installed a Self-Report identifying an issue with CIP-005-1 R3.1. Due to security software incompatibility, the entity could not access Critical Cyber Assets (CCAs) to change passwords every 60 days as required by the entity’s cyber security policy. The entity deployed its cyber security policy in accordance with Reliability Standard CIP-007 R3.1. The entity’s policy to change passwords every 60 days in a more stringent, then CIP-007 R3.1, which requires the entity to change its passwords “at least annually or more frequently based on risk.” Under the entity’s cyber security policy, the entity should have changed the user account passwords on its identified CCAs but did not do so until approximately six months after the expected date.

**RFC-004-1**

The entity submitted a Self-Report identifying a possible issue with CIP-004-1 R3.1. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC-005-1**

The entity installed a Self-Report identifying a possible issue with CIP-005-1 R3.6. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC10000058**

The entity submitted a Self-Report to ReliabilityFirst identifying a possible issue with CIP-005-1 R3.1. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC10000067**

The entity submitted a Self-Report to ReliabilityFirst identifying a possible issue with CIP-004-1 R3.1. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC100000441**

The entity submitted a Self-Report to ReliabilityFirst identifying a possible issue with CIP-005-1 R3.6. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC10000067**

The entity submitted a Self-Report to ReliabilityFirst identifying a possible issue with CIP-004-1 R3.1. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC100000441**

The entity submitted a Self-Report to ReliabilityFirst identifying a possible issue with CIP-005-1 R3.6. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC10000058**

The entity submitted a Self-Report to ReliabilityFirst identifying a possible issue with CIP-004-1 R3.1. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.

**RFC10000067**

The entity submitted a Self-Report to ReliabilityFirst identifying a possible issue with CIP-004-1 R3.1. The entity experienced a storm that resulted in loss of power to more than 30,000 customers for more than one hour. The entity submitted the preliminary written report submitted to the U.S. Department of Energy (Preliminary Report) in the form of ReliabilityFirst and NERC approximately seven months after the required 24-hour reporting period.
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<tr>
<th>Site Identifier</th>
<th>Name/Address</th>
<th>RFC Numbers</th>
<th>RFC UREJ</th>
<th>CIP-OU7-1</th>
<th>Date</th>
<th>Description</th>
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<tbody>
<tr>
<td>ReliabilityFirst Corporation (ReliabilityFirst)</td>
<td>Unidentified Registered Entity</td>
<td>RFC201000413</td>
<td>RFC201000413</td>
<td>CIP-067-1</td>
<td>B3</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity’s failure to timely submit Technical Feasibility Exceptions (TFE) Requests in accordance with NERC procedures. The Self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an asset-condition investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted three late TFE Requests for CIP-067-1. ReliabilityFirst determined that the issue posed a material risk to the reliability of the bulk power system (BPS) because the issue resulted from failures by the entity to comply with the administrative process for the submission of formal TFE Requests. ReliabilityFirst determined that entity’s system is structured with many firewall and other security controls. As of the effective date of the CIP Standards, there were compensating measures in place, such as performing vulnerability scans on the network and monitoring network traffic. Many of the compensating measures were in place well before the effective date of the CIP Standards. Therefore, although the entity submitted timely TFE Requests, the entity was performing compensating measures to ensure the basic security of its system throughout the duration of the issue. ReliabilityFirst accepted and approved the TFE Requests’ compensating measures because they “achieve at least a comparable level of security for the Bulk Electric System as is achieved by acceptable” methods.”</td>
</tr>
<tr>
<td>ReliabilityFirst Corporation (ReliabilityFirst)</td>
<td>Unidentified Registered Entity</td>
<td>RFC201000413</td>
<td>RFC201000413</td>
<td>CIP-067-1</td>
<td>B4</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity’s failure to timely submit Technical Feasibility Exceptions (TFE) Requests in accordance with NERC procedures. The Self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an asset-condition investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted three late TFE Requests for CIP-067-1. ReliabilityFirst determined that the issue posed a material risk to the reliability of the bulk power system (BPS) because the issue resulted from failures by the entity to comply with the administrative process for the submission of formal TFE Requests. ReliabilityFirst determined that entity’s system is structured with many firewall and other security controls. As of the effective date of the CIP Standards, there were compensating measures in place, such as performing vulnerability scans on the network and monitoring network traffic. Many of the compensating measures were in place well before the effective date of the CIP Standards. Therefore, although the entity submitted timely TFE Requests, the entity was performing compensating measures to ensure the basic security of its system throughout the duration of the issue. ReliabilityFirst accepted and approved the TFE Requests’ compensating measures because they “achieve at least a comparable level of security for the Bulk Electric System as is achieved by acceptable” methods.”</td>
</tr>
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<td>RFC201000414</td>
<td>RFC201000414</td>
<td>CIP-067-1</td>
<td>E3</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity’s failure to timely submit Technical Feasibility Exceptions (TFE) Requests in accordance with NERC procedures. The Self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an asset-condition investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted nine late TFE Requests for CIP-067-1. ReliabilityFirst determined that the issue posed a material risk to the reliability of the bulk power system (BPS) because the issue resulted from failures by the entity to comply with the administrative process for the submission of formal TFE Requests. ReliabilityFirst determined that entity’s system is structured with many firewall and other security controls. As of the effective date of the CIP Standards, there were compensating measures in place, such as performing vulnerability scans on the network and monitoring network traffic. Many of the compensating measures were in place well before the effective date of the CIP Standards. Therefore, although the entity submitted timely TFE Requests, the entity was performing compensating measures to ensure the basic security of its system throughout the duration of the issue. ReliabilityFirst accepted and approved the TFE Requests’ compensating measures because they “achieve at least a comparable level of security for the Bulk Electric System as is achieved by acceptable” methods.”</td>
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<td>NCRXXXXX RFC20100415</td>
<td>CIP-005-1</td>
<td>R2.6</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity’s failure to timely submit Technical Feasibility Exception (TFE) Requests in accordance with NERC procedures. The Self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an extent-of-condition investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted one late TFE Request for CIP-005-1 R2.6.</td>
<td>Reliability/First determined that the issue posed a minimal risk to the reliability of the bulk power system (BPS) because the issue resulted from failures by the entity to comply with the administrative process for the submission of formal TFE Requests. Reliability/First determined that the entity’s system is structured with many firewall and other security controls. As of the effective date of the CIP Standards, there were compensating measures in place, such as using two-factor authentication and firewall rules that minimize exposure of devices. Many of these compensating measures were in place well before the effective date of the CIP Standards. Therefore, although the entity submitted untimely TFE Requests, the entity was performing compensating measures to ensure the basic security of the entity’s system throughout the duration of the issue. Reliability/First accepted and approved the TFE Requests’ compensating measures because they “achieve at least a comparable level of security for the Bulk Electric System as would Strict Compliance with the [CIP Standards].” Moreover, the entity also identified and implemented additional measures after the effective date of the CIP Standards.</td>
<td>The entity mitigated the issue by submitting all acceptable TFE Requests and has continuously performed all of the compensating measures as discussed in the TFE Requests.</td>
</tr>
<tr>
<td>Reliability/First</td>
<td>NCRXXXXX RFC20100415</td>
<td>CIP-007-1</td>
<td>R3</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity’s failure to timely submit Technical Feasibility Exception (TFE) Requests in accordance with NERC procedures. The Self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an extent-of-condition investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted two late TFE Requests for CIP-007-1 R3.</td>
<td>Reliability/First determined that the issue posed a minimal risk to the reliability of the bulk power system (BPS) because the issue resulted from failures by the entity to comply with the administrative process for the submission of formal TFE Requests. Reliability/First determined that the entity’s system is structured with many firewall and other security controls. As of the effective date of the CIP Standards, there were compensating measures in place, such as using two-factor authentication and firewall rules that minimize exposure of devices. Many of these compensating measures were in place well before the effective date of the CIP Standards. Therefore, although the entity submitted untimely TFE Requests, the entity was performing compensating measures to ensure the basic security of the entity’s system throughout the duration of the issue. Reliability/First accepted and approved the TFE Requests’ compensating measures because they “achieve at least a comparable level of security for the Bulk Electric System as would Strict Compliance with the [CIP Standards].”</td>
<td>The entity mitigated the issue by submitting all acceptable TFE Requests and has continuously performed all of the compensating measures as discussed in the TFE Requests.</td>
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<tr>
<td>Reliability/First</td>
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<td>R4</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity’s failure to timely submit Technical Feasibility Exception (TFE) Requests in accordance with NERC procedures. The Self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an extent-of-condition investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted three late TFE Requests for CIP-007-1 R4.</td>
<td>Reliability/First determined that the issue posed a minimal risk to the reliability of the bulk power system (BPS) because the issue resulted from failures by the entity to comply with the administrative process for the submission of formal TFE Requests. Reliability/First determined that the entity’s system is structured with many firewall and other security controls. As of the effective date of the CIP Standards, there were compensating measures in place, such as using two-factor authentication and firewall rules that minimize exposure of devices. Many of these compensating measures were in place well before the effective date of the CIP Standards. Therefore, although the entity submitted untimely TFE Requests, the entity was performing compensating measures to ensure the basic security of the entity’s system throughout the duration of the issue. Reliability/First accepted and approved the TFE Requests’ compensating measures because they “achieve at least a comparable level of security for the Bulk Electric System as would Strict Compliance with the [CIP Standards].”</td>
<td>The entity mitigated the issue by submitting all acceptable TFE Requests and has continuously performed all of the compensating measures as discussed in the TFE Requests.</td>
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<td>CIP-007-1</td>
<td>R2</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity's failure to timely submit Technical Feasibility Exception (TFE) Requests in accordance with NERC procedures. The self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an extensive investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted one tue TFE Request for CIP-007-1 R2.</td>
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<td>CIP-005-1</td>
<td>R3</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity's failure to timely submit Technical Feasibility Exception (TFE) Requests in accordance with NERC procedures. The self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an extensive investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted one tue TFE Request for CIP-005-1 R3.</td>
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<tr>
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<td>CIP-005-1</td>
<td>R3</td>
<td>The entity self-reported an issue with the CIP Standards arising from the entity's failure to timely submit Technical Feasibility Exception (TFE) Requests in accordance with NERC procedures. The self-Reports referenced all identified TFEs that should have been filed as of that point. The entity subsequently conducted an extensive investigation and identified four additional needed TFEs. The TFE Requests for the entity were submitted between approximately five and fifteen months late. Specifically, the entity submitted one tue TFE Request for CIP-005-1 R3.</td>
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<td>Entity</td>
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<td>SlackID</td>
<td>RFC</td>
<td>RFC/URE</td>
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<td>CIP-004-1</td>
<td>R4</td>
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</table>

The entity self-reported the issue by submitting all acceptable TFE Requests and has subsequently performed all of the compensating measures as discussed in the TFE Requests.
Upon further investigation of the facts and circumstances, substantial risk to the reliability of the Bulk Power System (BPS).

SPP_UREI discovered that full personnel risk to the reliability of the Bulk Power System (BPS).

SPP_UREI implemented additional security controls to its server facilities access request process, the management authorization of the prerequisites, or PRAs needed in order to access.

SPP_UREI installed a server rack that can only be opened by a newly installed security card is attached to the rack. Moreover, aural automation is used upon an individual entering the server room is located 24 hours a day, 7 days a week with a device installed in the server room.

I certify that mitigation was complete, and SPP_UREI certified that mitigation was complete.
<table>
<thead>
<tr>
<th>Region</th>
<th>State</th>
<th>Entity</th>
<th>Is Unidentified</th>
<th>NERC Standard(s)</th>
<th>Date</th>
<th>Event Type</th>
<th>Details</th>
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<tr>
<td>Southwest Power Pool Regional Entity (SPP RE)</td>
<td></td>
<td></td>
<td></td>
<td>NERC.CC002XX</td>
<td>SPP.201000325</td>
<td>R3</td>
<td>During a spot check, SPP RE determined that SPP _UREI was noncompliant with CIP-004-1 R3 for incorrectly identifying the network switches located within SPP _UREI’S Electronic Security Perimeter (ESP). Specifically, the switches were identified as Permitted Cyber Assets (PCAs) but they should have been identified as CCAs because they are the communication interfaces between the operator consoles and the name of SPP _UREI’s systems and essential to the reliable operation of SPP _UREI’s control center. SPP RE has determined that this issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the Bulk Power System. In SPP _UREI’s cyber assurance, PCAs and CCAs were identified within the same computer system and this was corrected. Consequently, the misclassification of the network switches had no actual impact to the reliability of the BPS, and there was no increased risk to the reliability of the BPS. SPP _UREI updated its Control Center CCA process to reflect the new list quarterly as required by the SPP _UREI Certified.</td>
</tr>
</tbody>
</table>
| Entity | Registered Entity | NCR XXXX | SPPR1000792 | CIP-400-1 | R6 | SSPP URE4 reported in its Self Certification that it was in full compliance with CIP-004-2 and that it did not pose a serious or substantial risk to the reliability of the Bulk Power System. Although SSPP URE4 had not identified a process for change control and configuration management for adding, modifying, or removing all CCA hardware or software, SSPP URE4 had a Change Control process that it used for changes to its systems hardware and applications/databases that were controlled by the vendor. Any changes, additions, or upgrades to SSPP URE4 equipment were provided by the vendor to SSPP URE4 and included detailed procedures and configuration changes that explained the effects of the new equipment would have on the SPP URE4's system. Also, SSPP URE4 had been using a spreadsheet to document changes that occurred to its system software, but the procedures of how and when to document changes was not included in SSPP URE4's policy. While the change control program SSPP URE4 used on its SCADA system was not a formal process, it acknowledged that document changes in software and hardware that affected an important component of the system and that these changes had been documented. SSPP URE4 has determined that this process meet the requirements for change control and configuration management. SSPP URE4 did not have a physical document addressing sabotage reporting, but it did have a third party process for sabotage reporting, and it used this process for sabotage reporting, along with CIP-001-1. In a Self-Certification, SSPP URE4 indicated that it did not have procedures for the recognition of and for making their operating personnel aware of sabotage events on its facilities and multiple site sabotage affecting larger portions of the Interconnection. SSPP URE3 determined that the issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the Bulk Power System (BPS). Although SSPP URE3 did not have a physical document addressing sabotage reporting, it stated that it had relied on a third party process for sabotage reporting, and that it used this process for sabotage reporting, along with CIP-001-1. The BPS has developed an official procedure to document changes that occurred to its system software, but the procedures of how and when to document changes was not included in SSPP URE4's policy. While the change control program SSPP URE4 used on its SCADA system was not a formal process, it acknowledged that document changes in software and hardware that affected an important component of the system and that these changes had been documented. SSPP URE4 has determined that this process meet the requirements for change control and configuration management. SSPP URE4 did not have a physical document addressing sabotage reporting, but it did have a third party process for sabotage reporting, and it used this process for sabotage reporting, and that it used this process for sabotage reporting, along with CIP-001-1. In a Self-Certification, SSPP URE4 indicated that it did not have procedures for the recognition of and for making their operating personnel aware of sabotage events on its facilities and multiple site sabotage affecting larger portions of the Interconnection. SSPP URE3 determined that the issue posed a minimal risk and did not pose a serious or substantial risk to the reliability of the Bulk Power System (BPS). Although SSPP URE3 did not have a physical document addressing sabotage reporting, it stated that it had relied on a third party process for sabotage reporting, and that it used this process for sabotage reporting, along with CIP-001-1. SSPP URE3 developed an official procedure to document changes that occurred to its system software, but the procedures of how and when to document changes was not included in SSPP URE3's policy. While the change control program SSPP URE3 used on its SCADA system was not a formal process, it acknowledged that document changes in software and hardware that affected an important component of the system and that these changes had been documented. SSPP URE3 has determined that this process meet the requirements for change control and configuration management. SSPP URE3 did not have a physical document addressing sabotage reporting, but it did have a third party process for sabotage reporting, and that it used this process for sabotage reporting, along with CIP-001-1. "SSPP URE3 indicated that it did not provide its operating personnel with sabotage response guidelines for reporting disturbances due to sabotage or other equipment failures. SSPP URE3 indicated that it did not provide its operating personnel with sabotage response guidelines for reporting disturbances due to sabotage or other equipment failures. SSPP URE3 developed an official procedure to document previously identified SSPP URE4 processes for sabotage reporting and provided training to its personnel on the procedure. SSPP URE4 has determined that this process meet the requirements for change control and configuration management. SSPP URE4 did not have a physical document addressing sabotage reporting, but it did have a third party process for sabotage reporting, and that it used this process for sabotage reporting, along with CIP-001-1. "SSPP URE3 indicated that it did not provide its operating personnel with sabotage response guidelines for reporting disturbances due to sabotage or other equipment failures. SSPP URE3 developed an official procedure to document previously identified SSPP URE4 processes for sabotage reporting and provided training to its personnel on the procedure. SSPP URE4 has determined that this process meet the requirements for change control and configuration management. SSPP URE4 did not have a physical document addressing sabotage reporting, but it did have a third party process for sabotage reporting, and that it used this process for sabotage reporting, along with CIP-001-1. In a Self-Certification, SSPP URE4 indicated that it did not have procedures for the recognition of and for making their operating personnel aware of sabotage events on its facilities and multiple site sabotage affecting larger portions of the Interconnection.
Texas Entity SouthWest Power Pool (TREP-ERE) Inc.

| Texas Reliability Entity, Inc. (TREP-ERE) | Unidentified Registered Entity 1 (TREP-ERE) | TRE201000150 | CIP-005-1 | 01 | TRE_URE4 did not have a method to document complaints regarding sabotage to the appropriate parties in the Interconnection. This issue was discovered through a Self-Report.

This issue did not pose a serious or substantial risk and posed a minimal potential and actual risk to the bulk power system (BPS). Therefore, TRE_URE4 determined that the issue posed a minimal risk and did not pose a potential or substantial risk to the reliability of the Bulk Power System (BPS). Although the TRE_URE4 did not have a physical document associated with the procedure, it did rely on a third-party process for sabotage reporting, and it is the process for sabotage reporting, along with CIP-001-1, to draft a sabotage document that would comply with CIP-001-1. Therefore, there was a reporting procedure in place, just no documentation of it. Therefore, the risk to the BPS is minimal.

TREP-ERE developed an official procedure to document potential and actual risk to the bulk power system (BPS) because TRE_URE3's system area and operates a small distribution system fed from only two radial lines, thus reducing the risk to the BPS. Also, during the time period of the possible violation no event occurred related to the CIP-001-1.

TREP_ERE sent new procedures to Texas RE that included a procedure to document information regarding sabotage events, not just addressing the requirements of CIP-001-1. All mitigation activity has been completed and verified by Texas RE.

Texas Reliability Entity, Inc. (TREP-ERE) | Unidentified Registered Entity 2 (TREP-URE3) | TRE201000151 | CIP-006-1 | 02 | TRE_URE4 did not have a document to document complaints regarding sabotage to the appropriate parties in the Interconnection. This issue was discovered through a Self-Report.

This issue did not pose a serious or substantial risk and posed a minimal potential and actual risk to the bulk power system (BPS) because TRE_URE4's system area and operates a small distribution system fed from only two radial lines, thus reducing the risk to the BPS. Also, during the time period of the possible violation no event occurred related to the CIP-001-1.

TREP_ERE sent new procedures to Texas RE that included a procedure to document information regarding sabotage events, not just addressing the requirements of CIP-001-1. All mitigation activity has been completed and verified by Texas RE.

Texas Reliability Entity, Inc. (TREP-ERE) | Unidentified Registered Entity 3 (TREP-URE2) | TRE201000157 | CIP-007-1 | 03 | TRE_URE2 should have timely filed TFEs for some card reader controllers because it did not use anti-virus software and other malicious software prevention tools, which technically feasible to detect, prevent, deter, and mitigate the introduction, exposure, and propagation of malicious software.

This issue was discovered through a Self-Report.

The issue did not pose a serious or substantial risk and posed a minimal potential and actual risk to the bulk power system (BPS) because TRE_URE2's system area and operates a small distribution system fed from only two radial lines, thus reducing the risk to the BPS. Also, during the time period of the possible violation no event occurred related to the CIP-001-1.

TREP_ERE sent new procedures to Texas RE that included a procedure to document information regarding sabotage events, not just addressing the requirements of CIP-001-1. All mitigation activity has been completed and verified by Texas RE.

October 31, 2011
## Attachment A-1

### October 31, 2011 Public - Find Fix and Track Informational Filing of Remediated Issues Spreadsheet

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Resolution</th>
<th>Action Plan</th>
<th>Resource Plan</th>
</tr>
</thead>
<tbody>
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<td>October 31, 2011</td>
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<td>Mitigation plan was completed and verified.</td>
<td>Filings of TPRs on May 17, 2010 addressed the issue.</td>
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**PRIVILEGED/CONFIDENTIAL INFORMATION HAS BEEN REMOVED FROM THIS PUBLIC VERSION (CIP and NON-CIP)**
<table>
<thead>
<tr>
<th>Issue</th>
<th>Description</th>
<th>Occurrence of the Issue</th>
<th>Remediation and Flag Status</th>
<th>Source(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas Reliability Entity, Inc. (Texas RE)</td>
<td>Unidentified Registered Entity</td>
<td>NCRXXXXX</td>
<td>WECC2011032998</td>
<td>PRIVILEGED/CONFIDENTIAL INFORMATION HAS BEEN REMOVED FROM THIS PUBLIC VERSION (CIP and NON-CIP)</td>
</tr>
<tr>
<td>Texas Reliability Entity, Inc. (Texas RE)</td>
<td>Unidentified Registered Entity</td>
<td>NCRXXXXX</td>
<td>TRE201000165</td>
<td>CIP-001-1</td>
</tr>
<tr>
<td>Texas Reliability Entity, Inc. (Texas RE)</td>
<td>Unidentified Registered Entity</td>
<td>NCRXXXXX</td>
<td>TRE201000151</td>
<td>CIP-001-2</td>
</tr>
<tr>
<td>Western Electricity Coordinating Council (WECC)</td>
<td>Unidentified Registered Entity</td>
<td>NCRXXXXX</td>
<td>WECC2011032998</td>
<td>CIP-001-3</td>
</tr>
</tbody>
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This issue did not pose a serious or substantial risk and posed a minimal potential and actual risk to the bulk power system (BPS) because TRE_URE4 had sabotage-related procedures in place that addressed reporting of hazardous conditions. Although the procedures did not fully meet the requirements of the Standard, these procedures reduced the risk in the BPS. Also, operating personnel were verbally told to report suspected sabotage to the appropriate authorities.

**Mitigation Plan:**
- Procedure to include sabotage-related procedures.
- Operating personnel verbally told to report suspected sabotage to the appropriate authorities.

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**Mitigation Plan:**
- Procedure to include sabotage-related procedures.
- Operating personnel verbally told to report suspected sabotage to the appropriate authorities.

This issue did not pose a serious or substantial risk and posed a minimal potential and actual risk to the bulk power system (BPS) because although the procedure did not explicitly list the name of the delegate, the title was listed. During the compliance period, that interpretation was held by the same person. Although four persons changed official job titles, the entity presented other documents and results that demonstrated that this person was the person being referred to in the delegation of authority.

**Mitigation Plan:**
- Procedure to include sabotage-related procedures.
- Operating personnel verbally told to report suspected sabotage to the appropriate authorities.

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**Mitigation Plan:**
- Procedure to include sabotage-related procedures.
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This issue did not pose a serious or substantial risk and posed a minimal potential and actual risk to the bulk power system (BPS) because the lists of Critical Cyber Assets remained the same from years prior. The lists of Critical Cyber Assets were validated by a third-party consultant to validate the RBAM.

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- Procedure to include sabotage-related procedures.
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NOTES
What Happens When Matters and Rules 
Get to the 11th Floor and Beyond?
Robert H. Solomon
Solicitor, Office of General Counsel
Federal Energy Regulatory Commission
Court Cases

The Solicitor's Office, in the Office of the General Counsel, represents the Commission in Federal and state courts. It is responsible for the preparation and presentation of legal documents, pleadings and arguments supporting and enforcing FERC orders and opinions in judicial proceedings, including all appellate litigation in the US Courts of Appeals.

- » New Petitions
- » Pending Cases
- » Opinions
- » Appellate Briefs

CONTACT
Robert H. Solomon,
Solicitor
Room: 9A-01
Telephone: 202 502-8257
Email: robert.solomon@ferc.gov

QUICK LINKS
Calendar: Court Cases
FAQs: Court Cases

Updated: June 29, 2010

http://www.ferc.gov/legal/court-cases.asp

FERC Docket No. EL06-93
Assigned to: Lona Perry
Status: oral argument 11/2/2011

Alcoa Power Generating Inc. v. FERC, No. 10-1066 (D.C. Cir. filed 3/19/2010)

FERC Docket No. P-2197
Assigned to: Jennifer Amerkhall
Status: petition denied 5/3/2011


Conditional acceptance of proposals by the various Alliance Companies to join either the Midwest ISO or PJM. Alliance Cos., et al., 103 FERC ¶ 61,137 (2002), order on reh'g, 103 FERC ¶ 61,274 (2003).
FERC Docket No. ER03-765
Assigned to: Beth Pacella
Status: in abeyance


FERC Docket Nos. EL02-111, et al.
Assigned to: Beth Pacella
Status: abeyance

Arkansas Public Service Comm'n, et al. v. FERC, Nos. 08-1330, et al. (D.C. Cir. filed 10/14/2008 and later)

Opinions

Slip opinions and orders issued in FERC cases:
(Note: Many of the links below will take you out of FERC website)

Texas Pipeline Association v. FERC
No. 10-60066 (5th Cir. October 24, 2011)

ExxonMobil Gas & Power Marketing Company, et al. v. FERC
No. 10-1098 (D.C. Cir. October 21, 2011)

Montana Consumer Council v. FERC
No. 08-71827 (9th Cir. October 13, 2011)

County of Butte, California v. FERC
No. 10-70140 (9th Cir. August 2, 2011)

MarkWest Michigan Pipeline Company, LLC v. FERC
No. 10-1075 (D.C. Cir. July 1, 2011)

L.S. Starrett Company v. FERC
No. 10-1470 (1st Cir. June 15, 2011)

Alcoa Power Generating, Inc. v. FERC
No. 10-1066 (D.C. Cir. May 3, 2011)

George C. Jepsen, et al. v. FERC
No. 10-1104 (D.C. Cir. April 26, 2011)

Western Refining Southwest, Inc., et al. v. FERC
No. 09-60947 (5th Cir. March 24, 2011)

State of Oregon, et al v. FERC
No. 09-70269 (9th Cir. March 2, 2011)

Petersburg Municipal Power & Light v. FERC

Dynegy Midwest Generation, Inc. v. FERC
633 F.3d 1122 (D.C. Cir. 2011)

New York Regional Interconnect, Inc. v. FERC
634 F.3d 581 (D.C. Cir. 2011)

Maryland Public Service Commission, et al. v. FERC
632 F.3d 1283 (D.C. Cir. 2011)

Fishermen Interested In Safe Hydrokinetics, et al. v. FERC
No. 09-72920 (9th Cir. Jan. 28, 2011)

Flint Hills Resources Alaska, LLC v. FERC
631 F.3d 543 (D.C. Cir. 2011)

Murray Energy Corporation, et al. v. FERC
629 F.3d 231 (D.C. Cir. 2011)

City of Idaho Falls, Idaho et al. v. FERC
629 F.3d 222 (D.C. Cir. 2011)

http://www.ferc.gov/legal/court-cases/opinions.asp
Appellate Briefs

Click on the categories below to view additional information.

- 2011
- 2010
- 2009
- 2008
- 2007
- 2006
- 2005
- 2004

**Date**  **Case**  **Circuit**  **Attorney**

11/08/11 City of New Orleans, Louisiana, et al. v. FERC Nos. 11-1043 et al.


10/20/11 Occidental Permian Ltd., et al. v. FERC No. 10-1381

Conditional authorization to Tres Amigas to sell, at negotiated rates, transmission services on proposed superstation connecting the three continental interconnections and allowing the transmission of intermittent wind and solar generation. *Tres Amigas LLC*, 130 FERC ¶ 61,207 (2010), reh'g denied, 132 FERC ¶ 61,233 (2010).

10/04/11 Mobil Pipe Line Co. v. FERC No. 11-1021

Order affirming ALJ's Initial Decision, following hearing, and denying Mobil's application for market-based rate authority. *Mobil Pipe Line Co.*, 133 FERC ¶ 61,192 (2010).

08/11/11 Freeport-McMoran Corp. v. FERC No. 08-1349, et al.


The Role of State Public Utilities Commissions In Proceedings Before The Federal Energy Regulatory Commission

By
Frank R. Lindh
General Counsel, California Public Utilities Commission

Energy Bar Association “Primer” on FERC Practice
Washington, D.C. December 2, 2011

Disclaimer: The views expressed in this presentation are entirely those of the presenter, and should not be construed to represent the position of the Public Utilities Commission or any other agency of the State of California.
FERC and the States: Joined at the Hip
Roots of Federal/State Partnership: The Attleboro case (1927)


- **Held:** The sale of electric power, in a wholesale transaction, by a Rhode Island Utility to a Massachusetts utility, across the state line between the two states, was outside the regulatory powers of the Rhode Island Public Utilities Commission. Because this was “interstate commerce,” an individual state like Rhode Island could not regulate the terms of such a wholesale transaction, under “dormant” Commerce Clause principles.
Roots of Federal/State Partnership: Natural Gas Equivalent of Attleboro

*Missouri v. Kansas Gas Co.*, 265 U.S. 298 (1924)

- **Held**: Natural gas piped from Oklahoma and Kansas into Missouri, and then sold in Missouri at wholesale to gas distribution utilities, was “interstate commerce,” not subject to regulation by the Missouri Public Utilities Commission.
In the 1930s, Congress enacted two statutes, instituting Federal regulatory jurisdiction over the wholesale, interstate transactions the states could not regulate under Atteleboro and Kansas Gas:

The Federal Power Act of 1935
The Natural Gas Act of 1937

These two federal statutes were “. . . so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges.” Atlantic Refining Co. v. Public Services Commission of New York, 360 U.S. 378, 388 (1959).
State Public Utilities Commissions Have Special Status at FERC

FERC traditionally gives substantial deference to the views of state public utilities commissions in its proceedings.

In contrast to other parties (private and public), State PUCs are afforded intervention as-of-right in FERC dockets.
Thank you.

QUESTIONS AND ANSWERS ARE WELCOME
BIOGRAPHIES
BIOGRAPHY

JOHN T. CARLSON

John Carlson is the Deputy Director, Office of Electric Reliability. In this position Mr. Carlson is responsible for advising the Commission on Technical and Policy issues relating to Electric Reliability and Cyber Security. He was appointed to this position in 2010.

Mr. Carlson has been a member of FERC’s technical staff for the past 32 years. Prior to being appointed to his present position, he served as the Deputy Director of the Division of Electric Power Regulation – West in FERC’s Office of Energy Market Regulation.

Mr. Carlson received a B.A. degree from Michigan State University, and an M.A. degree from American University.
Practice Experience


He regularly counsels clients in non-public and public audits, investigations and enforcement proceedings. He has also served as lead counsel in numerous FERC adjudicative and settlement proceedings and assisted clients in numerous judicial proceedings before federal and state courts. Mr. Hagan was named an "Up and Coming" attorney in Energy: Electricity (Regulatory & Litigation) in the 2011 edition of Chambers USA, where he was described as having a "really good grasp of the litigation side of the practice."

Mr. Hagan advises clients on a variety of transmission and interconnection issues, compliance with FERC's standards of conduct, market-based and cost-based rate issues, and Order Nos. 888 and 890. He also assists clients with internal audits and developing and implementing compliance programs. In addition to developing and maintaining the White & Case NERC Database, which contains summaries of NERC Notices of Penalty, Administrative Citation of Penalties and Find, Fix, Track and Reports, he advises clients on a broad array of reliability issues, including NERC registration requirements, audits, self-reports, methods for complying with reliability standards, developing compliance protocols and procedures, assessing and mitigating reliability related risk when purchasing and selling jurisdictional assets and negotiations with NERC and regional entities.

Daniel also assists clients in negotiating agreements for energy management services and the purchase and sale of electric energy and related products, thermal energy and natural gas. Mr. Hagan has also obtained regulatory approvals for clients seeking to merge, acquire or dispose of FERC jurisdictional assets.

Speaking Engagements


Professional Associations

Energy Bar Association, Renewable Energy & Demand-Side Management and System Reliability, Planning & Compliance Committees
New Jersey Bar Association, Public Utility Law Section
District of Columbia Bar Association
Raymond W. Hepper – Vice President, General Counsel & Corporate Secretary

Mr. Hepper received a Bachelor of Science degree in 1976 from Lehigh University, summa cum laude, and a Juris Doctorate from the University of Pennsylvania Law School in 1979. He is admitted to practice law in New Jersey, Pennsylvania, Maine and Massachusetts.

Mr. Hepper joined ISO New England in June of 2004. As Vice President, General Counsel and Corporate Secretary, he is the principal legal advisor for ISO New England, and is responsible for coordinating all legal and regulatory activities. ISO New England is the independent system operator for New England. In addition to operating the bulk electricity system for the region, ISO New England administers the wholesale electricity marketplace, as well as the Open Access Transmission Tariff on behalf of the New England Power Pool. ISO New England is based in Holyoke, Massachusetts.

Mr. Hepper began his legal career as an Appellate and Review Attorney at the U.S. Department of Justice. In 1989 he joined Central Maine Power Company in Augusta, Maine as a tax attorney, and after four years he made the transition to regulatory law as Assistant General Counsel, where he was responsible for all proceedings before the Maine Public Utilities Commission and the Federal Energy Regulatory Commission. In 1994, he became General Counsel at CMP. When he departed in 2000, he was managing the Legal, Rates, Environment, and Regulatory departments. Immediately before joining ISO New England, Mr. Hepper was a partner at Pierce Atwood in Portland, Maine, where he specialized in Energy & Utility Regulation, representing clients in a variety of matters related to power transmission, complex regulatory proceedings, transactions and contract negotiations.
Paul Korman

Member

Paul Korman is experienced in complex litigation before federal and state courts and the Federal Energy Regulatory Commission (FERC). He advises interstate pipelines, intrastate pipelines, natural gas producers, marketers, and distribution companies on virtually all aspects of natural gas regulation. Mr. Korman represents companies and investors in rate cases, complaints, and confidential investigations before FERC and other regulatory agencies involving both natural gas and electricity. In November 2007, he was invited to be a member of the “Practitioners Panel” at FERC’s first conference on Energy Policy Act of 2005 enforcement.

Recent examples of Mr. Korman’s work include:

- On behalf of the Texas Pipeline Association, briefed and argued an appeal resulting in an opinion from the U.S. Court of Appeals for the Fifth Circuit vacating the Commission rule requiring the posting of certain data by intrastate pipelines.
- Successfully litigating rate, complaint, and certificate cases on behalf of interstate pipelines, including rate cases initiated under sections 4 and 5 of the Natural Gas Act and section 311 of the Natural Gas Policy Act.
- Successfully representing a client subject to a FERC show cause order alleging market manipulation.
- Resolving FERC enforcement matters without the client paying a civil penalty.
- Providing compliance training for regulated entities on all facets of FERC’s regulations and conducting internal investigations.

Professional Background

Prior to joining Van Ness Feldman, Mr. Korman served as the Assistant General Counsel of MidCon Corp., a subsidiary of Occidental Petroleum Corporation. In addition to representing MidCon Corp. at FERC, he was responsible for all phases of complex litigation between two interstate pipelines, which included proceedings before federal and state courts and FERC. He also managed administrative litigation and won reversal of an order seeking over $1 billion in restitution, precipitating a favorable settlement.

Government Service

Assistant to Commissioner George Hall, Federal Energy Regulatory Commission, 1977-1979

Special Assistant, Federal Power Commission, 1975-1977
Professional and Civic Affiliations
- Energy Bar Association

Honors & Distinctions
- *Legal 500 USA*; Energy Litigation; 2008-2010
- *Chambers USA*; Energy: Oil & Gas; 2010-2011
Paul Mohler is an attorney in private practice and is actively engaged in federal and state energy regulatory, enforcement, and litigation matters.

Mr. Mohler is currently a co-Chair of the EBA’s FERC Practice and Administrative Law Judges Committee. He previously served on the EBA Board of Directors and is a past President of the Charitable Foundation of the Energy Bar Association.

Mr. Mohler was formerly a shareholder at Heller Ehrman LLP, where he served a term as co-Chair of its Energy Practice and specialized in complex energy litigation. Before leaving for private practice, he served at the FERC in a variety of roles, including as a trial attorney, dealing with the natural gas, oil pipeline, and electric industries.

Prior to obtaining his law degree, Mr. Mohler was employed as an economist, public utilities specialist, and expert witness in proceedings involving natural gas pipeline purchasing practices, take-or-pay contracts, rates, and accounting issues.

Mr. Mohler received his J.D. from George Mason University School of Law, a M.A. in Economics from The George Washington University, and a B.A., Magna Cum Laude, with Distinction in Economics, from San Diego State University. He is a veteran of the U.S. Navy.

Mr. Mohler is a member of the Virginia State Bar and the District of Columbia Bar. He is admitted to practice before the Supreme Court of the United States, the U.S. Courts of Appeals for the District of Columbia, Fourth, Fifth, and Ninth Circuits, and the U.S. District Court for the District of Columbia.

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Paul B. Mohler
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Direct: 571.344.5097
Voicemail or Fax: 703.533.7226
Email: pmohler@paulmohler.law

11/18/11
Harvey L. Reiter

DIRECT CONTACT
202.785.9100
WASHINGTON, D.C.
1150 18th Street, N.W., Suite 800
Washington, D.C. 20036

Harvey represents clients in the natural gas, electric utility and communications industries, primarily before the Federal Energy Regulatory Commission, the Federal Communications Commission and the federal appellate courts. His clients have included natural gas distributors, governmental agencies, the World Bank, electric utilities, cogenerators, gas and power marketers and Internet service providers. He has provided legal counseling, litigation, appellate, transactional and other legal services, including 20 oral arguments before various federal circuit courts of appeal.

Prior to entering private practice, Harvey was, for nine years, a staff attorney and then later Special Assistant to the Deputy General Counsel for Litigation with the Federal Energy Regulatory Commission. Among his responsibilities were the supervision of the trial staff in connection with electric, natural gas hydroelectric and oil pipeline proceedings.

Representative Experience

- Known for his work and publications on competition in the electric and natural gas industries. His principal areas of concentration have been in proceedings before the Federal Energy Regulatory Commission and the federal courts involving the competitive restructuring of the natural gas and electric utility industries.
- He has represented coalitions of state public utility commissions in the Northeast and the Midwest in cases related to the formation of Regional Transmission Organizations (RTOs), represented a large principal utility in numerous cases related to the design of California electric markets, and has represented groups of local gas distribution companies in various pipeline rate proceedings before FERC.
- Before the FCC he represented a broad group of state consumer advocates, local communities and Internet Service Providers (ISPs) advocating open access to cable systems by ISPs as a means to promote competition with cable-affiliated ISPs.

Education

Boston University, J.D., 1975

Michigan State University, B.A., Economics, graduated with high honors, 1972

Of Note

Harvey currently serves as Executive Editor of the Energy Law Journal. His 1983 law review article outlining his views on FERC’s authority to compel open access transportation and transmission by natural gas pipelines and electric utilities, "Competition and Access to the Bottleneck: The Scope of Contract Carrier Regulation under the Natural Gas Act", was subsequently cited by the D.C. Circuit Court of Appeals in upholding FERC’s open access rules for natural gas pipelines. Associated Gas Distributors v. FERC, 824 F.2d 981, 999 (D.C. Cir. 1987). That article helped lay the legal groundwork for FERC’s subsequent decisions to open these industries up to competition.
Steve Ross is a partner in the electric power practice group at Steptoe & Johnson. Steve has been a FERC practitioner for nearly thirty years, beginning his career with FERC in 1982. Steve advises clients on an array of transmission issues, and most recently he has been working with clients that are attempting to develop new large scale transmission projects to improve regional reliability and to accommodate the delivery of new renewable energy resources.
Bob has been FERC Solicitor since November 2005. The Solicitor’s Office operates within the FERC Office of the General Counsel. The Solicitor is responsible for defending the agency’s orders, policies and initiatives, primarily in the U.S. Courts of Appeals. The Solicitor has independent litigating authority – i.e., the Solicitor files pleadings and presents oral argument on behalf of the FERC without the need for coordination with other federal agencies and departments – except in matters before the U.S. Supreme Court, where the Solicitor coordinates with the Solicitor General at the U.S. Department of Justice. Information about the Solicitor’s Office and its operations – including links to pending cases, recent decisions, and recent briefs – can be found (on the FERC web site) at http://www.ferc.gov/legal/court-cases.asp.

Within the Solicitor’s Office, Bob has the privilege of working with 8 of the finest attorneys in the energy and appellate bars – Lona Perry, Beth Pacella, Judy Albert, Holly Cafer, Carol Banta, Bob Kennedy, Sam Soopper, and Jennifer Amerkhail. Bob also has the pleasure of working daily with members of the energy and appellate bars who consistently raise thoughtful, interesting issues for consideration and practicing before judges who, usually, are studious and fair in their deliberations. In addition to his management responsibilities, Bob personally has presented oral argument before appellate panels, in defense of the Commission, over 60 times.

Bob has been with FERC for 23 years. Before becoming Solicitor, Bob was Associate and Deputy Solicitor (2001-2006), a Legal Advisor to Commissioners Bailey and Hébert (1998-2001), a Deputy Assistant General Counsel (1991-1998), and a trial attorney in the Solicitor’s Office (1988-1991). During these years, Bob has had the extremely good fortune of working with a number of terrific bosses and mentors, including Jerry Feit, Dan Larcamp, Vicky Bailey, Curt Hébert, Dennis Lane, and many General Counsel and other public-minded FERC lawyers and officials.

Before coming to FERC in 1988, Bob was an associate attorney at Newman & Holtzinger, a Washington, D.C. law firm specializing in energy and regulatory matters. Bob received his law degree in 1985 from Washington University School of Law in St. Louis, Missouri and his undergraduate degree in 1982 from the University of Pennsylvania in Philadelphia, Pennsylvania.
Carla Urquhart is a Managing Attorney at the Federal Energy Regulatory Commission, Office of General Counsel, where she works on corporate and transactional issues, as well as market-based rate and market design issues. She joined FERC in 2006 as the agency was implementing and issuing rules under EPAct 2005. Prior to joining FERC, she was an associate at Milbank, Tweed, Hadley & McCloy LLP from 1998-2006 where she represented clients on significant cross border mergers, as well as financial institutions and private equity investors in the energy industry. She was an associate at Grammer Kissel Robbins Skancke & Edwards (now GKRSE) from 1997-1998.

Carla has served as Chair and Vice Chair of the EBA Finance and Transactions Committee. She has a J.D. from Washington and Lee University School of Law.