

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Enforcement of Statutes, Orders Rules, and Regulations))))	Docket No.	PL10-4-000
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COMMENTS OF THE ISO/RTO COUNCIL

I. INTRODUCTION

The ISO/RTO Council (“IRC”)¹ respectfully submits these joint comments in response to the Commission’s Order, dated April 15, 2010,² suspending its March 18 Policy Statement on Penalty Guidelines.³ In its Suspension Order, the Commission determined that the public interest would be served by affording interested entities a broader opportunity to comment on the penalty guidelines set out in the Policy Statement before issuing a final order and putting them into effect.⁴ The Commission specifically noted that it would assess the comments and

¹ The IRC is comprised of the Alberta Electric System Operator (“AESO”), the California Independent System Operator (“CAISO”), Electric Reliability Council of Texas (“ERCOT”), the Independent Electricity System Operator of Ontario, Inc., (“IESO”), ISO New England, Inc. (“ISONE”), Midwest Independent Transmission System Operator, Inc., (“Midwest ISO”), New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, L.L.C. (“PJM”), Southwest Power Pool, Inc. (“SPP”), and New Brunswick System Operator (“NBSO”). The IESO, AESO and NBSO are not subject to the Commission’s jurisdiction and these comments do not constitute agreement or acknowledgement that they can be subject to the Commission’s jurisdiction. The AESO and NBSO do not join in these comments. The IRC’s mission is to work collaboratively to develop effective processes, tools and standard methods for improving the competitive electricity markets across North America. In fulfilling this mission, it is the IRC’s goal to provide a perspective that balances reliability standards with market practices so that each complements the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers.

² *Order Regarding Policy Statement on Penalty Guidelines*, 131 FERC ¶ 61,040 (2010) (“Suspension Order”).

³ *Policy Statement on Penalty Guidelines*, 130 FERC ¶ 61,220 (2010) (“Policy Statement”).

⁴ Suspension Order at P 1.

determine whether to amend the Policy Statement before adopting it and putting it into effect.⁵

As described herein, the IRC focuses its comments on the manner in which the proposed Policy Statement applies to enforcement of, and applications of penalties to, violations of NERC Standards. In so doing, the IRC respectfully requests that the Commission amend the proposed Policy Statement before putting it into effect.

II. DISCUSSION

A. Concerns about Tying Culpability Scores, For Purposes of Escalating Penalty Amounts, to Size of Organization

The IRC recommends that the Commission reconsider the use of bright line staffing numbers as a measure of an organization's ability to pay a penalty. In the proposed Policy Statement, the Commission states that the Commission will:

consider whether tolerance of the violation by substantial authority personnel was pervasive throughout the organization or unit of the organization within which the violation occurred. Following the Sentencing Guidelines, this factor is tied to the size of the organization and the unit of the organization within which the violation occurred. For example, we will increase the "culpability score" by five points where this factor applies to an organization with 5,000 or more employees, four points if 1,000 or more employees, three points if 200 or more employees, two points if fifty or more employees, and one point if ten or more employees.⁶

The IRC recognizes that ability to pay should be a relevant factor in assessing the size of a particular penalty. In fact, the Commission has already recognized that an RTO's/ISO's not-for-profit structure is a relevant factor to consider in assessing penalties against RTOs and ISOs.⁷

⁵ *Id.*

⁶ Policy Statement at P 44.

⁷ *See Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the*

However, the IRC is concerned that the use of bright line staffing numbers as an absolute measure of an organization's ability to pay may be too sweeping and that a more refined case specific examination is in order. For example, certain energy market participants routinely create multiple limited liability corporations or wholly-owned corporations, each of which owns a particular generating station. Further, in the case of other organizations, the Policy Statement may create an incentive to structure corporate subsidiaries involved in key reliability functions so as to limit that entity's staffing, and thus reduce the level of penalty exposure. Such staffing levels may not be adequate to maintain reliable operations.

Second, the proposed Policy Statement would be improved by cross-referencing prior Commission precedent regarding the impact that the *type* of organization may have on the assessment of penalties. For example, when the Commission originally approved the rules for certifying the Electric Reliability Organization, and the procedures for the establishment, approval and enforcement of electric Reliability Standards, the Commission acknowledged the “unique characteristics of ISOs and RTOs and agree[d] that, in determining a penalty, circumstances such as organizational structure or not-for-profit status will be considered.”⁸

In short, where the entity found to violate the standard is a not-for-profit entity, the Policy Statement should reassert the Commission's previous findings that such factors should be taken into account to determine not only that no monetary penalty may be appropriate, but also to mitigate such penalties if the Commission concludes that a monetary penalty is appropriate. As to the Commission's plan to use the size of an entity as a proxy for ability to pay, the IRC

Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 at P 56 (2006).

⁸ *Id.*

suggests that the Commission further refine its analysis so as to ensure that the Commission can holistically judge an entity's ability to pay in those cases where reliability functions are subdivided among multiple corporate subsidiaries.

B. The Penalty Guidelines Should Clarify that Activities on Radial Transmission Facilities Cannot Constitute Violations of NERC Standards

In the Penalty Guidelines' "Illustrative Examples" of risk of harm, the Commission identifies failure to maintain radial facilities as constituting "minor harm." Specifically, the Penalty Guidelines state that an example of a "High risk of minor harm" is:

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.⁹

Under Order No. 693, the Commission stated that, "for at least an initial period, the Commission will rely on the NERC definition of bulk electric system..."¹⁰ NERC's definition of the "bulk electric system" is:

As defined by the Regional Reliability Organization, the electric generation resources, transmission lines, interconnections with neighboring systems, and associated equipment, generally operated at voltages of 100kV or higher. Radial transmission facilities serving only load with one transmission source are generally not included in this definition.¹¹

⁹ Policy Statement, FERC Penalty Guidelines at § 2A1.1, Illustrative Example (1)(C.1); *see also* Policy Statement at P 50.

¹⁰ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 75, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

¹¹ NERC Glossary of Terms Used in Reliability Standards (updated Apr. 20, 2009), available at http://www.nerc.com/docs/standards/rs/Glossary_2009April20.pdf.

While the Commission or NERC may modify the definition of “bulk electric” or “bulk power” system, at the present time, radial facilities are excluded. Therefore, the Commission should not consider events occurring solely on radial transmission facilities as potential “minor harm” constituting a violation of NERC Standards, subject to these Penalty Guidelines. The IRC notes that this comment applies to the example provided in the Policy Statement, which was based on the application of a Reliability Standard to a radial facility. The IRC understands that radial transmission facilities are FERC-jurisdictional and are subject to the enforcement of other rules, such as compliance with tariff provisions, and that penalties may apply in that context.

C. The Commission Should Add Additional Clarity that Use of the Guidelines is Discretionary and how the Guidelines Relate to the NERC Penalty Matrix in the Case of Violations of Reliability Standards.

While Commission staff has stated during recent technical conferences that the Policy Statement is intended to be used with discretion, the IRC believes that the Policy Statement itself should be revised to clearly state that the Commission retains discretion as to whether the application of the guidelines set out in the Policy Statement should be utilized in a given case. The IRC recommends that the Commission clarify that (1) it will apply the Policy Statement only when it determines that a penalty is appropriate, and (2) the Commission retains the discretion not to impose a penalty, and hence not apply the Penalty Guidelines, in the first place. In other words, the Commission should clarify that it may determine that no penalty is warranted even when violations have been identified.

Further, the relationship between the Policy Statement and the NERC penalty matrix is not clear. Thus, the penalty regime to be utilized in cases of Reliability Standards violations is uncertain. The Commission should clarify whether it intends that the NERC matrix be used in cases where NERC is calculating the appropriate penalty and that the Policy Statement be used

in cases where the Commission is calculating the penalty. Alternatively, the Commission should clarify whether its intent is to utilize the policy statement to displace the NERC penalty matrix only in cases of extraordinary Reliability Standard violations. The stated goal of the Policy Statement is to provide greater “fairness, consistency, and transparency” to the enforcement program. To that end, additional clarity regarding the relationship between the NERC penalty matrix and the Policy Statement would inform industry as to the circumstances when each may apply.

The Commission should also clarify that it will not use the Penalty Guidelines as an opportunity to layer on penalty schemes in addressing a single set of potential violations. At Paragraph 64 of the Policy Statement, the Commission explains that NERC and the Regional Entities (“REs”) also possess the authority to not only conduct their own investigations, but to impose penalties under a standalone penalty scheme. The Commission explains:

In our previous determinations on notices of penalty, our prior Policy Statements on Enforcement and the Policy Statement on Compliance were resources that informed our judgment whether to review the notices of penalty. We intend to use the Penalty Guidelines in a similar manner. That is, while we do not anticipate applying the Penalty Guidelines when we look at most notices of penalty that we receive, for an out-of-ordinary notice of penalty describing a serious violation we may consider the results of applying the Penalty Guidelines—but these results would not be determinative of our decision to proceed with a further review.¹²

Notwithstanding the Commission’s stated track record with respect to reviewing Regional Entity or NERC penalty assessments, the fact remains that companies remain subject to multiple investigations of the same facts and circumstances. Also, given the time and resources that are needed to respond to multiple regulatory entities, little has been identified in terms of

¹² Policy Statement at P 64.

deterrent value or restitution to the market that justifies subjecting companies to more than one investigation into the same circumstances, yet the Penalty Guidelines suggest that companies may now have a greater potential of having to respond to multiple authorities than ever before. The Commission has established a very transparent process with respect to violations of NERC Standards. The Commission should clarify that it places great confidence in that process, and thus does not intend to layer an additional investigation and analysis upon the NERC process. Indeed, where the Commission has said that it would consider applying Penalty Guidelines factors to NERC Notices of Penalties in “out-of-the-ordinary” cases, the Commission should provide examples of what an “out of the ordinary” circumstance would be, and clarify that such an application would not require the initiation of an entirely new investigation.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, the IRC requests that the Commission consider these comments and modify the penalty guidelines as set out in the Policy Statement as discussed above.

Respectfully submitted,

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