

FERC Issues New Civil Penalty Guidelines

March 22, 2010

On March 18, the Federal Energy Regulatory Commission (FERC or the Commission) issued a Policy Statement on Penalty Guidelines (Penalty Guidelines) to assess civil penalties pursuant to the Commission's civil penalty authority that was created by the Energy Policy Act (EPAAct) of 2005. The Penalty Guidelines are modeled after the factor-based United States Sentencing Guidelines, and are modified to account for Commission-specific considerations and concerns. By offering a quantitative and qualitative factor-based approach, FERC seeks to promote greater fairness and proportionality in determining penalties. Penalty Guidelines will apply to violations of FERC regulations, orders, and policies along with a special application for violations of FERC-approved Reliability Standards.

In its order issuing the Penalty Guidelines, FERC acknowledged that it has been difficult to maintain consistency with prior issuances of civil penalties following EPAAct 2005's enactment. FERC believes that the creation and application of uniform Penalty Guidelines will assist in reducing penalty disparities between similarly situated offenders.

FERC sees the new Penalty Guidelines as a means to promote administrative efficiency in determining civil penalties and to enable penalties to be determined in a more straightforward manner. However, FERC reserves the discretion to depart from the Penalty Guidelines when the Commission deems it appropriate.

FERC also views the Penalty Guidelines as a measure to promote greater transparency by providing notice to organizations as to how civil penalties are determined for violations of its regulations, orders, and policies. In doing so, FERC enumerated quantitative factors that follow a five-step process:

- **Step 1:** Base Violation Level
- **Step 2:** Adjustments
- **Step 3:** Base Penalty
- **Step 4:** Culpability Score
- **Step 5:** Multiplication of Base Penalty by Minimum and Maximum Multipliers

First, depending on the violation, a Base Violation Level will be selected for the violation type, for example, reliability, manipulation, and so on. Second, the Base Violation Level is then adjusted for the particular circumstances that surrounded that particular violation, from which a final violation level is determined, which in turn corresponds to a specific dollar amount ranging from \$5,000 to \$72.5 million. Third, the Base Penalty is set by taking the greater of (a) the final violation level dollar amount and (b)

the pecuniary gain achieved or the pecuniary loss created by the violation. Fourth, the Culpability Score is calculated and is adjusted upward or downward depending on a number of factors. Fifth, Minimum and Maximum Multipliers that correspond to the Culpability Score are applied to the Base Penalty to yield a dollar range within which the final penalty—as determined by the Commission—will fall.

FERC illustrated the process with four hypothetical examples of different substantive standards: market manipulation, a tariff violation, a capacity release violation, and a violation of FERC-approved Reliability Standards.

FERC acknowledged that statutory, regulatory, and policy changes will affect how the new Penalty Guidelines will be applied, and thus understands that the Penalty Guidelines will warrant amendment and adjustment in light of reason and experience.

A technical conference on the Penalty Guidelines will be held at the Commission on April 7, 2010 at 9:00 am. One year from the implementation of the Penalty Guidelines, FERC Enforcement staff will conduct another technical conference to discuss the effectiveness of the guidelines and hear comments and questions from industry participants.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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