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FERC Issues Revised Policy Statement on Penalty Guidelines

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On September 17, the Federal Energy Regulatory Commission (FERC or the Commission) issued a Revised Policy Statement on Penalty Guidelines (Revised Policy Statement), 132 FERC ¶ 61,216 (2010), which addresses comments received concerning the Commission's Policy Statement on Penalty Guidelines issued on March 18, 2010. The Commission also issued revised Penalty Guidelines attached to the Revised Policy Statement. FERC reiterated that the purpose of the Penalty Guidelines is to ensure fairness, consistency, and transparency. The Commission directed its Office of Enforcement (Enforcement) to hold a technical conference one year from the issuance of the revised Penalty Guidelines to discuss how they have worked and to receive comments.

The Revised Policy Statement begins by noting that the Penalty Guidelines would continue to be based on the U.S. Sentencing Guidelines, and that the Penalty Guidelines would not affect Enforcement Staff's exercise of discretion to close investigations or self-reports without sanctions. The Commission states that the Penalty Guidelines come into effect only after the Enforcement Staff determines that a violation has been committed and that such violation warrants the imposition of a penalty by the Commission.

The Revised Policy Statement addresses a number of electric-reliability-related issues. First, FERC reiterates that the Penalty Guidelines will be appropriately applied to violations of Reliability Standards. However, the Commission will not apply the Penalty Guidelines in its review of Notices of Penalty issued by the North American Electric Reliability Corporation (NERC). Rather, the Penalty Guidelines will be reserved solely for FERC's own 18 C.F.R. Part 1b investigations and enforcement actions.

The Revised Policy Statement also reduces the base violation for the Reliability Guidelines from a Base Violation Level of 16 to six. The Commission also states that it will not attempt to conduct a specific, individualized assessment of the value of the loss of load as a measure of the harm from a violation, but will instead look to the quantities of lost load as a measure of harm.

With respect to compliance credits, the Commission reiterates that its primary goal is compliance, not assessing penalties, and states this explicitly in the revised Penalty Guidelines. To that end, the Revised Policy Statement provides for partial credit for effective compliance programs—even those that do not meet every requirement of the Penalty Guidelines. The Commission also deletes the provision in the Penalty Guidelines that would automatically eliminate any compliance credit where an organization's senior-level personnel participated in, condoned, or were willfully ignorant of a violation, recognizing that an organization that has devoted significant efforts and resources to compliance may not be able to avoid a violation if it has a rogue employee that does not adhere to clear direction from the company. In the Revised Policy Statement, FERC also does the following:

- Declines to eliminate the requirement that, for compliance credit to be received, a detected violation must be reported without unreasonable delay
- Notes that the Penalty Guidelines adequately take into account whether an entity has an effective compliance program
- States that it will consider the size of an organization for purposes of determining whether an organization has met the requirements an effective compliance program

In the Revised Policy Statement, FERC modifies 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 factor has independent value and will be so credited.

The modified Penalty Guidelines now include a scienter requirement for intentional or reckless misrepresentations and false statements to FERC staff, clarifying the Commission's intention that the affected guideline not be applied to inadvertent errors or miscommunications in organizations' filings or in their communications with the Commission or its staff.

The Revised Policy Statement also addresses issues regarding the following:

- Efforts to remedy violations
- Prior history of violations
- Misrepresentations and false statements
- Multiple violations
- Organization size and status
- A statutory cap of $1 million per day, per violation
- Duration and volume enhancements
- Consideration of loss under the Penalty Guidelines
- Issuance of the Penalty Guidelines through a policy statement rather than a rulemaking

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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