

## **FERC Issues Guidance on Reliability Penalties Assessed for Repeated Violations by the Same or Affiliated Companies**

**September 1, 2010**

In a Guidance Order issued on August 27, the Federal Energy Regulatory Commission (FERC or the Commission) provided guidance on how the North American Electric Reliability Corporation (NERC) and the Regional Entities responsible for the enforcement of mandatory Reliability Standards should assess repeated violations by the same or affiliated companies. The Commission expressed concern that NERC and the Regional Entities have not sufficiently considered repeated violations as an aggravating factor in approving monetary sanctions. To address this concern, the Commission provided new guidance that broadens the category of what will be considered a “repetitive” violation of a Reliability Standard in the future. As a result, the compliance risk presented by many Reliability Standards, particularly those dependent on human judgments and procedures, will significantly increase.

This Guidance Order stemmed from the Commission’s review of a Notice of Penalty filed by NERC, in which a utility was found to have twice violated PRC-005-1 Requirement R2.1, but not to have engaged in “repetitive” infractions of the Reliability Standards. In that Notice of Penalty, NERC claimed that the two violations were unrelated because they were caused by separate breakdowns in the technology and management processes used by the utility for protection system maintenance.

As a result, NERC did not apply the previous violation as an aggravating factor to increase the appropriate monetary sanction for the second violation, as permitted by the NERC Sanction Guidelines, which contain the metrics and guidelines used to determine appropriate penalties for violations of mandatory Reliability Standards. The Commission rejected this distinction, concluding that the violations were related because they both resulted from “inadequacies in the management and effectiveness” of the protection system maintenance program.

The Commission then described what it considers “repetitive infractions” under the NERC Sanction Guidelines. The Commission explained that a violation should be considered a repeat violation and therefore potentially subject to heightened sanctions if the violation meets any of the following criteria:

- It is the result of conduct similar to the conduct underlying the previous violation of the same or a closely related Reliability Standard Requirement
- It is the result of conduct addressed in a company’s mitigation plan for a prior violation of the same or a closely related Reliability Standard Requirement
- It is an additional violation of the same Reliability Standard Requirement

The Commission also clarified that in some circumstances a prior violation by an affiliate could provide a basis for a finding of a repeat violation. In determining whether two companies are affiliated, the Commission stated that NERC should consider whether the prior violation involved either of the following:

- An affiliate operated by the same corporate entity
- An affiliate whose reliability compliance activities are conducted by the same corporate entity

Finally, the Commission emphasized that where prior violations occurred within the boundaries of a different Regional Entity, the assessment of the new sanction should include a consideration of the prior violation as potential grounds for the finding of a repeated violation.

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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