

132 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.:

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, 2010.¹ 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.² 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,³ but do so in a more focused manner by assigning specific and

¹ *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220 (2010) (Policy Statement on Penalty Guidelines).

² The Penalty Guidelines will apply to any pending investigation where our Office of Enforcement staff (Enforcement staff or staff) and the organization have not yet entered into settlement negotiations.

³ *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 50-71 (2008) (Revised Policy Statement); *Enforcement of Statutes, Orders,*

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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.⁴ 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.

Rules, and Regulations, 113 FERC ¶ 61,068, at P 17-27 (2005) (2005 Policy Statement).

⁴ Compare Penalty Guidelines §§ 1C2.3, 2A1.1, 2B1.1 with Revised Policy Statement, 123 FERC ¶ 61,156 at P 54-68.

- We accept the commenters' suggestion that we 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.
- We have modified the Penalty Guidelines' provision on compliance credit, section 1C2.3(f), in two respects. First, we agree to give partial compliance credit to organizations that have effective, yet imperfect, compliance programs. Second, we agree to delete the provision in the Penalty Guidelines that eliminates compliance credit when 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.
- We agree to unbundle the mitigation credits for self-reports, cooperation, avoidance of trial-type hearings, and acceptance of responsibility, recognizing that these factors carry independent value and should be credited accordingly.
- We agree to include a scienter requirement with respect to misrepresentations and false statements under section 2C1.1 of the Penalty Guidelines.

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.⁵ 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.⁶

II. Discussion

A. Sentencing Guidelines as a Model for the Penalty Guidelines

1. Comments

10. EEI, INGAA, NERC, MISO, NorthWestern, National Grid, the Joint Municipals, TANC, and Turlock comment that there are fundamental distinctions

⁵ *Enforcement of Statutes, Orders, Rules, and Regulations*, 131 FERC ¶ 61,040 (2010).

⁶ 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.⁷ 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, EEI, 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, EEI 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]nlike a civil regulatory context where violations generally are unintentional, narrowly focused miscues 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

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

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

⁹ Comments of EEI at 18-19.

¹⁰ Comments of APPA at 5.

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, EEI, NERC, and Reliability*First* comment that the Sentencing Guidelines provide an inappropriate model because their use is in decline in federal courts.¹³ For example, EEI 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, EEI 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 EEI, 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 Reliability*First* 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

¹¹ Comments of ELCON at 2-3.

¹² Comments of WIRAB at 2.

¹³ See Comments of EEI at 15-16; NERC at 14; and Reliability*First* at 10.

¹⁴ Comments of EEI at 15.

¹⁵ See Comments of EEI at 16 (citing Memorandum from Eric Holder to Heads of Department Components and United States Attorneys, June 16, 1999 (Holder Memo)).

¹⁶ *Id.*

¹⁷ Comments of NERC at 3; Reliability*First* at 10.

¹⁸ Comments of Turlock.

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 EPCRA 2005 and that we believe are the centerpiece of our penalty regime.”¹⁹ 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.”²⁰ 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.²¹ Also, by using the Sentencing Guidelines as a model, the Penalty Guidelines consider many of the same culpability factors that

¹⁹ Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 26.

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.

we have always considered, including prior history of violations, senior management involvement, compliance efforts, self-reporting, and cooperation.²²

17. Thus, we are not persuaded that modeling the Penalty Guidelines on the Sentencing Guidelines inappropriately inserts criminal law principles into our determination of civil penalties. Nor did the Commission in any way intend to insert such criminal law principles into our penalty regime. The Commission's ability to impose significant monetary penalties under the Penalty Guidelines for statutory and regulatory violations that do not require proof of intent or recklessness is *not* a function of using the Sentencing Guidelines as a model for our Penalty Guidelines. Rather, it is a result of a Congressional determination that persons and organizations that violate the statutes we administer can be subjected to civil penalties of up to \$1 million per day per violation.²³

18. We are also not persuaded by a related point advanced by EEI that the Sentencing Guidelines are a poor model for our Penalty Guidelines because "the Sentencing Guidelines for Organizations were not intended, even by their drafters, to apply to violations of regulatory regimes of the sort enforced by the Commission."²⁴ We have found nothing in the text of the Sentencing Guidelines

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.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 *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-*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.*"²⁶ The Court also ruled that a district court "must make an individualized assessment based on the facts presented."²⁷

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, *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 8C2.10 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.

²⁶ *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (emphasis added).

²⁷ *Id.* at 50. Furthermore, while it may have been historically true, as EEI claims, that many federal judges felt unduly constrained by the pre-*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

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Thus, the federal judiciary continues to use the Sentencing Guidelines as a first step in determining an appropriate penalty but departs where appropriate. Likewise, 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. The federal judiciary's continued use of the Sentencing Guidelines confirms our previously expressed view that "[t]he adoption of the Penalty Guidelines promotes greater fairness and ensures greater proportionality . . . by more rigorously imposing appropriately different penalties for conduct of differing severity."²⁸

20. We also reject EEI's claim that we should not use the Sentencing Guidelines as a model because "federal prosecutors do not use [the Sentencing Guidelines] consistently because they provide such poor incentives for corporate compliance programs."²⁹ EEI's asserted support for this position in the Holder Memo is unavailing. The argument fails to recognize that the Holder Memo and the Organizational Sentencing Guidelines address two different decisions made at two different stages in the enforcement process. The Holder Memo applies at the outset of the enforcement process and provides guidance to the Department of Justice (DOJ) staff in its exercise of discretion of whether to seek sanctions against a corporation. In contrast, the Organizational Sentencing Guidelines apply only after this decision to seek sanctions has been reached and provide guidance on the appropriate sanction for an admitted or proven violation.³⁰ Moreover, while EEI

best achieves the goals of sentencing. *See* United States Sentencing Commission, "Results of Survey of United States District Judges, January 2010 through March 2010," Table 19 (seventy-five percent of judges endorsing current Sentencing Guidelines system). As we noted earlier, *supra* at P 15, the Penalty Guidelines and the Organizational Sentencing Guidelines share a common set of purposes, including achieving compliance with regulatory requirements and deterring violations.

²⁸ Policy Statement on Penalty Guidelines at P 27.

²⁹ Comments of EEI at 16 (quoting Jennifer Arlen, White Paper: Evaluation of the FERC Policy Statement on Penalty Guidelines (Arlen), at 5).

³⁰ Indeed, the Holder Memo itself provides the strongest refutation of EEI's argument that the DOJ's supposed dissatisfaction with the Sentencing Guidelines ought to make the Commission hesitant in using them as a model for the Penalty Guidelines. Specifically, it instructs DOJ staff that "[o]nce the decision to charge is made, the same rules as govern charging natural persons apply. These rules

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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.

³¹ Holder Memo § IV, “Charging a Corporation: Pervasiveness of Wrongdoing” (adopting Sentencing Guidelines’ definition of “pervasiveness”); § VI, “Charging a Corporation: Voluntary Disclosure” (citing the Sentencing Guidelines’ treatment of this factor).

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.

EEI 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

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.

minor violations that do not cause harm and where preventive measures have been implemented to avoid recurrences. The Penalty Guidelines come into effect only after determining that a violation has been committed and that the violation warrants the imposition of a penalty by the Commission.

28. We decline, however, to adopt a bright-line rule that the Penalty Guidelines will not apply to non-serious violations, though we will consider the nature of the violation in our penalty determination. For example, if an organization has a pattern of multiple non-serious violations, circumstances might dictate the application of the Penalty Guidelines.

29. 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. We clarify that while Enforcement staff can recommend downward and upward departures from the Penalty Guidelines, only the Commission can *authorize* such departures.

30. EEI also proposes that we adopt a rule that penalties not be imposed in cases where there is a "legitimate ambiguity over what the law requires."⁴⁸ Our position on this issue has not changed since Order No. 693, in which we stated, "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."⁴⁹

31. The Commission clarifies that zero dollar penalties are still possible under our guidelines-based approach. Specifically, Enforcement staff still has the discretion to close an investigation with no sanctions even when a violation occurred. In addition, Enforcement staff can recommend and the Commission can decide to depart from the Penalty Guidelines altogether, and such a departure could result in a zero dollar penalty. The Commission can also depart from the Penalty Guidelines in the absence of a staff recommendation or contrary to staff's recommendation.

32. Finally, in response to NERC's request for clarification on the criteria we will consider in deciding whether to depart from the Penalty Guidelines, no

⁴⁸ Comments of EEI at 21.

⁴⁹ Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 275.

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. 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.⁵¹

C. Reliability-Related Issues

1. 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.

⁵⁰ See *supra* P 2.

⁵¹ See Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 65 (“[W]e expect that all orders imposing penalties shall describe the facts that support the penalty amount.”). In the context of settlement discussions, staff will inform the subject of the investigation of any departures.

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 3-4; NorthWestern at 2; PPC at 11-12; Reliability *First* at 12; SMUD at 3-5; SCE at 1-2; Joint Municipals 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

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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

Guidelines should apply only to serious reliability violations. Comments of MISO at 8.

⁵³ Comments of EEI at 5.

⁵⁴ *Id.* at 6.

⁵⁵ *See, e.g., id.* at 6-7.

⁵⁶ Comments of APPA at 8.

⁵⁷ Comments of EEI at 6.

⁵⁸ *See* Comments of PPC at 6; EPSA at 9; and National Grid at 12.

⁵⁹ Comments of PPC at 6.

under Part 1b of our regulations.⁶⁰ 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.⁶¹

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.⁶²

38. EEI states that the Commission approved the Sanction Guidelines to provide a predictable, uniform, and rational approach for determining penalties.⁶³ 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.⁶⁴

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.⁶⁵ 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

⁶⁰ See Comments of EEI at 7; NERC at 25; and NorthWestern at 4. EPSA also urges the Commission to clarify that the Penalty Guidelines would apply only to the Commission's own investigations conducted under Part 1b of our regulations. Comments of EPSA at 7-8.

⁶¹ Comments of EEI at 6.

⁶² See, e.g., Comments of EEI at 5-7; ELCON at 4; NERC at 2-3; APPA at 7-8; MRO at 5-6; NPCC at 7; NCPA at 3-4; NorthWestern at 2; ReliabilityFirst at 8-9; FRCC at 1; SWTDUG at 5; MISO at 7-8; TAPS at 5; WECC at 1; Hoosier at 3-4; and Xcel at 3-5.

⁶³ Comments of EEI at 5-7.

⁶⁴ *Id.* at 5.

⁶⁵ Comments of NERC at 12.

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.⁶⁶

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.⁶⁷

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.⁶⁸ APPA also asserts that a dual penalty regime will substantially undermine NERC's Commission-approved model for no good purpose.⁶⁹

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.⁷⁰ 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."⁷¹

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

⁶⁶ *Id.*

⁶⁷ Comments of ReliabilityFirst at 8-9.

⁶⁸ Comments of MISO at 7.

⁶⁹ Comments of APPA at 9.

⁷⁰ Comments of SWTDUG at 5.

⁷¹ *Id.*

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 EPCA 2005, Congress granted the Commission explicit authority to directly enforce the Reliability Standards.⁷² 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 our 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, EPCRA 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.⁷⁹ 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.⁸⁰ 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.⁸¹ NPCC further recommends that the Commission continue to utilize the NERC

the *Policy Statement on Enforcement*, if NERC and the Regional Entities are unable to do so.”).

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.

Sanction Guidelines and corresponding Commission case law when reviewing Notices of Penalty.⁸²

52. TANC, NERC, APPA, ISO/RTO Council, BPA, Joint Municipals, 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.⁸³ 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.⁸⁴

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.⁸⁵ 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.⁸⁶

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 Municipals at 11; ReliabilityFirst at 4; and Turlock.

⁸⁴ Comments of ISO/RTO Council at 7.

⁸⁵ Comments of APPA at 8.

⁸⁶ *Id.*

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.⁸⁷ 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.⁸⁸

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.⁸⁹ 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.⁹⁰

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.⁹¹ The Commission now believes, however, that our use of the Penalty Guidelines should be reserved solely for our own Part 1b investigations and enforcement actions and not for our

⁸⁷ Comments of WIRAB at 3.

⁸⁸ *Id.*

⁸⁹ Comments of APPA at 17-18.

⁹⁰ *Id.* at 18. The Commission views APPA’s specific comments on the merits of the Turlock Notice of Penalty as beyond the scope of the Penalty Guidelines. This is not the proper proceeding to discuss the merits of individual Notices of Penalty.

⁹¹ Policy Statement on Penalty Guidelines, 130 FERC ¶ 61,220 at P 64.

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.⁹²

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.⁹³ 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.⁹⁴ Similarly, Empire argues that the base violation

⁹² See *Review of Notices of Penalty for Violations of Reliability Standards*, 123 FERC ¶ 61,046, P 11 (2008).

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; NPCC at 5; NCPA 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.⁹⁵

60. EEI proposes a modification to the base violation level and reliability adjustments to better account for the varying types of reliability violations.⁹⁶ 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.⁹⁷

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.⁹⁸ 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.⁹⁹

⁹⁵ Comments of Empire at 1.

⁹⁶ See Comments of EEI at 25.

⁹⁷ These modifications are summarized in chart form in EEI's comments at 25.

⁹⁸ Comments of EEI at 24.

⁹⁹ Comments of BPA at 8.

b. Commission Determination

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. The total violation levels in the original Penalty Guidelines for violations falling within these categories were twenty-three and twenty-five. Under these revisions, the violation levels are reduced to nineteen and twenty-four.

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:

| Comparison of Base Violation Levels and Risk of Harm Adjustments | | | | | | | | |
|--|---------------------|------|-------|--------------|---------------------|------|-------|--------------|
| Risk of Harm | Original Guidelines | | | | Modified Guidelines | | | |
| | Base | Adj. | Total | Base Penalty | Base | Adj. | Total | Base Penalty |
| Low Risk-Minor Harm | 16 | 0 | 16 | \$175,000 | 6 | 0 | 6 | \$5,000 |
| Low Risk-Substantial Harm; Moderate Risk-Minor Harm | 16 | 3 | 19 | \$500,000 | 6 | 5 | 11 | \$30,000 |
| Moderate Risk-Substantial Harm; High Risk-Minor Harm | 16 | 5 | 21 | \$910,000 | 6 | 8 | 14 | \$85,000 |
| Low Risk-Major Harm; High Risk-Substantial Harm | 16 | 7 | 23 | \$1,600,000 | 6 | 13 | 19 | \$500,000 |
| Moderate Risk-Major Harm | 16 | 9 | 25 | \$2,800,000 | 6 | 18 | 24 | \$2,100,000 |
| Low Risk-Extreme Harm; High Risk-Major Harm | 16 | 12 | 28 | \$6,300,000 | 6 | 22 | 28 | \$6,300,000 |
| Moderate Risk-Extreme Harm | 16 | 14 | 30 | \$10,500,000 | 6 | 24 | 30 | \$10,500,000 |
| High Risk-Extreme Harm | 16 | 16 | 32 | \$17,500,000 | 6 | 26 | 32 | \$17,500,000 |

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.¹⁰⁰

¹⁰⁰ See, e.g., Comments of EEI 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...)

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.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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.¹⁰⁴

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."¹⁰⁵ 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

NorthWestern at 3; PNGC at 3-4; PPC at 7-8; SMUD at 7-9; SCE at 10-11; Joint Municipals at 8-10; TAPS at 13-17; TANC at 3-4; WIRAB at 3; and Xcel at 3-4.

¹⁰¹ See, e.g., Comments of NERC at 17; ELCON at 3; APPA at 11; NARUC at 2; NPCC at 6; PNGC at 3; PPC at 7-8; SMUD at 7-9; Joint Municipals at 8-10; TAPS at 13-14; and WIRAB at 3.

¹⁰² Comments of NERC at 17.

¹⁰³ Comments of NERC at 18; NARUC at 2.

¹⁰⁴ Comments of NERC at 18.

¹⁰⁵ Comments of APPA at 12.

responsible for violations of Reliability Standards.¹⁰⁶ PPC states that these employees play a key role in ensuring reliable system operation and maintenance.¹⁰⁷ 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.¹⁰⁸ NorthWestern states that system operators “should be left to manage reliability, not penalty risk.”¹⁰⁹

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.¹¹⁰ EEI, 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.”¹¹¹ EEI 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.¹¹² Xcel comments that it is neither cost effective nor in

¹⁰⁶ Comments of PPC at 8. *See also* Affidavit of Robin E. Manning on Behalf of EEI at 2 (asserting that the Penalty Guidelines’ consideration of load loss “would introduce confusion, doubt and indecision in the process of load shedding for reliability purposes”).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Comments of NorthWestern at 3.

¹¹⁰ *See, e.g.*, Comments of EEI at 8-13; NorthWestern at 3; PNGC at 3-4; SCE at 10-11; and Xcel at 3-4.

¹¹¹ Comments of EEI at 8; *see also* White Paper of Richard A. Epstein in Support of EEI’s comments at 6-22 (asserting that state law has placed strict limitations on consequential damages imposed on private parties who have failed to comply with contractual or statutory standards and arguing that this law should apply in the regulatory context).

¹¹² *Id.* at 9-11.

the best interest of customers to expose utilities to consequential damages associated with customer outages.¹¹³

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.¹¹⁴

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."¹¹⁵ TANC believes that the load loss factor will have a disparate impact on smaller utilities and non-profit entities, and their customers.¹¹⁶ 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.¹¹⁷

73. EEI 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.¹¹⁸ 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."¹¹⁹ ISO-NE believes that the quantity of lost load is a better factor than the value of lost

¹¹³ Comments of Xcel at 4.

¹¹⁴ *See, e.g.*, Comments of ELCON at 3-4; NCPA at 5; SCE at 10-11; and Joint Municipals at 8-10.

¹¹⁵ Comments of SMUD at 8.

¹¹⁶ Comments of TANC at 20.

¹¹⁷ Comments of NorthWestern at 3.

¹¹⁸ *See* Comments of EEI at 8; ISO-NE at 8.

¹¹⁹ Comments of ISO-NE at 8.

load because the use of value would result in different penalties for violations of the same standards for the same amount of load.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."¹²¹ Second, Cities/M-S-R requests further information on how the Commission plans to calculate losses of load.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 2A1.1, 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

¹²⁰ *Id.*

¹²¹ Comments of PJM at 2.

¹²² Comments of Cities/M-S-R at 10.

occurred.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.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.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.”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.¹²⁷ Of course, neither the Commission nor

¹²³ 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 ¶ 61,062, at P 380 (*Certification Order*), *order on reh’g and compliance*, 117 FERC ¶ 61,126 (2006).

¹²⁴ *See Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672*, 123 FERC ¶ 61,046, at P 11 (2008).

¹²⁵ *2008 Florida Blackout*, 122 FERC ¶ 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 NERC and the FRCC.”).

¹²⁶ *North American Electric Reliability Corp.*, 130 FERC ¶ 61,151, at P 12 (2010).

¹²⁷ 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-

(continued...)

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.¹²⁸ 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

002-2 R6-R7; EOP-003-1 R1-R2. *See also* Table 1, Transmission System Standards – Normal and Emergency Conditions, appended to Reliability Standards TPL-001-0 through TPL-004-0 (outlining instances that call for planned losses of load under Reliability Standards TPL-001-0 through TPL-004-0).

¹²⁸ *See* Penalty Guidelines § 2A1.1 (Application Note 4).

cascading outages by increasing penalties in proportion to the quantity of lost MWh.

5. Risk of Harm Examples

a. Comments

80. EEI recommends that the Commission delete the hypothetical “risk of harm” examples in the reliability section of the Penalty Guidelines.¹²⁹ EEI 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.¹³⁰

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.¹³¹ 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.¹³²

¹²⁹ Comments of EEI at 16.

¹³⁰ *Id.* at 7.

¹³¹ Comments of Hoosier at 4.

¹³² *Id.*

83. 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.¹³³ 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.¹³⁴

b. Commission Determination

84. 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 the Commission has received approximately 380 Notices of Penalty but not a single Notice of Penalty involving a registered entity that knowingly committed a violation or engaged in misconduct that ultimately led to a violation.¹³⁵ Rather, SMUD asserts that the vast majority of violations involved administrative errors, documentation-related errors, or misapplication of the requirements of a particular standard.¹³⁶ Accordingly, SMUD argues that it is unreasonable to apply the Penalty Guidelines to violations of the mandatory Reliability Standards.¹³⁷

¹³³ Comments of FirstEnergy. FirstEnergy did not provide page numbers with its comments.

¹³⁴ *Id.*

¹³⁵ Comments of SMUD at 3.

¹³⁶ *Id.* at 4.

¹³⁷ *Id.* at 3.

86. MISO requests that the Commission adopt an express distinction between serious Reliability Standard violations and inadvertent violations, particularly documentation errors that do not have a serious impact on reliability.¹³⁸ Specifically, MISO requests that the Commission's Penalty Guidelines apply only to violations of Reliability Standards that result from operator negligence or willful misconduct, and that directly threaten or otherwise adversely affect the reliability of the Bulk-Power System.¹³⁹

87. NorthWestern states that the base penalty for any reliability violation other than a documentation error under the Penalty Guidelines is punitive and unnecessary, and believes that the Penalty Guidelines are likely to discourage firms from investing in measures to detect and report wrongdoing.¹⁴⁰ NERC also requests clarification on how the Commission intends to differentiate, in the base penalty, between documentation violations and significant, operational violations.¹⁴¹

b. Commission Determination

88. The Commission disagrees with SMUD that it is unreasonable to apply the Penalty Guidelines to violations of the mandatory Reliability Standards simply because some of these violations may involve administrative errors, documentation-related errors, or misapplication of the requirements of a particular standard. Although we recognize that some reliability violations involve documentation and administrative errors, we do not intend to investigate minor violations of the Reliability Standards that involve little or no harm or risk of harm. We have not focused on such minor violations in past investigations and 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.

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

¹³⁸ Comments of MISO at 6.

¹³⁹ *Id.* at 9.

¹⁴⁰ Comments of NorthWestern at 3.

¹⁴¹ Comments of NERC at 23.

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.¹⁴² 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.¹⁴³ 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).¹⁴⁴

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

¹⁴² Comments of SCE at 3.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 4.

VRFs to account for the experience over the last two years in implementing section 215 of the FPA.¹⁴⁵

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.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹

¹⁴⁵ Comments of NorthWestern at 2.

¹⁴⁶ Comments of ISO/RTO Council at 4.

¹⁴⁷ Comments of BPA at 8.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 10.

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.¹⁵⁰ 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,¹⁵¹ 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.¹⁵² 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,

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).

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 EAct 2005, the Commission has continually placed a heavy emphasis on promoting industry-wide

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,¹⁶⁵ 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 turn, 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, in part, through the existence of an effective compliance program. Moreover, 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.¹⁶⁶ 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

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.

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.”¹⁶⁷ 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.”¹⁶⁸ 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.”¹⁶⁹

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.”¹⁷⁰ The Commission expects that civil penalties will prompt organizations to devote significant efforts and resources to compliance in order to avoid future penalties.

¹⁶⁷ Holder Memo § XI.

¹⁶⁸ *Id.* § VII.

¹⁶⁹ *Id.*

¹⁷⁰ Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 Am. Crim. L. Rev. 1459, 1476 (2009) (emphasis added); *see also* John D. Copeland, *The Tyson Story: Building an Effective Ethics and Compliance Program*, 5 Drake J. Agric. L. 305, n.7 (2000) (“Criminal penalties are imposed on corporations to encourage them to develop effective compliance programs.”).

113. 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

114. 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

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.*

partial compliance credit is warranted, but does not propose a specific range of credit.¹⁷⁶

b. Commission Determination

115. 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.

116. 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.

117. 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

¹⁷⁶ Comments of Xcel at 5.

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

¹⁷⁸ Policy Statement on Compliance, 123 FERC ¶ 61,058 at P 13-21.

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.”¹⁸⁰

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.¹⁸¹

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.¹⁸² 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.¹⁸³ EEI also states that Boards of Directors cannot eliminate the risk of hiring errant

¹⁸⁰ *Id.* P 10.

¹⁸¹ Penalty Guidelines § 1C2.3(f) (Application Note 9).

¹⁸² *See* Comments of EEI at 36-37; Xcel at 5; and INGAA at 9.

¹⁸³ Comments of EEI at 36.

managers.¹⁸⁴ Xcel shares the views of EEI and states that effective compliance programs serve as a deterrent, not a guarantee.¹⁸⁵

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.¹⁸⁶ Under the amendment, to receive compliance credit where high-level personnel were involved, the organization must meet certain criteria, including that no individual with 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,¹⁸⁷ 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

¹⁸⁴ *Id.* at 37.

¹⁸⁵ Comments of Xcel at 5.

¹⁸⁶ Comments of INGAA at 9. The proposed amendment would add subsection 8C2.5(f)(3)(C) to the Sentencing Guidelines. *See Amendments to the Sentencing Guidelines* (May 3, 2010), available at http://www.ussc.gov/2010guid/20100503_Reader_Friendly_Proposed_Amendments.pdf.

¹⁸⁷ 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

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).

self-reporting it.¹⁹⁰ Xcel states that even effective compliance programs might not result in discovery of all violations by a company.¹⁹¹

126. On a related note, AGA comments that the Penalty Guidelines are unclear as to what would constitute an “unreasonable” delay in reporting or a “reasonable” period of time to conduct an investigation.¹⁹² AGA submits that the Penalty Guidelines should specify the factors that would be considered in determining whether a particular period of time is “reasonable.”¹⁹³

b. Commission Determination

127. The Commission disagrees with the commenters’ request that we eliminate the requirement that, for compliance credit to be received, a detected violation must be reported without unreasonable delay. The Commission has always expected prompt reporting of violations as part of an organization’s compliance program. For example, we made clear in the Policy Statement on Compliance that after a violation is detected “we expect that companies will act expeditiously to end the wrongful conduct and *will report it promptly.*”¹⁹⁴ The Penalty Guidelines do not change this expectation. The Commission believes that giving organizations credit for prompt reporting of violations increases compliance by providing an incentive for, and increasing the likelihood of, early detection of violations.

128. Thus, because the Commission continues to expect prompt reporting of violations as part of an organization’s compliance efforts, we will not eliminate the requirement that, for compliance credit to be received, a detected violation must be reported without unreasonable delay.¹⁹⁵

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.

adequately address this concern. Calculations under the Penalty Guidelines result in a wide range of possible penalties, and we can use this range to address the entity that might not have an effective compliance program. For example, we can assess a penalty that falls on the higher side of the penalty range. Or, in the case of a widespread disregard for compliance or little or no culture of compliance we may decide to depart from applying the Penalty Guidelines. These ways of addressing the lack of an effective compliance program give us the flexibility to consider the particular compliance program and its degree of effectiveness in particular circumstances.

132. Also, in reviewing an organization's compliance program, the Penalty Guidelines do not affect the Commission's ability to consider an organization's record retention and electronic recordkeeping policies.

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.²⁰¹ Self-reports are valuable, EEI believes, because without them the Commission may never know that a violation occurred.²⁰² Cooperation, on the other hand, is valuable, EEI asserts, because it facilitates Enforcement staff’s review of misconduct.²⁰³ EEI and INGAA also argue that tying the credits for self-reports and cooperation could create a disincentive to self-reporting in

²⁰¹ See Comments of EEI at 37; National Grid at 7; and TAPS at 30.

²⁰² Comments of EEI at 38.

²⁰³ *Id.*

instances where the organization cannot be certain whether it will receive cooperation credit.²⁰⁴

137. EEI and TAPS also propose that we unbundle the credits for cooperation and avoidance of trial-type hearings because, they contend, these are unrelated concepts.²⁰⁵ Specifically, EEI states that cooperation helps Enforcement staff during the preliminary phase of an investigation and a trial-type hearing occurs, not because of the absence of cooperation, but because of legal or factual disputes.²⁰⁶ INGAA also takes issue with bundling these credits. It states that a company should not forego the cooperation credit by contesting a penalty calculation, commenting that an organization should have the right to admit a violation, but nonetheless contest the proposed penalty calculation in a trial-type hearing.²⁰⁷

138. Similarly, AGA states that, under the Penalty Guidelines, no credit is given for self-reporting, cooperating, and accepting responsibility unless the organization resolves the matter without the need for a trial-type hearing. AGA believes that this aspect of the Penalty Guidelines appears to undervalue self-reporting, cooperation, and acceptance of responsibility by conditioning credit for them on a settlement.²⁰⁸ AGA recommends that we restructure this model to provide separate credits for each of the identified actions.²⁰⁹

139. Finally, INGAA recommends unbundling the credits for cooperation and acceptance of responsibility from the credit for resolving a matter without a trial-type hearing because an organization should not be deemed uncooperative or unwilling to accept responsibility by seeking a trial-type hearing where there is a good-faith basis for a disagreement over the law or facts of a case.²¹⁰

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.”²¹¹ 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

²¹¹ 2005 Policy Statement, 113 FERC ¶ 61,068 at P 24.

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;²¹² (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.²¹³

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.²¹⁴ 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.”²¹⁵ We

²¹² See *infra* section II.E.2.b.

²¹³ Comments of EEI at 38.

²¹⁴ See *North American Electric Reliability Corporation*, 124 FERC ¶ 61,015, at P 32 (2008).

²¹⁵ *Id.*

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.”²¹⁶

148. 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.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.²¹⁸

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.”

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

²¹⁶ *Id.*

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.

²¹⁸ Comments of INGAA at 13.

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,²²⁰ 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.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 316A²²² 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

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.").

²²¹ Comments of National Grid at 5; 7-8.

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.²²³ 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.²²⁴

156. Further, SMUD questions the legality of applying the Penalty Guidelines to the NERC Reliability Standards without accounting for an organization's remediation efforts.²²⁵ 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.*"²²⁶ 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.²²⁷

2. Commission Determination

157. 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."²²⁸ 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."²²⁹ In addition, to the extent the violation is causing harm, remedial action to limit the

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).

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

159. 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.²³⁰ 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.²³¹ 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.²³²

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.²³³ 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.²³⁴ INGAA shares these views and states further that treating settlements as prior history will serve as a disincentive to settle.²³⁵

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

²³³ Comments of EEI at 35; INGAA at 14.

²³⁴ Comments of EEI at 35.

²³⁵ Comments of INGAA at 14.

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 EAct 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.²³⁶

²³⁶ See, e.g., *In re Tenaska Marketing Ventures*, 126 FERC ¶ 61,040, Stipulation and Consent Agreement at P 17 (2009) (“Tenaska consents to the use of Enforcement’s conclusions set forth in paragraph numbers 10 and 11 of this Agreement [related to staff’s findings that Tenaska violated 18 C.F.R. § 1c.1] for the purpose of assessing the factors in any future matter, *including the factor of determining the company’s history of violations . . .*”); *In re Louisville Gas & Electric Co.*, 127 FERC ¶ 61,068, Stipulation and Consent Agreement at P 13 (2009) (same); *In re Anadarko Petroleum Corp.*, 127 FERC ¶ 61,069, Stipulation and Consent Agreement at P 13 (2009) (same); *In re Puget Sound Energy*, 127 FERC ¶ 61,070, Stipulation and Consent Agreement at P 20 (2009) (same); *In re Wasatch Oil & Gas Corp.*, 127 FERC ¶ 61,322, Stipulation and Consent Agreement at P 14 (2009) (same); *In re Piedmont Natural Gas Co.*, 127 FERC ¶ 61,319, Stipulation and Consent Agreement at P 16 (2009) (same); *In re NorthWestern Corp.*, 125 FERC ¶ 61,233, Stipulation and Consent Agreement at P 31 (2008) (same); *Columbia Gas Transmission Corp. and Columbia Gulf Transmission Co.*, 125 FERC ¶ 61,150, Stipulation and Consent Agreement at P 24 (2008) (same); *In re Duquesne Light Co.*, 123 FERC ¶ 61,221, Stipulation and Consent Agreement at P 19 (2008) (same); *In re Cleco Power, LLC*, 119 FERC ¶ 61,271, Stipulation and Consent Agreement at Section 5, P B (2007)

(continued...)

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.²³⁷ NERC believes the "Commission should clarify if it is making changes with respect to treating all prior violations as repeat history."²³⁸

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.²³⁹ 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.

(same); *In re Columbia Gulf Transmission Co.*, 119 FERC ¶ 61,174, Stipulation and Consent Agreement at P 20 (2007) (same).

²³⁷ Comments of NERC at 24.

²³⁸ *Id.*

²³⁹ Penalty Guidelines § 1C2.3(c).

H. Section 1C2.3(d) Culpability Enhancement for Violating an Order

1. Comments

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.²⁴⁰ 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.²⁴¹ 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.²⁴²

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.²⁴³ 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.²⁴⁴

170. 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.²⁴⁵ 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 these errors are corrected as a matter of course when discovered by Commission staff or the parties involved.²⁴⁶ INGAA also believes that the Commission should adopt a scienter requirement for violations of section 2C1.1.²⁴⁷

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.

²⁴⁴ Comments of EEI at 32.

²⁴⁵ Comments of AGA at 9.

²⁴⁶ *Id.*

²⁴⁷ Comments of INGAA at 5.

173. The Commission will continue to draw distinctions and will pursue only intentional and reckless misrepresentations and false statements that mislead, or attempt to mislead, staff's efforts. Thus, we have modified the Penalty Guidelines to clarify that section 2C1.1 applies only to intentional or reckless misrepresentations that mislead, or attempt to mislead, the Commission's or staff's efforts.

2. Scope of Section 2C1.1

a. Comments

174. EEI urges the Commission to identify the statutory provisions and regulations that are covered by the section 2C1.1 guideline for misrepresentations and false statements in an effort to promote and further transparency.²⁴⁸

b. Commission Determination

175. Although the Commission declines to provide an exhaustive list of all of the statutory provisions and regulations that potentially are covered by section 2C1.1 of the Penalty Guidelines, we emphasize that we have authority to assess civil penalties for violations of the statutes, rules, regulations, and orders that we oversee. In addition, the Commission has the authority to enforce Commission-approved tariff provisions.

176. Section 35.41(b) of the Commission's regulations is one of the requirements that could be covered under section 2C1.1 of the Penalty Guidelines. This regulation imposes a duty of candor upon electric power sellers authorized to engage in sales for resale of electric energy at market-based rates to provide accurate, factual, and complete information in communications with the Commission.²⁴⁹ A section 35.41(b) violation, however, is not limited to section 2C1.1 of the Penalty Guidelines. Such a violation could also fall under section 2B1.1, covering fraud, anti-competitive conduct, and other rule, tariff, and order violations, with a base violation level of six in certain cases, as section 35.41(b) does not contain a scienter requirement.

²⁴⁸ Comments of EEI at 31.

²⁴⁹ 18 C.F.R. § 35.41(b)(2010).

3. **Base Violation Level for Misrepresentations and False Statements**

a. **Comments**

177. EEI 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.²⁵⁰ EEI comments that a base violation level of eighteen under the Penalty Guidelines corresponds to a base penalty of \$350,000. EEI believes that this is an extreme penalty that is even more severe than the penalties for perjury in federal court.²⁵¹ AGA similarly comments that the base penalty for misrepresentations and false statements may be excessive in certain cases.²⁵²

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. EEI'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. EEI, for

²⁵⁰ Comments of EEI at 33-34.

²⁵¹ *Id.* at 33.

²⁵² Comments of AGA at 8-9.

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.²⁵³ 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.²⁵⁴ 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.²⁵⁵

180. 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.²⁵⁶ 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.”²⁵⁷

181. NERC requests that the Commission address the following questions in its final action: (1) Are penalties going to be developed and applied on a per Reliability Standard violation basis; (2) if not, how will they be developed and applied; and (3) would a bell-curve approach be used with regard to penalty assignments if a penalty results in a disparity.²⁵⁸

2. Commission Determination

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

²⁵³ Comments of EEI 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.²⁵⁹ For multiple violations that fall within section 2A1.1 (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.²⁶⁰ We have modified the Penalty Guidelines to emphasize this point.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 2B1.1; or made multiple misrepresentations or false statements in which the penalty is determined under section 2C1.1, 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 2B1.1(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

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.

²⁶⁰ When treating multiple violations that relate to the same conduct or event as a whole under section 2A1.1, we may also have to account for each violation to assure that the statutory cap for each violation will not be exceeded.

²⁶¹ See Penalty Guidelines § 2A1.1 (Application Note 5). We have also modified sections 2A1.1(b)(1) and (b)(2) to make clear that section 2A1.1 considers harm and risk of harm arising from multiple violations that relate to the same event.

Guidelines.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).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.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 215.²⁶⁵

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.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.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.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.²⁶⁹ On the other hand, CPUC recommends that the Commission clarify that if an organization is unable to pay, the Commission is not

²⁶² Comments of APPA at 13.

²⁶³ *Id.* at 15.

²⁶⁴ *See* Comments of APPA at 17; PPC at 11.

²⁶⁵ Comments of APPA at 17.

²⁶⁶ *See* Comments of Cities/M-S-R at 13; Turlock.

²⁶⁷ Comments of Cities/M-S-R at 13.

²⁶⁸ *Id.* at 14.

²⁶⁹ *Id.*

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

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.

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

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

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).

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 1C3.2(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 1C3.2’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

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.²⁸⁹ 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.”²⁹⁰ Section 553(b) does not apply “(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice”²⁹¹ 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.²⁹² 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

1. Comments

196. 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.²⁹³ 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

²⁸⁹ 5 U.S.C. § 603(b)(2006).

²⁹⁰ 5 U.S.C. § 601(2)(2006).

²⁹¹ 5 U.S.C. § 553(b)(3)(A)(2006).

²⁹² *See also Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 214 (D.C. Cir. 2005) (“We therefore hold that the [Order] constituted an interpretive rule under § 553(b)(3)(A) of APA. It follows that the Commission was not required to issue an impact statement under § 604 of the Regulatory Flexibility Act, which applies only to legislative rules.”).

²⁹³ Comments of ISO-NE at 8-9.

statute.²⁹⁴ National Grid recommends that the Penalty Guidelines be limited to the statutory maximum.²⁹⁵

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.²⁹⁶

2. Commission Determination

198. The Penalty Guidelines explicitly state, “[w]here the minimum guideline penalty is greater than the maximum penalty authorized by statute, the maximum penalty authorized by statute will be the guideline penalty.”²⁹⁷

199. 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

200. EEI and CPUC suggest modifications to the Commission’s consideration of duration and volume under section 2B1.1 of the Penalty Guidelines. EEI proposes converting the volumetric and duration enhancements to be floors, not enhancements.²⁹⁸ CPUC suggests that the enhancements under section 2B1.1 for duration and volume should be cumulative.²⁹⁹

²⁹⁴ Comments of CPUC at 6.

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.

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 CPUC suggests, because we believe that a cumulative application could result in overly severe penalties in many circumstances. The Commission will continue to apply the greater of either the volume or duration enhancement.

N. Consideration of Loss Under the Penalty Guidelines

1. Comments

203. EEI "propose[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.³⁰⁰ 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."³⁰¹ 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."³⁰²

³⁰⁰ Comments of EEI at 14, 28.

³⁰¹ *Id.* at 28.

³⁰² *Id.* at 29.

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.³⁰³

2. Commission Determination

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,³⁰⁴ 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."³⁰⁵ 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.³⁰⁶ 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.").

³⁰⁶ See, e.g., *Nantahala Power and Light Co.*, 19 FERC ¶ 61,152, at n.9 (1982) (citing *Steadman v. S.E.C.*, 49 U.S. L.W. 4174 (February 25, 1981)(*Steadman*)).

evidence,” not the methods by which the evidence is calculated.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹

³⁰⁷ *Steadman*, 450 U.S. at 98.

³⁰⁸ Comments of NERC at 9.

³⁰⁹ *Id.* at 8-9.

209. National Grid recommends that the Commission's methodology for assessing penalties should be implemented by a rulemaking instead of a policy statement.³¹⁰ 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.³¹¹

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.³¹² 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.³¹³ Moreover, where the Commission decides to depart

³¹⁰ Comments of National Grid at 13-14.

³¹¹ *Id.* at 13.

³¹² *See Conference on Enforcement Policy*, Docket No. AD07-13-000 (Nov. 16, 2007).

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 EAct 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 EAct 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

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.

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

³¹⁶ Comments of EEI at 41.

³¹⁷ Comments of INGAA at 15.

³¹⁸ See *Report on Enforcement*, Docket No. AD07-13-002, at 16 (Dec. 17, 2009) (listing investigations closed without monetary sanctions from 2007 through 2009, including violations of non-serious posting requirements, OATT violations, and violations of the Standards of Conduct).

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

220. 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

221. 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

³¹⁹ See Comments of Turlock.

³²⁰ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989).

³²¹ *Id.*

³²² See Comments of FirstEnergy.

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

³²³ Revised Policy Statement, 123 FERC ¶ 61,156 at P 51.

³²⁴ *Id.* (quoting 16 U.S.C. § 825o-1 (2006) (as amended by EPA Act 2005, § 1284(e)).

³²⁵ *Id.*

³²⁶ Comments of SCE at 8-9.

Operators.³²⁷ 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.”³²⁸ 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.³²⁹ 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.³³⁰ 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.³³¹ Finally, SCE believes that future technical conferences should explore how the Reliability Standards can be incorporated into the Penalty Guidelines.³³² PPC requests that the Commission refrain from issuing a final policy statement or a determination adopting the Penalty Guidelines.³³³ PPC requests that the Commission engage the industry to develop the best approach to

³²⁷ See *Reliability Standard Compliance and Enforcement in Regions with Regional Transmission Organizations or Independent System Operators*, 122 FERC ¶ 61,247 (2008).

³²⁸ *Id.* P 16.

³²⁹ Comments of SMUD at 16.

³³⁰ Comments of SCE at 12-13.

³³¹ *Id.*

³³² *Id.*

³³³ Comments of PPC at 12.

oversight of penalty determinations and settlements by the reliability organizations.³³⁴

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.³³⁵

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 EPCRA 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

³³⁴ *Id.* at 4.

³³⁵ *Id.* at 6.

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)
14. Joint Comments of American Public Power Association, Large Public Power Council, and National Rural Electric Cooperative Association (collectively, APPA)
15. Joint Comments of Georgia Transmission Corporation (GTC) and Georgia Systems Operations Corporation (GSOC)
16. Midwest Independent Transmission System Operator, Inc. (MISO)
17. Midwest Reliability Organization (MRO)
18. National Association of Regulatory Utility Commissioners (NARUC)
19. National Grid USA (National Grid)
20. North American Electric Reliability Corporation (NERC)
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. Reliability*First* Corporation (Reliability*First*)
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 Municipals)
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)

37. Turlock Irrigation District (Turlock)
38. Utility Services, Inc. (Utility Services)
39. Western Electricity Coordinating Council (WECC)
40. Western Interconnection Regional Advisory Body (WIRAB)
41. Xcel Energy Services, Inc. (Xcel)

FERC Penalty Guidelines

CHAPTER 1

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*

- with a substantial ownership interest. "High-level personnel of a unit of the organization" is defined in the Commentary to §1C2.3 (Culpability Score).*
- (b) *"Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel of the organization, individuals who exercise substantial supervisory authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.*
- (c) *"Agent" means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.*
- (d) *An individual "condoned" a violation if the individual knew of the violation and did not take reasonable steps to prevent or terminate the violation.*
- (e) *"Prior adjudication" means any resolution, whether by trial or settlement, regardless whether the settlement included an admission of the violation.*
- (f) *"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.*
- (g) *"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.*
- (h) *"Pecuniary loss" is equivalent to the term "loss" as used in Chapter Two (Violation Conduct).*
- (i) *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.*
- (j) *"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.*

PART B - DISGORGING GAIN FROM VIOLATIONS AND EFFECTIVE COMPLIANCE PROGRAM

1. DISGORGING GAIN FROM VIOLATIONS

§1B1.1. Disgorgement

- (a) In the case of pecuniary gain as a result of the violation, the Commission enters a disgorgement order for the full amount of the gain plus interest.

2. EFFECTIVE COMPLIANCE PROGRAM

§1B2.1. Effective Compliance Program

- (a) To have an effective compliance program, for purposes of subsection (f) of §1C2.3 (Culpability Score), an organization shall—
- (1) exercise due diligence to prevent and detect violations; and
 - (2) otherwise promote an organizational culture that encourages a commitment to compliance with the law.
- Such compliance program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting violations. The failure to prevent or detect the instant violation does not necessarily mean that the program is not generally effective in preventing and detecting violations.
- (b) Due diligence and the promotion of an organizational culture that encourages a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:
- (1) The organization shall establish standards and procedures to prevent and detect violations.
 - (2)
 - (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance program.
 - (B) High-level personnel of the organization shall ensure that the organization has an effective compliance program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance program.
 - (C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate

subgroup of the governing authority, on the effectiveness of the compliance program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

- (3) 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.
- (4)
 - (A) 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.
 - (B) 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.
- (5) 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.
- (6) 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.
- (7) 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.

- (c) 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.

Commentary

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 §1A1.1 (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. 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.

(D) *Recurrence of Similar Violations.*—*Recurrence of similar violations creates doubt regarding whether the organization took reasonable steps to meet the requirements of this guideline. For purposes of this subdivision, "similar violations" has the meaning given that term in the Commentary to §1A1.1 (Application Instructions - 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 whose 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 subdivision (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 subdivision (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

| <u>Violation Level</u> | <u>Amount</u> |
|------------------------|---------------|
| 6 or less | \$5,000 |
| 7 | \$7,500 |
| 8 | \$10,000 |
| 9 | \$15,000 |
| 10 | \$20,000 |
| 11 | \$30,000 |
| 12 | \$40,000 |
| 13 | \$60,000 |
| 14 | \$85,000 |
| 15 | \$125,000 |
| 16 | \$175,000 |
| 17 | \$250,000 |
| 18 | \$350,000 |
| 19 | \$500,000 |
| 20 | \$650,000 |
| 21 | \$910,000 |
| 22 | \$1,200,000 |
| 23 | \$1,600,000 |
| 24 | \$2,100,000 |
| 25 | \$2,800,000 |
| 26 | \$3,700,000 |
| 27 | \$4,800,000 |
| 28 | \$6,300,000 |
| 29 | \$8,100,000 |
| 30 | \$10,500,000 |
| 31 | \$13,500,000 |
| 32 | \$17,500,000 |
| 33 | \$22,000,000 |

| | |
|------------|--------------|
| 34 | \$28,500,000 |
| 35 | \$36,000,000 |
| 36 | \$45,500,000 |
| 37 | \$57,500,000 |
| 38 or more | \$72,500,000 |

§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 impedance, 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 §1B2.1 (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 §1A1.1(Applicability of these Guidelines).

2. *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."*
3. *"High-level personnel of the organization" is defined in the Commentary to §1A1.1 (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).*
4. *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 was 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).*
5. *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 line of business involved in the instant violation is to be used. A "separately managed line of business" is a subpart 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.*
6. *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.*
7. *Under subsection (c)(1), the adjudication(s) must have occurred within the specified period (ten or five years) of the instant violation.*
 8. *Adjust the culpability score for the factors listed in subsection (e) whether or not the violation guideline incorporates that factor, or that factor is inherent in the violation.*
 9. *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 1B2.1 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.*
 10. *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.*
 11. *To qualify for a reduction under subsection (g)(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 to be measured is the cooperation of the organization itself, not 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 despite the organization's efforts 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 managements become more professional, participation in, condonation of, 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.

§1C2.4. Minimum and Maximum Multipliers

Using the culpability score from §1C2.3 (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.

| <u>Culpability Score</u> | <u>Minimum Multiplier</u> | <u>Maximum Multiplier</u> |
|--------------------------|---------------------------|---------------------------|
| 10 or more | 2.00 | 4.00 |
| 9 | 1.80 | 3.60 |
| 8 | 1.60 | 3.20 |
| 7 | 1.40 | 2.80 |
| 6 | 1.20 | 2.40 |
| 5 | 1.00 | 2.00 |
| 4 | 0.80 | 1.60 |
| 3 | 0.60 | 1.20 |
| 2 | 0.40 | 0.80 |
| 1 | 0.20 | 0.40 |
| 0 or less | 0.05 | 0.20 |

§1C2.5. Guideline Penalty Range – Organizations

- (a) The minimum of the guideline penalty range is determined by multiplying the base penalty determined under §1C2.2 (Base Penalty) by the applicable minimum multiplier determined under §1C2.3 (Minimum and Maximum Multipliers).
- (b) The maximum of the guideline penalty range is determined by multiplying the base penalty determined under §1C2.2 (Base Penalty) by the applicable maximum multiplier determined under §1C2.3 (Minimum and Maximum Multipliers).

3. IMPLEMENTING THE PENALTY

§1C3.1. 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 §1C2.5 (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.

§1C3.2. 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 §1C2.5 (Guideline Penalty Range-Organizations) and §1B1.1 (Disgorgement).

Provided, that the reduction under this subsection will not be more than necessary to avoid substantially jeopardizing the continued viability of the organization.

Commentary

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 13.**
 - (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 8.**
 - (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:

| | Minor harm | Substantial Harm | Major Harm | Extreme Harm |
|---------------|------------|------------------|------------|--------------|
| Low Risk | +0 | +5 | +13 | +22 |
| Moderate Risk | +5 | +8 | +18 | +24 |
| High Risk | +8 | +13 | +22 | +26 |

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.1) ***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.2) ***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 300 MW generator, which may make it difficult for the Generator Operator's Balancing Authority to replace the power in a time period of high demand or low supply availability.

(C.1) ***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 Operator 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.

(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 15 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 foot, 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.

(H) *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 as 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 increases. 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 to 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(s). 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 not, 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 2A1.1(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 2A1.1 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.*

**Guideline for Fraud, Anti-Competitive Conduct and
Other Rule, Tariff and Order Violations**

§2B1.1

- (a) Base Violation Level: **6**
- (b) Specific Violation Characteristics
- (1) If the loss exceeded \$5,000, increase the violation level as follows:

| <u>Loss (Apply the Greatest)</u> | <u>Increase in Level</u> |
|----------------------------------|--------------------------|
| (A) \$5,000 or less | no increase |
| (B) More than \$5,000 | add 2 |
| (C) More than \$10,000 | add 4 |
| (D) More than \$30,000 | add 6 |
| (E) More than \$70,000 | add 8 |
| (F) More than \$120,000 | add 10 |
| (G) More than \$200,000 | add 12 |
| (H) More than \$400,000 | add 14 |
| (I) More than \$1,000,000 | add 16 |
| (J) More than \$2,500,000 | add 18 |
| (K) More than \$7,000,000 | add 20 |
| (L) More than \$20,000,000 | add 22 |
| (M) More than \$50,000,000 | add 24 |
| (N) More than \$100,000,000 | add 26 |
| (O) More than \$200,000,000 | add 28 |
| (P) More than \$400,000,000 | add 30 |

- (2) If more than one of the following enhancements applies, use only the greatest.

If the violation--

- (A) involved more than 70,000 MMBtus 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 MMBtus 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 MMBtus 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

- (3) 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 (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 (D), 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 that 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.