

129 FERC ¶ 61,069
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Guidance on Reliability Notices of Penalty
North American Electric Reliability Corporation

Docket Nos. AD10-1-000
RR09-7-000

FURTHER GUIDANCE ORDER ON FILING OF RELIABILITY NOTICES OF
PENALTY

(Issued October 26, 2009)

1. Pursuant to section 215(e)(1) of the Federal Power Act (FPA),¹ the North American Electric Reliability Corp. (NERC), as the Electric Reliability Organization (ERO), may impose a penalty on a user, owner, or operator of the Bulk-Power System for a violation of a Reliability Standard approved by the Commission. NERC must file Notices of Penalty that include these penalty determinations for Commission review.² In NERC's three-year assessment of its performance as the ERO, filed on July 20, 2009, NERC indicates that there is extensive stakeholder concern that NERC has not filed Notices of Penalty concerning numerous self-reported, confirmed or alleged violations of mandatory Reliability Standards that date from 2007 and 2008.³

¹ 16 U.S.C. § 824o(e)(1) (2006).

² 18 C.F.R. § 39.7(e)(1) (2009). Each Notice of Penalty is subject to review by the Commission, on its own motion or by an application for review by the subject of a penalty, within thirty days after the date of NERC's filing. In the absence of the filing of an application for review of a penalty or motion or other action by the Commission, each penalty filed by NERC shall be affirmed by operation of law upon the expiration of the applicable thirty-day period.

³ NERC Three-Year Electric Reliability Organization Performance Assessment Report (Performance Assessment), Docket No. RR09-7-000 at 36.

2. In response to NERC and industry concerns about this Notice of Penalty backlog, the Commission announces that it will accept, in certain circumstances, an abbreviated format that NERC may use to file Notices of Penalty relating to particular classes of alleged and confirmed violations NERC and Regional Entities have determined did not pose a significant risk to the reliability of the Bulk-Power System. NERC should work with the Regional Entities, stakeholders, and Commission staff to develop such a proposal.

A. Background

3. In an order issued on July 3, 2008 on the first set of Notices of Penalty NERC filed, the Commission set forth its expectations about the records NERC would submit in future Notice of Penalty filings.⁴ The Commission stated that it expects NERC to include in such records, among other things: (1) all relevant facts, in sufficient detail, to indicate the nature of the violation cited and its duration; (2) sufficient information on whether an entity did not perform the action required by the relevant Reliability Standard or failed to document that the action had been performed; (3) a linkage between specific facts and the penalty factors listed as relevant to the penalty determination; (4) specific information in a mitigation plan how a registered entity will comply with the requirements it has violated; and (5) specific information on how a Regional Entity verified that a registered entity timely completed a mitigation plan.⁵ The Commission explained that it sought records with this information to advance the goals of comparability and consistency in penalty-setting as well as minimizing the need for the Commission to review Notices of Penalty on its own motion.⁶ The Commission also stated that it expected this level of information to help it gauge the nature and seriousness of violations and the reasonableness of any penalty assessment.⁷ In turn, these considerations will allow entities subject to mandatory reliability standards to understand the basis for a particular penalty so as to deter future violations appropriately without waiting an extended time period for a Commission determination in most instances.

⁴ *Guidance on Filing Reliability Notices of Penalty*, 124 FERC ¶ 61,015 (2008) (July 3 Order).

⁵ *Id.* P 26, 31, 34, 36, 37.

⁶ *Id.* P 26.

⁷ *Id.* P 15.

4. On July 20, 2009, NERC filed in Docket No. RR09-7-000 the initial, three-year assessment of its performance as the ERO.⁸ NERC indicates in that filing that following issuance of the July 3 Order, it and Regional Entities devoted intensive effort to ensuring that records in future Notices of Penalties would satisfy the Commission's expectations set forth in that order.⁹ However, NERC also states in its performance assessment that a "backlog" of alleged violations has built up that relate to the period from June 18, 2007, when Commission-approved reliability standards became mandatory in the United States.¹⁰ NERC states that stakeholders commented that the backlog of compliance violations is preventing the industry from having a body of violation determinations to generate a body of "precedents" that would enable registered entities to better understand what constitutes compliance with requirements and what is needed to demonstrate compliance.¹¹ In response to the current backlog, NERC states that it has developed a plan for reducing the backlog of its older, lower significance violations, which it plans to use to file with the Commission, in batch form, a number of Notices of Confirmed Violations. NERC filed this batch of Notices of Penalty on October 14, 2009 in Docket No. NP10-2-000.

5. In addition, to prevent a backlog from occurring in the future, NERC proposes in its assessment that it and Regional Entities develop and implement simplified compliance and enforcement approaches, such as pro-forma settlement options, that can be used for violations of documentation requirements or other administrative requirements, where the registered entity is performing the necessary task required by the standard and the risk to the Bulk-Power System is low.¹² According to NERC, allowing Regional Entities to develop, and NERC to file, abbreviated Notices of Penalty in these cases would permit Regional Entities and NERC to concentrate their compliance resources on more serious

⁸ NERC Three-Year Electric Reliability Organization Performance Assessment Report (Performance Assessment), Docket No. RR09-7-000. While we are addressing part of NERC's Performance Assessment with respect to the backlog of penalties, the remainder of NERC's Performance Assessment will be subject to a separate order in that proceeding.

⁹ *Id.* Attachment 3 at 12 and 35 and Joint Regional Entity-Self-Assessment at 25.

¹⁰ *Id.* Attachment 1 at 65.

¹¹ *Id.* at 36.

¹² *Id.* Appendix A at 7 and Attachment 2 at 23.

alleged violations and avoid future backlogs.¹³ Stakeholders' comments support NERC's efforts.¹⁴

B. Discussion

6. The Commission shares the concerns raised by NERC, the Regional Entities and industry stakeholders on the transparency and timeliness of the Notice of Penalty process. In this order, the Commission supplements the guidance in the July 3 Order on the record that will be appropriate in NERC's future Notice of Penalty filings.

7. First, the Commission acknowledges that NERC has filed an omnibus Notice of Penalty filing, which greatly reduces the current backlog. We recognize that NERC and the Regional Entities faced many challenges during the first few years of mandatory Reliability Standards, including the timely review of potential violations. We appreciate the work NERC and the Regional Entities did to reduce the current backlog of penalties and will rule on the omnibus filing in that proceeding.

8. We also recognize that NERC, the Regional Entities, and the industry are working together to develop a plan to ensure that such a backlog does not occur in the future. While there will always be some accumulation of alleged violations that are outstanding, the Commission agrees with NERC and the industry that an excessive backlog may undermine the statutory goals of FPA section 215.

9. As outlined above, in the July 3 Order, the Commission indicated that it needed "sufficient" documentation of the facts surrounding the violation. The Commission has observed that "[t]he appropriate level of detail relates to the particular factual situation in each Notice, including the complexity and relative importance of each violation at issue."¹⁵ We continue to believe that the record in a Notice of Penalty should be proportional to the complexity and relative importance of the violations it addresses. A Notice of Penalty need not include more information than necessary to support the rationale for the penalty, given the nature of the violations at issue.

¹³ *Id.* Attachment 2 at 23.

¹⁴ *See* comments filed September 3, 2009 in Docket No. RR09-7-000 of National Rural Electric Cooperative Association at 7 (supporting NERC's efforts to develop additional streamlined processes and clearer criteria for more types of violations) and American Public Power Association at 5 (supporting NERC's steps to address the current backlog of pending compliance violations that have yet to be filed with the Commission).

¹⁵ *North American Electric Reliability Corp.*, 127 FERC ¶ 61,198, at P 3 (2009).

10. Thus, the Commission believes that there is merit in NERC's proposal to create an abbreviated format for Notices of Penalty that conforms to the limited significance of particular types of violations or alleged violations. Such an approach could provide transparency and predictability more quickly for certain categories of violations and allow Regional Entities and NERC to concentrate their compliance resources on more significant alleged violations. Although at this time we do not seek to prescribe the parameters of these types of Notices, the Commission generally believes that an abbreviated format Notice of Penalty could be appropriate where the registered entity is performing the necessary task, but certain documentation may be missing or incomplete. Other appropriate uses may be for instances in which a Regional Entity proposes to assess a zero dollar penalty or enters into a settlement concerning violations or alleged violations that: (a) were found not to have posed a significant risk to the reliability of the Bulk-Power System; and (b) are addressed by mitigation plan(s) for which the relevant Regional Entity has confirmed timely completion. The Commission is open to other categories of penalty for which a short form Notice of Penalty may be appropriate. NERC should work with the Regional Entities and stakeholders in developing any such pro forma Notice of Penalty. In addition, Commission staff will be available to informally work with NERC on this matter.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.