

E-ALERT | Energy

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FERC ISSUES GUIDELINES FOR CIVIL PENALTIES AND REDUCES REPORTING REQUIREMENTS FOR NEW GENERATION SITE ACQUISITIONS

In a sharp break from its past practice, on March 18, 2010 FERC issued a policy statement establishing extensive guidelines for determining civil penalties. The guidelines should add greater fairness, consistency, and transparency to the Commission's civil penalty determinations, inform entities subject to FERC's enforcement authority how the agency will determine penalties, and help market participants allocate resources to the most important compliance objectives. In another action, FERC dropped its requirement for market-based rate sellers to report certain generation site acquisitions.

CIVIL PENALTY GUIDELINES

Modeled on the U.S. Sentencing Guidelines, FERC's Penalty Guidelines ("Guidelines") use a set of characteristics described as objective to determine civil penalty ranges based on a combination of a "violation level" and a "culpability score." FERC has used many of the identified factors or characteristics in the past, but will now apply them in a more structured and focused manner.

The Guidelines apply to all future violations and to pending investigations where FERC's Enforcement Staff and organizations have not yet entered settlement negotiations. The Guidelines are not applicable to natural person violators, as opposed to organizations, or to cases involving multiple types of violations. For these cases, FERC will continue to determine civil penalties based on individual facts and circumstances.

FERC stated that its prior policy statements on enforcement and its Policy on Compliance still provide useful guidance and will continue to inform its enforcement program. Although the Guidelines "supplement" those documents, any perceived conflicts will be resolved in favor of the Guidelines.

The Commission will now use five steps to determine civil penalty ranges.

Step One: Base Violation Level. FERC will identify a "base violation level" for the alleged offense. Violations involving fraud, manipulation or anti-competitive conduct and violations of rules, tariffs, and orders are assigned a base violation level of six. Violations of the bulk power system reliability standards are assigned a base violation level of sixteen. Violations involving misrepresentations and false statements to the Commission are assigned a base violation level of eighteen.

Step Two: Adjustments. Adjustments specified in the Guidelines will be made to the "base violation level" that account for circumstances that are specific to the type of violation at issue. For example, violations involving fraud, manipulation, or anti-competitive conduct and violations of rules, tariffs, and orders may be adjusted for the monetary gain or loss caused by the violation and the scope of the violation. Applying these adjustments to the base violation level generates a "final violation level" that corresponds to a specific dollar amount for a civil penalty.

Step Three: Base Penalty. Next, the Commission will calculate the “base penalty.” The base penalty is the greater of: (1) the dollar amount that corresponds to the final violation level (as described in step two); (2) the pecuniary gain to the organization from the violation; or (3) the pecuniary loss caused from the violation.

Step Four: Culpability Score. The “culpability score” corresponds to a set of minimum and maximum multipliers to be applied to the base penalty. Each organization begins with a base score of five. This base score may be adjusted upward or downward depending on six factors.

An upward adjustment is made if high-level personnel participated in, condoned, or were willfully ignorant of the violation. This factor is tied to the size of the organization or unit within which the violation occurred. For example, the culpability score will increase by five points if the factor applies to an organization with 5,000 or more employees, but only one point if the factor applies to an organization with only ten or more employees.

Upward adjustments are also made if: (1) the organization has a prior history of violations; (2) the violation violated a judicial or Commission order or injunction directed at the organization by the Commission or other Federal or state enforcement agency adjudicating similar matters; or (3) the organization obstructed justice or encouraged the obstruction of justice.

Downward adjustments are made if the company had an effective compliance and ethics program at the time of the violation or if the organization self-reported, cooperated, and accepted responsibility for the violation. FERC announced that it will give specific, measurable credit if an organization clearly demonstrates recognition and affirmative acceptance of responsibility for its violation. Also, FERC will reduce the culpability score if the organization resolves the matter without the need for a trial-type hearing.

The final culpability score corresponds to a set of minimum and maximum multipliers for penalties. For example, a culpability score of ten or higher will result in a minimum multiplier of 2 and a maximum multiplier of 4, the highest combination of multipliers. Culpability scores of less than five means one or both multipliers is less than one.

Step Five: Multiplication of Base Penalty by Minimum and Maximum Multipliers. This step produces a penalty range. The Commission retains discretion to set a penalty within this range and will use the specific facts of each case to determine where in the range the ultimate penalty might fall.

Although FERC stated it does not intend to depart from the Guidelines regularly, it recognized that deviations may be necessary to adjust for specific facts and circumstances. In addition, penalty ranges will not be followed when the minimum guideline is greater than the maximum penalty authorized by the Commission’s statutory authority (\$1 million per day, per violation). Penalties will also be reduced if they impair an organization’s ability to disgorge profits or if an organization is not able to pay the minimum penalty.

FERC further declared it will continue to order disgorgement for the full amount of the gain from a violation, plus interest. The Guidelines do not modify the approach the Commission uses to determine whether it will review penalties for reliability standard violations proposed by the North American Electric Reliability Corporation or a Regional Entity.

There will be three agency workshops to discuss how the Guidelines will be applied and answer questions. The first workshop is scheduled for April 7, 2010, from 9:30 a.m. to 12:00 p.m. Eastern

Daylight Time at FERC's headquarters in Washington. Additional workshops are scheduled for Houston, Texas on April 14, 2010, and San Francisco, California on April 15, 2010. The times and locations of these later workshops are to be determined. Finally, FERC's enforcement staff will hold a technical conference in one year to discuss how the Guidelines have worked.

The policy statement may be accessed [here](#).

A flow chart showing how the penalty guidelines will be applied may be accessed [here](#).

REVISED REPORTING REQUIREMENTS FOR ACQUISITION OF NEW GENERATION SITES

FERC issued Order No. 697-D clarifying and revising the rules for reporting acquisitions of new generation sites by market-based rate sellers (Docket No. RM04-7). As part of its vertical market power analysis, FERC requires information regarding a seller's control of inputs to electric power production, including sites for new generation capacity development.

Prior orders established the following rules for reporting acquisitions of generation sites:

- Sellers must report the acquisition of control of sites for new generation capacity development on a quarterly basis. This reporting requirement is limited to sites for which: (1) site control has been demonstrated in the interconnection process, or a monetary deposit has been made to allow site control to be demonstrated later; and (2) the potential number of megawatts that are reasonably commercially feasible is 100 MW or more.
- Sellers also must report annually, in a single report, any land acquired or any arrangements to acquire for the purpose of developing a generation site for which: (1) site control has not yet been demonstrated during the prior three years; and (2) the potential number of megawatts that are reasonably commercially feasible is equal to 100 megawatts or more.

In Order No. 697-D, FERC eliminated the latter reporting requirement due to the difficulty of determining the potential number of megawatts that are reasonably commercially feasible on sites for which site control has not yet been demonstrated in the interconnection process. At least one petitioner noted this estimate is especially difficult for thermal generation plants. FERC noted that if there is a concern that acquisitions are made for the purpose of preventing new generation development, FERC can request additional information.

Regarding the first reporting requirement, FERC clarified that quarterly filings are not needed if no sites have been acquired during a quarter, and that a seller is required only to report acquisitions that have not previously been reported, i.e., the reporting obligation is not cumulative.

Order No. 697-D may be accessed [here](#).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our energy practice group:

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