

132 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation	Docket Nos. NP10-143-000
	NP10-144-000
	NP10-145-000
	NP10-146-000
	NP10-147-000
	NP10-148-000
	NP10-150-000
	NP10-151-000
	NP10-152-000
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	NP10-158-000
	NP10-159-000

NOTICE OF NO FURTHER REVIEW AND GUIDANCE ORDER

(August 27, 2010)

1. On July 30, 2010, the North American Electric Reliability Corporation (NERC), the Commission's Electric Reliability Organization (ERO), filed 17 Notices of Penalty in Docket Nos. NP10-143-000 through NP10-159-000, pursuant to section 39.7(c) of the Commission's regulations.¹ NERC, as the Commission-approved ERO, must file a Notice of Penalty with the Commission before a penalty assessment made by a Regional Entity or NERC regarding a violation of a Reliability Standard takes effect. Each penalty determination is subject to Commission review, on its own motion or by the filing of an application for review by the registered entity subject to the penalty within thirty days after the date NERC files the applicable Notice of Penalty. 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.

¹ 18 C.F.R. § 39.7(c) (2010).

2. Based on careful review of the Notices of Penalty that were submitted on July 30, 2010, the Commission has decided not to engage in further review of 16 of the Notices by instituting any formal proceedings on our own motion.² However, one Notice, Docket No. NP10-157-000 relating to Commonwealth Edison Company (ComEd), did raise an issue of particular concern to the Commission: whether repetitive infractions of the same or a closely-related Reliability Standard requirement are treated as an aggravating factor in penalty determinations. In this instance, the Commission chooses not to review the penalty determination in the particular Notice, but instead to provide additional guidance to NERC and the Regional Entities to clarify the Commission's expectations in regard to this issue in future Notices.

3. Docket NP10-157-000 involves a settlement agreement between ComEd³ and ReliabilityFirst Corporation (RFC) to resolve a violation of PRC-005-1 R2.1. NERC states that on June 16, 2009, ComEd self-reported its second occurrence of non-compliance with PRC-005-1 R2, discovered during an internal self-assessment of compliance performance.⁴ In the settlement agreement, ComEd neither admits nor denies the violation alleged in the Notice of Penalty, but agrees to pay a penalty of \$23,000.⁵ In approving the settlement, NERC's Board of Trustees Compliance Committee (BOTCC) considered the following factors: (1) the violation constituted ComEd's second occurrence of violation of the subject Reliability Standard but was unrelated to the first occurrence and was not considered an aggravating factor; (2)

² Pursuant to sections 375.311(u) and (v) of the Commission's regulations, 18 C.F.R. §§ 375.311(u) and (v) (2010), by separate order the Director of the Office of Enforcement is extending the time period for the Commission's consideration of Docket No. NP10-149-000 for the purpose of directing NERC and Texas Reliability Entity, Inc. to provide further information for our consideration.

³ ComEd is a unit of Chicago-based Exelon Corporation, one of the nation's largest electric utilities. ComEd is registered on the NERC Compliance Registry as a Distribution Provider, Load-Serving Entity, Purchasing-Selling Entity, and Transmission Owner in the ReliabilityFirst region. As such, ComEd is responsible for maintaining more than 90,000 miles of power lines that make up the electric transmission and distribution systems in Northern Illinois. ComEd also provides customer operations for 3.8 million customers, or 70 percent of Illinois' population. North American Electric Corporation, Docket No. NP10-157-000, July 30, 2010 Filing, Att. a at 2. (NP10-157-000 Record, July 30, 2010 Filing).

⁴ NP10-157-000 Record, July 30, 2010 Filing at 2.

⁵ NP10-157-000 Record, July 30, 2010 Filing, Att. a at 7.

ComEd self-reported the violation; (3) ReliabilityFirst reported that ComEd was cooperative throughout the compliance enforcement process; (4) the quality of the ComEd compliance program; (5) ReliabilityFirst reported there was no evidence of any attempt to conceal a violation nor evidence of intent to do so; (6) the violation did not pose a serious or substantial risk to the BPS; and (7) ReliabilityFirst reported that there were no other mitigating or aggravating factors or extenuating circumstances that would affect the assessed penalty.⁶ The Notice also stated that several affiliates of ComEd were the subject of Notices of Penalty involving violations of PRC-005-1 R2 or its subrequirement R2.1.⁷

4. The Commission addresses the conclusion reached by ReliabilityFirst and NERC that though the instant violation was ComEd's second violation of PRC-005-1 R2.1,⁸ it was not considered to be an aggravating factor in the penalty determination because it was "unrelated" to the first occurrence.⁹ ComEd's prior violation, resolved in the Omnibus Notice of Penalty in Docket NP10-2-000,¹⁰ stemmed from the self-reported discovery of an error within its maintenance scheduling tool where some of the automatic relay maintenance work order triggers were incorrectly set to "inactive" within the system. As a result, automatic notifications to schedule work for eleven transmission

⁶ NP10-157-000 Record, July 30, 2010 Filing at 3-4.

⁷ NP10-157-000 Record, July 30, 2010 Filing at 1 n.1 (referring to Docket No. NP10-151-000 relating to PECO Energy Company and Docket No. NP018-5-000 relating to Exelon Generation Company, LLC).

⁸ *North American Electric Reliability Corporation*, Docket No. NP10-2-000 (filed Oct. 14, 2009) (Omnibus Notice of Penalty in which RFC proposed a \$0 penalty for one violation of PRC-005-1 R2.1 by ComEd).

⁹ NP10-157-000 Record, July 30, 2010 Filing at 3.

¹⁰ ComEd's settlement with RFC on the first PRC-005-1 R2 violation states that the violation will be considered a confirmed violation for all purposes "and may be used as aggravating factors in accordance with the NERC Sanction Guidelines for determining appropriate monetary penalties or sanctions for future violations." Attachment A to August 8, 2009 letter from RFC to ComEd relating to NERC Violation # RFC200700013 in Docket No. NP10-2-000. filed October 14, 2009. In the Notice, NERC stated that it would describe each matter as a "violation," regardless of its procedural posture and whether it was a possible, alleged or confirmed violation. *Id.* at n.2. For purposes of our discussion, we use the term "violation" in the same manner as NERC does.

relay maintenance tasks were not generated and routine maintenance and testing was not performed.¹¹ The cause of the eleven omitted work orders was traced to a data migration issue from the former maintenance database to the current maintenance database.¹² In the instant Notice, Com-Ed self-reported discovery that preventive maintenance tasks were performed outside the defined intervals for certain station batteries and microwave batteries.¹³ The tasks were not performed on schedule because of: 1) a lack of rigor in ComEd's work management processes for the execution of its Protection System Equipment Preventative Maintenance Program;¹⁴ 2) deficiencies in accountability and ownership in the execution of the Protection System Equipment Preventative Maintenance Program; and 3) inadequate training on NERC compliance Requirements.¹⁵ Thus, not only did the initial and instant violations involve the same Reliability Standard and Requirement, they both stem from inadequacies in the management and effectiveness of ComEd's Protection System maintenance and testing program.

5. In considering the seriousness of a violation, one factor evaluated by the Commission is whether a violation is a repeat offense or if the company has a history of violations.¹⁶ Similarly, the NERC Sanction Guidelines state that, “[i]f a violator has had repetitive infractions of the same or a closely-related reliability standard requirement, particularly within a time frame defined within the standard(s) or deemed appropriate by NERC or the regional entity in the absence of the standard(s) defining the time frame, NERC or the regional entity shall consider some increase to the penalty.”¹⁷ The facts of a prior violation need not be identical to a current violation to constitute an aggravating factor. In particular, the Commission interprets the term “repetitive infractions” in

¹¹ NP10-2-000 Record, Oct. 14, 2009 Filing, Att. c at 2.

¹² *Id.*

¹³ NP10-157-000 Record, July 30, 2010 Filing, Att. d at 3.

¹⁴ The issues with ComEd's work management processes included problems with its work management and scheduling software application. NP10-157-000 Record, July 30, 2010 Filing, Att. d at 5.

¹⁵ NP10-157-000 Record, July 30, 2010 Filing, Att. a at P 11.

¹⁶ *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156, at P 55 (2008).

¹⁷ North American Electric Reliability Corporation, *Sanction Guidelines of the North American Electric Reliability Corporation*, effective Jan. 15, 2008, at 13.

NERC's Sanction Guidelines to include: 1) repeated or continuing examples of conduct similar to that underlying the prior violation of the same or a closely-related Reliability Standard Requirement; 2) conduct addressed in a registered entity's previously submitted mitigation plan for a prior violation of the same or a closely-related Reliability Standard Requirement; or 3) multiple violations of the same Standard and Requirement.

6. In this instance, the Commission sees ComEd's two violations of PRC-005-1 R2.1 as repetitive infractions because they are two violations of the identical Reliability Standard and Requirement by the same registered entity that embody that entity's repeated failure to meet the performance obligation the Requirement specifies. In our view, ComEd's failure to meet this performance obligation in two instances is sufficient to constitute the "repetitive infractions" that NERC and the Regional Entities must consider as an aggravating factor in determining penalties under the Sanction Guidelines. In addition, we observe that the factual circumstances surrounding the two violations do not significantly distinguish them from one another. That the original violation involved a failure to test relay maintenance packages and the instant violation involves a failure to timely test a variety of batteries does not distinguish the two violations: both relays and batteries are Protection System elements that must be tested and maintained pursuant to PRC-005-1 R2.1. Similarly, that the initial violation was caused by an error within the maintenance scheduling tool, does not meaningfully distinguish it from the instant violation, which was caused by a range of issues including problems with the work management and scheduling software application. ComEd's deficiencies in the management of its Protection System maintenance and testing program resulted in two separate violations of the same Reliability Standard and Requirement, PRC-005-1 R2.1.¹⁸

7. We also note that the Notice mentioned previous Notices in which the Commission had permitted a penalty assessment against an affiliate of ComEd for a violation of PRC-005-1 R2 or R2.1 to become final, yet did not state whether RFC or NERC had considered whether to treat these violations as prior violations that would affect the penalty determination for ComEd. We believe that there are situations in which NERC or a Regional Entity could consider a registered

¹⁸ Two other Notices filed on July 30, 2010 also included repeat violations of the same or a closely-related Reliability Standard. Docket No. NP10-144-000 resolved a repeat violation of VAR-002-1 R2 by Dynegy Inc. with a settlement for a proposed penalty of \$20,000. Docket No. NP10-146-000 resolved a second violation of PRC-005-1 R2.1 by San Diego Gas and Electric Company with a settlement for a proposed penalty of \$30,000. Both Notices state that NERC and the Regional Entity considered that the violations were repeat violations of the same Reliability Standard and Requirement as a factor in the penalty determination. However, these two Notices fail to explain how NERC and the Regional Entity assessed those prior violations in their penalty determinations.

entity's violation as a prior violation with respect to an affiliate's later-in-time violation.¹⁹ Although the record in this Notice correctly demonstrates awareness by NERC and RFC of the prior violations by ComEd's affiliates,²⁰ it does not explain whether NERC and RFC considered any facts from these prior violations as indicating the involvement of the whole corporation or other affiliates in the instant violation. Future Notices of Penalty should explain how NERC and the Regional Entities assessed whether the instant violations may reflect recurring conduct by the same registered entity or by an affiliate or department that is operated by the same corporate entity or whose compliance activities may be conducted by that entity. Likewise, prior violations by the same or affiliated entity should not be disregarded for the reason that a different Regional Entity made the prior finding.

8. The Commission expects all future Notices of Penalty to conform to this guidance by providing adequate information about all prior violations by a Registered Entity and by explaining how NERC and the Regional Entities assessed those prior violations in their penalty determinations. The foregoing discussion should not be read to suggest that NERC and the Regional Entities lack the discretion to determine, based on the particular facts of each violation, whether a prior violation of the same or a closely-related Reliability Standard should be considered an aggravating factor. Rather, the Commission viewed the specific facts of Docket No. NP10-157-000 as an appropriate opportunity to provide immediate guidance to NERC and the Regional Entities regarding our interpretation of the scope of the term "repetitive infractions" in the NERC Sanction Guidelines, as discussed above.

¹⁹ *Cf.* Section 3.11 of the Sanction Guidelines, which states that in considering the characteristics of a violator's operation or power system:

If the violator constitutes part of a corporate family the size of the violator will be attributed to that violator alone, in the absence of any facts indicating involvement of the whole corporation or corporate affiliates of the violator.

If the violator is an entity established solely as a shell to register as subject to one or more Reliability Standards the size of the entity will be disregarded in favor of consideration of the size of parent entity or any affiliates that NERC or the regional entity deems involved and constituting the "actual" size of the violator.

²⁰ NP10-157-000 Record, July 30, 2010 Filing at 1 n. 1.

The Commission will not further review, on its own motion, the following Notices of Penalty:²¹

<u>Docket No.</u>	<u>Filing Date</u>	<u>Registered Entity</u>
NP10-143-000	July 30, 2010	City of Tallahassee
NP10-144-000	July 30, 2010	Dynegy, Inc.
NP10-145-000	July 30, 2010	Pacific Gas and Electric Company
NP10-146-000	July 30, 2010	San Diego Gas & Electric Company
NP10-147-000	July 30, 2010	Greenwood Commissioners of Public Works
NP10-148-000	July 30, 2010	City of Vineland, New Jersey
NP10-150-000	July 30, 2010	Baltimore Gas & Electric Company
NP10-151-000	July 30, 2010	PECO Energy Company
NP10-152-000	July 30, 2010	Dynegy, Inc.
NP10-153-000	July 30, 2010	DTE Energy Trading
NP10-154-000	July 30, 2010	Ocala Utility Services
NP10-155-000	July 30, 2010	EPCOR USA North Carolina LLC (Roxboro)
NP10-156-000	July 30, 2010	EPCOR USA North Carolina LLC (Southport)
NP10-157-000	July 30, 2010	Commonwealth Edison Company

²¹ The Secretary is issuing this notice as to Docket Nos. NP10-145-000 and NP10-153-000 pursuant to authority the Commission delegated in Order No. 728. *See Delegations for Notices of Penalty*, Order No. 728, FERC Stats. & Regs. ¶ 31,298 (2009).

NP10-158-000 July 30, 2010

Public Service Company of New Mexico

NP10-159-000 July 30, 2010

Unidentified Registered Entity

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.