



**Federal Energy Regulatory Commission**  
**September 16, 2010**  
**Open Commission Meeting**  
**Staff Presentation**  
**Item M-1**

“Good morning Mr. Chairman and Commissioners. Agenda item M-1 is a revised policy statement addressing the Penalty Guidelines, which the Commission first issued on March 18, 2010, to add greater fairness, consistency, and transparency to its penalty determinations. The Commission suspended the guidelines’ application on April 15, 2010, to afford entities the opportunity to submit written comments on them. The Commission received forty-one sets of comments on the Penalty Guidelines from various segments of the energy industry covering a broad range of issues. The Revised Policy Statement on Penalty Guidelines addresses these comments and describes modifications to the Penalty Guidelines based on the comments. Enforcement staff will hold a technical conference one year from issuance of the modified Penalty Guidelines to discuss how they have worked in practice, to permit comments and questions from the industry, and to allow the Commission to receive further input on the guidelines and their implementation.

Like the Penalty Guidelines the Commission issued in March, the modified Penalty Guidelines proposed today will play a significant role in the Commission’s determinations of civil penalties and will help to ensure fairness, consistency, and transparency in its enforcement program. The modified Penalty Guidelines continue to base penalties on the same factors as those present in the Commission’s 2005 and 2008 policy statements on enforcement, but do so in a more focused manner by assigning specific and transparent weight to each factor. Thus, organizations will now know with more certainty how each factor is applied. At the same time, the Commission will continue to exercise its discretion to make an individualized assessment based on the facts presented in a given case.

Also like the original Penalty Guidelines, the modified Penalty Guidelines are modeled on the sections of the United States Sentencing Guidelines that apply to organizations in federal court cases, though we have deviated from that model as appropriate to fit our circumstances. We believe the Sentencing Guidelines provide the best model to adapt to Commission purposes because they focus on factors—such as the seriousness and remediation of a violation—that reflect the requirements of EAct 2005 and that are at the center of the Commission’s penalty regime. For Commission purposes, they provide an effective analytical tool promoting objectivity, consistency, and transparency to penalty determinations, regardless of the underlying prohibited conduct.

The modified Penalty Guidelines clarify that they do not affect Enforcement staff’s exercise of discretion to close investigations or self-reports without sanctions. Staff will continue to close all investigations and self-reports where no violation is found, and to close some investigations and self-reports without sanctions for certain violations that are relatively minor in nature and that result in little or no potential or actual harm. Enforcement staff can also recommend downward and upward departures from the Penalty Guidelines’ penalty range.

I have just discussed some of the ways in which the modified guidelines remain the same as the guidelines issued in March. I’ll now turn to Steve to highlight some of the modifications that have been made based on commenters’ recommendations.

Agenda item M-1 proposes several modifications to the section of the Penalty Guidelines on reliability violations. First, although the Penalty Guidelines will still apply to

violations of the Reliability Standards, they will apply only to the Commission's Part 1b investigations and enforcement actions. They will not apply to the Commission's review of NERC's Notices of Penalty.

Second, the modified Penalty Guidelines reduce the base violation level for reliability violations from sixteen under the original Penalty Guidelines to six and increase the risk of harm enhancements for reliability violations. The combination of these modifications balances the need for an adequate deterrent for all reliability violations while recognizing that relatively less severe violations should receive relatively smaller penalties.

Third, the modified Penalty Guidelines do not attempt to conduct a specific, individualized assessment of the monetary value of the loss of load resulting from a violation of a Reliability Standard as a measure of the harm from the violation. Instead, as suggested by one commenter, the Penalty Guidelines will consider the quantity of load lost, in MWh, as a measure of the seriousness of the violation. Calculating the monetary value of lost load would require a substantial commitment of time and resources by the entity under investigation and by Commission staff. Focusing on quantity avoids that burdensome process but still allows us to consider the seriousness of the particular violation.

The modified Penalty Guidelines also make significant changes to the Penalty Guidelines' provision on compliance credit. First, the Penalty Guidelines now give partial compliance credit to organizations that have effective, yet imperfect, compliance programs, recognizing that organizations can have effective compliance programs, despite not meeting every requirement and sub-requirement listed in the guidelines. Second, the modified Penalty Guidelines delete the provision that automatically eliminates any compliance credit for violations where an organization's senior-level personnel participated in, condoned, or were willfully ignorant of the violation. We recognize that an organization could devote significant efforts and resources to compliance, but still not be able to prevent a rogue employee from participating in a violation.

The modified Penalty Guidelines also 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. Thus, for example, an organization can now receive a two-point credit for self-reporting even without also earning cooperation credit.

Finally, the modified Penalty Guidelines add an explicit scienter requirement with respect to misrepresentations and false statements.

Staff has carefully 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. That concludes our presentation. We would be pleased to respond to questions."