

139 FERC ¶ 61,248
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

North American Electric Reliability Corporation

Docket No. NP10-18-002

ORDER DENYING REHEARING AND PROVIDING CLARIFICATION

(Issued June 21, 2012)

1. On April 18, 2011, a group of trade associations¹ and the North American Electric Reliability Corporation (NERC) and six Regional Entities² filed separate requests for clarification, or, in the alternative, rehearing of the Commission's March 17, 2011, Order on Review of Notice of Penalty involving Turlock Irrigation District (Turlock).³
2. The March 17 Order affirmed an \$80,000 penalty that WECC assessed against Turlock for alleged violations of several Reliability Standards, including a violation of Reliability Standard FAC-003-1 Requirement R2 related to a vegetation-caused outage of transmission facilities on August 29, 2007. Turlock's FAC-003-1 R2 violation led to a loss of firm load in the service areas of Turlock and a neighboring registered entity, Modesto Irrigation District (Modesto).⁴ The March 17 Order also addressed several issues related to Turlock's FAC-003-1 R2 violation, including load loss and self-

¹ The trade associations are the Edison Electric Institute, the Electric Power Supply Association, the Large Public Power Council, and the National Rural Electric Cooperative Association (collectively, the Trade Associations).

² NERC filed its request with Florida Reliability Coordinating Council, Inc., Midwest Reliability Organization, Northeast Power Coordinating Council, Inc., Southwest Power Pool Regional Entity, Texas Reliability Entity, Inc., and Western Electricity Coordinating Council (WECC) (collectively, NERC and Identified Regional Entities).

³ *North American Electric Reliability Corporation*, 134 FERC ¶ 61,209 (2011) (March 17 Order).

⁴ *Id.* P 34.

reporting possible violations of Reliability Standards, to provide guidance to NERC, the Regional Entities, and industry on how the Commission expects to handle these issues on a prospective basis.⁵ The Trade Associations and NERC and Identified Regional Entities seek clarification, or, in the alternative, rehearing, on some of this guidance. For the reasons discussed below, the Commission denies rehearing of the March 17 Order and clarifies certain aspects of that order. The Commission also corrects two factual statements from the March 17 Order, as requested by Turlock and Modesto.

I. Background

3. The background of this matter is discussed in detail in the March 17 Order and is therefore only summarized here. On August 30, 2007, Turlock reported to WECC a violation of FAC-003-1 R2 for Turlock's failure to maintain sufficient clearances between vegetation and its 230 kV transmission lines, as required by its 2007 Vegetation Management Work Plan.⁶ This failure resulted in contact between an almond tree and Turlock's 230 kV Westley-Walnut transmission line on August 29, 2007, leading Turlock and Modesto to shed firm load that dropped nearly 40,000 customers comprising a maximum of 270 megawatts (MW) of firm load in the Turlock and Modesto areas. Some customers lost power for more than one hour.⁷ On November 13, 2009, NERC filed a Notice of Penalty in Docket No. NP10-18-000 related to Turlock's violation of FAC-003-1 R2 as well as of other Reliability Standards (Notice). The Notice includes a settlement agreement between WECC and Turlock in which Turlock neither admits nor denies violations of the pertinent Reliability Standards.

4. On February 26, 2010, pursuant to section 215(e)(2) of the Federal Power Act (FPA)⁸ and section 39.7(e)(1) of the Commission's regulations,⁹ the Commission initiated, on its own motion, a review of the Notice to determine whether the violations of other Reliability Standards or facts not disclosed in the Notice may have contributed to the loss of firm load, and whether the proposed penalty amount was appropriate.¹⁰

⁵ *Id.* P 35.

⁶ *North American Electric Reliability Corporation*, Docket No. NP10-18-000, at 7 (filed Nov. 13, 2009) (Notice).

⁷ *Id.* at 7-8.

⁸ 16 U.S.C. § 824o(e)(2) (2006).

⁹ 18 C.F.R. § 39.7(e)(1) (2011).

¹⁰ *North American Electric Reliability Corporation*, 130 FERC ¶ 61,151, at P 10 (2010) (February 26 Order).

Comments filed on the February 26 Order focused on Turlock's violation of FAC-003-1 R2 and the causes of the load shedding that followed the vegetation contact.

5. Based on its review of these comments and the record filed in this proceeding, the Commission affirmed the \$80,000 penalty as an appropriate exercise of WECC's discretion to assess a penalty for a violation that took place during the "initial period" after FAC-003-1 became effective and mandatory in the United States, i.e., the period from June 18, 2007, through December 31, 2007.¹¹ The Commission considered the penalty appropriate given that the violation occurred about two weeks after this period began.¹² In addition to this decision, the Commission also took the opportunity to respond to issues raised by the comments and the record to provide guidance to NERC, the Regional Entities, and industry on issues raised in future notices of penalty.¹³

6. Among the issues addressed in the March 17 Order, four aspects of the Commission's guidance are relevant to the requests for clarification and rehearing: (1) load loss; (2) self-reporting; (3) size and nature of a registered entity; and (4) adequacy of the record filed with notices of penalty.

7. On load loss, the Commission explained that the penalty for a violation of a Reliability Standard that results in load shedding "should take into account the lost load because the violation created a more serious risk or result than a similar violation that did not necessitate load shedding."¹⁴ In support of this position, the Commission stated that "Section 215(e)(6) of the FPA 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"¹⁵ The Commission reasoned that, to consider the

¹¹ March 17 Order, 134 FERC ¶ 61,209 at P 2. The Commission announced this initial period in Order No. 693, explaining that the ERO's and Regional Entities' enforcement discretion during this period would "allow the ERO, Regional Entities and other entities time to ensure that the compliance monitoring and enforcement processes work as intended and that all entities have time to implement new processes." *Mandatory Reliability Standards for the Bulk Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 222, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

¹² *Id.* P 34.

¹³ *Id.* P 35.

¹⁴ *Id.* P 38.

¹⁵ *Id.* P 40 (internal quotation marks omitted).

seriousness of a violation adequately, it must take into account the actual harm and risk to reliability posed by a violation, and that loss of load is relevant to the harm posed by a violation.¹⁶ The Commission also noted that NERC's Sanction Guidelines support the consideration of load shedding in assessing penalties because these guidelines allow Regional Entities and NERC to consider factors they deem appropriate in determining penalties.¹⁷

8. While explaining that load loss should be considered as a relevant factor, the Commission emphasized that this consideration was not intended "to have a chilling effect on system operators' willingness to shed load for fear of risking a higher penalty."¹⁸ Indeed, the Commission recognized that "load shedding is sometimes required by the Reliability Standards," and system operators' decisions to shed load would not result in a violation in such circumstances.¹⁹

9. On self-reporting, the Commission explained that Turlock should not have received self-reporting credit for its FAC-003-1 R2 violation because it was required to report the event to WECC as a reportable disturbance under Reliability Standard EOP-004-1 R3.²⁰ The Commission stated that, when "a registered entity informs a Regional Entity of a potential violation through a report required more quickly by another standard than by the one that the registered entity may have violated, . . . the Regional Entity and NERC [should] remove self-reporting as a mitigating factor when assessing a penalty amount."²¹ Although self-reporting credit is not warranted when an entity is required to disclose information about a violation, cooperation credit may be warranted for providing additional, useful information about the facts and circumstances surrounding the violation.²²

¹⁶ *See id.*

¹⁷ *Id.* P 42 (citing Sanction Guidelines of the North American Electric Reliability Corporation, Effective January 1, 2011 (Sanction Guidelines), § 4.3).

¹⁸ *Id.* P 38.

¹⁹ *Id.*

²⁰ *Id.* P 46. EOP-004-1 R3 requires a registered entity to report certain disturbances, including those that result in firm load shedding of 100 MW or more. *Id.*

²¹ *Id.* P 47.

²² *Id.* P 46-47.

10. With respect to size and nature of a registered entity, the Commission explained that “a violation of FAC-003-1 R2 does not automatically warrant a lower penalty than other notices of penalty involving alleged or confirmed violations of FAC-003-1 R2 because the violator is a smaller entity than other registered entities assessed such penalties and is a public entity.”²³ In the March 17 Order, the Commission also disagreed with Turlock that a registered entity’s size should be measured solely by the number of miles of transmission lines an entity operates and its interconnections to the Bulk-Power System.²⁴ Rather, the Order stated that size is determined by multiple factors, including number of employees and annual revenue and profits.²⁵

11. Finally, with respect to the adequacy of records filed with notices of penalty, the Commission emphasized that “NERC should file a complete and accurate record for each notice of penalty, whether it reflects an adjudicated determination or a settlement with the registered entity.”²⁶ The March 17 Order noted that, had Commission staff “not issued a data request seeking additional information and had the Commission not initiated review on its own motion, it would have not discovered facts . . . critical [to] evaluating and assessing Turlock’s penalty and subsequent efforts to increase compliance and improve reliability.”²⁷

II. Discussion

12. The Trade Associations seek clarification, or, in the alternative, rehearing on the Commission’s March 17 Order related to load loss. The Trade Associations and NERC and Identified Regional Entities seek clarification, or, in the alternative, rehearing on the Commission’s March 17 Order related to self-reporting. In addition, the Trade Associations seek clarification, but not rehearing, on the Commission’s March 17 Order related to size and nature of registered entities and adequacy of records filed with notices of penalty.

²³ *Id.* P 45.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* P 37.

²⁷ *Id.* P 36.

A. Load Loss**1. Request for Clarification or, in the Alternative, Rehearing**

13. The Trade Associations ask the Commission to clarify whether we intended “to direct NERC, when assessing penalties under its Sanction Guidelines, to factor loss of load and harm to customers into the calculation.”²⁸ The Trade Associations raise the Penalty Guidelines in questioning the Commission’s statements on load loss. Specifically, they question whether we would have intended to direct NERC to consider load loss when assessing penalties because we have previously stated that our Penalty Guidelines, which account for load loss with respect to determinations of penalties the Commission assesses for violations of Reliability Standards, do “not extend to NERC’s enforcement actions or to the Commission’s review of NERC enforcement actions.”²⁹

14. In addition, the Trade Associations ask the Commission to clarify whether, if it intends to require that NERC consider load loss, the Commission would require “a calculation of the cost of economic or physical injury to customers.”³⁰

15. In the alternative, the Trade Associations ask for rehearing if the Commission did intend to direct NERC to factor loss of load and harm to customers into the calculation of penalties under the Sanction Guidelines.³¹ Their argument for rehearing is twofold. First, the Trade Associations assert that NERC’s “Sanction Guidelines already address the relative risk to the Bulk Electric System posed by violations of each Reliability Standard individually,” and that the Commission decision to “add an additional factor reflecting load loss . . . would have only the untoward effect of influencing decisions whether to shed load – decisions that should reflect solely an unbiased determination as to whether shedding load is necessary . . . to prevent further adverse effect on the Bulk Electric System.”³² Specifically, the Trade Associations note that NERC’s Sanction Guidelines already account for risk by applying a Violation Risk Factor (VRF) based on the specific Reliability Standard violated, which “express[es] a relative measure of the

²⁸ Trade Associations’ Request for Clarification and Rehearing, April 18, 2011 (Trade Associations’ Request), at 8.

²⁹ *Id.* at 7 (citing *Enforcement of Statutes, Orders, Rules, and Regulations*, 131 FERC ¶ 61,040 (2010) (Revised Policy Statement on Penalty Guidelines)).

³⁰ *Id.* at 14.

³¹ *Id.* at 8.

³² *Id.* at 11 (emphasis in original).

degree to which the practices to which they attach pose risks to the Bulk Electric System.”³³ Because the Sanction Guidelines already consider risk through VRFs, the Trade Associations argue that adding load loss as a factor is unnecessary and would serve only to discourage system operators from exercising their best, unbiased judgment in deciding whether to shed load when needed, thus increasing the risk to the Bulk-Power System.³⁴

16. Second, the Trade Associations contend that, by directing NERC to consider load loss, the Commission has substantially reinterpreted the Sanction Guidelines, which, they assert, the Commission cannot do without providing notice and an opportunity for comment.³⁵ In the March 17 Order, the Commission explained that section 4.3 of the Sanction Guidelines allows Regional Entities and NERC to consider factors they deem appropriate in determining penalties.³⁶ The Trade Associations argue that this interpretation is not a reasonable interpretation of the Sanction Guidelines, “but rather that it has the effect of a substantive revision.”³⁷ According to the Trade Associations, the Commission interpretation is not reasonable because the Sanction Guidelines do not indicate that load loss is an aggravating factor and “the VRFs were designed as the exclusive mechanism for factoring the risk posed by each violation into the calculation of penalties.”³⁸

2. Commission Determination

17. The Commission clarifies that it intended in the March 17 Order to direct NERC to consider load loss and harm to customers resulting from violations of Reliability Standards in its penalty assessments for these violations. FPA section 215(e)(6) states: “Any penalty imposed under this section 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.” The factors of loss of load and harm to customers, if present, are relevant to the seriousness of violations of Reliability Standards. In considering on review of a penalty whether it is reasonably related to the seriousness of any violation, the Commission must be able to consider the

³³ *Id.* at 10-11.

³⁴ *See id.* at 8-14.

³⁵ *Id.* at 15.

³⁶ March 17 Order, 134 FERC ¶ 61,209 at P 42.

³⁷ Trade Associations’ Request at 15.

³⁸ *Id.*

outcomes of a violation—including, when present, losses of load or harm to customers, as well as the reasons for the violation and any other factors relevant to its seriousness.

18. In response to the Trade Associations’ suggestion that directing NERC to consider load loss is inconsistent with our previous statements that the Penalty Guidelines do not apply to notices of penalty, we emphasize that we did not apply the Penalty Guidelines when reviewing the Turlock Notice. Also, we did not instruct NERC and the Regional Entities to apply the Penalty Guidelines and did not instruct them how to consider losses of load or load shedding incidents. Rather, our intent in the March 17 Order was simply to provide guidance to NERC that load shedding is a relevant factor to consider when assessing the seriousness of violations, not to specify how NERC considers the factor.

19. This guidance is consistent with NERC’s Sanction Guidelines. Three separate provisions of the Sanction Guidelines either require or allow NERC and the Regional Entities to consider the seriousness of violations when determining a penalty amount. First, section 3.8 requires “[p]enalties, sanctions, and remedial actions levied or applied for the violation of a reliability standard [to] bear a reasonable relation to the seriousness of the violation”³⁹ Adequately factoring the seriousness of a violation into a penalty determination requires consideration of any losses of load stemming from the violation. As the Commission indicated in the March 17 Order, to adequately consider the seriousness of the violation, actual harm and risk must be considered, and loss of load is relevant to the harm posed by a violation.⁴⁰ Second, section 4.3 states that the Commission’s 2005 Policy Statement on Enforcement is “instructive to NERC and the [R]egional [E]ntities when they are determining penalties.”⁴¹ The 2005 Policy Statement on Enforcement captures load loss resulting from a violation as a relevant penalty factor by, for example, suggesting that the Commission consider the scope of harm and impact from a violation of a Reliability Standard.⁴² The role of loss of load is relevant to the scope of harm resulting from a violation. Finally, section 4.3 also allows “NERC or the

³⁹ Sanction Guidelines § 3.8.

⁴⁰ See March 17 Order, 134 FERC ¶ 61,209 at P 40. See also *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, at P 551 (2006) (noting that the actual or potential effect of a violation is “certainly one consideration in determining the seriousness of the violation”).

⁴¹ Sanction Guidelines § 4.3.

⁴² See *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068, at P 20 (2005) (2005 Policy Statement on Enforcement).

[Regional Entity to] consider other additional factors it deems appropriate under the circumstances as long as their use is clearly identified and adequately justified.”⁴³ The identification of loss of load as an effect of, or harm or impact from, a violation of a Reliability Standard clearly could have been identified and adequately justified when WECC and NERC considered the penalty to be imposed against Turlock.

20. The Commission denies the Trade Associations’ request for rehearing on the load loss issue. We disagree with the Trade Associations’ two arguments on this issue. First, their argument that the Sanction Guidelines already address the relative risk to the Bulk-Power System through consideration of VRFs is inconsistent with the Sanction Guidelines, the Commission’s long-standing position on risk and harm resulting from violations of Reliability Standards, and with the way NERC and the Regional Entities have considered risk and harm in their own penalty assessments. The Commission recognizes the importance of VRFs in determining the risk posed by violations. NERC and the Regional Entities are required to consider VRFs in their penalty determinations.⁴⁴ For this consideration, the VRFs provide NERC and the Regional Entities with a “clear, concise and comprehensive association between the violation of a requirement and the expected or potential impact of the violation to the reliability of the bulk power system.”⁴⁵ However, VRFs apply to particular Reliability Standard requirements uniformly, without regard to individual facts and circumstances. Thus, they do not necessarily account for the *actual* risk or harm resulting from a specific violation of a Reliability Standard. In contrast, the Commission has always interpreted its obligation to consider the seriousness of a violation as requiring it to assess any actual harm to reliability posed by the particular facts.⁴⁶ In addition, NERC and the Regional Entities have always considered in notices of penalty the actual risk and harm resulting from a violation separately from their application of VRFs. The Turlock notice of penalty illustrates this very point. WECC and NERC considered that FAC-003-1 R2 has a High VRF, but they also evaluated the actual risk and harm based on the particular facts,

⁴³ Sanction Guidelines § 4.3.

⁴⁴ See *North American Electric Reliability Corp.*, 118 FERC ¶ 61,030, at P 90 (2007) (“The ability of NERC and Regional Entities to enforce Reliability Standards is based in large measure on an appropriate method to determine a monetary penalty for a particular violation. Although this determination depends on the use of the Base Penalty Amount Table, NERC and the Regional Entities will not be able to use the table without Violation Risk Factors that are approved by the Commission.”).

⁴⁵ Sanction Guidelines § 4.1.1.

⁴⁶ See, e.g., *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).

emphasizing that Turlock's "vegetation-caused outage that caused approximately 13,000 customers to lose service was a significant event that warrants a commensurate penalty."⁴⁷ Similarly, although Turlock had other violations of requirements with High VRFs, WECC and NERC considered the actual risk from these violations and concluded that these violations "resulted in a minimal to moderate impact to the reliability of the BPS with penalties assessed accordingly."⁴⁸

21. Thus, it is not accurate for the Trade Associations to argue that NERC already accounts for relative risk as an element of the seriousness of a Reliability Standard violation through VRFs. A loss of load is directly relevant to the actual risk and harm posed by a Reliability Standard violation. It is, therefore, appropriate for the Regional Entities and NERC to consider in determining penalties for violations of Reliability Standards any loss of load resulting from such violations.

22. Moreover, the Regional Entities and NERC's consideration of load loss should not have a chilling effect on system operators' willingness to shed load because we made clear that system operators should shed load when required by the Reliability Standards and "their decision to shed load would not result in a violation."⁴⁹ In fact, load shedding may sometimes be necessary or required by the Reliability Standards. NERC cannot impose a civil penalty for conduct that does not violate a Reliability Standard. Losses of load should be considered as a factor in penalty determinations only when the load shedding *results from* a violation of the Reliability Standards.⁵⁰ This statement should not have a chilling effect on system operators' willingness to shed load. A system operator often has a range of options to address a system disturbance, including shedding load. When the system operator reaches a point where it is necessary to shed load to prevent a further deterioration of the situation or as the only available means to mitigate the disturbance, that operator must shed load to prevent a broader effect on system reliability. The Regional Entity and NERC will then need to consider the case-specific

⁴⁷ Notice at 19.

⁴⁸ *Id.* Specifically, Turlock also allegedly violated TPL-001-0 R1, TPL-002-0 R1, TPL-003-0 R1, and PER-002-0 R3, which all have High VRFs, but when WECC and NERC reviewed the particular facts and circumstances, they concluded that the resulting actual risk and harm was minimal.

⁴⁹ March 17 Order, 134 FERC ¶ 61,209 at P 38.

⁵⁰ *Id.*; *see also id.* P 43 (noting that it is appropriate to consider load loss resulting from a reliability violation, but recognizing that "load shedding can be required by the Reliability Standards as a last resort to contain system emergencies and prevent cascading").

facts to determine whether the decision to shed load was a separate violation or whether the decision was necessary to prevent a greater impact on system reliability such as a cascading outage. In circumstances where the registered entity decision to shed load was necessary to prevent a greater impact on system reliability, the registered entity's potential penalty exposure should not be greater because of the decision itself to shed load. Moreover, operators are better off shedding load when required by the Reliability Standards because doing so avoids an additional violation, better contains the outage, and avoids greater load loss and damage to assets.

23. We also disagree with the Trade Associations' second argument for rehearing, that the Commission has improperly reinterpreted the Sanction Guidelines. Section 3.8 of the Sanction Guidelines, citing FPA section 215(e)(6), requires NERC and the Regional Entities to consider the seriousness of a violation in determining an appropriate penalty.⁵¹ In addition, section 4.3 of the Sanction Guidelines gives NERC and the Regional Entities the discretion to consider "additional factors [they] deem[] appropriate under the circumstances as long as their use is clearly identified and adequately justified." This expansive language supports the inclusion of load loss and harm to customers resulting from violations of Reliability Standards as relevant factors for NERC and Regional Entities to consider.

24. The Trade Associations further assert that the Commission's interpretation of the Sanction Guidelines is unreasonable because "the VRFs were designed as the exclusive mechanism for factoring the risk posed by each violation into the calculation of penalties."⁵² This argument is contrary to the broad language of the Sanction Guidelines as well as the stated intent of NERC in applying this section. At the time NERC was first certified as the Electric Reliability Organization, it proposed the factors listed in section 4.3 of the Sanction Guidelines, but "also propose[d] that, in a particular penalty determination, the ERO or Regional Entity may consider other, unidentified factors and 'facets' not specified in the Sanction Guidelines."⁵³ Moreover, section 4.3 of the Sanction Guidelines cites the Commission's 2005 Policy Statement on Enforcement and the Securities and Exchange Commission's 2001 Release No. 1470 as documents that will be "instructive to NERC and the regional entities when they are determining penalties for violations of the reliability standards." Both of these documents consider the harm to customers resulting from violations as relevant factors in determining

⁵¹ Sanction Guidelines § 3.8.

⁵² Trade Associations' Request at 15.

⁵³ *North American Electric Reliability Corporation*, 116 FERC ¶ 61,062, at P 449 (2006).

appropriate penalties.⁵⁴ Thus, even before it became certified as the ERO, NERC has intended that such factors could be considered when determining appropriate penalties. Losses of load and harm to customers are logical factors to consider, given that they are relevant to the seriousness of reliability violations.⁵⁵

25. Finally, while we expect NERC and the Regional Entities to consider load loss and harm to customers resulting from reliability violations, we do not intend to instruct NERC and the Regional Entities on how to account for these factors. We are not directing NERC and the Regional Entities, for example, to calculate the cost of economic or physical injury resulting from a loss of load. NERC and the Regional Entities retain the discretion to determine how best to consider lost load and harm to customers, resulting from a violation, as long as they consider these factors in some form and the resulting penalty “bears a reasonable relation to the seriousness of the violation.”⁵⁶

B. Self-Reporting

1. Request for Clarification, or, in the Alternative, Rehearing

26. The Trade Associations and NERC and Identified Regional Entities request clarification on the following statement in the Commission’s March 17 Order:

When a registered entity informs a Regional Entity of a potential violation through a report required more quickly by another standard than by the one that the registered entity

⁵⁴ 2005 Policy Statement on Enforcement, 113 FERC ¶ 61,068 at P 20 (listing harm to customers and whether the harm is widespread across customers as relevant factors going to the seriousness of a violation); United States Securities and Exchange Commission, Release No. 1470, Accounting and Auditing Enforcement (Oct. 23, 2001) (listing harm to investors and other corporate constituencies as relevant factors in penalty determinations).

⁵⁵ See also Sanction Guidelines § 4.21 (“NERC or the regional entity may consider the specific circumstances of the violator to determine if the violation of the requirement actually produced the degree of risk or harm anticipated by the Violation Risk Factor.”).

⁵⁶ 16 U.S.C. § 824o(e)(6) (2006). In NP12-8-000, for example, NERC made clear in a supplement to the notice of penalty that the NERC Compliance Enforcement Authority and NERC “considered the loss of load as a factor in the determination of the penalty in this case.” *North American Electric Reliability Corporation*, Docket No. NP12-8-000, Supplement to NOP Regarding Sacramento Municipal Utility District, at 2 (filed Jan. 23, 2012).

may have violated, we will expect the Regional Entity and NERC to remove self-reporting as a mitigating factor when assessing a penalty amount. The Regional Entity and NERC may recognize the registered entity's cooperation thereafter as a separate mitigating factor in the penalty determination of this Notice, if justified.⁵⁷

27. Specifically, the Trade Associations ask the Commission to clarify that we did not intend to "hold that self-reports are irrelevant in the calculation of penalties under NERC's Sanction Guidelines where the registered entity is otherwise required to report the underlying event pursuant to another standard."⁵⁸ They assert that such a holding would discourage self-reports and internal reviews designed to discover the cause of lost load.⁵⁹ In the alternative, the Trade Associations ask for rehearing if we did intend this result, arguing that our decision would be an "unexplained departure from earlier precedent encouraging self-reports."⁶⁰

28. Similarly, NERC and Identified Regional Entities ask the Commission to clarify that we "did not intend to disallow self-reporting under any circumstances or to eliminate incentives for self-reporting."⁶¹ NERC and Identified Regional Entities ask the Commission to clarify further that we did not intend to interfere with NERC and the Regional Entities' discretion "in applying [NERC's Compliance Monitoring and Enforcement Program] and NERC Sanction Guidelines in determining the appropriate mitigating factors to be considered in a penalty determination."⁶² NERC and Identified Regional Entities note, for example, that the Sanction Guidelines give them flexibility to consider various factors, including self-disclosure, and they "seek[] clarification that the Commission did not intend to negate these . . . provisions of the Sanction Guidelines."⁶³

⁵⁷ Trade Associations' Request at 19 (quoting March 17 Order, 134 FERC ¶ 61,209 at P 47); NERC and Identified Regional Entities' Request for Clarification and Rehearing, April 18, 2011 (NERC and REs' Request), at 2-3 (quoting March 17 Order, 134 FERC ¶ 61,209 at P 47).

⁵⁸ Trade Associations' Request at 19.

⁵⁹ *Id.* at 3.

⁶⁰ *Id.* at 6.

⁶¹ NERC and REs' Request at 6.

⁶² *Id.*

⁶³ *Id.* at 8-9.

NERC and Identified Regional Entities also seek clarification that “the Commission intends for NERC and Regional Entities to continue placing an emphasis on registered entities’ conducting a rigorous analysis of system events and that appropriate incentives will be in place to encourage such behavior.”⁶⁴

29. NERC and Identified Regional Entities express concerns that the Commission’s statement on self-reporting “effectively disallows credit for any further self-reporting of violations once an entity has experienced a reportable event and then reported the event.”⁶⁵ They are concerned that this position could “diminish the incentive for a registered entity to self-evaluate its compliance performance following an event.”⁶⁶

30. Finally, NERC and Identified Regional Entities state that if the Commission disagrees with their request for clarification, they request, in the alternative, rehearing of our findings that: (1) Turlock did not self-report the FAC-003-1 R2 violation; and (2) self-reporting credit is not warranted “when there is a separate reporting obligation under a particular Reliability Standard.”⁶⁷ With respect to both issues, they assert that we have not properly supported our conclusions.⁶⁸

2. Commission Determination

31. The Commission clarifies that its statements in the March 17 Order on self-reporting are not a departure from any prior statements encouraging self-reporting. We believe that self-reports add significant value to overall compliance. Self-reporting credit gives entities incentives to detect and correct violations promptly. Self-reports also assist the review of violations by Regional Entities, NERC, and the Commission. We will continue to encourage self-reporting.

32. While we continue to encourage self-reporting, we clarify that all self-disclosures are not of equal value and do not necessarily warrant self-reporting credit. Self-reporting credit is not warranted, for example, when a registered entity reports facts relating to a possible violation under an existing reporting obligation before making a self-report, or reports facts after the commencement of a compliance audit, spot check, or other compliance process. If the registered entity is otherwise required to report facts relating

⁶⁴ *Id.* at 10.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.*

⁶⁷ *Id.* at 11-12.

⁶⁸ *Id.* at 12.

to a possible violation, through, for example, a self-certification or exception reports,⁶⁹ self-reporting credit is not warranted. Or, as happened with Turlock, when a Reliability Standard requires a registered entity to report an event and, in reporting the event, the entity is required to disclose certain information sufficient to reveal a potential violation, self-reporting credit is not appropriate.⁷⁰ Self-reporting credit, however, may be appropriate when the registered entity voluntarily discloses a violation in advance of any required report because learning of violations at an early stage facilitates an enforcement agency's review of the facts.⁷¹

33. Also, a registered entity's required reporting of an event would not foreclose self-reporting credit for all disclosures of violations related to the event. Rather, it would foreclose self-reporting credit only for violations for which the registered entity was required to disclose relevant facts. The registered entity, however, could still receive self-reporting credit for other violations, for which relevant facts were not required to be provided in the initial, required report, regardless of whether the entity provided that information in the initial report or later, as long as it was reported in advance of a

⁶⁹ Some Reliability Standards require registered entities to report "exceptions to compliance with the Reliability Standards as a form of compliance monitoring." NERC Compliance Monitoring and Enforcement Program § 3.7 (January 1, 2011) (Exception Reporting).

⁷⁰ For example, Turlock reported the loss of load using a NERC Standard EOP-004-1 System Disturbance form that instructs the submitter, among other things, to identify the cause of the disturbance. In identifying vegetation contact as the cause of the disturbance, Turlock disclosed information, as required, sufficient to reveal a potential violation.

⁷¹ For example, Reliability Standard FAC-003-1 R3 requires transmission owners to report, on a quarterly basis, sustained transmission line outages caused by vegetation. If a transmission owner were to report, voluntarily, rather than in compliance with another requirement for earlier reporting, such an outage in advance of the quarterly requirement, self-reporting credit could be appropriate. The degree of self-reporting credit should be a case-specific determination based on the relevant facts surrounding the disclosure, including the time in advance of the required report that the disclosure was made.

requirement to do so.⁷² Moreover, if a registered entity's required reporting of an event provides extensive information and details that prove especially valuable in assisting Regional Entities' and NERC's review of potential violations, separate mitigating credit may be warranted for the entity's cooperation.⁷³

34. Applying the foregoing principles to Turlock's situation, Turlock should not have received self-reporting credit for its FAC-003-1 R2 violation because it was required to submit a NERC Standard EOP-004-1 System Disturbance form identifying the cause of the disturbance. In submitting that form, Turlock was required to identify the cause of the disturbance and, therefore, disclosed to WECC that "[a] vegetation contact with the Westley-Walnut 230 kV line relayed the line, and the Westley-Parker 230 kV line opened at Parker."⁷⁴ This information was sufficient to disclose a possible violation of FAC-003-1 R2, which requires an entity registered as a Transmission Owner, such as Turlock, to create and implement an annual plan for vegetation management. Turlock, however, could have received self-reporting credit for another violation reported either on the System Disturbance form or at a later time in advance of a requirement to do so. For example, Turlock could have received self-reporting credit for its violation of COM-002-2 R2, had Turlock voluntarily disclosed this violation to WECC before commencement of the WECC compliance audit in which it was revealed, because its NERC Standard EOP-004-1 System Disturbance form did not require Turlock to reveal information related to a possible violation of COM-002-2 R2.⁷⁵ Also, Turlock could have received cooperation credit to the extent WECC and NERC believed the information Turlock provided after submitting its EOP-004-1 System Disturbance form warranted such credit.

⁷² For example, when disclosing in a quarterly report as required by FAC-003-1 R3 a sustained outage of its transmission line caused by vegetation, a transmission owner might voluntarily disclose to its Regional Entity that the outage partly resulted from a rating of the transmission line that was inconsistent with the transmission owner's facility rating methodology, in violation of FAC-009-1 R1. In that situation, the transmission owner could receive self-reporting credit for its self-reporting of the FAC-009-1 R1 violation.

⁷³ As we stated in the March 17 Order, "[t]he Regional Entity and NERC may recognize the registered entity's cooperation thereafter as a separate mitigating factor in the penalty determination . . . if justified." March 17 Order, 134 FERC ¶ 61,209 at P 47.

⁷⁴ NERC and WECC's January 26, 2010, Response to Requests for Data and Documents, at Attachment B.

⁷⁵ WECC learned of Turlock's COM-002-2 R2 violation through an on-site compliance audit. Notice at 9.

35. This clarification on self-reporting is consistent with NERC's Sanction Guidelines as well as Commission precedent. Both make clear that the primary principle underlying mitigation of a penalty for a self-report is that, but for the self-report, the violation could otherwise go undetected by the regulator, at least for a significant period of time. NERC's Sanction Guidelines, for example, state that NERC and the Regional Entities "shall consider whether a violator self-disclosed the violation *prior to detection or intervention by NERC or the [R]egional [E]ntity.*"⁷⁶ Moreover, the Commission has explained that there are critical distinctions between voluntary disclosures, which warrant self-reporting credit, and required disclosures, which do not warrant such credit.⁷⁷ Registered entities that voluntarily disclose violations or facts related to a violation deserve credit for providing information that otherwise could go undetected. On the other hand, credit is not warranted when a registered entity reports facts relating to a violation under an existing reporting obligation before making a self-report, or reports facts after the commencement of a compliance audit, spot check, or other compliance process.

36. This clarification on self-reporting does not change the Commission's long-standing position that NERC and the Regional Entities should continue to provide appropriate incentives to encourage good-faith, prompt self-reports. As the Commission explained in our Three Year Assessment Order, "NERC should continue to encourage, and develop incentives for, registered entities to self-report potential violations to the Regional Entities."⁷⁸ We emphasize, however, that NERC and Regional Entities can encourage self-reporting while ensuring that they distinguish between disclosures warranting credit and those that do not. Not all disclosures are equal; neither are all self-

⁷⁶ Sanction Guidelines § 4.3.3 (emphasis added).

⁷⁷ See, e.g., *North American Electric Reliability Corporation*, 124 FERC ¶ 61,015, at P 32 (2008) (distinguishing "between self-certifications, which do not support reductions in penalty amounts, and self-reports, which can be a mitigating factor for penalty determinations," and stating 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"); *North American Electric Reliability Corporation, Reliability Standards Development and NERC and Regional Entity Enforcement*, 132 FERC ¶ 61,217, at P 134 n.106 (2010) (Three Year Assessment Order) ("[W]e remind NERC that required notifications of compliance-related issues are not self-reports, and do not warrant a 'self-reporting' reduction in penalty amounts.").

⁷⁸ Three Year Assessment Order, 132 FERC ¶ 61,217 at P 134. See also *North American Electric Reliability Corporation*, 138 FERC ¶ 61,193, at P 65 (2012) (FFT Order) ("Additionally, the Commission recognizes the importance of self-reporting of violations by registered entities and encourages registered entities to self-report.").

reports. NERC and the Regional Entities should continue to encourage good-faith, prompt self-reports that contain information on possible violations that otherwise could go undetected.

37. Moreover, we do not intend our position to diminish NERC or the Regional Entities' flexibility in applying NERC's Sanction Guidelines to determine appropriate mitigating factors. In fact, as explained above, our position is consistent with the Sanction Guidelines, which require NERC and the Regional Entities to "consider whether a violator self-disclosed the violation prior to detection or intervention by NERC or the [R]egional [E]ntity."⁷⁹ Consistent with this directive, NERC and the Regional Entities should consider the timing of a self-disclosure of a violation and whether or when they could have detected the violation prior to such disclosures.

38. Finally, we disagree with the Trade Associations' assertion that our guidance in this proceeding signals an unexplained departure from earlier precedent encouraging self-reporting.⁸⁰ Contrary to the Trade Associations' implication, we have not questioned the value of self-reporting or disavowed previous Commission statements encouraging self-reporting. We have merely clarified when self-reporting credit is appropriate. We continue to recognize that credit for self-reporting gives entities incentives to detect and correct violations promptly and that self-reporting is an indicator of a healthy compliance culture. Self-reporting also assists the Commission, NERC, and the Regional Entities in reviewing violations in a timely manner. We continue to encourage entities to self-report.

C. Size and Nature of Registered Entities

1. Request for Clarification

39. The Trade Associations request clarification that the Commission did not intend "to limit NERC's own discretion in applying Section 3.11 of its Sanction Guidelines [related to size and nature of registered entities] as it sees best in particular cases."⁸¹ While the Trade Associations state that they do not necessarily have objections with the discussion in the March 17 Order of factors related to size, they "object . . . to the extent

⁷⁹ Sanction Guidelines § 4.3.3.

⁸⁰ Trade Associations' Request at 6. NERC and Identified Regional Entities make the related argument that we have not properly supported our conclusions in this proceeding. NERC and REs' Request at 12.

⁸¹ Trade Associations' Request at 18-19.

it could be read to dictate to NERC how it should interpret and apply the relevant section of the NERC Sanction Guidelines.”⁸²

2. Commission Determination

40. The Commission clarifies that it did not intend to instruct NERC how to interpret and apply the Sanction Guidelines related to size and nature of registered entities. The Commission recognizes that NERC has the flexibility to consider size and nature of registered entities in determining penalties under its Sanction Guidelines. Even prior to our approval of the Sanction Guidelines, the Commission stated in Order No. 672 that “the relative size of an entity or its financial ability [to pay a penalty] is a factor that the ERO or a Regional Entity may consider when developing penalty guidelines or determining an appropriate penalty in a particular case.”⁸³

41. While we do not instruct NERC how to exercise this discretion, NERC has a statutory obligation to ensure that penalties for violations of Reliability Standards “bear a reasonable relation to the seriousness of the violation.”⁸⁴ Size and nature of a registered entity, while relevant, should not eliminate or erode this consideration. Our discussion of size in the March 17 Order responded to comments that seemed to justify using size as an overriding factor in penalty determinations without regard for the overall seriousness of the violation. Specifically, in response to the February 26 Order, NERC, WECC, and Turlock asserted that Turlock’s penalty was appropriately lower than prior penalties assessed against Baltimore Gas & Electric Company and Commonwealth Edison Company for FAC-003-1 R2 violations because Turlock is substantially smaller than those entities.⁸⁵

42. As the Sanction Guidelines instruct, “size of the violator can be considered in the assessment but shall not be the only characteristic considered.”⁸⁶ We also observe that

⁸² *Id.* at 18.

⁸³ Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 564, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

⁸⁴ 16 U.S.C. § 824o(e)(6) (2006).

⁸⁵ Response of NERC and WECC to Order Initiating Review of Notice of Penalty, March 18, 2010, Docket No. NP10-18-000, at 7-9; Turlock Motion to Intervene and Comment in Support of Settlement, March 18, 2010, Docket No. NP10-18-000, at 12-16.

⁸⁶ Sanction Guidelines § 3.11.

the Sanction Guidelines give discretion to Regional Entities and NERC on how to assess size of a registered entity with respect to its violation.⁸⁷

D. Adequacy of the Record

1. Request for Clarification

43. The Trade Associations request clarification of the statement in the March 17 Order that “NERC should file a complete and accurate record for each notice of penalty, whether it reflects an adjudicated determination or a settlement with the registered entity.”⁸⁸ Specifically, they ask us to clarify that this statement should not be construed as “a reversal of a Commission policy set forth in several orders endorsing more streamlined and flexible approaches to the submission of notices of penalty and underlying records.”⁸⁹

2. Commission Determination

44. The Commission clarifies that its instruction to NERC to “file a complete and accurate record for each notice of penalty” is not intended to undermine or reverse prior Commission statements endorsing streamlined approaches to notice of penalty submissions.

45. The statement in the March 17 Order is consistent with the Commission’s previous statements endorsing streamlined approaches to notices of penalty submissions. Those prior statements did not advocate a streamlined approach for all notices of penalty. Rather, we have encouraged NERC to “align the record and format of notices of penalty to the relative significance of violations.”⁹⁰ Thus, the significance or seriousness of the violation will determine the appropriate approach to the level of detail that is adequate in a particular notice of penalty and, for example, will dictate whether the notice is filed as a full or spreadsheet notice. The Commission has “encouraged NERC and the Regional Entities to develop flexible approaches and more streamlined processes to achieve

⁸⁷ *See id.* § 4.2, n.11 (“The circumstances of the violator will include but not be limited to, as appropriate: the violator’s aggregate and net load; interconnections characteristics such as voltage class and transfer ratings.”).

⁸⁸ Trade Associations’ Request at 21 (quoting March 17 Order, 134 FERC ¶ 61,209 at P 37).

⁸⁹ *Id.*

⁹⁰ Three Year Assessment Order, 132 FERC ¶ 61,217 at P 218.

efficiency in the enforcement process, *especially with regard to more minor violations.*”⁹¹ Moreover, the Commission has approved the “Find, Fix, Track and Report” (FFT) mechanism, which establishes a streamlined process for matters eligible for FFT treatment.⁹²

46. Thus, while we continue to encourage NERC to use streamlined approaches, we do not believe that these procedures will apply to all notices of penalty. For example, because of the seriousness of Turlock’s violations, the notice of penalty in this proceeding would not have been a candidate for one of the streamlined processes.⁹³

47. Finally, our determination in the March 17 Order for which the Trade Associations seek clarification did not address the length or format of any particular notice of penalty. Rather, we wished to emphasize that, to be adequate, the record in each notice of penalty must be complete and accurate and not exclude facts that are “critical in evaluating and assessing [a registered entity’s] penalty and subsequent efforts to increase compliance and improve reliability.”⁹⁴

III. Corrections to Record

48. Turlock filed a Motion to Correct the Record with respect to two factual statements in the March 17 Order, and Modesto filed a supporting document.⁹⁵ First, Turlock and Modesto ask the Commission to correct the statement in Paragraph 24 of the March 17 Order that “Turlock points out that it operates a ‘sub-control area’ within the Balancing Authority of Sacramento Municipal Utility District.”⁹⁶ Turlock and Modesto clarify that Western Area Power Administration, not Turlock, operates the sub-control

⁹¹ *North American Electric Reliability Corporation*, 134 FERC ¶ 61,157, at P 7 (emphasis added) (2011).

⁹² *See* FFT Order, 138 FERC ¶ 61,193 at P 2.

⁹³ *Id.* P 49 (The Commission expects NERC to process violations involving “most serious risk” matters identified by NERC, including violations leading to losses of load, as full notices of penalty).

⁹⁴ March 17 Order, 134 FERC ¶ 61,209 at PP 36-37.

⁹⁵ Turlock Irrigation District’s Motion to Correct the Record, Docket No. NP11-18-000, March 25, 2011 (Turlock Motion); Answer of Modesto Irrigation District in Support of Turlock Irrigation District’s Motion to Correct the Record, Docket No. NP11-18-000, March 29, 2011 (Modesto Motion).

⁹⁶ Turlock Motion at 2; Modesto Motion at 2.

area within the Balancing Authority of Sacramento Municipal Utility District.⁹⁷ Second, Turlock and Modesto ask the Commission to correct our statement in Paragraph 52 of the March 17 Order that “[s]ince the alleged FAC-003-1 violation occurred in 2007, Turlock has added a jointly owned 230 kV line and two 115kV transmission lines to its system.”⁹⁸ Turlock and Modesto clarify that while it is correct that Turlock has added two 115 kV transmission lines to its system, it has not added a 230 kV line. Rather, Modesto has added a solely-owned pair of 230 kV lines.⁹⁹ No objections were filed to Turlock’s motion. The Commission agrees to correct both factual statements, consistent with Turlock and Modesto’s clarifications.¹⁰⁰

The Commission orders:

(A) Rehearing of the March 17 Order is denied, as discussed in the body of this order.

(B) The Commission clarifies the March 17 Order, as discussed in the body of this order.

(C) The Commission corrects the record in the March 17 Order, as discussed in P 48 of this order.

By the Commission. Commissioner Clark voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ These corrections do not affect our determinations in this proceeding.