UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Enforcement of Statutes, Orders, Rules, And Regulations	))	Docket No. PL10-4-000

COMMENTS OF THE PUBLIC POWER COUNCIL, CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, FRANKLIN COUNTY PUBLIC UTILITY DISTRICT, NORTHWEST REQUIREMENTS UTILITIES, AND WESTERN MONTANA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE

On March 18, 2010, the Commission issued in this docket a *Policy Statement on Penalty Guidelines* (Penalty Guidelines).[1] By an order dated April 15, 2010, the Commission suspended the Penalty Guidelines, made its March 18 issuance interim and granted the public an opportunity to comment.[2] Comments on the interim Policy Guidelines are due on June 14, 2010. Public Power Council files these comments, pursuant to the Commission's April 15 order, on behalf of itself and the parties named in the caption.

Parties' Interests in this Proceeding

Public Power Council (PPC) is a non-profit trade association that represents the common interests of more than one hundred consumer-owned electric utilities in the Pacific Northwest that are requirements power and transmission customers of the Bonneville Power Administration (BPA). PPC's members range in size from the very

[1] Policy Statement on Penalty Guidelines, *Enforcement of Statutes, Order, Rules and Regulations,* 130 FERC ¶ 61,220 (Mar. 18, 2010) (*Policy Statement*).
[2] Order, *Enforcement of Statutes, Order, Rules and Regulations,* 131 FERC ¶ 61,040 (Apr. 15, 2010).

small to the very large and include municipal corporations, cooperatives and public utility districts. They serve retail customers in Washington, Oregon, Idaho, Montana and Nevada, and they use the interconnected transmission system to wheel power to their distribution systems. PPC is a member of the North American Electric Reliability Corporation (NERC) and the Western Electric Coordination Council (WECC), as are many of PPC's members. A very large number of PPC's members are registered entities with WECC for purposes of mandatory reliability standard compliance and enforcement.

Franklin County PUD is an electric utility located in Pasco, Washington, and purchases power from BPA and other sources. Central Lincoln PUD is an electric utility located in Newport, Oregon, and also purchases power from BPA. NRU is a trade organization representing Northwest consumer-owned utilities. Similarly, WMG&T is a generation and transmission cooperative, whose members are Montana electric cooperatives and a tribal contractor to the federal government. Many of the utilities represented by these two parties, along with Central Lincoln PUD and Franklin County PUD, are PPC members. All of these utilities are similarly situated to, and have similar interests as, the PPC member utilities described in the preceding paragraph.

Communications

PPC requests that service in this proceeding be made upon, and communications directed to, the following persons:

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Comments

A. Introduction and Executive Summary

PPC comments on these Penalty Guidelines to the extent that they relate or could apply to penalties for violations of reliability standards approved by the Commission pursuant to section 215 of the Federal Power Act (section 215).[3] PPC does not offer comment on the Penalty Guidelines as they might apply or relate to violations of other Commission regulations, rules or statutes.

PPC's members are firmly committed to reliable bulk power system operations and maintenance and to compliance with reliability standards. Power system safety and reliability are best promoted by a "culture of compliance." By this we mean an industry culture in which utilities and their employees implement standards that embody best practices, and engage with reliability organizations and other utilities, all with the goal of maintaining the requisite level of bulk system reliability and security. Achievement of this culture requires clear, implementable standards and on-going communication and cooperation among utilities. The Penalty Guidelines proposed by the Commission, however, promise to take the industry in the wrong direction. The proposed Penalty Guidelines would impose a regime of excessively punitive penalties for less than perfect

[3] Section 215(d)(2), 16 U.S.C. §824o(d)(2) (2006).

operations and outcomes. They will not promote adherence to best practices, nor will they promote communication or cooperation or improve bulk system reliability.

We encourage the Commission to abandon the Penalty Guidelines and engage the industry in a constructive dialogue about the role of the Commission and the role of penalties in promoting and securing bulk system reliability. We believe that the Commission can best achieve its, and section 215's, reliability goals by permitting NERC and the electric industry to develop standards and sanctions that will establish and promote best practices and the best achievable reliability.

PPC has reviewed the joint comments filed by the American Public Power Association, National Rural Electric Cooperative Association, and Large Public Power Council. PPC has also reviewed the comments filed by the Edison Electric Institute. PPC agrees with and supports those comments, and incorporates them here by reference. Rather than reiterate the comments of those parties, PPC's comments focus on related matters that are of particular concern to PPC's members.

B. The Penalty Guidelines Are an Inappropriate and Damaging Choice

In its Penalty Guidelines, the Commission proposes to adapt the federal criminal sentencing guidelines and apply these guidelines to violations of reliability standards adopted under section 215. The Penalty Guidelines would be available to the Commission to use at its discretion and would increase the monetary penalties for reliability standard violation by approximately 500 to 10,000 percent over current levels. The current NERC sanction guidelines cap fines at $ 1 million per day per violation, which is a very substantial fine.

Northwest consumer-owned utilities support and have striven to comply with the mandatory reliability standards. They actively work with NERC and WECC to craft understandable and enforceable standards that produce the needed levels of bulk system reliability. For consumer-owned utilities, with elected boards, councils and commissions that govern their operations, poor service creates public outcry and pressure to improve service. Even without this feedback, consumer-owned utilities strive to provide the best service possible because their sole function is to provide excellent service, and return benefits, to their communities. Given the level of the utilities' commitment to reliable operations, adaption of the federal criminal sentencing guidelines as Penalty Guidelines is deeply offensive to consumer-owned utility employees and managers.

1. The Penalty Guidelines Are Inappropriate for Civil Sanctions and Will Create Duplicative and Confusing Sanctions Frameworks

More importantly, use of the federal criminal sentencing guidelines, without meaningful alteration, is inappropriate for use in enforcement of civil regulations. The great majority of reliability violations are unintentional; many relate solely to recordkeeping requirements. Moreover, utilities have no incentive to violate these standards. They cannot profit in any sense by providing unreliable service. Poor service reduces sales and, therefore, income. The Commission proposes to apply sentencing guidelines designed to punish acts motivated by criminal intent and for the purpose of profit to actions by utilities taken without malice or intent to injure or for purposes of profit. This application of sentencing guidelines is inherently excessive and thus cannot be just or reasonable.

2. The Penalty Guidelines Will Not Achieve Greater Compliance with Reliability Standards and Will Create Confusion

The Commission does not explain why the current enforcement program and its hefty fines are inadequate to meet the Commission's enforcement needs. The Commission has approved,[4] and with NERC and the Regional Reliability Organizations (RROs), has implemented an enforcement program with a penalty structure that provides for substantial penalties, up to $ 1 million per day per violation.[5] In some cases even these fines can be too harsh. Establishment of mandatory standards has been sufficient to gain the compliance of utilities in the vast majority of cases. The current regime of audits and fines will be sufficient to achieve full compliance. The Commission does not demonstrate the need for larger sanctions or how greater compliance would be achieved by their adoption.

Indeed, the Commission does not propose to eliminate the existing NERC and RRO penalty structure. The Commission asserts that the Penalty Guidelines are guidelines that the Commission itself will apply.[6] The end result of the Commission's Penalty Guidelines would be to establish guidelines that conflict with and which may or may not override the existing penalty structure.

The existence of conflicting sanctions guidelines will cause confusion and uncertainty, not predictability, consistency or improved reliability. Moreover, we fully expect that the RROs and NERC will calculate their sanctions, not strictly in accordance

[4] Order 672, 114 FERC ¶ 61,104

[5] *Statement of Administrative Policy on Processing Notices of Penalty and Order Revising Statement in Order No. 672*, 123 FERC ¶ 61,046 (2008); see also NERC, 119 FERC ¶ 61, 145 (2007).

[6] Policy Statement, 130 FERC ¶ 61,220 at ¶ 64.

with the existing sanctions guidelines, but with an eye towards the Penalty Guidelines. Their sanctions will rise to meet the Commission's more punitive sanctions. The Commission asserts that it expects that its adoption of the Penalty Guidelines will not much affect the application of the sanctions guidelines now in place at FERC and the RROs.[7] We cannot agree that this is a reasonable prediction of how the reliability organizations will respond.

C. The Penalty Guidelines Will Damage System Reliability

1. Excessive Penalties, Especially for Loss of Load, Will Create Perverse Incentives for Utility Operations

Pursuant to the Penalty Guidelines, the Commission would fine utilities for loss of load in amounts keyed to the economic cost of the load loss. This imposes very severe penalties for mistakes in situations where judgment must be exercised in very little time to keep the power system functioning. Each system is different and each situation can be different; reliability standards do not substitute for knowledge of power systems when decisions must be made quickly to prevent system disturbances from developing into cascading outages.

For example, no system operator wants to shed load to resolve a disturbance, but sometimes an operator must shed a small amount of load in order to prevent a disturbance from escaping from the operator's system. Step 3 of the Penalty Guidelines' evaluation, however, would permit the imposition of fines for any loss of load associated with a standards violation. System operators facing a system

[7] *Id*. at ¶ 58 ("The Penalty Guidelines will generally be applicable to Commission cases. . . .") & ¶ 64 (preserving the Base Penalty Amount Table for use by NERC and the RROs).

disturbance must manage the events on the system to first ensure safety, second avoid damaging the power system equipment and then contain the disturbance to their own system if possible. The proper priority of these goals should be obvious. Safety is undeniably the most important consideration and avoiding damage is critical because, if transmission system equipment is damaged, the consequences of the disturbance cease to be short-term problems and become long-term problems. A very important tool in meeting these goals is to shed load in a controlled manner. Shedding load is not in this case a failure to operate responsibly and must not be made an excuse to impose sanctions if a coincident standards violation occurs.

The Commission's approach appears to be, and typically it is the approach of RRO investigators, however, to find violations in these events and punish utilities for "failures." The Penalty Guidelines codify the demand for perfect operation and exacerbate the conflicting messages received by system operators in regard to how to respond to emergencies.

2. Excessive Regulation and Penalty Application is Already Resulting in Loss of Expertise within Utilities

PPC member utilities report that experienced engineers and craftspeople are retiring or requesting transfers to other assignments in order to avoid duties that involve compliance activities. These employees fear that, despite their best intentions, best judgment and best actions, they will be held responsible for violations of reliability standards. One utility has seen retirements in operations staff triggered by news of the penalty guidelines; learning that the Commission believed that larger penalties might be needed and that penalties modeled on criminal sentencing guidelines were appropriate was the last straw. Another utility reassigned an experienced substation employee after he requested a position that did not require compliance work; the utility filled the position and within two weeks the new employee requested a transfer as well. None of these employees objected to standards. In fact, utility employees view reliability standards as a reasonable and appropriate reliability measure. The penalty and compliance framework, however, is driving talented employees out of the industry.

The Commission should not view this development as positive in any respect. These are experienced, dedicated employees who now view the electric industry as an environment in which they do not feel comfortable working as a result of the Commission's penalty and compliance regulations. The electric industry is already experiencing a loss of experienced employees due to an aging workforce with limited numbers of qualified candidates to fill in as employees retire. These employees are key to reliable system operation and maintenance.

Needlessly piling on penalties will make this situation worse. Given that *extra* penalties, even if imposed infrequently, will exacerbate what is already growing sense of fear among employees, we can expect to see employee reassignment requests, retirements and departures from the industry continue or accelerate.

3. Enforcement Based on Penalties Undermines Cooperation and Culture of Compliance and Self-Reporting

Guidelines will neither improve compliance with standards nor improve reliability. Section 215 established a reliability construct established predicated on industry self-regulation, with oversight by the Commission, and self-reporting of violations. More critically, interconnected grid security requires coordination, cooperation and information sharing among grid operators, generation and loads. Imposition of monetary penalties for each infraction, whether the infraction is inconsequential or devastating, is corrosive of the environment necessary for cooperation and information-sharing. Contrary to the Commission's assumptions, the Penalty Guidelines will drive secrecy, damage self-reporting and cooperation with neighboring systems, and harm grid reliability.

D. Application of Excessive Penalty Provisions to Consumer-Owned Utilities Is Inappropriate

For public power, ratepayers will bear the burden of these penalties. There are no shareholders to absorb the cost. As noted above, customers of utilities that are fined bear the burden of paying those costs through increased rates. Fines, therefore, become a direct tax on these customers. There is no policy justification for imposing punitive fines for violations of standards, which were unintentional and did not financially benefit utility customers.

For public power customers, fines for loss of load would represent a "double-charging" of retail customers for load loss: utilities' customers incur costs from the power interruption and they incur a second cost when the utility is fined for the interruption because the customers must make up the cost in rates. The Commission has evidenced no intention of returning the moneys collected to the customers that experienced the economic loss, nor is there a means of implementing a fair and equitable distribution of those funds. The fine functions as a tax and not as a means of remediation.

Lastly, the level of penalties called for by the Guidelines could be ruinous for some utilities, particularly, smaller ones. The Commission states that it will not impose fines so large as to prevent profit disgorgement or reduce fines on organizations that cannot pay the minimum fine.[8] This is no comfort at all. Neither situation in which the Commission states in may reduce a fine protects a utility or its retail customers from fines that exceed the utility's ability to pay without substantial rate increases. The Commission does not explain how these fines advance reliability or are a just and reasonable approach to reliability standard enforcement.

E. The Penalty Guidelines' Sanctions for System Disturbances and Loss of Load Conflict with State Law

In addition to these problems, the Step 3 of the Penalty Guidelines signal that the Commission intends to overrule, at its discretion, state law establishing liability for load loss.[9] State law has limited the liability for the effects of system disturbances. The application of large penalties for loss of load exposes utilities to significant new monetary liabilities. In a sense it makes them a "guarantor" of power delivery, which is not the case at present. There is no policy support for overruling state law or imposing these fines.

F. Conclusion

PPC believes that the Penalty Guidelines will degrade bulk power system reliability and will not result in just and reasonable penalties that are commensurate in

[8] Id. at ¶ 61.

[9] Utilities in the Western Interconnection typically follow a policy of taking responsibility for liabilities on their own systems and hold each other harmless from liability as part of an agreement among them.

any respect with the nature of the standards violations to which they may be applied. PPC respectfully requests that the Commission refrain from issuing a final policy statement or a determination adopting the Policy Guidelines or revised guidelines based the Policy Guidelines. Rather, PPC requests that the Commission engage the industry to develop the best approach to oversight of penalty determinations and settlements by the reliability organizations.

DATED this 11th day of June 2010.

Respectfully submitted,

/s/

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