Federal Energy Regulatory Commission
January 18, 2007
Open Commission Meeting
Statement of
Chairman Joseph T. Kelliher

Item M-3: NorthWestern Corporation, SCANA Corporation, Entergy Services, Inc., PacifiCorp, and NRG Energy, Inc. (IN07-1-000, IN07-3-000, IN07-4-000, IN07-5-000, and IN07-6-000)

"Today, the Commission approves five settlement agreements resolving enforcement investigations the Commission has conducted in recent months. This is the first exercise of our enforcement authority under the Energy Policy Act of 2005, and the first civil penalties collected by the Commission under our new authority.

I have long thought the Commission needed stronger enforcement authority. The basic enforcement tool available to a regulatory body is the ability to impose civil penalties. We largely lacked that necessary tool before the Energy Policy Act of 2005.

I began to argue in favor of expanding the Commission's enforcement authority nearly ten years ago, when I was counsel to the House Energy and Commerce Committee. When I was an advisor to Secretary of Energy Spencer Abraham, I argued in favor of granting the Commission increased civil penalty authority. As FERC chairman, I argued in favor of retaining the penalty provisions during the conference on the Energy Policy Act of 2005. It is a matter of great personal satisfaction to take this action today.

These settlements all involve violations that occurred since enactment of the Energy Policy Act of 2005. One of the threshold decisions we made after enactment of the law was to limit imposition of civil penalties to violations that followed enactment of the law. We did so on due process grounds, since the regulated community could not have known in advance of enactment of the new law that violations would result in possible application of the new civil penalties.

We immediately began a number of investigations of alleged violations. We also continued investigations of alleged violations whose course may have begun before enactment of the Energy Policy Act of 2005, but continued subsequent to enactment.

We moved quickly to implement our new enforcement authority.

Shortly after enactment of the Energy Policy Act of 2005, we issued a Policy Statement on Enforcement that explained how we would exercise our new authority. The Enforcement Policy Statement was modeled on the best enforcement practices of other agencies, including the Securities and Exchange Commission, the U.S. Department of Justice, and the Commodity Futures Trading Commission.

In particular, the Enforcement Policy Statement discussed the factors that we will take into account in determining penalties for violations of the statutes, orders, rules, and regulations we administer. Our actions today are guided by and consistent with the Commission's Enforcement Policy Statement.

The Policy Statement made plain that our purpose is firm but fair enforcement. It also encouraged regulated companies to develop a culture of compliance, and proposed to use our civil penalty authority to that end.

We have been deliberate in our approach. The fact that we are acting on five settlements rather than one is not inadvertent. The Commission decided that acting on a number of settlements simultaneously could provide greater regulatory certainty on and insight into how the Commission will use its civil penalty authority in the future.

I anticipate there will be a great deal of public interest in the actions we are taking today. The first exercise of our new enforcement authority is an important step, and I want to make sure the regulated community and the public understands what we are doing today – and what we are not doing. Let me explain my view on what principles can be drawn from our actions today.

None of the settlements imposes maximum penalties, but all of the settlements involve some level of civil penalties. That does not mean that the Commission will not impose maximum penalties; rather, it means that we will generally do so only if one or more of the factors listed in the Policy Statement clearly calls for the maximum penalty, for example, where the harm is really significant, the complicity of senior management in the violation is egregious, or the company obstructed the investigation. By the same measure, we may not always impose civil penalties. Over the past year, the Commission received over 40 self reports from companies. In many cases, these matters were resolved without imposition of civil penalties.

Regulated companies receive credit for self reporting violations. That is fully consistent with the Enforcement Policy Statement. Four of the five settlements today involve self reports, and all of these companies received substantial credit for self reporting.

I should point out that the credit for self reporting will diminish if a regulated company does not make a strong commitment to develop a compliance culture. If a company self reports violations, does not develop a strong compliance culture, and continues to commit violations, I would expect the credit for self reporting would diminish over time, and civil penalties for violations would escalate.

These settlements also demonstrate that the Commission is aggressively enforcing the Open Access Transmission Tariff. In the past, there may have been a perception the Commission assumed compliance with Open Access Transmission Tariff. Now we are assuring compliance. Three of the settlements today – and the three largest settlements – all involve allegations of violations of the Open Access Transmission Tariff.

The Commission expects regulated companies to make a commitment to compliance, and we will use our penalty authority to that end. That is reflected in our orders today. In the case of PacifiCorp, we saw a change in management when MidAmerican acquired PacifiCorp from Scottish Power. I want to recognize that MidAmerican immediately demonstrated a strong commitment to compliance, quickly took corrective action, self reported the violations that occurred before the acquisition, fully cooperated with our investigation, and agreed to a settlement with the Commission. In short, PacifiCorp reflected a different compliance culture after the MidAmerican acquisition, and demonstrated a newfound commitment to compliance.

The Entergy settlement also has an important message. That settlement resolves several investigations involving violations of a number of Commission rules, orders, and tariffs. But none of these violations appeared to be intentional, there was no profit to Entergy, and minimal harm was caused. Nonetheless, the Commission imposed a civil penalty. To its credit, Entergy self reported many of these violations, and they received appropriate credit for self reporting. They are taking other steps to strengthen their compliance culture. To me, the Entergy settlement stands for the proposition that if a regulated company has a weak compliance culture, and commits violations, even if inadvertent, a civil penalty is appropriate, even if the violations were not intentional, even if there was no profit, and even if there was no or minimal harm. Further, if a regulated company persists in a weak compliance culture, I would expect civil penalties would escalate.

While all of the settlements we announce today involve electric utilities, no one should conclude that our investigations are limited to electricity matters. Our investigations extend into all areas of our regulatory authority.

Before the enactment of the Energy Policy Act of 2005, the Commission could not fairly be described as an enforcement agency. That has changed. We were given new enforcement responsibilities to prevent manipulation of electricity and gas markets, and assure reliability. We are now an enforcement agency capable of effective oversight. Today's actions show we are well on our way to being a preeminent enforcement agency.

I want to commend the Office of Enforcement for the quality of its work in recent months. Its investigations have been thorough and complete. We will always be willing to enter into settlements, but the staff also always prepares for litigation. Just last month, the Commission issued statement of administrative policy regarding the process for assessing civil penalties. As we explained there, while we still prefer to negotiate settlements of alleged violations, we are prepared to litigate and issued the statement to assist the public and the regulated community to understand the process that will be followed under each of the applicable statutes to that end.

I particularly want to commend Bob Pease and Lee Ann Watson, and all of the staff members introduced earlier. On behalf of myself and my colleagues, I thank you for your dedication, commitment, and hard work.

As a final note, although these settlements do not bear on reliability standards, there are implications for future enforcement of reliability standards. I recognize there is concern about the Commission's approach towards enforcement among some who may be governed by mandatory reliability standards that are outside our usual regulatory authority. I have heard concerns that the Commission will reflexively seek to impose maximum penalties for all reliability violations.

Today's settlements should put those concerns to rest. We will exercise prosecutorial discretion, and allocate our enforcement resources to the most serious violations, and we would expect the same from any regional entity that receives delegated enforcement authority, as well as the Electric Reliability Organization. Minor violations may be resolved without imposition of a civil penalty. Most violations will likely be resolved through settlements. Maximum penalties will likely be reserved for those reliability violations that cause significant harm, or are

especially egregious."