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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Guidance on Filing Reliability Notices of Penalty Docket No. AD08-10-000

North American Electric Reliability Corporation Docket Nos. NP08-1-000
NP08-2-000
NP08-3-000
NP08-4-000
NP08-5-000
NP08-6-000
NP08-7-000
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GUIDANCE ORDER ON RELIABILITY NOTICES OF PENALTY

(Issued July 3, 2008)

1. On June 4, 5 and 6, 2008, the North American Electric Reliability Corporation (NERC), the Commission's Electric Reliability Organization (ERO), filed 37 Notices of Penalty in the dockets listed above, pursuant to section 39.7(c) of our regulations.¹ These Notices of Penalty concern the first penalty determinations, made by Regional Entities under enforcement authority delegated to them by NERC, that NERC has filed for violations of one or more mandatory Reliability Standards the Commission has approved pursuant to section 215 of the Federal Power Act (FPA).² Pursuant to FPA section 215(e)(2) and section 39.7(e)(1) of our regulations, each penalty determination is subject to review by the Commission, on its own motion or by an application for review by the subject of a penalty, within 30 days after the date NERC files the applicable Notice of Penalty.³ 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.

2. Based on our careful review of the Notices of Penalty that were submitted to us, we have decided not to engage in further review of these first Notices of Penalty by instituting any formal proceedings on our own motion.⁴ Because we believe that

¹ 18 C.F.R. § 39.7(c) (2008). The Commission certified NERC as the ERO in *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*ERO Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006).

² 16 U.S.C. § 824o (2006).

³ 18 C.F.R. § 39.7(e)(1) (2008).

⁴ If the subject of one of the Notices of Penalty addressed in this order files an application for review of the penalty before the expiration of the 30-day period for making such a filing, the Commission would review the penalty, and the penalty would not be affirmed by operation of law at the expiration of the 30-day period. *See* 18 C.F.R. § 39.7(e)(1) (2008).

additional guidance can clarify our expectations, this order provides guidance to the ERO regarding the content of future notices of penalty submitted to the Commission.

3. The NERC's filing of this first group of penalty determinations represents another significant milestone in the transition from the voluntary reliability regime that existed prior to enactment of FPA section 215 in the Energy Policy Act of 2005 (EPAcT)⁵ to the era of mandatory and enforceable Reliability Standards within the United States.

4. While the Commission appreciates that NERC and the Regional Entities have done a significant amount of work in monitoring compliance with the Reliability Standards, enforcing them, and preparing the Notices of Penalty, this order provides guidance to minimize the number of occasions when the Commission would review Notices of Penalty on its own motion, to ensure the adequacy of the record and to set forth our expectations for future penalty assessments by Regional Entities and NERC.

I. Background

A. Regulatory History

5. Pursuant to FPA section 215(e)(1), NERC, as the ERO, may impose a penalty on a user, owner, or operator of the Bulk-Power System for a violation of a Reliability Standard approved by the Commission. The Commission approved delegation agreements in which NERC delegated this enforcement authority to Regional Entities.⁶ NERC's Compliance Monitoring and Enforcement Program (CMEP), subject to approved deviations for particular Regional Entities, is incorporated into each delegation agreement through its Exhibit D.⁷ Under the CMEP, the Regional Entities are the primary first-line enforcers of Reliability Standards.⁸ The Regional Entities receive allegations of violations through, among other things, self-reports by registered entities subject to particular Reliability Standards.⁹ The Regional Entities also conduct

⁵ Pub. L. No. 109-58, 119 Stat 594 (2005). FPA section 215 was enacted in EPAcT Title XII, Subtitle A, § 1211(a), 419 Stat. at 941.

⁶ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060, *order on reh'g*, 120 FERC ¶ 61,260 (2007).

⁷ *North American Electric Reliability Corp.*, 120 FERC ¶ 61,260, at P 3-4 (2007).

⁸ *See generally* Uniform Compliance Monitoring and Enforcement Program of NERC, NERC Rules of Procedure, App. 4C (CMEP).

⁹ *Id.* § 3.0.

compliance audits of registered entities and require self-certifications by registered entities that they are in compliance or out of compliance with particular requirements of the Reliability Standards.¹⁰

6. If the compliance staff of a Regional Entity believes that a violation of a Reliability Standard has occurred, pursuant to CMEP section 5.1, the compliance staff may issue a Notice of Alleged Violation and Proposed Sanction or Penalty in which the compliance staff describes the alleged violation and proposes a penalty for it. A registered entity that is the subject of such a notice of alleged violation may agree to the Regional Entity's proposed violation and proposed penalty and choose not to contest them; negotiate the violation and penalty and enter into a settlement with Regional Entity with respect to the alleged violation; or contest the allegation and/or the proposed penalty amount through an adjudicatory process, which may involve a hearing. At that point, the Regional Entity transmits the penalty and the record supporting it to NERC's Board of Trustees Compliance Committee (BOT Compliance Committee) for review. If the BOT Compliance Committee approves a penalty, NERC files a notice of penalty with the Commission.

7. In Order No. 693, the Commission approved 83 Reliability Standards that NERC proposed.¹¹ These Reliability Standards became effective on June 18, 2007. In Order No. 693, the Commission directed that NERC and Regional Entities, as a matter of enforcement discretion, focus their resources on the most serious violations during an initial period extending through December 31, 2007.¹² The Commission stated that Regional Entities and NERC would have discretion not to assess a penalty for a violation occurring during the initial period and, in such cases, encouraged NERC to establish a process to inform the violator of the potential penalty that could have been assessed.¹³

¹⁰ The procedures governing these compliance audits, self-certifications, and self-reports are set forth in CMEP section three. *Id.* §§ 3.1, 3.2, 3.5.

¹¹ *Mandatory Reliability Standards for the Bulk-Power System*, FERC Stats. & Regs. ¶ 31,242, P 1 (2007), *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007). The Commission subsequently approved other Reliability Standards. *North American Electric Reliability Corp.*, 119 FERC ¶ 61,260 (2007) (approving eight regional standards proposed by the Western Electricity Coordinating Council); *Facilities Design, Connections and Maintenance Reliability Standards*, Order No. 705, 121 FERC ¶ 61,296 (2007); *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order No. 706, 122 FERC ¶ 61,040 (2008).

¹² Order No. 693 at P 222 (2007).

¹³ *Id.* P 223.

On the other hand, the Commission stated that it wished to ensure that from the outset of the period in which Reliability Standards were mandatory and enforceable, Regional Entities and NERC can assess a monetary penalty in situations in which, for example, a registered entity's non-compliance puts Bulk-Power System reliability at risk.¹⁴ The Commission further stated that on an ongoing basis, "separate from our specific directive that all concerned focus their resources on the most serious violations during the initial period, the ERO and Regional Entities retain enforcement discretion as would any enforcement entity."¹⁵ The Commission pointed out that this discretion exists within NERC's Sanction Guidelines, which the Commission has approved, because the guidelines "provide flexibility as to establishing the appropriate penalty within the range of applicable penalties."¹⁶

8. On April 17, 2008, the Commission issued a statement of administrative policy on processing Notices of Penalty.¹⁷ The Commission observed that it "does not anticipate moving to review every notice of penalty that NERC files, or even most."¹⁸ The Commission discussed the general criteria it will use to determine whether to review specific notices on its own motion. These criteria include: (1) the apparent relative seriousness of a violation listed in the notice, as evidenced by the combination of violation risk factor and violation severity level that NERC assigned and that the Commission has approved for the particular requirements implicated in the notice; (2) the potential risk the violation posed to Bulk-Power System reliability, as well as any actual harm, presented by the factual pattern relating to the violation; (3) the application of penalties in a reasonably consistent manner; and (4) the improvement in compliance and consequent increase in Bulk-Power System reliability that the penalty would provide.¹⁹ The Commission advised that when reviewing a Notice of Penalty, it will conduct a *de novo* review of the record of the proceeding below to ascertain whether the record contains adequate evidence that the proposed penalty determination accords with the test in FPA section 215(e)(6) that a penalty imposed for a violation of a Reliability Standard

¹⁴ *Id.* P 224.

¹⁵ *Id.* P 225.

¹⁶ *Id.*

¹⁷ *Statement of Administrative Policy on Processing Reliability Notices of Penalty and Order Revising Statement in Order No. 672*, 123 FERC ¶ 61,046 (2008) (*Notice of Penalty Policy Order*).

¹⁸ *Id.* P 10.

¹⁹ *Id.* P 11.

“shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts of [the registered entity] to remedy the violation in a timely manner.”²⁰ The Commission also stated that it retained the ability to review on its own motion settlements imposing penalties to which a Regional Entity had agreed, after approval by NERC, thereby changing a policy first announced in Order No. 672.²¹

B. NERC Notices of Penalty

9. On June 4-6, 2008, NERC filed 37 Notices of Penalty. These Notices of Penalty address violations that occurred during the “initial period,” i.e., prior to December 31, 2007, established by Order No. 693. No monetary penalty is assessed in 35 of the Notices of Penalty. In two Notices of Penalty, entities are assessed monetary penalties for violations of Reliability Standard FAC-003-1 (Vegetation Management), where tree contact resulted in a line outage.

10. In Docket No. NP08-1-000, NERC filed a Notice of Penalty for \$180,000 assessed by Reliability *First* Corporation (RFC), a Regional Entity, against Baltimore Gas & Electric Company (BGE) for a violation of Requirement R2 of Reliability Standard FAC-003-1. That requirement provides that a transmission owner shall create and implement an annual plan for vegetation management work to protect the reliability of the system. BGE accepts the penalty. In Docket No. NP08-2-000, NERC filed a Notice of Penalty for \$75,000 assessed by Midwest Reliability Organization (MRO), another Regional Entity, against MidAmerican Energy Company (MidAmerican) for a violation of the same requirement, pursuant to a March 2008 settlement agreement between MidAmerican and MRO. Each determination addresses an outage of a transmission line with a voltage greater than 200 kV that occurred as a result of the registered entity’s failure to maintain the appropriate clearance between a tree and a conductor in accordance with the registered entity’s vegetation management plan.

11. Of the 37 Notice of Penalty determinations:

- two determinations assessed monetary penalties (to BGE and MidAmerican), each of which involved a single violation;

²⁰ *Id.* P 9, *citing* 16 U.S.C. § 824o(e)(6) (2006).

²¹ *Id.* P 15, *referencing Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, FERC Stats. & Regs. ¶ 31,204, Order No. 672, at P 598 (2006).

- eighteen of the 35 determinations that assessed no monetary penalties involved violations of multiple requirements;
- twenty determinations, including the two that assessed monetary penalties, addressed violations of at least one Reliability Standard requirement with a “high” violation risk factor – the highest such category;²²
- SERC Reliability Corporation (SERC), Northeast Power Coordinating Council (NPCC), Texas Regional Entity (TRE) and Southwest Power Pool Regional Entity (SPP) assessed zero dollar penalties only for violations in their respective regions.

12. The violation(s) addressed in 16 of the Notices of Penalty came to the attention of the relevant Regional Entity through a self-certification by the registered entity that it was not in compliance in response to a questionnaire issued by the Regional Entity. The relevant Regional Entity received notice through a compliance audit of a violation or violations addressed in 15 of the Notices of Penalty. Regional Entities received self-reports of violations by the registered entity with respect to eight notices.²³

13. On May 21, 2008, the BOT Compliance Committee issued a blanket determination with respect to the 35 “zero dollar” penalties for which NERC filed Notices of Penalty. In its decision, the BOT Compliance Committee affirmed the Regional Entity’s determination to exercise its enforcement discretion, in accordance with Order No. 693, to impose a zero dollar penalty in each case. On May 21, 2008, the BOT Compliance Committee issued separate determinations for the BGE penalty in Docket No. NP08-1-000 and the MidAmerican penalty in Docket No. NP08-2-000.

14. Each Notice of Penalty includes in its record one or more mitigation plans that the registered entity submitted to the Regional Entity for the purpose of bringing itself into compliance with each Reliability Standard requirement it violated. The mitigation plans establish timetables and milestones for their completion. After approving each mitigation plan, the Regional Entities transmitted them to NERC for review. NERC then approved the plans. Each registered entity subject to a Notice of Penalty then self-certified to its

²² The other categories are “medium” and “low.” *See North American Electric Reliability Corp.*, 119 FERC ¶ 61,145, at P 9 (2007).

²³ The Notice of Penalty in Docket No. NP08-19-000 (SERC penalty assessment to West Georgia Generating Company, LLC) involved both a self-report and a compliance audit, while the Notice of Penalty in Docket No. NP08-34-000 (SERC penalty assessment to Dow Chemical Company (Dow)) indicates that self-reports and self-certifications occurred.

Regional Entity that it had timely completed the mitigation plan. The Regional Entities, in turn, verified these certifications.

II. Discussion

15. Based on our careful review of the Notices of Penalty that were submitted to us, we have decided not to engage in further review of these first Notices of Penalty by instituting any formal proceedings on our own motion. While we recognize the substantial time and effort expended by the Regional Entities and ERO in developing records to support their first notice of penalty determinations, we nevertheless believe there is substantial room for improvement in future records associated with notices of penalty. Based on our review of the content of certain of the 37 Notices of Penalty, in particular, the Commission finds it appropriate to provide guidance to the ERO and Regional Entities to assure that future notice of penalty filings contain the appropriate level of information to help the Commission accurately gauge the nature and seriousness of violations and the reasonableness of any penalty assessment. Below, the Commission addresses the following concerns: (1) settlements; (2) completeness of the record; (3) documentation issues; (4) self-reports and self-certifications; (5) linkage between facts and penalty factors; (6) mitigation plans; and (7) multiple violations. Our decision not to institute review of any of these first Notice of Penalty determinations on our own motion should not be taken as any indication as to whether the Commission would impose comparable penalties (either monetary, non-monetary or no penalty) with respect to any violation of a Reliability Standard that occurred either during or after the initial period.

A. Settlements

16. While we are not instituting review of MRO's settlement with MidAmerican, we make several observations about it. We note that, along with the \$75,000 penalty, MidAmerican has committed to undertake significant efforts to come into compliance and help ensure it will not commit similar violations in the future.²⁴ For example, the Commission notes that the settlement lists a number of actions that MidAmerican has taken or agreed to take: analyze why the violation of FAC-003-1, R2 described in the settlement occurred; mitigate the violation; minimize possible future violations; and otherwise protect the reliability of the Bulk-Power System. The Commission believes that settlements relating to reliability penalties that include these provisions are desirable because they: (1) protect and improve reliability, the basic goal of the mandatory Reliability Standards; (2) serve to deter future violations through the imposition of

²⁴ Notice of Penalty in Docket No. NP08-2-000, Settlement Agreement by and between MidAmerican Energy Company and Midwest Reliability Organization at 12-17.

penalties and agreement by the registered entity to take actions to improve prospective compliance; and (3) tend to strengthen the registered entity's compliance program and compliance culture, a factor we emphasized in our recently-issued *Revised Enforcement Policy Statement*.²⁵

17. However, in two respects, we believe that the settlement's provisions are inconsistent with prior orders of the Commission. First, section 23 of the settlement provides that NERC will submit it to the Commission for informational purposes only. Because MRO and MidAmerican entered into the settlement in March 2008, their agreement to this provision predated the *Notice of Penalty Policy Order*, in which the Commission changed its policy to provide for the possibility of review of such settlements on its own motion. While we understand why the MRO-MidAmerican settlement contains this provision, we will not accept it in future settlements in light of the *Notice of Penalty Policy Order*. Second, section 20(10) of the settlement states that the penalty monies MRO receives pursuant to it "shall be applied to the MRO compliance and enforcement budget consistent with NERC rules."²⁶ This provision is not consistent with our determination in Order No. 672 that the entity investigating a possible violation "must receive the penalty monies as an offset against its next year's budget for implementing FPA Section 215."²⁷ This principle means that MRO must apply the penalty monies as an offset to its overall budget for 2009 for implementing FPA section 215, rather than applying them solely to MRO's enforcement and compliance budget.

18. NERC and the Regional Entities should ensure that the terms and conditions of settlement agreements are consistent with Commission regulations and orders, as well as NERC's Rules of Procedure.

B. Completeness of the Record

19. To better facilitate the Commission's internal review procedures, we expect that the records in future notices of penalty determinations will provide more detailed information about the nature or the duration of the violations than what was provided in some of the records before us. For example, with respect to the penalty determination in

²⁵ *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 57-58 (2008). Of course, to achieve these goals, the actions that a registered entity commits to complete in such a settlement must not be ones that the entity was planning to perform whether or not the settlement were to occur.

²⁶ Notice of Penalty in Docket No. NP08-2-000, Settlement Agreement by and between MidAmerican Energy Company and Midwest Reliability Organization at 17-18.

²⁷ Order No. 672 at P 627. *See also* NERC Rules of Procedure, § 1107.2.

Docket No. NP08-1-000 against BGE, BGE submitted a self-report to RFC on August 17, 2007 that it had violated Requirement R2 of FAC-003-1 by reason of “failure to maintain appropriate clearance between the tree and conductor at maximum emergency sag for a 230 kV interconnected transmission line in accordance with the BGE Annual Plan.” BGE reported in a Vegetation Outage Report that a transmission line outage had occurred on August 15, 2007, that the line returned to service and the offending tree was removed and nearby trees were trimmed on August 16, 2007, and that the outage occurred because of a vegetation grow-in inside BGE’s right-of-way, caused when a “[p]ine tree on right of way between towers #86 and #87 caused arc and fault with conductor.”²⁸ BGE further reported that the line in question had been last patrolled in January 2007 when “the heights of these specific trees were not measured with instrumentation but visually estimated, without a correct adjustment made for the maximum engineered sag of the conductor into the tree-wire clearance dynamic.”²⁹ The record shows that RFC staff considered the date or period of the violation to be “One occurrence on August 15, 2007,” although RFC staff considered that “BGE failed to effectively implement a vegetation management plan that took into account the anticipated vegetation growth of a known stand of trees located inside the right-of-way thus resulting in a transmission line outage.”³⁰

20. In Order No. 693, the Commission reaffirmed its interpretation that FAC-003-1 “requires sufficient clearances to prevent outages due to vegetation management practices under all applicable conditions.”³¹ The fact that BGE self-reported an outage on one of its 230 kV transmission lines caused by a vegetation grow-in as a violation of FAC-003-1, R2 is sufficient evidence that a violation occurred on the date that the outage began, August 15, 2007. However, because the outage continued through part of August 16, 2007, under the theory that the violation occurred because of the outage, the violation apparently ended on August 16, rather than August 15, 2007. More fundamentally, based on BGE’s self-report, it is possible that the outage occurred because in January 2007, a BGE patrol visually estimated the heights of the trees in question,

²⁸ Notice of Penalty in Docket No. NP08-1-000, Attachment a (Self-Report) at 1-2.

²⁹ *Id.* at Attachment a at 3.

³⁰ *Id.* at Attachment c (Notice of Confirmed Violation) at 2-3. RFC compliance staff referenced a provision of FAC-003-1, R2 that states, “The [vegetation management] plan should be flexible enough to adjust to changing conditions, taking into consideration the anticipated growth of vegetation and all other environmental factors that may have an impact on the reliability of the transmission systems. *Id.* at 3.

³¹ Order No. 693 at P 729 (2007).

rather than measuring their heights with instrumentation, without correctly adjusting for the maximum engineered sag of the conductor. At the same time, the patrol decided to delay trimming the trees because of resistance from an adjacent landowner.³² The record does not indicate whether BGE accurately measured the tree heights or took into account the maximum engineered sag of the line at any time between January 2007 and August 15, 2007. Nevertheless, it is possible that BGE personnel believed that the vegetation required trimming because they initiated the process but stopped after the adjacent property owner protested. The Commission would have expected the Regional Entity to investigate this matter further by comparing BGE's vegetation management policy to the estimated proximity of the tree at the time of the arc event, thereby evaluating compliance with the Reliability Standard from June 18, 2007, the initial date that FAC-003-1, R2 became mandatory and enforceable, through August 16, 2007. If this information were in the record, RFC could have considered whether BGE's violation of FAC-003-1, R2 extended from June 18, 2007 through August 16, 2007.

21. The extent of detail in the record appears in part to be due to the forms Regional Entities use to obtain information about violations. We observe that the self-certification forms from Regional Entities that are included in the record in the Notices of Penalty typically direct a registered entity to indicate whether it is in compliance or not in compliance with a particular Reliability Standard requirement. The Notices of Penalty show that different Regional Entity self-certification forms may elicit different levels of information relating to an entity's self-certification that it is not in compliance with a particular requirement. One example pertains to Reliability Standard CIP-001-1, R1, which specifies that registered entities subject to the requirement have procedures for recognition of, and for making operating personnel aware of, sabotage events. One Regional Entity's self-certification form covering this requirement includes a space for additional comments, another Regional Entity's form requests a short explanation from a registered entity that indicates that it is not in compliance with a requirement, while a third Regional Entity's form requests a detailed explanation for a self-certification of non-compliance.³³ In general, we believe that more consistency and effort is needed to

³² Notice of Penalty in Docket No. NP08-1-000, Attachment a (Self-Report) at 1.

³³ Compare Docket No. NP08-8-000, Attachment a (Self-Certification Report) at 1 (NPCC self-certification form for Reliability Standard CIP-001-1 asking for additional comments), *and* Docket No. NP08-12-000, Attachment a (Self-Certification Report) at 1 (TRE self-certification form for, among other requirements, CIP-001-1, R1, with general instructions that request a short explanation for a self-certification of non-compliance), *with* Docket No. NP08-17-000, Attachment a (Self-Certifications) at 1 (SERC self-certification form for Reliability Standard CIP-001-1, R1 that asks for a detailed explanation why compliance with the requirement was not accomplished).

ensure that Regional Entities request – and receive – detailed information that bears on the nature and duration of violations.

22. Detailed information on the duration and nature of violations of Reliability Standards is crucial to development of adequately-documented records that support penalty determinations. In particular, information that identifies the time period for a violation is necessary to impose penalties on a per violation, per day basis, as the Commission has required for all Reliability Standard requirements other than those for which compliance is measured on the basis of cumulative acts over time, such as acts that yield average quantities over a given time.³⁴ We observe, in contrast, that in some of the Notices of Penalty that are the subject of this order, NERC and Regional Entities may have assessed penalties on a “per occurrence” basis rather than a per violation, per day basis.³⁵ Reliability penalty assessments on a “per occurrence” basis are inappropriate when compliance with the relevant requirement does not involve achieving an average of a value over a given period. Obtaining information that will confirm the number of days on which a particular violation occurred is necessary for NERC and the Regional Entities to impose penalties on a per violation, per day basis when they are required to do so.

23. Supplying detailed information in the record of a notice of penalty to assess the nature and circumstances of a violation is equally important. Section 4.2.2 of NERC’s Sanction Guidelines sets forth a basis on which NERC and the Regional Entities may support the assessment of a zero dollar penalty for the first incidence of a violation of a

³⁴ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,046, at P 40; *order on compliance filing*, 121 FERC ¶ 61,033 (2007). *See also* Sanction Guidelines of NERC, § 3.21 (effective January 15, 2008).

³⁵ *Compare* Docket No. NP08-6-000 at Attachment c (Notice of Confirmed Violation and Penalty or Sanction) at 4 (notice of confirmed violation stating that “Hours with noncompliance to INT-004-1 R2.2 were found on seven different days during [the period from June 18, 2007 through August 8, 2007] including the event on August 8, 2007.”) with Docket No. NP08-21-000 at Attachment c (Notice of Alleged Violation and Penalty or Sanction) at 6 (notice of confirmed violation giving the occurrence of a violation of PRC-005-1, R1 as June 18, 2007, and its date of discovery as September 1, 2007, with a statement that “The entity is in violation of Requirement R1 because its documentation of the existing maintenance procedures, records, and the basis for the maintenance intervals is insufficient to comply with the standard requirements of PRC-005-1.”).

particular Reliability Standard requirement by a registered entity.³⁶ To comply with this provision, Notices of Penalty that impose no monetary penalties for “first violations” that occur after the initial period should include a detailed factual record that supports the determination that: (1) the actual or foreseen impact of the violation is inconsequential; (2) the violation is the first incidence of violation, occurring within the period in which the pertinent requirement is mandatory and enforceable, by the violator; and (3) the aggregate effect of the factors considered after the Base Penalty Amount is set to zero does not increase the amount of the final penalty above zero.

24. In this regard, in Notice of Penalty determinations in which Regional Entities imposed zero dollar penalties, NERC stated that the BOT Compliance Committee considered that “no system disturbances occurred as a result of the violations, and the violations were deemed not to be a violation that put bulk power system reliability at serious or substantial risk.”³⁷ In fact, the BOT Compliance Committee stated, “While certain of the Reliability Standards associated with the violations below have ‘Medium’ or ‘High’ Violation Risk Factors, and the non-compliance level could reach a “Severe” level based on the duration of the violations, most of these violations involve situations where processes, procedures or plans were in place but documentation of one or more elements was lacking.”³⁸ The BOT Compliance Committee concluded that “[I]n all cases, there was no actual impact on the reliability of the bulk power system.”³⁹

25. NERC defines requirements with high violation risk factors as requirements that “if violated, could directly cause or contribute to bulk power system instability, separation, or a cascading sequence of failures, or could place the bulk power system at an unacceptable risk of instability, separation, or cascading failures.”⁴⁰ As noted above,

³⁶ This provision states, “If the actual or foreseen impact of the violation is judged to be inconsequential by NERC or the regional entity and the violation is the first incidence of violation of the requirement in question by the violator, NERC or the regional entity may at its discretion: (i) set the Base Penalty Amount to a value it deems appropriate within the [initial value range] or (ii) excuse the penalty for the violation (i.e., set the Base Penalty Amount to 0\$).” Sanction Guidelines of NERC, NERC Rules of Procedure, App. 4B, § 4.2.2.

³⁷ *See, e.g.*, Notice of Penalty in Docket No. NP08-3-000 at 4.

³⁸ *Id.* at Attachment h (NERC BOTCC Decision) at 1.

³⁹ *Id.*

⁴⁰ NERC Reliability Standards Development Procedure at 7 (effective June 7, 2007). *See also* Sanction Guidelines of NERC, § 4.1.1 (referring to the definitions of violation risk factors in the Reliability Standards’ development process documentation).

some Notices of Penalty identify a violation of a requirement with a high violation risk factor, yet NERC also indicates that the violation is inconsequential. Given the incongruity between the violation risk factor designation and NERC's conclusion that certain violations are inconsequential, we expect that in the future, NERC and the Regional Entities will specifically state in an individual notice of penalty determination why, particularly with respect to a violation of a requirement with a medium or high violation factor, the "actual or foreseen impact of the violation is judged inconsequential."⁴¹

26. Therefore, NERC and the Regional Entities must include in the record of notices of penalty determinations all relevant facts, in sufficient detail, to indicate the nature of each violation cited and its duration. This practice will help ensure comparability among cases in which violations of the same requirements occur, advance the goal of consistent penalty-setting insofar as possible, and minimize possible Commission reviews of notices of penalty determinations.

C. "Documentation" Issues

27. In its blanket determination on the Notices of Penalty in which Regional Entities assessed no monetary penalties, NERC's BOT Compliance Committee stated that "most of these violations involved situations where processes, procedures or plans were in place but documentation of one or more elements was lacking."⁴² The Commission has two general concerns about determinations that a registered entity was complying with the applicable requirement but did not provide "documentation" of this compliance. Specifically, it is not clear whether some Notices of Penalty provide an appropriate level of information that supports a determination that a violation involved a "documentation" issue. In addition, it is not always clear how Regional Entities ascertained whether a "documentation" issue was present.

28. For example, Reliability Standard PRC-005-1, R2 and R2.1 requires an entity that owns a transmission protection system to provide documentation of its protection system maintenance and testing program and the implementation of that program to its Regional Entity on request (within 30 calendar days). It also requires that the documentation include evidence that protection system devices were maintained and tested within the defined intervals. While NERC provided sufficient information in some Notices of

⁴¹ *See supra* n.36. We do not believe that the lack of a system disturbance is the sole criterion as to whether a violation of a Reliability Standard requirement put Bulk-Power System reliability at an unacceptable risk.

⁴² *See, e.g.*, Notice of Penalty in Docket No. NP08-3-000, Attachment h (NERC BOTCC Decision) at 1.

Penalty to determine if the entity had a complete maintenance program, but had not documented its compliance, in other Notices of Penalties it did not.

29. In Docket No. NP08-22-000, NERC states that Sam Rayburn G&T Electric Cooperative, Inc.'s (Sam Rayburn G&T's) protection system maintenance and testing program did not include maintenance cycles and did not include a summary of the maintenance and testing procedures. It is not clear from this statement whether Sam Rayburn G&T failed to have maintenance cycles or if it had maintenance cycles that were not documented. In fact, SERC "made no findings that Sam Rayburn G&T Electric Cooperative, Inc. did not have a maintenance plan and schedule, or facility ratings."⁴³ It is therefore unclear from the record NERC provided to the Commission whether the registered entity had maintenance cycles but did not document them, or did not perform the action required by the Reliability Standard.

30. In contrast, in Docket No. NP08-32-000, SERC explained that it examined Old Dominion Electric Cooperative's maintenance records and found that it was testing its protection systems. This Notice of Penalty more clearly delineates the fact that the violation resulted from a lack of sufficient documentation for compliance rather than a failure of the registered entity to perform the action required by the Reliability Standard. Another example is the Notice of Penalty to Bandera Electric Cooperative, Inc. (Bandera) in Docket No. NP08-3-000. There, NERC stated that a Bandera internal memorandum and Bandera's self-certifications both identified that Bandera had violated PRC-005, R2.1 by having "fallen behind" in its scheduled maintenance beyond the defined intervals. In this Notice of Penalty, NERC lays out that the Bandera's violation was of the action required in the Reliability Standard.⁴⁴

31. Therefore, NERC and the Regional Entities must ensure that they provide the Commission with sufficient information to determine whether the entity subject to a notice of penalty violated the relevant requirement by not performing the action required

⁴³ Notice of Penalty in Docket No. NP08-22-000 at 6.

⁴⁴ On the other hand, the Notice of Penalty did not state when Bandera had fallen behind in its scheduled maintenance of protection systems. If that failure to maintain its scheduled maintenance began prior to the date of Bandera's self-certification, Bandera's violation would have started on that earlier date. This information would be appropriate in determining the duration of Bandera's violation to assess a penalty on a per violation, per day basis. The Commission also notes that detailed information regarding what an entity was doing to comply with the Reliability Standards when the violation was found is required to accurately determine the violation severity level associated with the proposed penalty.

by the Reliability Standard or failed to document that the action had been performed. NERC and the Regional Entities also must detail how they ascertained that a “documentation” issue was present. These practices will help ensure that the Commission understands the exact nature of the violation.

D. Self-Reports and Self-Certifications

32. The Commission observes that most of the violations in these Notices of Penalty came to the attention of Regional Entities through self-certifications or self-reports by registered entities. We take this opportunity to distinguish between self-certifications, which do not support reductions in penalty amounts, and self-reports, which can be a mitigating factor for penalty determinations. Unlike a self-certification in response to a Regional Entity’s questionnaire or inquiry, which is a required act,⁴⁵ a self-report is a totally voluntary disclosure of a violation. 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 to the Regional Entity in response to a self-certification questionnaire or to another directive from a Regional Entity to submit compliance-related information.⁴⁶ We expect that in future notices of penalty, NERC and Regional Entities will better distinguish between self-certifications and self-reports.⁴⁷

⁴⁵ Section 3.2 of the CMEP provides, “[t]he Compliance Enforcement Authority [which is defined to include a Regional Entity] may require Registered Entities to self-certify their compliance with Reliability Standards.” CMEP section 3.2.1 states that the Regional Entity posts and updates the reporting schedule and informs registered entities and requests the registered entity to make the self-certification within the notice period specified by the applicable Reliability Standard. Then the registered entity “provides the required information to the [Regional Entity].” CMEP § 3.2.

⁴⁶ *Cf.* section 3.5 of the CMEP: “Self-reporting is encouraged at the time a Registered Entity becomes aware (i) of a violation of a Reliability Standard, or (ii) a change in the violation severity level of a previously reported violation. Self-reporting of a violation of a Reliability Standard is encouraged regardless of whether the Reliability Standard requires reporting on a pre-defined schedule in the Compliance Program and the violation is determined outside the pre-defined reporting schedule.” *Id.* § 3.5

⁴⁷ In one Notice of Penalty, SERC identified as self-reports a number of statements indicating possible violations of Reliability Standard requirements that Dow submitted to SERC following Dow’s failure to self-certify compliance with those requirements timely. Docket No. NP08-34-000 at 2, 3 and 6. These statements did not constitute self-reports.

E. Linkage between Facts and Penalty Factors

33. In its blanket determination to approve the zero dollar penalties; NERC's BOT Compliance Committee cited an identical list of factors in supporting each decision. The Commission notes that NERC listed in its individual notices in which zero dollar penalties were imposed specific factors that the BOT Compliance Committee did not mention in its blanket determination on zero dollar penalties. It is not clear from the filings if these individual factors were taken into consideration by the Regional Entity, the BOT Compliance Committee, or were identified after the penalty determination was confirmed by the BOT Compliance Committee. While the Commission understands that, for this initial set of 37 notices, it might have been appropriate for the factors considered by the BOT Compliance Committee in affirming zero dollar penalties to be similar for all Notices of Penalty it considered; the Commission anticipates that future notice of penalty determinations will be based on specific facts that are linked to the penalty factors listed as relevant to the penalty determinations. In particular, the mere recitation of a general list of factors will no longer be sufficient to explain the basis of the use of discretion to impose zero dollar penalties.

34. Further, the Notices of Penalty determinations generally cite similar factors considered in determining the appropriate penalty. In addition, the Notices of Penalty generally do not describe how each factor was taken into account in determining the penalty.⁴⁸ Even where NERC provided specific facts relating to a violation, it was difficult for us to ascertain how the facts supported the factors NERC stated that it and the Regional Entity used to impose the penalty. In future notice of penalty determinations, the Commission expects that NERC and the Regional Entities will provide more discussion on the specific facts of a case and how these facts link to the penalty factors that support the conclusion that a penalty amount is appropriate.

F. Mitigation Plans

35. The Commission attaches great importance to the successful, timely completion of mitigation plans for the purpose of bringing into compliance registered entities that violate Reliability Standards. The records in these Notices of Penalty show that the

⁴⁸ For example, in the Notice of Penalty in Docket No. NP08-1-000, NERC states that in assessing the penalty, it and RFC considered that BGE was "aware of the vegetation from prior patrols but allowed the vegetation to remain 'because of resistance, for aesthetic reasons, by an adjacent property owner to the complete removal of trees from the site.' The vegetation was scheduled to be removed on the next routine maintenance schedule in early 2008." However, NERC does not discuss how these specific facts affected the factors listed in the penalty determination.

registered entities are making substantial efforts to submit mitigation plans, adopt reasonable schedules for implementing them, and complete them fully and on time. Successful completion of these mitigation plans will serve the purpose of improving reliability of the Bulk-Power System. The Regional Entities and NERC have responsibility for reviewing proposed mitigation plans to ensure that they, in fact, are designed to bring a registered entity back into compliance within a reasonable time. The Regional Entities and NERC also monitor compliance with mitigation plans. In turn, the Commission has overall responsibility for compliance with Reliability Standards, including the content and implementation of mitigation plans.⁴⁹ In this respect, the Commission observes that a few of the mitigation plans approved with respect to the violations covered by these Notices of Penalty do not include optimal measures to bring the registered entity into compliance with the applicable Reliability Standard.

36. For example, in Docket No. NP08-12-000, SUEZ Energy Marketing NA Inc. (SUEZ) submitted a mitigation plan (MIT-07-0210) to bring itself into compliance with Reliability Standard IRO-004-1, R4, which requires SUEZ, as a generator operator, to provide information required for system studies. SUEZ self-certified that it was not complying with this requirement. TRE concluded that SUEZ was providing the required information but did not have a written procedure for its submission. SUEZ's mitigation plan provided, "A contractor has been engaged to develop and provide information regarding system studies. Completion is scheduled for December 14, 2007."⁵⁰ Although TRE and NERC subsequently approved the mitigation plan, the fact that SUEZ committed to engage a contractor to provide information regarding system studies does not, in itself, ensure that SUEZ would timely document its submission of the required system study information.⁵¹ Other mitigation plans that the applicable Regional Entity and NERC approved do not appear to us to include optimal measures to bring violators

⁴⁹ *North American Electric Reliability Corp.*, 119 FERC ¶ 61,274, at P 8 (2007) (Commission retains the ability to review a mitigation plan and take action under FPA section 215 when appropriate, such as when the Commission finds that a mitigation plan is substantively inadequate or allows an unreasonable period of time for an entity to come into compliance).

⁵⁰ Notice of Penalty in Docket No. NP08-12-000, Attachment d (Mitigation Plans) at 12.

⁵¹ We note that TRE verified that SUEZ was in compliance with IRO-004-1, R4 by reviewing screenshots of SUEZ's submittal of information relating to system studies to ERCOT, SUEZ's Reliability Coordinator. TRE did not mention the consultant's work for SUEZ. *Id.* at Attachment f (Texas Regional Entity's Statement of Verification that the Mitigation Plans Have Been Completed).

into compliance.⁵² We expect that in the future, Regional Entities and NERC will ensure that mitigation plans will specifically indicate how the registered entity will comply with the requirements it has violated.

37. In some Notices of Penalty, the Regional Entity did not describe how it verified the registered entity's certification that it had completed each mitigation plan relating to its violations. For example, in Docket No. NP08-28-000, SERC did not detail what information or documents it reviewed to determine that Elizabethtown Power, LLC (Elizabethtown), the registered entity, had completed each of its five mitigation plans. Rather, SERC stated that each "Mitigation Plan has been completed [on a specific date] in accordance with its terms."⁵³ The Commission believes that it is important for Regional Entities to document how they verify a registered entity's certification that it has timely completed a mitigation plan and thereby attained compliance with the applicable Reliability Standard requirements. In future filings, we expect Regional Entities to provide specific information on how they verified that registered entities completed on time mitigation plans to bring themselves into compliance.

38. We further note that in the Notices of Penalty determinations, the Regional Entities often describe important information on facts underlying violations and a registered entity's efforts to bring itself into compliance in mitigation plans. For example, in the mitigation plan in Docket No. NP08-10-000, SERC explained that the violation occurred because of a miscommunication between the relay testing contractor and the plant personnel. SERC further stated that both the registered entity and the contractor acknowledged the mistake and took appropriate action to reschedule the required testing. As explained above, this type of information helps ensure that the Commission understands the exact nature of the violation. The Commission recommends

⁵² *See, e.g.*, Notice of Penalty in Docket No. NP08-29-000, Attachment c (Notice of Alleged Violation and Penalty or Sanction) at 6 and Attachment e (Mitigation Plans) at 3-8 (In mitigation plans to address violations of TPL-001-0, R1, TPL-002-0, R1 and TPL-003-0, R1, all of which required the City of Columbia, Missouri (Columbia) to perform annual assessments of its transmission system planning, Columbia stated only that it would add the annual assessments to its budgeting process for capital improvement projects).

⁵³ Notice of Penalty in Docket No. NP08-28-000, Attachment g (SERC Reliability Corporation's Statement of Verification that the Mitigation Plans have been Completed) at 1-4. In this particular Notice of Penalty, SERC did not include a statement that it had verified Elizabethtown's completion of mitigation plan MIT-07-0263 for its violation of Reliability Standard IRO-004-1, R4, a requirement with a high violation risk factor.

that Regional Entities and NERC incorporate such detailed information relating to violations in the Notices of Penalty themselves.

G. Multiple Violations

39. In the Notices of Penalty determinations, the Regional Entities and NERC did not distinguish between registered entities that had a single violation and registered entities that had a cluster of violations. The existence of a cluster of violations, especially in different categories of the Reliability Standards, may indicate a lack of a compliance program or an overall lack of a compliance culture. The Commission has recognized this factor as an important consideration for penalty assessments in its *Revised Policy Statement on Enforcement*.⁵⁴ In the future, the Commission expects that NERC and the Regional Entity concerned will address in the notice of penalty determination, with respect to a registered entity that violates a number of requirements within multiple Reliability Standards,⁵⁵ whether the number and range of violations in conjunction with the total facts of the violations evidence a failure of the registered entity to properly prioritize compliance.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁴ *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 25, 55 & n.56 (2008).

⁵⁵ The following Notices of Penalty concerned multiple violations: Docket Nos. NP08-3-000, NP08-5-000, NP08-6-000, NP08-7-000, NP08-8-000, NP08-10-000, NP08-11-000, NP08-13-000, NP08-14-000, NP08-15-000, NP08-16-000, NP08-18-000, NP08-20-000, NP08-21-000, NP08-23-000, NP08-24,000, NP08-26-000, NP08-27-000, NP08-30-000, NP08-33-000, NP08-34-000, NP08-36-000, and NP08-37-000.