



Federal Energy Regulatory Commission
January 18, 2007
Open Commission Meeting
Statement of
Commissioner Suedeen G. Kelly

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)

- These settlements represent the first exercise of the expanded civil penalty authority granted to the Commission under the Energy Policy Act of 2005. I believe this package of settlements will provide some guidance on how the Commission will assess penalties under this newly-granted authority.
- The Commission's October 2005 *Policy Statement on Enforcement* set forth the factors that the Commission may consider in determining the seriousness of the offense in determining appropriate penalties. I would like to focus on one of those factors—the harm caused by the violation.
- For example, NRG Energy Inc. agreed to a \$500,000 civil penalty which arose out of misrepresentations by an NRG employee about the availability of a generating unit. This violated the Commission's Market Behavior Rules and the ISO-NE Tariff. However, the unavailability of the unit had no effect on customers or the market because ISO-New England never called upon the unit for reliability. In addition, NRG did not profit from these violations because the ISO-New England did not pay NRG the fixed costs NRG would have otherwise collected. In summary, NRG's violations did not result in harm to customers or the market.
- By contrast, the settlement with PacifiCorp resulted in a \$10 million civil penalty stemming from the improper use of network transmission service and violations of our Standards of Conduct rules. These violations occurred under previous ownership of the company. The violations resulted in some harm to customers and the market. Similarly, the SCANA settlement involved alleged misuse of network transmission service, which could harm customers and disadvantage SCANA's merchant function's competitors, thereby harming the market.
- Although PacifiCorp itself did not derive much financial benefit from these violations, its practices did provide its merchant function benefits in the form of added certainty and convenience at the expense of the merchant functions competitors. By using Network Transmission service instead of Point to Point service, PacifiCorp's merchant function could avoid competing with unaffiliated transmission customers for Point to Point service, forego designating specific points of receipt and delivery for off-system sales, and prevent curtailments or denials of service by the transmission function. PacifiCorp's practices resulted in underpayments to certain customers, which PacifiCorp has voluntarily paid to those customers. Such practices may not have an easily quantifiable or significant impact on the market but they nevertheless can have a harmful effect on the market. A transmission provider treating its merchant function more favorably than its merchant function's competitors can negatively impact the competitiveness, transparency and proper functioning of open access transmission markets.

- o I believe that PacifiCorp (which, as I previously noted, is now under new ownership) and SCANA, both of whom self-reported the practices at issue, have evidenced a commitment to prevent a reoccurrence of these types of practices through their compliance plans. Therefore, I support these settlements and the civil penalties assessed in these cases.