



September 16, 2010

Commissioner Marc Spitzer

STATEMENT

Statement of Commissioner Marc Spitzer on Revised Penalty Guidelines

"On March 18, 2010, the Commission issued the Penalty Guidelines to provide greater transparency as to how we make civil penalty determinations and to ensure consistency in our calculation of monetary penalties.¹ On April 15, 2010, we issued an order suspending the implementation of the Penalty Guidelines to allow for comments on the proposed Penalty Guidelines. We have completed our review of those comments and today we issue revised Penalty Guidelines.

The Commission's enforcement authority, including the imposition of penalties, is a component of the Commission's mission. However, our ultimate objective is to promote compliance with our rules, regulations and orders. We best achieve that objective by providing all entities subject to our enforcement authority with clarity as to how the Commission will apply its rules, regulations, and orders. We must make the rules of the road as clear as possible. My ultimate goal is compliance, not the imposition of monetary penalties.

Against this backdrop, I continue to believe that the Penalty Guidelines will provide additional transparency to the entities subject to our enforcement powers. Moreover, I believe that the Penalty Guidelines will provide greater consistency by assessing and imposing civil penalties based on objective characteristics and a uniform set of factors weighted similarly for similar violations and similar violators.

The Commission's use of Penalty Guidelines modeled after the United States Sentencing Guidelines does not evidence our intent to classify those entities subject to our enforcement powers as criminals. Rather, the Penalty Guidelines provide an analytical framework to develop a range of penalty values once the Commission has determined that a violation has occurred and has determined that a monetary penalty is warranted. Let me repeat, the Penalty Guidelines would only apply *once the Commission has determined that a violation has occurred and has determined that a monetary penalty is warranted*. Notably, nothing in the Penalty Guidelines changes our discretion to close an investigation without any sanction at all or impose no monetary penalty. This has been our practice for a large number of enforcement matters the Commission has processed since obtaining enhanced enforcement powers through the Energy Policy Act of 2005.²

A large number of the comments the Commission received focused on the intersection of the Penalty Guidelines and NERC's existing Sanction Guidelines; therefore, I will briefly discuss my thoughts on this issue. I believe that NERC, the Regional Entities, the users, owners, operators and the Commission all have the same goal as to reliability: a safe and reliable national grid.

In light of the comments, the Commission will not apply the Penalty Guidelines when we review NERC's Notices of Penalty. The Commission will, however, apply the Penalty Guidelines to violations of the Reliability Standards when it has conducted an investigation under Part 1b of its regulations or initiated its own enforcement action against a user, owner, or operator. Further, we have modified the Penalty Guidelines to reduce the base violation for reliability matters from 16 to 6 and revised the risk of harm enhancements.

¹ *Enforcement of Statutes, Orders, Rules, and Regulations*, 130 FERC ¶ 61,220 (2010) (Policy Statement on Penalty Guidelines).

² Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).



Consistent with the Commission's goal of promoting compliance, not the imposition of penalties, we were persuaded by comments on creating incentives for effective compliance programs by, among other things, allowing companies partial credit for a strong compliance program that meets most, but not all, of the requirements listed in section 1B2.1(b) of the Penalty Guidelines. Therefore, an organization can receive a three point credit for an effective compliance program and can earn partial credit for compliance programs that do not meet every requirement listed in section 1B2.1, but, nonetheless, are effective.

The Commission also modified the Penalty Guidelines to allow for partial credit where an organization's senior level personnel are involved in a violation. The Commission will not automatically eliminate all compliance credit but we will consider whether the senior-level personnel acted on his or her own or at the direction or supervision, or with tacit acquiescence of the organization's governing authority. Last, we modify the Penalty Guidelines so that the mitigation credits for self-reports, cooperation, avoidance of trial-type hearings, and acceptance of responsibility carry an independent value that can be credited accordingly.

Consistent with section 553 of the Administrative Procedure Act,³ when the Commission applies its Penalty Guidelines in individual matters, we will detail why it is appropriate to apply the Penalty Guidelines and will justify their application in the particular circumstances.⁴ Moreover, where the Commission decides to depart from the Penalty Guidelines, it will support and justify that departure based upon the facts and circumstances of the specific case.

I support the Commission's Enforcement program and appreciate the hard work of our Enforcement leadership and staff to create a useful analytical tool that will further our goal of promoting clarity to best ensure compliance. Finally, I note that Enforcement staff will hold a technical conference one year from the issuance of the Penalty Guidelines to discuss how the Penalty Guidelines have worked and to permit comments and questions from the community subject to our enforcement authority.

For these reasons, I support the order."

³ Section 553 of the Administrative Procedure Act requires an agency to promulgate rules through a particular rulemaking process, including publishing a Notice of Proposed Rulemaking and Final Rule in the Federal Register (including the terms and substance of the proposed rule and the legal authority to promulgate the rule), and offering the opportunity for public participation in the proceeding. Administrative Procedure Act, 5 U.S.C. § 553 (2010). However, section 553(b)(A) exempts from this process "general statements of policy," such as the Policy Statement on Penalty Guidelines.

⁴ See *Pac. Gas & Elec. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974)(an agency "cannot apply or rely upon [the policy] as law because a general statement of policy only announces what the agency seeks to establishing as policy."); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970); and *Am Trucking Ass'n v. U.S.*, 642 F.2d 916, 920 (5th Cir. 1981)(court looks to see that the agency considered the relevant facts, avoided clear error, and had a rational connection between the facts and conclusions).