

123 FERC ¶ 61,156
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.

Enforcement of Statutes, Regulations and Orders

Docket No. PL08-3-000

REVISED POLICY STATEMENT ON ENFORCEMENT

(Issued May 15, 2008)

1. The Commission issues this Revised Policy Statement to provide guidance to the regulated community as to our enforcement policies concerning our governing statutes, regulations and orders. We also include in the Statement information as to our two years of experience in applying our enhanced enforcement tools under the Energy Policy Act of 2005¹ which, among other things, granted the Commission new civil penalty authority under the Natural Gas Act (NGA)² and enhanced civil penalty authority under Part II of the Federal Power Act (FPA)³ and the Natural Gas Policy Act of 1978 (NGPA).⁴

I. Introduction

2. On October 20, 2005, following enactment of EAct 2005, the Commission issued its first Policy Statement on Enforcement.⁵ Our goal in the 2005 Policy Statement was to set forth the remedies available to us in the event we determined a violation of a statute,

¹ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (EAct 2005).

² 15 U.S.C. § 717t-1 (added by EAct 2005, § 314(a)(1)).

³ 16 U.S.C. § 825o-1 (2000) (as amended by EAct 2005, § 1284(e)); 16 U.S.C. § 823b (2000).

⁴ 15 U.S.C. § 3414(b)(6) (2000) (as amended by EAct 2005, § 314).

⁵ *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005) (2005 Policy Statement).

regulation, or order had occurred, to explain how we determined what remedy was appropriate, and specifically to discuss the factors we intended to consider in determining the amount of any penalty.

3. The 2005 Policy Statement has guided both the Commission and the Office of Enforcement staff (Enforcement staff) in the conduct of our audits, investigations, and other enforcement actions, including the approval of 14 settlements that included civil penalties. We have endeavored to ensure that every exercise of our penalty authority has been fair, and have sought to encourage compliance with our governing statutes, regulations, and orders both through the deterrent effect of our penalties, and through the compliance plans we have generally required from companies found to be in violation.

4. Notwithstanding our efforts to administer a balanced enforcement program, the public and the regulated community have been unable to see the overall results of our efforts because, by regulation, most of our enforcement work is non-public. And, because normally it is only in those cases where penalties or other remedies have been imposed that the results of our investigations have been made public, the public and regulated community have remained unaware of the many instances in which Enforcement staff has determined not to open an investigation, or has closed an investigation without recommendation of a penalty or other remedy. As a result, the Commission has received many expressions of concern about the application of our penalty authority.

5. To remedy this situation, Enforcement staff prepared a report summarizing the enforcement actions we have taken in the first two years since issuance of EAct 2005.⁶ The Commission also held a conference in November of 2007, to entertain comments and questions from the industry regarding our enforcement policies.⁷ We received many thoughtful comments in connection with that conference, a number of which requested additional information as to how we apply the factors set forth in the 2005 Policy Statement. In light of the importance of the subject and the expressed need for further guidance, we believe it is desirable at this time to issue a Revised Policy Statement on Enforcement. This Statement is designed to give the industry a fuller picture as to how our investigative process works, including the considerations Enforcement staff takes into account in determining whether to open an investigation and, once opened, whether to close it without further action or to recommend sanctions. We also set forth in detail the factors we consider in determining whether a penalty is appropriate and, if so, the amount of the penalty.

⁶ Report on Enforcement, Docket No. AD07-13-000, Nov. 14, 2007 (Staff Report).

⁷ Conference on Enforcement Policy, Docket No. AD07-13-000, Nov. 16, 2007 (Enforcement Conference).

II. Background

6. The Commission has a number of enforcement tools at its disposal in overseeing those areas of the electric, natural gas, hydroelectric, and oil pipeline industries within our jurisdiction. These tools include imposition of compliance plans; disgorgement of unjust profits; the ability to condition, suspend, or revoke market-based rate authority, certificate authority, or blanket certificate authority; the ability to refer matters to the Department of Justice for criminal prosecution; and civil penalty authority. These tools give us great flexibility in fashioning the most appropriate and effective remedies and sanctions for each violation, both to deter future violations and to compensate injured entities in those cases where profits have been wrongfully gained in violation of a statute, regulation, or order.

7. The ability granted under EAct 2005 to impose sizable monetary penalties has generated a number of questions and concerns from the industry regarding our enforcement program. As noted, many of these questions arise because of the non-public nature of much of what our Enforcement staff does. For investigations closed without any action by the Commission, the existence of the investigation remains non-public in all but rare circumstances.⁸ However, when we decide to either approve a settlement resolving an action or institute an Order to Show Cause proceeding, both of which may involve the imposition of monetary sanctions, the existence and particulars of the investigation become public information. This incomplete picture may foster the misperception that most investigations result in civil penalties.

8. To address this concern, and to entertain questions and suggestions regarding our enforcement policies, we held a widely attended and viewed Enforcement Conference on November 16, 2007. The conference featured a broad range of panelists, including former Commissioners and practitioners. In advance of the conference, Enforcement staff issued the Staff Report noted above, which cataloged the number and type of investigations, self-reports, settlements, and Orders to Show Cause that it has handled since October 2005.

9. As noted in the Staff Report, between 2005 and 2007, Enforcement staff closed approximately 75 percent of its investigations without any sanctions being imposed, even though Enforcement staff found a violation in about half of those closed investigations. Only the remaining one-quarter of the total investigations completed during the study period resulted in civil penalties. Additionally, more than half of the self-reports submitted to Enforcement staff were closed with no action. The information provided in the Staff Report demonstrates that Enforcement staff frequently exercises prosecutorial discretion to resolve minor infractions with voluntary compliance measures rather than with penalties.

⁸ See 18 C.F.R. § 1b.9 (2007).

10. Through April 1, 2008, all of the post-EPA 2005 investigations resulting in the imposition of civil penalties have been resolved by settlement between Enforcement staff and the subject companies. The Commission has issued 14 orders approving these settlements.⁹ The civil penalties ranged from \$300,000 to \$10 million, and reflect a wide variety in the type and seriousness of the violations at issue. In some of these cases, disgorgement or other monetary remedies were imposed as well, and all but three of the settlements included compliance plans designed to prevent reoccurrence of the violations. We believe that the record in each of these cases demonstrates our commitment to firm and fair resolution of violations, and our desire to ensure future compliance with our governing statutes, regulations, and orders. While circumstances in the future may warrant imposition of the maximum civil penalty authorized by law, we note that each of the civil penalties we have so far imposed was significantly less than the maximum.

11. Since the passage of EPA 2005, we have also issued two Orders to Show Cause, based on Enforcement staff's allegations of possible violations of a former Market Behavior Rule¹⁰ and the current Anti-Manipulation Rule.¹¹ We have yet to make a final determination on these pending matters.¹²

III. Scope of this Revised Policy Statement

12. The foregoing discussion suggests that the non-public nature of much of Enforcement staff's work, coupled with the potential for the imposition of significant monetary penalties, argues for a fuller explication than we have yet provided as to how

⁹ *In re Entergy New Orleans, Inc.*, 122 FERC ¶ 61,219 (2008); *In re Constellation NewEnergy – Gas Division, L.L.C.*, 122 FERC ¶ 61,220 (2008); *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007); *In re MGTC, Inc.*, 121 FERC ¶ 61,087 (2007); *In re Gexa Energy L.L.C.*, 120 FERC ¶ 61,175 (2007); *In re Cleco Power, LLC*, 119 FERC ¶ 61,271 (2007); *In re Columbia Gulf Transmission Co.*, 119 FERC ¶ 61,174 (2007); *In re Calpine Energy Services, L.P.*, 119 FERC ¶ 61,125 (2007); *In re Bangor Gas Co.*, 118 FERC ¶ 61,186 (2007); *In re NRG Energy, Inc.*, 118 FERC ¶ 61,025 (2007); *In re NorthWestern Corp.*, 118 FERC ¶ 61,029 (2007); *In re Entergy Services, Inc.*, 118 FERC ¶ 61,027 (2007); *In re SCANA Corp.*; 118 FERC ¶ 61,028 (2007); *In re PacifiCorp*, 118 FERC ¶ 61,026 (2007).

¹⁰ 18 C.F.R. §§ 284.288(a) and 284.403(a)(2005) (at the time of the alleged violations, these regulations included the now rescinded Market Behavior Rule 2).

¹¹ 18 C.F.R. § 1c.1-1c.2 (2007).

¹² See *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007) (Market Behavior Rule 2); *Amaranth Advisors L.L.C.*, 120 FERC ¶ 61,085 (2007) (Anti-Manipulation Rule).

we conduct our investigations and determine the imposition of remedies, including civil penalties. We have carefully considered the suggestions of the commenters at the Enforcement Conference, and determined that a revised policy statement is the best vehicle to convey to the public the manner in which our Enforcement work is conducted. We have also instructed Enforcement staff to release annual statistical reports summarizing our enforcement activities for the preceding year, to be issued at the close of our fiscal year, September 30. This report would include information on both investigations and audits.

13. Accordingly, we issue this Revised Policy Statement, which supersedes our 2005 Policy Statement.¹³ It affirms and restates our existing policies but also makes adjustments as needed. In addition, it describes the steps involved in an audit and the steps involved in an investigation, including a description of the types of matters as to which Enforcement staff either determines not to open an investigation, or closes an investigation without a finding of violation or recommendation of sanction.

A. Audits

14. The Divisions of Audits within the Office of Enforcement helps ensure compliance with the Commission's statutes, regulations, and orders by conducting a wide array of audits of jurisdictional entities. In contrast to investigations, most of the audits conducted by the Commission are initiated without any information of or allegation regarding any specific wrongdoing.

15. The initiation of an audit is public and documented in an audit commencement letter and included in eLibrary. The commencement letter describes the purpose and scope of the audit, and audit staff's authority to perform the audit. The commencement letter also identifies the audit team members and provides appropriate contact information for Enforcement staff leadership. Shortly after the company receives the commencement letter, the audit team contacts the company and discusses the commencement letter with the company. Although the commencement letter is a public document, all information and documentation gathered during the audit fieldwork, with the exception of the company's written response to the draft audit report, is treated as non-public information.

16. The discovery techniques used in an audit typically consist of on-site interviews, conference calls, document reviews, transactional testing, observing and walking through processes and control procedures, and data requests accompanied by an affidavit to determine any area of non-compliance. When the audit team initiates a site visit, an

¹³ The 2005 Policy Statement may, of course, continue to be consulted for its background discussion regarding the enforcement policies of other agencies and the considerations we looked to in developing the policies set forth in that document.

opening meeting with the company is held to explain the audit process and address any issues or concerns that have arisen since the issuance of the commencement letter. After the completion of a site visit, the audit team holds a wrap-up conference to discuss potential audit findings or areas of concerns, identify the work the audit team needs to complete, and clarify any outstanding data requests.

17. Once all the audit fieldwork is completed and documented, the audit team conducts an exit conference to discuss audit staff's preliminary audit findings and recommendations with the company. This conference may be conducted in person or through a conference call. The result of an audit is documented in a final audit report, which is publicly reported, that contains a detailed description of the audit findings and recommendations, the audit methodology, and the company's written response to a draft audit report. The audit methodology identifies the major audit work performed to satisfy the audit objectives. Audit reports are either issued under delegated authority by the Director of Enforcement or approved by the Commission.

18. In an effort to increase the transparency of the audit process, following the Enforcement Conference, the Office of Enforcement's audit staff began to include in final audit reports a section detailing the methodology used to test compliance in each major area within the scope of the audit, thereby enabling companies to be better informed and prepared in the event of a similar audit of their operations.¹⁴ For instance, after identifying the time period covered by the audit, the Scope and Methodology section (SM Section) of the recent KCPL audit report explained that the methodology used to determine KCPL's compliance with Commission regulations included reviewing and analyzing publicly available and non-public information, such as KCPL's 10Q and 8-K filings with the Securities and Exchange Commission; FERC documents, such as KCPL's Form No. 1 filings; and previous KCPL audit reports. In addition, and as detailed above, the SM Section described how audit staff reviewed, tested, analyzed, and verified data received from the company in response to data requests, and conducted several site visits and conference calls. Next, the SM Section spelled out the specific techniques used and data examined in the various areas within the scope of the audit (*e.g.*, requirements relating to interlocking directorate activity, record retention, recovery of fuel costs, open access transmission service, standards of conduct, and uniform system of accounts). In regard to fuel cost recovery, for example, the audit staff identified the types of charges related to fossil fuel, purchased power, and nuclear fuel that KCPL passed through the wholesale FAC to verify that the costs were eligible for recovery under the company's wholesale FAC tariff.

¹⁴ See, *e.g.*, the Kansas City Power & Light Company (KCPL) audit report (PA06-6-000) (Nov. 27, 2007) at pp. 7-9.

19. Enforcement staff has posted on the Commission website audit process guidance that sets forth a detailed description of the entire audit process.¹⁵ It also describes the various procedures for disposition of contested audit matters, as set forth in the Commission's regulations.¹⁶ At any point during the audit process, Audit staff may refer suspected violations of the Commission's governing statutes, regulations or orders to Investigations staff for the possible opening of an investigation.

B. Investigations

20. The following sections of this Revised Policy Statement follow a chronological scheme and lay out the procedures used in the conduct of an investigation. First, we discuss the factors considered by staff during the pre-investigation stage to determine whether an investigation is warranted. Second, we describe the investigatory process, the ways in which an investigation can be closed without further action and, in the event further action is warranted, the options for resolution, namely settlement or show cause proceedings. Third, we enumerate the various remedies available to the Commission and the factors we look to in choosing the appropriate remedy. Finally, we focus on civil penalties in particular and discuss the factors considered in determining the appropriate amount of a penalty.

21. At the outset, however, we emphasize that we are committed to ensuring the fairness of our investigatory process from the commencement of an investigation until the time it is completed.¹⁷ We will continue to hold Enforcement staff to the highest ethical

¹⁵ See the "Audits" tab under the "Enforcement" tab on the Commission's website, www.FERC.gov.

¹⁶ *Procedures for Disposition of Contested Audit Matters*, Order No. 675, FERC Stats. & Regs. ¶ 31,209; *order on reh'g*, Order No. 675-A, FERC Stats. & Regs. ¶ 31,217 (2006).

¹⁷ We are in accord with the approach taken by the U.S. Department of Justice in the "McNulty Memorandum," a directive issued on December 12, 2006 by Paul J. McNulty, then Deputy Attorney General, to the United States Attorneys. Although the memorandum addresses corporate criminal prosecutions, its principles apply as well to our investigations: "A prosecutor's duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission . . . [p]rosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which we do our job as prosecutors – the professionalism we demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation – impacts public perception of our mission. Federal prosecutors recognize that they must maintain

(continued...)

standards throughout the process, and we are clarifying certain of our procedures to ensure that the subjects of an investigation receive due process both in perception and reality.

22. We also want to stress that a subject's good faith exercise of its rights under the relevant statutes and our regulations, including but not limited to good faith disputes regarding discovery or settlement issues, will not be considered in determining whether the subject of an investigation has cooperated with staff and will not cause the subject of an investigation to forego possible credit for exemplary cooperation.

1. Initiation of an Investigation

23. By regulation, Enforcement staff is authorized to initiate and conduct investigations relating to any matter subject to our jurisdiction.¹⁸ Investigations Staff initiates investigations when it has reason to suspect violations or when it has received information from a variety of sources, both internal and external, including intra-office referrals such as from the Division of Audits and the Division of Energy Market Oversight; referrals from other Commission offices, such as the Office of Energy Market Regulation, the Office of Electric Reliability, and the Office of Energy Projects; referrals from the Commission; referrals from market monitors; tips from the industry; self-reports; and Hotline calls. Pursuant to section 1b.9 of our regulations, all information and documentation received during an investigation, as well as the existence of an investigation, is treated as non-public information. As noted above, disclosure is permitted only at the Commission's direction or authorization, or is otherwise required to be disclosed.¹⁹

24. Prior to opening an investigation, staff reviews the information received and typically conducts a preliminary examination of the identified activity. Staff may consult publicly or commercially available sources of data, seek input from Commission staff with expertise in the subject matter, or contact the entity involved for an explanation of its actions. In some situations, this preliminary examination establishes an adequate

public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action." Pages 2-3.

¹⁸ 18 C.F.R. §§ 1b.3 and 375.314 (2007). According to these regulations, staff can conduct a preliminary investigation or, if compulsory process is required, seek an order from the Commission commencing a formal investigation. *See* 18 C.F.R. §§ 1b.5 and 1b.6 (2007). Except for the subpoena authority available to staff in a formal investigation, preliminary and formal investigations are handled in the same manner.

¹⁹ 18 C.F.R. §§ 1b.9(a)-(c), 388.112 (2007).

justification for the subject activity or otherwise indicates that no further inquiry is needed. In other cases, staff determines that a fuller inquiry into the subject conduct is required, and opens an investigation.

25. To determine whether there is a substantial basis for opening an investigation, staff considers available information concerning the following factors, as appropriate:

- Nature and seriousness of the alleged violation,
- Nature and extent of the harm, if any,
- Efforts made to remedy the alleged violation,
- Whether the alleged violations were widespread or isolated,
- Whether the alleged violations were willful or inadvertent,
- Importance of documenting and remedying the potential violations to advance Commission policy objectives,
- Likelihood of the conduct recurring,
- Amount of detail in the allegation or suspicion of wrongdoing,
- Likelihood that staff could assemble a legally and factually sufficient case,
- Compliance history of the alleged wrongdoer, and
- Staff resources.

26. If, based on a consideration of the foregoing factors, staff determines that an investigation is not warranted, it will so notify the subject of the inquiry, assuming the subject is aware that an investigation is under consideration. If, on the other hand, staff determines that an investigation should be opened, it will notify the subject of that fact.

2. Investigatory Process and Resolution of an Investigation

a. Communications with the Commission

27. At the Enforcement Conference and subsequently in written comments, various entities raised the issue of whether it is permissible for the subject of an investigation to communicate directly with the Commission during an investigation. We announce that, as a matter of Commission policy, neither the Commissioners nor their assistants will receive oral communications, in person or by telephone, from any person concerning an ongoing staff investigation as to which such person is the subject. However, this does not

prevent such person from communicating with the Commission regarding other matters, consistent with the Commission's ex parte rules,²⁰ nor does it bar such person from making written submissions to the Commission. The Commission's regulations provide that "any person may, at any time during the course of an investigation, submit documents, statements of facts or memoranda of law for the purpose of explaining said person's position or furnishing evidence which said person considers relevant regarding the matters under investigation."²¹ The Commission clarifies that nothing in our regulations prohibits the submission of such written information directly to the Commission. Such a submission may be made at any time during an investigation, up to the point at which our procedures regarding Orders to Show Cause come into play, which follow specific rules and are addressed more fully below.

b. Discovery

28. Once opened, an investigation involves fact-gathering by Enforcement staff through customary discovery methods such as data and document requests, interrogatories, interviews, and depositions. The time to complete an investigation depends on many factors, including the complexity of the conduct involved and the nature of the alleged violations. During this process, staff is in frequent contact with the subject being investigated, and will meet or otherwise converse with company representatives to discuss relevant facts, data, and legal theories. We note that subjects of an investigation are always free to contact Enforcement staff to provide additional information or explanations of their conduct.²²

29. Discovery in Commission investigations, as in all litigation endeavors, is crucial in determining the nature of the activities at issue. However, the Commission and staff recognize the financial and time burdens that compliance with discovery requests impose on companies, which must continue to conduct their ordinary business while at the same time meeting staff's needs. For this reason, staff targets its discovery requests to the specific demands of the investigation, refrains from seeking information unnecessary to the resolution of the issues and conduct examined, and works with the subject of an investigation to accommodate reasonable requests regarding the production of data. The Commission will ensure that this practice continues.

30. Some entities have asked the Commission to establish a mediation process to address discovery or other disputes that may arise during an investigation between

²⁰ 18 C.F.R. § 2201 (2007).

²¹ 18 C.F.R. § 1b.18 (2007).

²² See 18 C.F.R. § 1b.18 (2007).

enforcement staff and the subject of an investigation. We conclude that such processes need not be established at this time. However, we will re-evaluate our conclusions if warranted by facts and circumstances.

c. Closing an Investigation

31. At any time during the course of its investigation, staff may determine to close the investigation without taking any further action. This happens when staff determines that no violation occurred, the evidence is insufficient to warrant further investigation, or no further action is otherwise called for based on a totality of the circumstances. In such a case, staff notifies the subject that the investigation is closed.

32. If staff reaches the conclusion that a violation occurred that warrants sanctions, staff shares with the subject of the investigation its views, including both the relevant facts and legal theories. This may be done either orally or in writing. At this time, the subject has an opportunity to respond and to furnish any additional information it may deem to be helpful. If this process alters the complexion of the investigation, staff reconsiders its views. In some situations, such reconsideration has resulted in staff closing an investigation without recommending sanctions, or revising its view of the appropriate sanction. If staff continues to believe that sanctions of some sort are warranted, the matter will follow one of two courses: either the subject of the investigation and Enforcement staff agree on a settlement, or the subject contests Enforcement's conclusions.

d. Settlement

33. Staff attempts to reach a settlement with the subject of an investigation before recommending an enforcement proceeding. Settlement is our preferred resolution to investigations that result in a recommendation of remedial action. From the subject's point of view, settlement can often result in penalty payments significantly lower than those that would result from contesting staff's conclusions, and avoids litigation risk as well as the time and costs of a hearing. From the Commission's point of view, the public interest is often better served through settlements because we are able to ensure that compliance problems are remedied faster and that disgorged profits may be returned to customers faster, and we are able to reallocate to other enforcement matters the resources that would have been spent in lengthy litigation.

34. If the subject's response to staff's presentation of its case does not persuade staff to close the investigation, staff requests settlement authority from the Commission and, in that request, seeks authority to negotiate within a range of potential civil penalties and/or disgorgement. This process ensures that the Commission, not staff, determines the appropriate range of remedies for purposes of settlement. Furthermore, when staff seeks such settlement authority, it will provide the Commission with the subject's written response to staff's views, if submitted as described in Paragraph 32. This process ensures that the Commission has both the views of its staff and the subject before it determines

whether to authorize settlement negotiations. If settlement authority is granted, staff and the subject proceed to settlement negotiations, which may involve several meetings. If staff and the subject are able to agree in principle on the terms of the settlement, staff drafts a proposed stipulation and consent agreement and sends it to the subject for review. Further negotiations over specific terms of the agreement may occur at this point. Once staff and the subject agree on the terms, an executed stipulation and consent agreement is submitted to the Commission for its consideration. Upon approval, the Stipulation and Consent Agreement and the order approving the settlement are generally released publicly.

e. Orders to Show Cause

35. If Enforcement staff and the subject of the investigation are unable to reach a settlement, staff may recommend that the Commission initiate enforcement proceedings. In such case, Enforcement staff, except in the most extraordinary circumstances,²³ notifies each subject of an investigation of its intention to make the recommendation. Along with this notification, staff advises the subject that it may make a submission to the Commission to present its case as to why an Order to Show Cause should not issue.²⁴ Staff then submits to the Commission both its report, containing recommended findings of fact and conclusions of law, and any submission made by the subject, if timely received, so that the Commission has both documents before it for its consideration.

36. After considering staff's recommendations and the subject's submission, the Commission determines whether an Order to Show Cause is appropriate. If so, we issue the Order to Show Cause with Enforcement staff's report attached. We will not issue any findings regarding the matter until after we have received the subject's response to the Order to Show Cause. In addition, once the Order to Show Cause issues, designated staff

²³ An example of such an extraordinary circumstance would be the need to seek an injunction to prevent immediate and irreparable harm.

²⁴ Although our rules currently permit staff discretion in deciding whether to offer this opportunity (*See* 18 C.F.R. § 1b.19 (2007)), in *Submissions to the Commission upon Staff Intention to Seek an Order to Show Cause*, Docket No. RM08-10-000, 123 FERC 61,159 (2008), issued concurrently with this Revised Policy Statement, we expand the ability of subjects of an investigation to make such submissions as a matter of right in all but the most extraordinary circumstances. This rule also clarifies the timing of such submissions.

are made non-decisional employees for the remainder of the proceeding.²⁵ Non-decisional employees are prohibited from conducting off-the-record communications about the investigation with any member of the Commission or its decisional staff.²⁶

37. The Commission emphasizes that, in issuing an Order to Show Cause, it does not make any finding as to whether there has been a violation of the law. Rather, an Order to Show Cause commences a Part 385 proceeding.²⁷ As indicated, Enforcement staff who participate in that proceeding become non-decisional. The Office of General Counsel will take the lead in advising the Commission regarding the disposition of arguments made in response to, and support of, the Order to Show Cause.

38. Following issuance of the Order to Show Cause, potential settlement may proceed in accordance with the requirements of Rule 602 of the Commission's Rules of Practice and Procedure.²⁸ Under this Rule, any participant in the proceeding may submit an offer of settlement at any time, which is transmitted to the Commission and the presiding officer, if one has been appointed. If the offer is uncontested, the Commission may approve the settlement upon a finding that it is fair, reasonable, and in the public interest.²⁹ Commission approval of a settlement closes the investigation and concludes the enforcement proceedings with respect to all matters covered in the settlement.

39. In the event there is no settlement, the proceeding will continue according to the process prescribed by the particular statute governing the violation at issue, as well as in accordance with any additional procedures set forth by the Commission in orders issued in the particular proceeding. In 2006, we issued an order in which we provided a

²⁵ Codification of the process is being proposed in a notice of proposed rulemaking, issued contemporaneously with this Revised Policy Statement. *See Ex Parte Contacts and Separation of Functions*, Docket No. RM08-8-000, 123 FERC ¶ 61,158 (2008) (Ex Parte NOPR).

²⁶ 18 C.F.R. §§ 2201(b), 2202 (2007). We are proposing revisions to these rules in the Ex Parte NOPR cited in the preceding footnote, which proposes that this restriction on off-the-record communications also apply to subjects of the investigation.

²⁷ 18 C.F.R. Part 385 (2007).

²⁸ 18 C.F.R. § 385.602 (2007).

²⁹ *Id. Petal Gas Storage v. FERC*, 496 F.3d 695, 701 (D.C. Cir. 2007); *cf. Tejas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990).

comprehensive review of the statutory requirements associated with the imposition of civil penalties under Parts I and II of the FPA, the NGA, and the NGPA, and outlined the process we follow in imposing civil penalties under each of the statutes.³⁰

40. These enforcement procedures are designed to provide due process to those who are the subjects of an investigation or enforcement action. During every stage of an investigation, subjects being investigated have the opportunity to make submissions to Enforcement staff to demonstrate that a violation did not occur, or to offer an explanation of why one occurred.³¹ Moreover, the Commission clarifies that, under section 1b.18, the subject of an investigation has the right, at any time during an investigation, to submit documents directly to the Commission, not just to Enforcement staff. Thus, throughout our Enforcement proceedings, the subject of an investigation has the right and the means to make its views known to staff and the Commission.

3. Choice of Remedy

41. In the event the Commission identifies a violation of a governing statute, regulation or order, we have available to us a panoply of remedies to sanction the behavior, recompense injured entities, and prevent reoccurrence of the conduct in question. We possess broad discretion in fashioning the appropriate remedy,³² and our choice is carefully tailored to the facts and circumstances of each case. These remedies and sanctions include civil penalties for violations of the NGA, NGPA, and Parts I and II of the FPA; disgorgement of unjust profits; and compliance plans and various other forms of non-monetary relief, all of which are discussed in more detail below.

a. Disgorgement

42. In the event an entity acquires unjust profits through a violation of a statute, regulation or order, the Commission may require disgorgement and order restoration of the unjust profits. It is important to note that the Commission has discretion to order disgorgement not in lieu of, but in addition to, civil penalties or other remedies that may be imposed on the wrongdoer.

³⁰ *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 (2006).

³¹ *See* 18 C.F.R. § 1b.18 (2007).

³² *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“the breadth of agency discretion is . . . at [its] zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs.”); *see also Consol. Edison Co. of New York v. FERC*. No. 06-1025, slip op. at 9 (D.C. Cir. 2007).

43. Requiring disgorgement of unjust profits is consistent with long-standing Commission practice,³³ the 2005 Policy Statement,³⁴ and the practice of other enforcement agencies such as the Securities and Exchange Commission (SEC)³⁵ and the Commodity Futures Trading Commission (CFTC).³⁶ Our practice in this regard has not altered since enactment of EAct 2005, including in those cases involving the imposition of civil penalties. In *In re SCANA Corporation*, we ordered disgorgement of \$1.4 million in unjust profits for the improper use of network transmission service, as well as a \$9 million civil penalty.³⁷ In *In re Constellation NewEnergy – Gas Division, LLC*, we approved disgorgement of approximately \$1.9 million, plus interest, for violations of the gas pipeline open-access requirements, as well as a \$5 million civil penalty.³⁸ And *In re Gexa Energy, L.L.C.*, we approved the disgorgement of over \$12,400, plus interest, for violations of sections 203(a) and 205 of the FPA, the Commission’s regulations regarding the filing of electric quarterly reports, and a Commission order granting the company market-based rate authority, as well as a \$500,000 civil penalty.³⁹

b. Compliance Plans

44. Another enforcement tool at our disposal is the imposition of compliance plans on the company in violation. Most of the settlements that we have approved post-EAct 2005 have included compliance plans, in addition to other remedies and sanctions.⁴⁰ The

³³ See, e.g., *Transcon. Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172, 1176-77 (D.C. Cir. 2007); *Coastal Oil & Gas Corp. v. FERC*, 782 F.2d 1249 (5th Cir. 1986).

³⁴ 2005 Policy Statement at P 19.

³⁵ The Securities Exchange Act §§ 21-21C, 15 U.S.C. §§ 78u-78u-3 (2000).

³⁶ 7 U.S.C. §§ 13a & 13b (2000); *Comm. Fut. L. Rep. (CCH)* ¶ 26,265, P 42,247.

³⁷ *In re SCANA Corp.*, 118 FERC ¶ 61,028 (2007).

³⁸ *In re Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 (2008).

³⁹ *In re Gexa Energy, L.L.C.*, 120 FERC ¶ 61,175 (2007).

⁴⁰ See, e.g., *In re Constellation NewEnergy-Gas Division, LLC*, 122 FERC ¶ 61,220 (2008) (two to three year compliance monitoring plan, with third year at staff’s sole discretion); *In re BP Energy Co.*, 121 FERC ¶ 61,088 (2007) (one to two year compliance monitoring plan, with second year at Enforcement staff’s sole discretion); *In re MGTC, Inc.*, 121 FERC ¶ 61,087 (2007) (compliance report); *In re Cleco Power, LLC*, 119 FERC ¶ 61,271 (2007) (one to two year compliance monitoring plan, with second year at Enforcement staff’s sole discretion); *In re Calpine Energy Services, L.P.*,

(continued...)

purpose of these plans is generally to monitor relevant activity by the company for a suitable period of time, to ensure that steps are taken within the company to improve compliance practices and thereby prevent reoccurrence of the violations.

45. Under a compliance plan, the company is required to submit sworn reports to Enforcement staff on a periodic basis for a specified period of time, most typically semi-annual reports for a period of one to three years. These reports describe measures taken by the company to end the practices that led to the violations and to alert staff to any additional violations that may have occurred and measures taken to correct them. In addition, the reports describe training and other activities taken by the company to implement and improve compliance. Staff reviews these reports and, where necessary, provides comments and suggestions to the company. Often, the compliance plan has called for the company to hire an independent third party auditor to review its business practices in order to ensure compliance.⁴¹

46. The Commission may also go further and approve, as part of the settlement, the development of a comprehensive compliance program addressing a broad area of Commission requirements.⁴² Such a comprehensive program may be appropriate for companies with many wide ranging violations, for frequent violators, or for entities with a demonstrable absence of a compliance culture. Often the company will be required to support its internal compliance program with a specified amount of funding. A comprehensive program of this type not only addresses compliance procedures and mechanisms, it often entails the engagement of an independent consultant to conduct a review of the company's existing compliance program, or to identify industry best-practices for adoption by the company.

47. We have not imposed a single approach to the compliance plans that have been imposed by the Commission. In the case of a settlement, Enforcement staff and the

119 FERC ¶ 61,125 (2007) (one to two year compliance monitoring plan, with second year at Enforcement staff's sole discretion); *In re Bangor Gas Co.*, 118 FERC ¶ 61,186 (2007) (one year compliance plan); *In re PacifiCorp*, 118 FERC ¶ 61,026 (2007) (one year compliance plan); *In re SCANA Corp.*, 118 FERC ¶ 61,028 (2007) (one year compliance plan); *In re Entergy Services, Inc.*, 118 FERC ¶ 61,027 (2007) (one to two year compliance monitoring plan, with second year at Enforcement staff's sole discretion); *In re NorthWestern Corp.*, 118 FERC ¶ 61,029 (2007) (two year compliance plan); *In re NRG Energy, Inc.*, 118 FERC ¶ 61,025 (2007) (one year compliance monitoring plan).

⁴¹ See *In re Cleco Power, LLC*, 119 FERC ¶ 61,271 (2007); *In re PacifiCorp*, 118 FERC ¶ 61,026 (2007); *In re Entergy Services, Inc.*, 118 FERC ¶ 61,027 (2007).

⁴² *Coral Energy Resources, L.P.*, 110 FERC ¶ 61,205 (2005).

company generally work out together the details of the plan, in order to best address the unique issues involved in the case.

48. Compliance plans are not always necessary. In some instances, a repetition of the violation may, due to external circumstances, be unlikely or impossible to occur.⁴³ In other instances, the violation at issue may have been discovered as the result of an existing strenuous internal compliance program, which argues against imposition of a new or different compliance plan. In a later section discussing civil penalties, we describe the typical elements we expect to see in a vigorous compliance program.

c. Other Non-Monetary Measures

49. The Commission is authorized to impose any of a number of other non-monetary measures to remedy violations. These measures include conditioning, suspending, or revoking market-based rate authority, certificate authority, or blanket certificate authority.⁴⁴ The decision of whether to impose one of these measures is based on an evaluation of the particular circumstances of the individual case, including the scope and seriousness of the violations. We also have the ability, in appropriate circumstances, to refer matters to the Department of Justice for criminal prosecution.⁴⁵

d. Civil Penalties

50. EAct 2005 significantly increased the scope of the Commission's civil penalty authority. The Commission is now authorized to impose civil penalties of up to \$1

⁴³ See, e.g., *In re Columbia Gulf Transmission Co.*, 119 FERC ¶ 61,174 (2007); *In re Gexa Energy L.L.C.*, 120 FERC ¶ 61,175 (2007).

⁴⁴ See, e.g., *Enron Power Marketing, Inc.*, 103 FERC ¶ 61,343, at P 52 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004); *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 99 FERC ¶ 61,272, at 62,154 (2002); *San Diego Gas & Electric Co.*, 95 FERC ¶ 61,418, at 62,548, 62,565 (2001), *order on reh'g*, 97 FERC ¶ 61,275 (2001), *order on reh'g*, 99 FERC ¶ 61,160 (2002); *accord Enron Power Marketing, Inc.*, 102 FERC ¶ 61,316 at P 8 & n.10. The Commission has revoked the market based rate authority of a number of other entities: *See Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006); *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006); *Electric Quarterly Reports*, 69 Fed. Reg. 57,679 (Sept. 27, 2004); *Electric Quarterly Reports*, 105 FERC ¶ 61,219 (2003).

⁴⁵ NGA § 20(a), 15 U.S.C. § 717s(a) (2000); FPA § 314(a) (2000), 16 U.S.C. § 825m(a) (2000); NGPA § 504(b)(5) (2000), 15 U.S.C. § 3414(b)(5) (2000).

million per day, per violation for any violation of the NGA, the NGPA, and Part II of the FPA. In addition, the Commission retains its existing penalty authority under Part I of the FPA.⁴⁶

51. With this expanded authority comes added responsibility to ensure that the Commission's penalty determinations are fair and reasonable, and take into account the unique factors relevant to a given violation. The NGA was amended by EAct 2005 to provide that "[i]n determining the amount of a proposed penalty, the Commission shall take into consideration the nature and seriousness of the violation and the efforts to remedy the violation."⁴⁷ The FPA retained almost identical language, which requires us to "take into consideration the seriousness of the violation and the efforts . . . to remedy the violation in a timely manner."⁴⁸ As we discussed in our 2005 Policy Statement, and as we describe more fully below, we implement these statutory mandates and our due process obligations by taking into account numerous factors in determining the appropriate civil penalty for a violation, including the nature and seriousness of the violation and the company's efforts to remedy it.

52. We continue to believe that this careful, considered approach provides the best method for determining whether civil penalties are appropriate and, if so, for determining the appropriate amount. Some commenters have suggested that the Commission should determine penalties in accordance with a pre-determined penalty schedule or formula. We rejected such an approach in our 2005 Policy Statement, explaining that we believed it was important to retain the discretion and flexibility to address each case on its merits, and to fashion remedies appropriate to the facts presented, including any mitigating factors.⁴⁹ Our two years of experience in administering the enhanced penalty authority granted under EAct 2005 has not yet convinced us to revise our decision at this time.⁵⁰

⁴⁶ FPA § 31(c), 16 U.S.C. § 823b(c) (2000) (providing civil penalties of "an amount not to exceed \$10,000 for each day that such violation or failure or refusal continues").

⁴⁷ 15 U.S.C. § 717t-1 (added by EAct 2005, § 314(b)).

⁴⁸ 16 U.S.C. § 825o-1 (as amended by EAct 2005, § 1284(e)). *See also* 16 U.S.C. § 824o(e)(6), requiring that any penalty imposed for violation of a reliability standard "shall bear a reasonable relation to the seriousness of the violation and shall take into consideration the efforts . . . to remedy the violation in a timely manner."

⁴⁹ 2005 Policy Statement at P 13.

⁵⁰ In the discrete area of reliability, we have permitted the Regional Entities and the Electric Reliability Organization to use a base penalty amount table in their initial determination of the appropriate amount of a civil penalty for violation of a Reliability

A penalty schedule is most feasible where the universe of regulatory requirements is fairly limited, the universe of regulated entities is small and reasonably homogeneous, and when the agency has significant experience in exercising its enforcement authority.

53. Our jurisdiction encompasses hydroelectric facilities, interstate natural gas pipelines and storage facilities, liquefied natural gas importation facilities, electric transmission facilities, regional transmission organizations, independent transmission system operators, and interstate oil pipelines. Indeed, our jurisdiction extends beyond the regulation of individual entities to include wholesale markets for the sale and purchase of physical natural gas and electric power. It also includes regulation of certain mergers and acquisitions involving certain jurisdictional assets or public utility holding companies. Moreover, the Commission's regulatory requirements are extensive, including statutes, regulations (including such wide-ranging areas as our anti-manipulation and fraud provisions⁵¹), tariffs, rules, and orders, which, taken together, address an extraordinarily broad panoply of prohibited activity. And, unlike a generic rulemaking, which may apply simply to one class of regulated entities, our universe of regulatory requirements can apply to anywhere from one entity to all the entities within our jurisdictional reach.⁵² This complex mix of requirements cannot neatly be reduced to a penalty schedule or matrix, at least not until the Commission develops more experience in reviewing matters involving its enforcement authority. For that reason, we believe that it would be impractical to develop such a schedule at this time. Our current practice of applying a

Standard. *North American Electric Reliability Corp.*, 116 FERC ¶61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006). All such proposed penalties, however, are subject to review and approval by the Commission.

⁵¹ 18 C.F.R. Part 1c (2007). See *Prohibition of Energy Market Manipulation*, Order No. 670, 71 Fed. Reg. 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, at P 25 (2006) (codified at 18 C.F.R. Part 1c) (explaining that the Commission's anti-manipulation and fraud authority "is modeled after section 10(b) of the Exchange Act, which has been interpreted as a broad anti-fraud 'catch-all clause'"); *Id.* at P 50 (explaining that "[t]he Commission defines fraud generally, that is, to include any action, transaction, or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market").

⁵² Indeed, under 18 C.F.R. Part 1(c) (2007), entities that are not regulated by the Commission are potentially subject to civil penalties or other sanctions.

case-by-case approach, one based on factors rather than formula, is the surest way of tailoring each remedy and sanction to the particular circumstances of the specific case before us.⁵³

54. In the following sections, we address the factors we consider in determining whether a civil penalty should be imposed and, if so, the amount of that penalty. These factors are grouped under the following headings: seriousness of the offense, commitment to compliance, self-reporting, cooperation, and reliance on staff guidance. Of these factors, the most important in determining the amount of the penalty are the seriousness of the offense and the strength of the entity's commitment to compliance.

(i) **Seriousness of the Offense**

55. As required by the NGA⁵⁴ and the FPA,⁵⁵ one of the broad categories of factors we consider in determining the amount of a civil penalty is the seriousness of a violation. We base the seriousness of a violation on the scope of the violation, the circumstances giving rise to it, and the effect it has on other entities and the market. We carry forward from the 2005 Policy Statement the factors we examine in determining the seriousness of a violation. These are:

- What harm was caused by the violation? Was there loss of life or injury or endangerment to persons? Was there damage to property or the environment? Was the harm widespread across markets or customers, or was it limited in scope and impact? Did it involve significant sums of money? Were others indirectly affected by the wrongdoing? What benefit did the wrongdoer gain from the violation?
- Was the violation the result of manipulation, deceit, or artifice? Did the wrongdoer misrepresent material facts? Was the conduct fraudulent? Were the actions reckless or deliberately indifferent to the results?
- Was the action willful? Was the violation part of a broader scheme? Did the wrongdoer act in concert with others?

⁵³ As we continue to issue orders under our enhanced enforcement authorities, a substantial body of case law will emerge that should assist the regulated community in understanding how we determine penalties.

⁵⁴ 15 U.S.C. § 717t-1 (added by EPOA 2005, § 314(b)).

⁵⁵ 16 U.S.C. § 825o-1 (as amended by EPOA 2005, § 1284(e)).

- Is this a repeat offense or does the company have a history of violations? Is this an isolated instance or a recurring problem? Was the wrongdoing systematic and persistent? How long did the wrongdoing last? ⁵⁶
- Was the wrongdoing related to actions by senior management, the result of pressure placed on employees by senior management to achieve specific results, or done with the knowledge and acquiescence of senior management? Did management engage in a cover-up?
- How did the wrongdoing come to light? Did senior management resist or ignore efforts to inquire into actions or otherwise impede an inquiry into the violation?
- What effect would potential penalties have on the financial viability of the company that committed the wrongdoing?

56. In addition to the factors identified in the 2005 Policy Statement, we also consider the following:

- What, if any, harm was there to the efficient and transparent functioning of the market? ⁵⁷
- What are the earnings, revenues and market share of the part of the company that is under investigation?
- What penalty amount best discourages improper conduct, while not excessively discouraging beneficial market participation?

⁵⁶ We note that with respect to repeat violations, we are concerned not only with violations of the same type, but with any other violations of the Commission's governing statutes, regulations and orders.

⁵⁷ See, e.g., *In re BP Energy Co.*, 121 FERC ¶ 61,088, at P 21 (2007) (explaining, "[the] violations [involving "flipping," i.e., a series of alternating short-term releases of discounted rate capacity to affiliated replacement shippers to avoid the competitive bidding requirement for discounted long-term capacity release] directly affected the transparency of the secondary market for natural gas transportation and storage. Market transparency was one of the primary goals of the Commission's pipeline open-access reforms, and remains an important priority today, as demonstrated by recent orders and notices.").

- What was the motivation of those accused of the improper conduct?
- Was the integrity of the regulatory process impaired?⁵⁸
- Was there a risk of serious harm, even if the actual harm was slight or non-existent?⁵⁹

(ii) **Commitment to Compliance**

57. A second broad category we consider in determining the amount of a civil penalty is the nature and extent of the company's internal compliance measures in existence at the time of the violation. Such compliance measures include: (i) systems and protocols for monitoring, identifying, and correcting possible violations, (ii) a management culture that encourages compliance among company personnel, and (iii) tools and training sufficient to enable employees to comply with Commission requirements. The presence of a robust internal compliance program is a mitigating factor that may result in a reduced penalty. We also consider in this category the actions taken by the company to correct the activity that produced the violation. This consideration, like seriousness of the offense, is mandated by statute.⁶⁰

58. We carry forward from our 2005 Policy Statement the factors we examine in determining the existence of a robust internal compliance program. These are:

- Does the company have an established, formal program for internal compliance? Is it well documented and widely disseminated within the company? Is the program supervised by an officer or other high-ranking official? Does the compliance official report to or have independent access

⁵⁸ See, e.g., *id.* (explaining, “these unlawful transactions impaired the effectiveness of the Commission’s pipeline open-access policies.”); *In re Columbia Gulf Transmission Co.*, 119 FERC ¶ 61,174, at P 13 (2007) (in light of staff’s finding that the company’s actions violated a Commission order by unreasonably delaying a Commission-approved interconnection, thus undermining the Commission’s open-access program, the Commission found “harm to the orderly administration of the Natural Gas Act”).

⁵⁹ This factor, for instance, would encompass an unsuccessful manipulation attempt that, had it succeeded, might have resulted in major disruptions or price fluctuations in the market. Another example would be the violation of a Reliability Standard that puts the bulk power system at serious risk, even if an outage is averted because of system conditions or other events.

⁶⁰ 15 U.S.C. § 717t-1 (2007); 16 U.S.C. § 825o-1 (as amended by EAct 2005, § 1284(e)).

to the chief executive officer and/or the board of directors? Is the program operated and managed so as to be independent? Are there sufficient resources dedicated to the compliance program?

- Is compliance fully supported by senior management? For example, is senior management actively involved in compliance efforts and do company policies regarding compensation, promotion, and disciplinary action take into account the relevant employees' compliance with Commission regulations and the reporting of any violations?
- How frequently does the company review and modify the compliance program? How frequently is training provided to all relevant employees? Is the training sufficiently detailed and thorough to instill an understanding of relevant rules and the importance of compliance?
- In addition to training, does the company have an ongoing process for auditing compliance with Commission regulations?
- How has the company responded to prior wrongdoing? Did it take disciplinary action against employees involved in violations? When misconduct occurs, is it a repeat of the same offense or misconduct of a different nature? Does the company adopt and ensure enforcement of new and more effective internal controls and procedures to prevent a recurrence of misconduct?

59. Most of the foregoing factors are self-explanatory. However, in order to give further guidance to the industry, we intend to hold periodic workshops in which we will discuss the elements we expect to see in vigorous compliance programs. We also offer the following suggested actions, which point to a strong compliance culture and which may aid companies in structuring their compliance programs, bearing in mind that each case is unique and no one size fits all:

- ✓ Prepare an inventory of current compliance risks and practices,
- ✓ Create an independent Compliance Officer who reports to the Chief Executive Officer and the Board, or to a committee thereof,
- ✓ Provide sufficient funding for the administration of compliance programs by the Compliance Officer,
- ✓ Promote compliance by identifying measurable performance targets,
- ✓ Tie regulatory compliance to personnel assessments and compensation, including compensation of management,

- ✓ Provide for disciplinary consequences for infractions of Commission requirements,
- ✓ Provide frequent mandatory training programs, including relevant “real world” examples and a list of prohibited activities,
- ✓ Implement an internal Hotline through which personnel may anonymously report suspected compliance issues, and
- ✓ Implement a comprehensive compliance audit program, including the tracking and review of any incidents of noncompliance, with submission of the results to senior management and the Board.

60. We also place great value on self-reporting, particularly when it points to a strong compliance program. However, self-reporting is no substitute for a strong compliance program; indeed, repeated self-reporting by an entity that persists in violations may be of little value. But good-faith self-reports are an important element of our enforcement efforts, and are discussed separately below.

(iii) Self-reporting

61. One of the highlights of the Commission’s post-EPA 2005 enforcement program has been the now common practice of companies submitting self-reports of possible violations, the third broad category we consider in determining the amount of a civil penalty. Between October 20, 2005, the date of the 2005 Policy Statement, and April 1, 2008, the Office of Enforcement has received 103 self-reports. In most cases, self-reported violations have resulted in the matters being closed without any enforcement action being taken. In the cases where a self-report did result in enforcement action, the penalties reflected mitigation credit for the self-reporting. While we do not articulate here the precise amount of mitigation credit that was earned for self-reporting in our recent enforcement actions, we reiterate that the penalties in these cases would have been greater absent self-reporting.

62. We continue to place importance on good-faith self-reporting, and will maintain our practice of awarding penalty credit for parties that promptly self-report violations, assuming such conduct is not negated by a poor compliance culture. We carry forward from the 2005 Policy Statement the factors we examine in determining the credit to be given for self-reporting:

- How did the company uncover the misconduct? Was it through a self-evaluation, internal audit, or internal compliance program? Did the company act immediately when it learned of the misconduct?

- Did the company notify the Commission promptly? Did senior management actively participate and encourage employees to provide information to identify the misconduct?
- Did the company take immediate steps to stop the misconduct? Did it implement or create an adequate response to the misconduct?
- Did the company arrange for individuals with full knowledge of the matter to meet with Commission Enforcement staff?
- Did the company present its findings to the Commission and provide all relevant evidence regarding the misconduct, including full disclosure of the scope of the wrongdoing; the identity of all employees involved, including senior executives; the steps taken by the company upon learning of the misconduct; communications among involved employees; documents evidencing the misconduct; and measures taken to remedy the misconduct?

63. The best self-reports will be in writing and will contain a discussion of all relevant factors from the foregoing list. In addition, it should provide any documents relevant to the matter being reported and sufficient information for Enforcement staff to understand the circumstances of how and why the violation occurred, along with the identity of the key personnel involved in the violation. Good self-reports also detail the steps taken to cure the violation and to prevent any recurrence.

64. We emphasize that not only is the comprehensiveness of a self-report important, but also the promptness in providing it to Enforcement staff. In fact, we encourage companies that discover a violation to contact Enforcement staff before submitting a full report of the incident or activity in question. This notification provides considerable benefit to the company. Early notification is one aspect of mitigation credit, and Enforcement staff can provide guidance as to the matters the company should explore and present in its written report. This may result in a more complete self-report and thus in both greater mitigation credit and a more rapid conclusion of staff's inquiry.

(iv) Cooperation

65. The NGA, NGPA and the FPA all require entities under the Commission's jurisdiction to respond to requests for information from the Commission in the course of its investigations, audits, and other inquiries.⁶¹ Since cooperation is expected of all entities, we do not give penalty mitigation credit for ordinary cooperation, such as timely responses to data requests. However, we do give credit for exemplary cooperation.

⁶¹ FPA § 301(b), 16 U.S.C. § 825b(b) (2000); NGA § 8(b), 15 U.S.C. § 717g(b) (2000); NGPA § 304(a), 15 U.S.C. § 3314(a) (2000).

66. We carry forward from the 2005 Policy Statement the factors we examine in determining whether there has been exemplary cooperation. These are:

- Did the company volunteer to provide internal investigation or audit reports relating to the misconduct? Did the company hire an independent outside entity to assist the company's investigation?
- Did senior management make clear to all employees that their cooperation has the full support and encouragement of management and the directors of the company?
- Did the company facilitate Commission access to employees with knowledge and information bearing on the issue, and actively encourage such employees to provide the Commission with complete and accurate information?
- Did the company identify culpable employees and assist the Commission in understanding their conduct?
- Did the company make records readily available, with assistance on searching and interpreting information in the records?
- Did the company fairly and accurately determine the effects of the misconduct, including identifying the revenues and profits resulting from the misconduct and the customers or market participants adversely affected by the misconduct?

67. As discussed above in the description of staff's investigative process, we will continue to ensure that staff is sensitive to the time and financial burdens that discovery places on the subjects of investigations. We also note that the absence of a self-report does not preclude an entity from earning mitigation credit through exemplary cooperation.

68. Exemplary cooperation begins at the beginning of an investigation and continues through its resolution. Therefore, companies that initially earn cooperation credit can lose that credit through uncooperative conduct, such as untimely or incomplete responses, unresponsiveness to information requests, misrepresentation,⁶² or any other conduct that

⁶² With respect to regulated entities engaging in sales for resale of electric energy at market-based rates, misrepresentation may rise to the level of a separately actionable matter subject to imposition of a civil penalty. *See* 18 C.F.R. § 35.41(b) (2008): "Seller will provide accurate and factual information and not submit false or misleading

obstructs a Commission investigation, audit or inquiry. Furthermore, engaging in obstructionist conduct may be viewed as an aggravating factor in determining the amount of a civil penalty. Obstructionist conduct in an investigation can include, among other things: misrepresentation, persistent delays in responding to information requests, or frivolous objections to information requests.

(v) **Reliance on Staff Guidance**

69. We are issuing, contemporaneous with this Revised Policy Statement, an Interpretive Order that, among other things, provides a description of each of the various methods of obtaining guidance from the Commission, including the avenues available for obtaining non-binding guidance from Commission staff.⁶³ We note that staff guidance, while not binding on the Commission, is informed by the experience and knowledge of the individuals who help shape and implement Commission policy, and therefore can provide a more readily accessible source of information than official Commission guidance.

70. In the event a company reasonably relies, in good faith, on staff guidance in pursuing conduct that is ultimately found to be in violation of a Commission requirement, mitigation credit will be considered. We therefore add reliance on staff guidance to the broad category of factors for determining a civil penalty amount that were set forth in the 2005 Policy Statement.

71. The application and degree of credit for reliance on staff guidance will be based on a case-by-case analysis, and will vary according to the nature and extent of the guidance and other surrounding circumstances. Conversely, we may also view it as an aggravating factor if the evidence shows that a violator ignored or otherwise disregarded staff guidance as to the conduct later found to be in violation. Such a determination will likewise be based on a case-specific analysis of all the circumstances.

IV. Conclusion

72. We have issued this Revised Policy Statement to inform and update the industry concerning our enforcement experience and procedures, and to provide detailed explanations of the factors we consider important in determining which remedies and

information, or omit material information, in any communication with the Commission . . . unless seller exercises due diligence to prevent such occurrences.” Furthermore, the United States Criminal Code provides that under certain circumstances, knowingly falsifying or concealing a material fact is a felony which may result in fines of up to \$10,000, and/or five years imprisonment, or both. *See* 18 U.S.C. § 1001.

⁶³ *Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC 61,157 (2008) (Interpretative Order).

sanctions to impose. We hope it provides guidance about our policies and increases public understanding of this vital area of our jurisdiction. Ultimately, it is our desire that our enforcement efforts foster increased compliance with our governing statutes, regulations, and orders, and minimize the occurrence of future violations.

By the Commission. Commissioner Moeller concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Enforcement of Statutes, Regulations and Orders

Docket No. PL08-3-000

(Issued May 15, 2008)

MOELLER, Commissioner *concurring*:

This policy statement will improve the Commission's existing procedures on the exercise of its penalty authority. The Energy Policy Act of 2005 provided the Commission with substantial penalty authority to ensure that market manipulation and other violations of our standards would be addressed swiftly and effectively. The Commission has worked diligently to establish an effective enforcement process. Nevertheless, as I have repeatedly expressed, the Commission can improve its procedures by adding context and transparency to certain aspects of its policies.

Those who are subject to Commission penalties need to know, in advance, what they must do to avoid a penalty. This policy statement provides that transparency and context, and that is why I strongly support it. The Commission can continue to improve its enforcement policies, just as it can always improve on all that it does. This policy statement recognizes that our policies will be subject to reconsideration and improvement as we gain more experience.

One area of future improvement may be in the guidance that the Commission provides the industry on its enforcement priorities. I believe that the Commission can and should provide more guidance on our enforcement priorities in a manner that classifies the severity and significance of prohibited conduct. While all violations of our rules and regulations are serious and subject to enforcement, given limited resources, we should identify and prioritize the types of violations that are most harmful. Notwithstanding, I am glad that we will be continuing our various outreach efforts and publishing an annual report that summarizes our enforcement activities for the preceding year, and it is my hope that the public will be able to use this report to discern trends in our enforcement priorities.

Philip D. Moeller
Commissioner