UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Enforcement of Statutes, Orders, Rules, and Regulations	Docket No. PL10-4-000

COMMENTS OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (“ELCON”)

The Electricity Consumers Resource Council (“ELCON”) appreciates that the Commission has changed course, suspending the effectiveness of the Policy Statement on Penalty Guidelines issued in this docket on March 18, 2010 (the “Penalty Guidelines”) and seeking public comment. ELCON believes that the substance of the Penalty Guidelines is fundamentally flawed. The Commission’s reliance on the United States Sentencing Guidelines for *criminal* activity results in an approach to penalties that is not germane to a *civil*, strict liability regime form highly regulated industry and yields penalty amounts that are excessive and disproportionate to the nature and extent of violations.

For these reasons, ELCON urges the Commission to return to square one and to develop revised Penalty Guidelines germane to the energy regulatory context.

Description of ELCON

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity throughout the United States. Accordingly, some ELCON members may be subject to Reliability Standards that are directly impacted by the Policy Guidelines as issued, and ELCON members generally are customers of public utilities that are directly subject to the Policy Guidelines and may incur additional costs as the Policy Guidelines are applied.

Comments

ELCON generally agrees with the comments being filed in this docket by the Edison Electric Institute (EEI), the American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA), the Transmission Access Policy Study Group (TAPS), and the North American Electric Reliability Corporation (NERC), among others. ELCON concurs with other filers that the Penalty Guidelines need to be rewritten. As drafted, the Penalty Guidelines are not supported by a sound explanation and would yield penalties that are disproportionate to the nature and significance of any violations. The United States Criminal Sentencing Guidelines, on which the Penalty Guidelines are based, are not germane to assessment of civil, rather than criminal, liability for heavily regulated industry subject to a myriad of detailed regulatory requirements whose violations are governed by strict liability. As EEI, TAPs and other commenters discuss in detail, FERC has broken ranks with other agencies who have declined to follow the criminal sentencing guidelines and instead have adopted approaches that tie penalties to the nature and seriousness of the violation, the extent to which a violation was knowing or willful, and the action taken in response to a violation. Unlike a *civil* regulatory context where violations generally are unintentional, narrowly focused miscues in following complex and sometimes obscure provisions, these considerations are not viewed as germane in the *criminal* context where, before the penalty phase, there already has been a determination of criminal intent and guilt beyond a reasonable doubt.

More particularly, ELCON is especially concerned that the Penalty Guidelines overlay the NERC Sanctions Guidelines for reliability-related matters, which FERC earlier has approved. The new Penalty Guidelines are duplicative of and inconsistent with the NERC Sanctions Guidelines. In the reliability context, the apparent outcome of application of the new competing Penalty Guidelines would be greatly increased penalties, including new exposure to liability based on the "value" of lost load – whatever is meant by that undefined concept, high penalty floors, and no adjustment based on size of the entity or ability to pay.

In fact, for several reasons, there is no tenable basis that would support the value of lost load as a factor that can increase the magnitude of applicable penalties. *First*, depending on the calculation methodology for value of lost load, the result will be massive penalties that do not adequately account for causation, foreseeability and other considerations that should factor into the penalty amount. *Second*, the potential for penalties to be based on lost load perversely distorts incentives for system operators, who should be allowed to manage reliability in accordance with applicable reliability standards and based on their informed judgments about what is best for the system, without having to assess the potential for penalty liability in making decisions. In particular, system operators should not be balancing the potential penalty consequences of shedding load preemptively to protect the bulk power system with the risks greater, uncontrolled loss of load. *Third*, this approach is inconsistent with the Federal Power Act and a long line of case law that give the states primary responsibility for service adequacy matters and, in that context have denied efforts to recover damages from utilities for loss of load. ELCON supports and incorporates by reference the detailed comments of EEI and TAPS in these respects. ELCON also agrees with NERC that the Penalty Guidelines would undermine incentives that are designed to maintain and enhance reliability, potentially making compliance risk management more important than reliability risk management.

Accordingly, on review FERC should specify that the existing NERC Sanctions Guidelines, and not the new Penalty Guidelines, apply in the reliability context. In addition, as addressed in greater detail by other parties seeking rehearing, the following additional flaws in the Penalty Guidelines, among others, need to be addressed:

- the disproportionate base weighting of various types of violations, including failure to adequately distinguish between documentary violations and performance violations and the failure to rationalize the base weighting of market manipulation and fraud compared to run-of-the-mill tariff violations and false statements to FERC;
- failure to provide that operational penalties paid under a public utility's tariff count as diminishing the pecuniary gain/loss associated with a tariff violation; and
- failure to provide for the adjustment of penalty levels based on the nature or size of an organization.

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For these reasons, ELCON respectfully requests that the Commission withdraw the current draft and redraft the Penalty Guidelines in a manner consistent with these comments.

Notices and Communications

Notices and communications with regard to these proceedings should be addressed to:

John P. Hughes
Vice President, Technical Affairs
ELECTRICITY CONSUMERS RESOURCE COUNCIL
1111 Nineteenth Street, NW, Suite 700
Washington, DC 20036
Email: jhughes@elcon.org
Phone: (202) 682-1390

W. Richard Bidstrup
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20006
Email: rbidstrup@cgsh.com
Phone: (202) 974-1500

Respectfully submitted,

/s/ W. Richard Bidstrup
W. Richard Bidstrup
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Avenue, N.W., Suite 9000
Washington, D.C. 20006
Telephone: (202) 974-1500

Counsel for ELCON

Dated: June 14, 2010

Certificate of Service

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: June 14, 2010

/s/ W. RICHARD BIDSTRUP
W. Richard Bidstrup