

FERC Issues Statement of Administrative Policy Regarding Procedures to Assess Civil Penalties

Policy Addresses Non-Compliance With Hydroelectric Licenses, Permits, and Exemptions

January 4, 2007

On December 21st, the Federal Energy Regulatory Commission (FERC or Commission) issued a “Statement of Administrative Policy” (Policy Statement) to provide guidance on the process for assessing civil penalties for violations of statutes, orders, rules, or regulations administered by the Commission. The Policy Statement was initiated, in part, by the Energy Policy Act of 2005 (EPA 2005) amendments to Part II of the Federal Power Act (FPA), the Natural Gas Act, and the Natural Gas Policy Act of 1978. In particular, EPA 2005 expanded the Commission’s authority to assess civil penalties of up to \$1 million per day for violations of rules, regulations, and orders issued under these acts.

While EPA 2005 did not amend Part I of the FPA to authorize the Commission to increase its civil penalty assessments for violations of hydroelectric licenses, permits, or exemptions, the Commission has authority pursuant to section 31(c) of the FPA to assess penalties of up to \$11,000 “for each day that such violation or refusal continues.” Given FERC’s increased focus on enforcement, and the Policy Statement’s discussion of hydroelectric compliance, the following provides an overview of the Commission’s process for establishing penalty assessments under Part I of the FPA.

Background

Section 31(a) of the FPA authorizes the Commission to monitor and investigate compliance with licenses, permits, and exemptions for hydropower projects issued under Part I of the FPA. Pursuant to section 31(c) of the FPA, the Commission has authority to assess civil penalties if a violation has occurred or a compliance order has been violated. The Commission also has authority under section 31(b) to issue an order revoking a license or exemption.

The Policy Statement acknowledges that civil penalties are often negotiated as part of a stipulation and agreement to resolve compliance issues. In such cases, the Commission imposes a civil penalty as part of a negotiated agreement, thereby obviating the need for undertaking a formal assessment to determine penalties for noncompliance. While the Commission fully expects this practice to continue, it recognizes that there may be circumstances where negotiated resolution of compliance issues is not possible; in these circumstances, the Policy Statement sets forth procedures for establishing civil penalties.

Process for Assessing Civil Penalties Under Part I of the FPA

The Policy Statement outlines the following process for assessing penalties under Part I of the FPA.

Notice. Prior to issuing an order assessing a civil penalty, the Commission will provide notice of the proposed penalty and a statement of the material facts constituting the violation. If a violation does not involve a final compliance order issued pursuant to section 31(a) of the FPA, the notice will state that a person may choose between: (a) an administrative hearing before an administrative law judge (ALJ); or (b) an immediate penalty assessment by the Commission that may be reviewed *de novo* by a United States district court. The Commission also will allow a person to file with the Commission – within 30 days of the notice – any legal or factual arguments that could justify a reduction, modification, or elimination of the

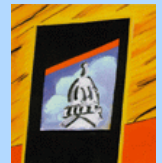
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proposed penalty. If the violation is a violation of a final compliance order, the penalty is assessed only after an administrative hearing before an ALJ.

Administrative Hearing. If a person elects an administrative hearing, or the violation involves a compliance order, the following procedures apply:

- **Hearing Order.** The Commission will issue a hearing order establishing the hearing before a FERC ALJ. Staff from FERC's Office of Enforcement will serve as trial staff.
- **Initial Decision.** The ALJ will issue an Initial Decision determining whether a violation has occurred. If a violation has occurred, the Initial Decision will recommend a penalty based on factors set forth in FERC's Policy Statement on Enforcement.
- **Exceptions and Assessment.** The Commission will consider the Initial Decision and any exceptions filed. If the Commission determines that a penalty has occurred, the Commission will issue an order assessing a penalty.
- **Rehearing.** After the Commission issues its order, a person has 30 days to seek rehearing.

Immediate Penalty Assessment. If a person elects an immediate penalty assessment by the Commission, the following procedures apply:

- **Immediate Penalty Assessment.** If the Commission determines there is a violation, the Commission will issue an order setting forth the material facts underlying the violation and assessing an appropriate penalty.
- **District Court Review.** If the assessed penalty is not paid within 60 days, the Commission will institute an action in a United States district court. The court is authorized to review *de novo* the law and facts involved in the penalty assessment.
- **Judgment.** The United States district court can enter a judgment enforcing, modifying, enforcing as modified, or setting aside the Commission's penalty assessment.

Appeal. A person can appeal to a United States Court of Appeals within the appropriate time for review of a Commission order or appeal of a district court order.

Judicial Enforcement. Once the Commission has obtained a judgment under section 31(d)(3) of the FPA, or there is a final Commission decision under section 31(d)(2) of the FPA, FERC can institute a collection action in an appropriate United States district court.

For Additional Information

If you would like additional information regarding FERC's Policy Statement, hydroelectric compliance matters, or relicensing issues, please contact Jay Ryan, Gary Bachman or any other member of the firm's Hydroelectric practice at (202) 298-1800. The firm also can provide additional information on FERC's procedures for assessing civil penalties under Part II of the FPA, the Natural Gas Act, or the Natural Gas Policy Act of 1978.

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