

RELIABILITY & SECURITY

Workshop - Salt Lake City, UT

March 26-27, 2024





Factors in Enforcement Dispositions and Penalty Calculations

March 26, 2024

Kaleb Brimhall
Enforcement Attorney

What You Will Learn and Why It Matters

- Learn the aggravating factors WECC considers when determining the appropriate disposition method
- Learn the aggravating and mitigating factors considered for penalties
- Understand how the factors used to determine disposition methods and penalty calculations:
 - Can be used by entities to improve their internal compliance programs to improve the reliability and security of the grid
 - Helps entities work well with WECC to avoid unnecessary, negative consequences when addressing potential noncompliance

Disposition Method Determination

Disposition Method	Risk
Compliance Exception (CE)	Minimal
Find, Fix, Track and Report (FFT)	Moderate
BC Find, Fix, and Track (BC FFT)	Minimal & Moderate
Settlement/Spreadsheet Notice of Penalty (SNOP)	Moderate
Settlement/Full Notice of Penalty (FNOP)	Serious
BC Notice of Alleged Violation (BC NOAV)	Moderate & Serious

Penalty Assessment Factors—Assessed Risk



- Evaluate potential impact or harm that could have occurred
- Determine the likelihood that the potential impact could occur
- Consider mitigating factors that would have reduced the likelihood of the potential impact
- Consider any internal controls that were in place at the time that expedited the discovery, shortened the duration, or reduced the severity of the impact of the noncompliance

Factors Considered for Disposition Methods

- Number of Instances
- Duration
- Compliance History
- Number and Types of Root Causes
- Mitigation Complexity
- Level of Cooperation
- Other Factors

Full Notice of Penalty (FNOP)

- FNOP must be used for violations involving (138 FERC ¶ 61,193, Paragraph 49):
 - Serious risk
 - Extended outages
 - Loss of load
 - Cascading blackouts
 - Vegetation contacts
 - Systemic or significance performance failures
 - Intentional or willful acts or omissions, including falsification of records, gross negligence, or other misconduct

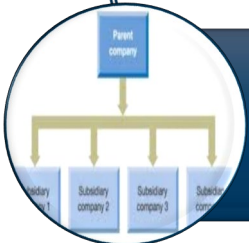
Compliance History Assessment

Step 1 – Relevant?

Step 2 – Aggravating or Not Aggravating?



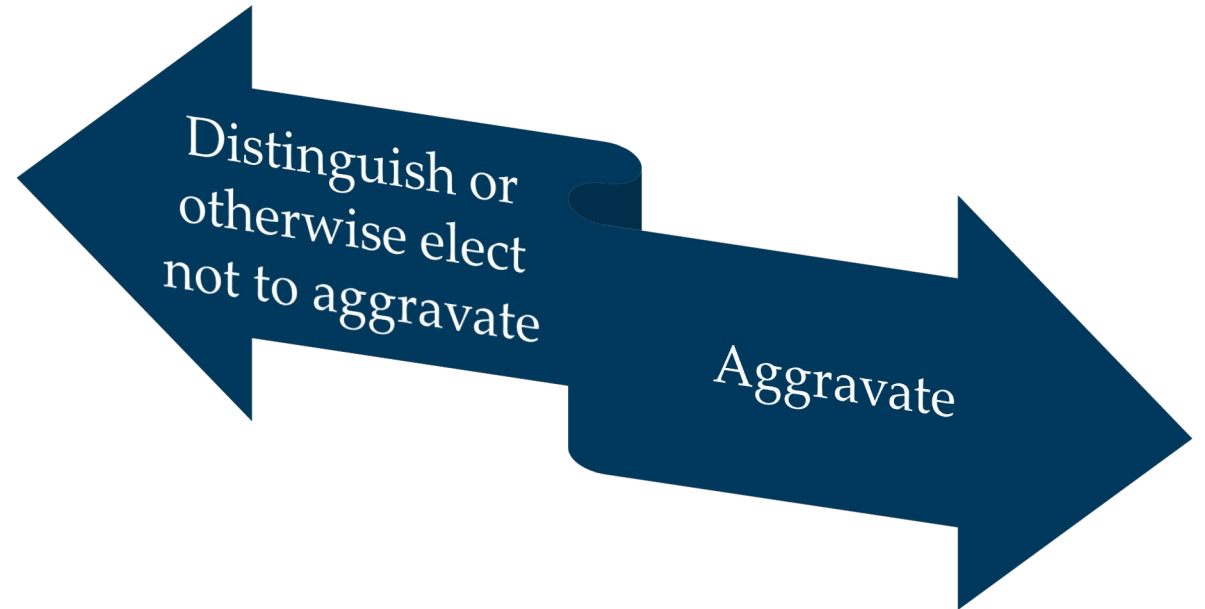
Same or Similar Standard and Requirement



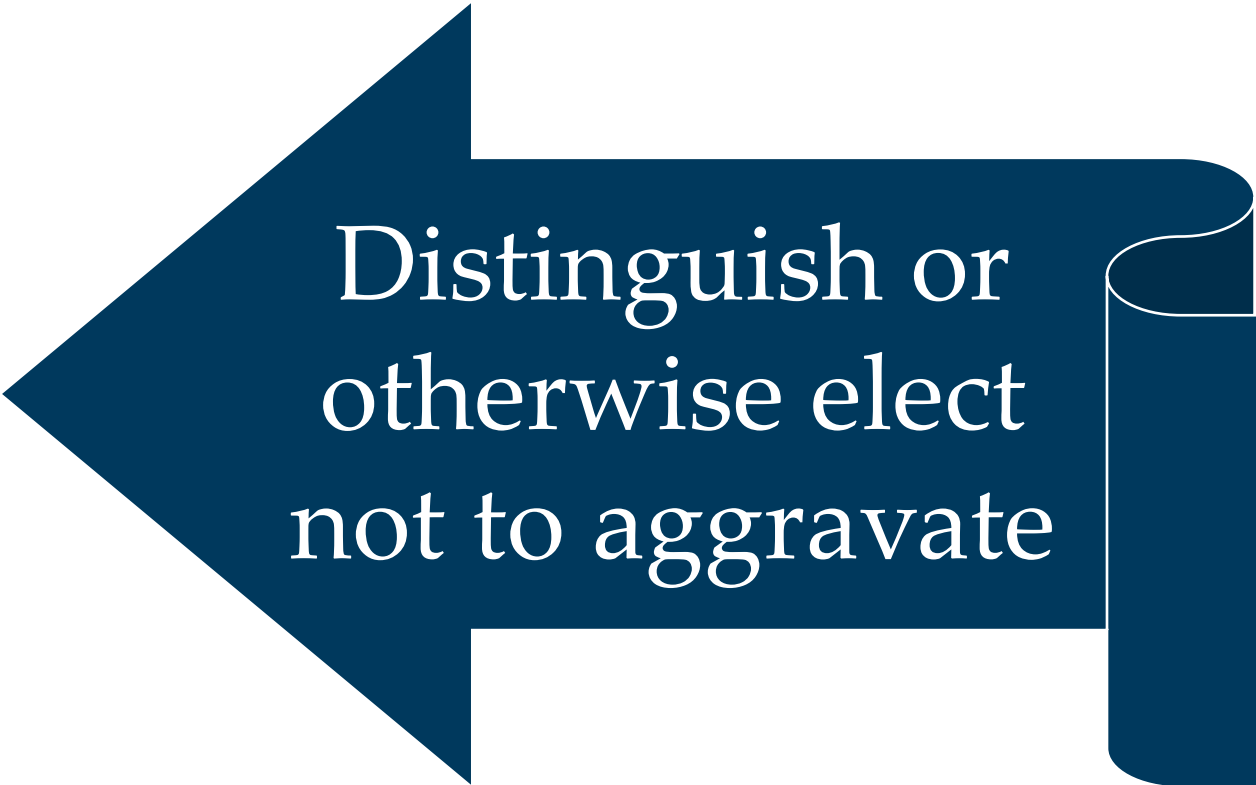
Affiliates



Five-Year Lookback



Decide Whether to Aggravate Disposition Track or Penalty



Distinguish or
otherwise elect
not to aggravate



Aggravate

Aggravating Compliance History



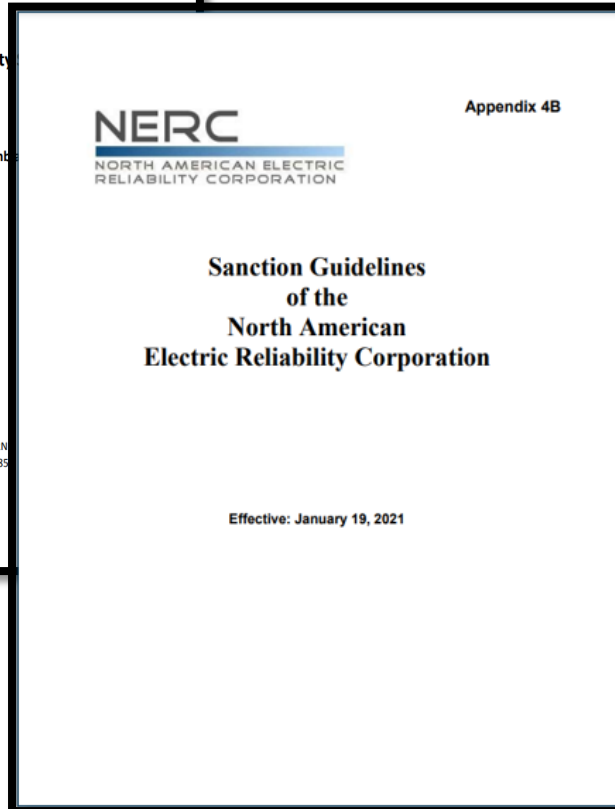
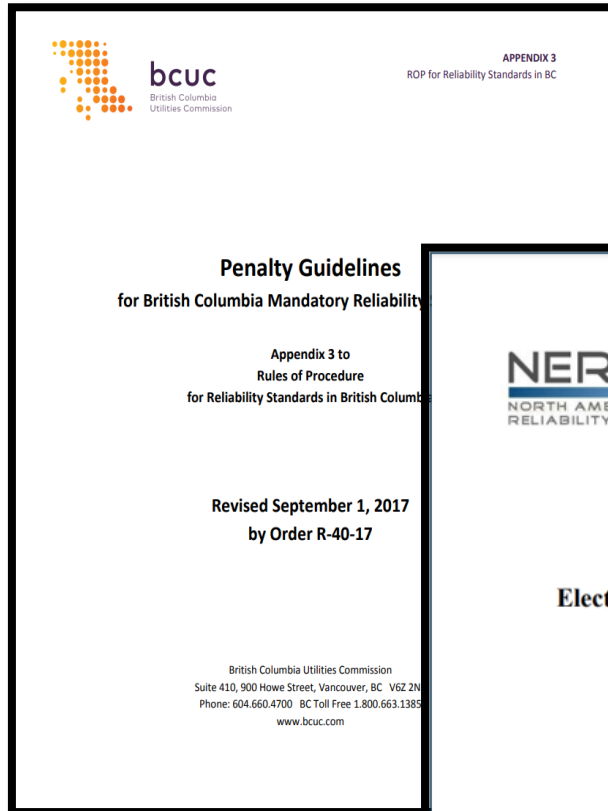
- Repetitive Violations
 - Repeat or continuing conduct (failure to adequately mitigate prior issue)
 - Relevant prior noncompliance has same root cause or prior mitigation should have prevented current issue
- Programmatic Failure
 - Multiple prior failures of same or similar Standard or Requirement, or multiple failures of a group of Standards or Requirements
 - Will usually involve substantial or widespread problems and require broad/entity-wide mitigation

Reasons to Not Aggravate



- Different root causes
- Prior mitigation would not have prevented current noncompliance
 - Different standard parts also considered in this analysis
- Other reasons
 - High frequency activities may result in minor noncompliance that is identified and corrected quickly
 - Entity overhauled/restructured compliance program in ways that resulted in quick identification and correction of instant noncompliance

Penalty Determination



- Penalty Determination if SNOP, FNOP, or BC NOAV
- Determine base penalty amount (General Factors)
 - Violation risk factor and violation severity level table
 - Entity size
 - Assessed risk
 - Violation duration
 - Violation time horizon
- Adjustment factors
 - Mitigating factors
 - Aggravating factors
- Review other comparable cases to ensure consistency of assessed penalty with prior filings

Penalty Assessment—Aggravating Factors

- Aggravating factors
 - Compliance history/repetitive conduct
 - Failure to comply with a Remedial Action Directive
 - Intentional violation
 - Concealment, resistance, impediment, nonresponsive, and lack of cooperation
 - Management involvement

Remedial Action Directive

- “Remedial Action Directive” means an action (other than a penalty or sanction) required by a Compliance Enforcement Authority that (1) is to bring a Registered Entity into compliance with a Reliability Standard or to avoid a Reliability Standard violation, and (2) is immediately necessary to protect the reliability of the Bulk Power System from an imminent or actual threat. (Appendix 2, NERC Rules of Procedure)
- “If the Entity violated Reliability Standard Requirements despite receiving related Remedial Action Directives, NERC or the Regional Entity shall consider increasing the monetary penalty.” (Appendix 4b, NERC Rules of Procedure, Section 3.3.2)

Intentional Violation

- Intentional violation
 - Exclude intentional violations by the Entity to:
 - Avoid a significant and greater threat to the immediate reliability of the BPS
 - Preserve personnel safety
 - Significant increase to monetary penalty—Presumption is to double monetary penalty
 - Greater aggravation for repetitive intentional violations
 - Violations attributable to an economic choice to violate are considered intentional violations

Concealment, etc.

- Concealment, resistance, impediment, nonresponsiveness, and lack of cooperation
 - Presumption for CONCEALMENT is to double the monetary penalty
 - Increase of monetary penalty for resistance, impediment, nonresponsiveness, and lack of cooperation
 - Greater penalty increase for repetitive conduct of any of the above behavior

Management Involvement

- If Entity's management or individual within the high-level personnel of the organization:
 - Directed
 - Condoned
 - Was willfully ignorant of the violation
- OR tolerance of the violation by substantial authority personnel was pervasive within the Entity as a whole or a unit of the Entity
- Presumption is to double the monetary penalty

Mitigating Factors

- Mitigating factors
 - Presence and Quality of Entity's Internal Compliance Program
 - Cooperation
 - Self-Reporting

Presence and Quality of Internal Compliance Program

- Effective internal compliance program means the entity:
 - Exercises due diligence to prevent and detect violations
 - Promotes an organizational culture that encourages commitment to NERC compliance and other laws and regulations
 - Designs, implements, and enforces the internal compliance program so that it is generally effective in preventing and detecting violations

Cooperation

- Degree and quality of Entity's cooperation with investigation and mitigation of violation:
 - Cooperation must be BOTH timely and thorough
 - Cooperation must start at the time the violation is reported or at the time the Entity becomes aware of the violation
 - Must include the disclosure of all pertinent information known by the Entity

Self-Reporting

- Entity self-reported the violation:
 - Reasonably prompt time after becoming aware of the violation
 - Prior to detection via a compliance monitoring engagement—must be reported prior to the notification of an upcoming compliance monitoring engagement
- Mitigation activities voluntarily undertaken by Entity to mitigate the violation

Penalty Assessment Factors

- Final adjustment factors
 - Settlement credit
 - Extenuating circumstances

Settlement and Accepting Responsibility

- Consider whether Entity is willing to resolve the violation by settlement
 - Considering Entity's good faith efforts to reach settlement without undue delay
- Consider whether Entity clearly admits to and accepts responsibility for the violation

Extenuating Circumstances

- When “unique extenuating circumstances caus[e] or contribut[e] to the violation, such as significant natural disasters or pandemic, NERC or the Regional Entity may significantly reduce or eliminate the monetary penalty otherwise determined.” (Appendix 4b, NERC Rules of Procedure, Section 3.4.3)

Case History Research

- Enforcement attorney compares disposition method and penalty amount to previously resolved instances of noncompliance to ensure resolutions are consistent
- Goal: Provide consistency and fairness in enforcing instances of noncompliance



Electric Reliability and Security for the West

www.wecc.org