

March 8, 2010

FERC Approves \$350k Settlement on FRCC's Role in Florida Blackout

In an order issued on Friday, the Federal Energy Regulatory Commission (FERC) approved a settlement filed by its Office of Enforcement (OE) and the North American Electric Reliability Corporation (NERC) under which the Florida Reliability Coordinating Council, Inc. (FRCC) will pay a \$350,000 civil penalty and take other actions designed to improve reliability. The settlement resolves alleged violations by FRCC of NERC Reliability Standards in connection with the 2008 Florida Blackout. The order underscores the uncertainty surrounding the determination of penalties for violations of the Reliability Standards, but emphasizes the need for creative, proactive strategies to ensure compliance with the NERC requirements and thereby enhance reliability.

Background

The settlement stems from FRCC's role in the February 26, 2008 blackout in peninsular Florida, which resulted in the loss of 3,650 MW of customer service (the Florida Blackout). The Florida Blackout originated as a fault caused by a Florida Power & Light Company (FPL) engineer at a substation on the FPL system that had a domino effect throughout southern Florida. Following an investigation of the blackout, OE and NERC found (among other things) that the acting Reliability Coordinator (RC) operator on duty at the time of the incident did not respond appropriately to the substation fault.

FRCC's Role

Although the RC operator was an employee of FPL, the operator was acting as an agent of FRCC. FRCC is the NERC-registered RC charged with responsibility for the reliable operation of the Bulk Electric System (BES) within the FRCC region, which encompasses most of Florida. Although FRCC can delegate its RC functions, it remains responsible for the performance of those functions and the maintenance of reliability.

Alleged Violations

OE and NERC charged FRCC with violating nine NERC Reliability Standard requirements related to staffing, training and equipping its delegates to react appropriately and comply with the NERC Reliability Standards. (Specifically, the affected Reliability Standards include COM-002, IRO-001, IRO-002, IRO-003, IRO-005, PER-004, and TOP-006.) FRCC's failure to ensure that the RC function was entrusted to qualified, dedicated staff was the basis for multiple violations. In addition, the staff's failure to fulfill certain reliability functions delegated to them by FRCC is imputed to FRCC because FRCC retains ultimate responsibility for maintaining the reliability of the BES.

Penalty Assessment

FERC considered both aggravating and mitigating factors in determining whether the settlement – including the \$350,000 civil penalty and remedial actions to be taken by FRCC – was equitable and in the public interest.

© 2010 Sutherland Asbill & Brennan LLP. All Rights Reserved.

This communication is for general informational purposes only and is not intended to constitute legal advice or a recommended course of action in any given situation. This communication is not intended to be, and should not be, relied upon by the recipient in making decisions of a legal nature with respect to the issues discussed herein. The recipient is encouraged to consult independent counsel before making any decisions or taking any action concerning the matters in this communication. This communication does not create an attorney-client relationship between Sutherland and the recipient.

Aggravating factors included the seriousness of the violation and its significant impact on the reliability of the BES (in particular the loss of load). In addition, OE and NERC found that there was a risk that the circumstances could have led to even more harmful impacts on the BES.

Among mitigating factors, FERC considered FRCC's limited role in initiating the event, the quick restoration of the system after the event, and the remedial efforts FRCC implemented. FRCC's remedial efforts included improving communications protocols, reinforcing to its members procedures relating to disabling protection, and implementing dedicated staffing of the RC position on a "24/7/365" basis. FRCC also created a new position to oversee the RC function and undertook other reliability enhancement measures.

Notably, FPL had already entered a settlement in the amount of \$25 million for its role in the Florida Blackout, which FERC approved in October 2009.

Lessons

In light of the size of the Florida Blackout in terms of loss of load, the FRCC penalty does not at first blush appear to be consistent with FERC's recent treatment of a proposed penalty involving an outage in the West. Specifically, FERC issued a notice the week before the order here indicating that it plans to review a proposed settlement that NERC had filed involving a blackout caused by Turlock Irrigation District (Turlock) which resulted in a 240-MW loss of load. (See our alert on the Turlock penalty by clicking [here](#).) The proposed settlement in that case was \$80,000, which FERC stated may be "insufficient". In contrast, the Florida Blackout resulted in more than 13 times the amount of MW loss, yet the approved penalty for FRCC is only about four times higher.

A number of factors may explain the seeming discrepancy. First, FRCC's relatively low penalty may be a result of the comparable fault FERC attributed to FRCC as compared to FPL (which agreed to a \$25 million penalty). In addition, the discrepancy is also likely based at least in part on the weight FERC attributes to non-monetary remedial and enhancement efforts. FERC noted that FRCC took significant affirmative steps to improve reliability following the Florida Blackout. In contrast, FERC stated in its order on the proposed Turlock penalty that it questioned whether Turlock's mitigation and remedial efforts were as "rigorous" as warranted by the violation.

Together these two orders reinforce a widely held perception that NERC penalties are highly unpredictable. Still, the orders highlight the importance of considering creative options when negotiating a settlement with a Regional Entity or NERC. The orders also indicate the value in promptly implementing measures to improve reliability that could significantly reduce monetary penalties. Such a course also results in more certain improvements in reliability – the ultimate goal served by hefty monetary penalties.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel E. Frank
Caileen N. Gamache

202.383.0838
202.383.0213

daniel.frank@sutherland.com
caileen.gamache@sutherland.com