

Enforcement Explained

Public

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Considerations in Applying Credit in Penalty Assessments for an Entity's Cooperation

The purpose of this column is to provide transparency into the factors considered by RF enforcement staff when determining an appropriate penalty in the context of a Settlement Agreement.



Registered Entities often ask questions about the nature and application of penalty adjustment factors. This article addresses one such adjustment factor, entity **cooperation**, which can either mitigate

(reduce) or aggravate (increase) an initial penalty determination.

As background, the Regions follow the NERC Sanction Guidelines, which are found in [Appendix 4B](#) of the NERC Rules of Procedure, when determining monetary and non-monetary penalties. The Sanctions Guidelines were revised in 2021 to provide more transparency as to how Regions determine and utilize penalties, adjustment factors, and non-monetary sanctions. While the Sanction Guidelines provide a consistent, repeatable method for determining penalties, they also give the Regions discretion to consider the facts surrounding each violation, use professional judgment, and deviate, when appropriate, from the recommended ranges for each factor described in the Sanction Guidelines to achieve penalties that bear a reasonable relationship to the seriousness of the violation.

As a general overview, the Sanction Guidelines call for establishing a Base Monetary Penalty Amount, and then evaluating the applicability of various adjustment factors. One such adjustment factor is cooperation.

Cooperation plays an essential part in allowing the Region to work with entities to identify and analyze the full scope of violations, any potential risk posed by the violations, and effective mitigation. The importance of this cooperation cannot be understated, and for this reason, RF may, and often does, grant proactive, cooperative entities mitigating credit against penalties. On the other hand, a lack of cooperation hinders RF's ability to effectively identify and mitigate the extent of the risk and may, therefore, serve as a basis to aggravate a penalty.

Mitigating Factor

Section 3.3.7 of the NERC Sanctions Guidelines provides the basis for granting mitigating credit for an entity's cooperation:

To qualify for a reduction in the monetary penalty, cooperation must be both timely and thorough, starting at essentially the same time as the entity reports or otherwise becomes aware of a violation, and should include the disclosure of all pertinent information known by the entity.

RF generally considers entities to be cooperative when they communicate promptly, thoroughly, and openly with RF in connection with the enforcement process. Opportunities for this type of communication and transparency occur throughout the process, including, as examples: (a) in connection with responses to requests for information and/or evidence, (b) by reaching out and voluntarily offering additional information without specific requests, or (c) in response to mitigation requests. Entities that are cooperative often provide information in an organized manner that allows for a more effective and efficient review by the Region and have management who encourage personnel to provide complete and accurate information with the full support of the company.

Additionally, although mitigation is required in all cases, entities that voluntarily undertake comprehensive mitigation with appropriately aggressive timelines may be awarded cooperation credit where appropriate. An entity that conducts mitigation more broadly than RF might require, or that provides updates in a way that allows RF to more quickly and effectively analyze the full scope of the issue, may be awarded credit.

As an example of where cooperation credit may be appropriate, where extent of condition reviews may take six months to multiple years (e.g., some FAC-008 or PRC-005 cases), an entity that aims to be cooperative will conduct the mitigation in a reasonable timeframe or more quickly than expected and will be prompt about updating data submissions where information has changed or new instances have been identified.

In terms of monetary impact, the rate or percentage is provided in Appendix A to the NERC Sanctions Guidelines. The range provided for penalty reduction via cooperation is 0% to 20% of the Base Monetary Penalty Amount.

Aggravating Factor

In rare cases, Regions may increase a penalty based on an entity's lack of cooperation. Lack of a cooperation is a subject of Section 3.3.4, Concealment or Impediment, in the NERC Sanction Guidelines. Section 3.3.4 of the NERC Sanction Guidelines provides the basis for penalty aggravation based on a lack of cooperation:

Additionally, NERC or the Regional Entity shall consider an increase to the monetary penalty if NERC or the Regional Entity determines, based on its review of the facts, that the entity resisted, impeded, was non-responsive, or otherwise exhibited a lack of cooperation during the discovery and review of a violation.

RF's experiences have generally included working with entities in a collaborative and cooperative manner to reach an appropriate resolution that results in a more sustainable and secure grid.

However, the Sanction Guidelines allow for increases in penalties where an entity's lack of cooperation is such that it interferes with or impedes the enforcement process. Examples could include unreasonable delays in providing information or mitigation solutions, burying key information, providing misleading information, refusing to provide relevant information, or otherwise interfering with the Region's ability to carry out the analyses necessary to resolve violations and reduce risk to the grid.

As to the monetary impact, the rate or percentage pursuant to Section 3.3.4 is an increase to the Base Monetary Penalty amount of 0% up to 800%.

For additional questions about how a Registered Entity can perform cooperatively in the Settlement Agreement space, please reach out to your enforcement case manager.