

Section 10 of Executive Order No. 13892: FERC’s Compliance with Section 223 of the Small Business Regulatory Enforcement Fairness Act

I. Introduction

On October 9, 2019, President Trump issued Executive Order No. 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*. Section 10 of the executive order requires all agencies, by April 6, 2020, to submit a report to the President demonstrating that the agency’s enforcement and investigation activities comply with section 223 of the Small Business Regulatory Enforcement Fairness Act (SBREFA). *See* Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996). In compliance with Executive Order No. 13892, the Federal Energy Regulatory Commission (Commission or FERC) submits this report demonstrating its on-going compliance with section 223 of the SBREFA.

II. Section 223 of the SBREFA

Section 223(a) of SBREFA requires agencies to establish a policy or program, “to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity.” Section 233(a), further states that “[u]nder appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities.”

Specifically, the agency can condition the reduction or waiver of a civil penalty on the entity correcting a violation within a reasonable period. *See* SBREFA Section 223(b). Moreover, the agency can exclude small entities that are subject to multiple enforcement actions, are engaged in criminal or willful conduct, or pose serious safety or environmental threats from its penalty reduction program. *Id.*

III. The Commission complies with Section 223 of the SBREFA

FERC complies with section 233 of the SBREFA through its regulations and policies that provide for the reduction, and under appropriate circumstances, for the waiver of civil penalties for violations of statutory or regulatory requirements by small entities.

A. The Commission’s Regulations Comply with the SBREFA.

Section 2.500 of the Commission’s regulations implements section 223 of SBREFA:

It is the policy of the Commission that any small entity is eligible to be considered for a reduction or waiver of a civil penalty if it has no history of previous violations, and the violations at issue are not the product of willful or criminal conduct, have not caused loss of life or injury to persons, property or the environment. An eligible small entity will be granted a waiver if it can also demonstrate that it performed timely remedial efforts, made a good faith effort to comply with the law and did not obtain an economic benefit from the violations. An eligible small entity that cannot meet the criteria for waiver of a civil penalty may be eligible for consideration of a reduced penalty. Upon the request of a small entity, the Commission will consider the entity's ability to pay before assessing a civil penalty. Notwithstanding paragraph (a) of this section, the Commission reserves the right to waive or reduce civil penalties in appropriate circumstances where it determines that a waiver is warranted by the public interest.

Statement of Compliance with Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996, 62 Fed. Reg. 15,827-02 (Apr. 2, 1997), codified at 18 C.F.R. § 2.500.

B. The Commission's Guidance Documents Comply with the SBREFA.

The Commission has two policy statements that provide guidance on the reductions or waivers of civil penalties available for small entities, and how the Commission considers the size of an organization in civil penalty assessments.

First, in its Policy Statement on Enforcement of FERC's Statutes, Regulations and Orders, the Commission adopted a "generally applicable policy for considering reductions or waivers of penalties *for small entities*." See *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005) (emphasis added). The Commission later revised the Policy Statement on Enforcement to, among other changes, provide factors that the Commission would consider when setting penalties, including the "earnings, revenues and market share" of the subject and "what penalty amount best discourages improper conduct, while not excessively discouraging beneficial market participation[.]" *Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 (2008).

Second, in the Commission's Revised Policy Statement on Penalty Guidelines, the Commission explained that in setting a civil penalty the Commission may "consider the size and non-profit status of organizations, including the impact that the guidelines' penalty range could have on a particular organization based on its size or non-profit status" The Commission also noted that it had "the discretion to examine the facts and circumstances of a case, including the size and non-profit status of an organization, and to depart from the Penalty Guidelines based on these factors." Overall, the Commission indicated that it (1) may reduce the penalty amount or take non-monetary enforcement action, for entities unable to pay; (2) considers size of the organization in the context of analyzing credit for

compliance programs; (3) may accept a penalty lower in the penalty guideline range for a smaller company; (4) may accept a payment plan; and/or (5) may depart from the penalty guidelines based on the size of an organization and/or other specific circumstances of the matter. *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216 (2010).

C. The Commission offers Additional Resources on Enforcement Activities for Small Businesses.

The Commission provides numerous publicly available resources for the regulated community, including small businesses, about the agency's enforcement and investigation activities. See FERC, *Enforcement Resources*, (November 21, 2018) <https://www.ferc.gov/enforcement/enforce-res.asp>. The Commission also provides an Enforcement hotline that market participants and the general public can call, email or write to discuss market activities or transactions that may be market manipulation, fraud, an abuse of an affiliate relationship, a tariff violation, a violation of a Commission order, or other possible violation. All information and documents obtained through the Hotline are non-public. Finally, the Commission often convenes public forums that provide regulated entities, including small business owners, with an opportunity to raise questions about specific regulatory issues.

IV. Conclusion

As detailed above, FERC complies with section 233 of the SBREFA. The Commission has established policies and procedures that provide for the reduction and, under appropriate circumstances, for the waiver of civil penalties for violations of statutory or regulatory requirements by small entities. Through this process, the Commission remains available to hear the concerns of small business, and to make any needed changes to address any unanticipated impacts on small business.