

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

NERC Full Notice of Penalty Regarding)	
Unidentified Registered Entities)	Docket No. NP19-4-000
“The Companies”)	

**MOTION TO INTERVENE AND REQUEST FOR PUBLIC IDENTIFICATION AND
RELEASE OF SETTLEMENT AGREEMENT FOR “THE COMPANIES” IN VIOLATION
OF SPECIFIC RELIABILITY STANDARDS**

Submitted by the Foundation for Resilient Societies on March 26, 2019

The Foundation for Resilient Societies (hereafter “Resilient Societies”) files this Motion to Intervene in the above captioned docket, pursuant to 18 C.F.R. § 39.7(e)(4). The settlement agreement submitted with redactions by the North American Electric Reliability Corporation (NERC) in Docket No. NP19-4-000 omits the identity of the reliability standards violator(s), described as “the Companies.” We respectfully request that the Federal Energy Regulatory Commission (FERC) release the unredacted version of this settlement agreement, including the identity of each of the violators. We also request that FERC release the identity of these same standards violators redacted in the NERC Notice of Penalty.

FERC Orders on Settlement Agreements

FERC Order 672, “Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,”¹ clearly states that “settlements will be made public”:

[P]ursuant to section 39.7(b)(4) of the Final Rule, the ERO should file, for informational purposes only, any settlement of an alleged violation regardless of whether the agreement contains an admission by the settling user, owner or operator. *Settlements will be made public.* This is consistent with our own procedures in which enforcement settlements are made public. (Emphasis added.)

¹ Order 672, 71 FR 8736, Feb. 17, 2006 at p. 230, 598, FERC Stats. & Regs. ¶ 31,204, as amended by Order 737, 75 FR 43404, July 26, 2010.

FERC Order 737² established a new Notice of Penalty (NP) Docket series but did not amend provisions of FERC Order 672 *requiring public release of settlement agreements*. Instead, FERC Order 737 was titled “Technical Corrections to Commission’s Regulations.” The pertinent section of FERC Order 737 reads:

PART 39—RULES CONCERNING CERTIFICATION OF THE ELECTRIC RELIABILITY ORGANIZATION; AND PROCEDURES FOR THE ESTABLISHMENT, APPROVAL, AND ENFORCEMENT OF ELECTRIC RELIABILITY STANDARDS

■49. The authority citation for Part 39 continues to read as follows: Authority: 16 U.S.C. 824o. § 39.7 [Amended]

■50. In § 39.7, paragraph (d)(6) is removed and paragraph (d)(7) is redesignated as paragraph (d)(6).

FERC Order 737 further claims it will not significantly affect the rights of the public:

14. The provisions of 5 U.S.C. 801 regarding Congressional review of final rules do not apply to this Final Rule, because this Final Rule concerns agency procedure and practice and *will not substantially affect the rights of non-agency parties*.

15. The Commission is issuing this Final Rule without a period for public comment. Under 5 U.S.C. 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure and practice, or where the agency finds that notice and comment is unnecessary. *This rule concerns only matters of agency procedure and will not significantly affect regulated entities or the general public.* (Emphasis added.)

Allowing Intervention by Resilient Societies Is in the Public Interest

Since the year 2012 the Foundation for Resilient Societies has participated in reliability standard proceedings as a non-profit engaged in research and education in support of more resilient critical infrastructures. We have participated in rulemakings for new cybersecurity standards to improve the Critical Infrastructure Protraction (CIP) standards violated by the unidentified “companies.” We should be allowed to intervene for the following reasons:

² Order 737, 75 FR 43404, July 26, 2010.

- Pursuant to Commission Rules of Practice, Rule 214 (Intervention) the Movant, the Foundation for Resilient Societies, takes position that the identities of registered entities accepting penalties for CIP standard violations should be publicly identified to deter noncompliance, to encourage greater prudence in the future, to assist regulators in other federal and state proceedings, to promote industry awareness of threats and hazards to critical energy infrastructure, to better inform the public of the risks and significance of noncompliance with reliability standards, and ultimately improve the resilience of critical energy infrastructure; and
- The Movant has an interest in the Commission’s compliance with its own declared purposes and objectives, including the commitment to transparency and public accountability expressed as reliability standard objectives in FERC Order No. 672³; and
- The Movant has a direct interest in the outcome of these proceedings, as an entity that depends upon reliable electric service as a consumer; and as a research organization that depends upon transparency of regulatory oversight for the bulk electric system.

For the above reasons, the Movant asserts that it is in the public interest that the Commission allow the intervention of the Movant in this Docket and its proceedings.

NERC and FERC Practices on Settlement Agreements

The effective date of FERC Order 737 was July 26, 2010. Several weeks before, on July 6, 2010, NERC began its longstanding practice of classifying settlement agreements as “privileged.” In this same month, NERC began redacting the identity of standards violators in its Notices of Penalty for CIP violations. The heavily redacted settlement agreement included in Docket No. NP19-4-000 is an exception to nearly all other Notice of Penalty dockets for CIP violations since July 2010; in these other dockets the settlement agreements have been withheld in their

³ FERC Order No. 672(2006) at ¶ 50 provides: “[O]nce the ERO or a Regional Entity imposes a penalty and files the statutorily-required ‘notice of penalty’ with the Commission, the Commission will publicly disclose the penalty. The Final Rule includes an exception to this public disclosure with respect to Cybersecurity Incidents and other matters that would jeopardize system security.” Section 39.7(e)(7) of the Final Rule in FERC Order 672 “allows the Commission to determine on a *case-by-case basis whether* a particular Commission proceeding to review an enforcement penalty for violation of a Reliability Standard can and should be nonpublic.” (Emphasis added.) In this case, we argue that the Commission should decide the proceeding in Docket No. NP19-4-000 should be public.

entirety from public access. Starting in 2017, NERC has placed settlement agreements on FERC dockets as “CEII.”

FERC prevents public docket access to the purported “privileged” and “CEII” versions of NERC’s settlement agreements. Significantly, FERC denial of public access to NERC’s settlement agreements apparently operates automatically and in perpetuity, without any “case-by-case” FERC procedure for review at time of submittal or reconsideration after a period of time.

We know of no “privileged” or “CEII” settlement agreement that has ever been released on the public docket by FERC, regardless of the nature of the violation, the time elapsed since the standards violation, or the status of violation corrections. FERC prevents public access to settlement agreements dated as far back as July 2010.

Notably, dozens of NERC’s “privileged” settlement agreements conceal the identities of violators of non-CIP standards, including violations of Standard FAC-003-1 — Transmission Vegetation Management Program. With dozens of recent fire deaths in California due to transmission lines contacting vegetation, immediate and unredacted release of these settlement agreements would clearly be in the public interest.⁴

Conclusions

FERC made a public commitment in Order 672 that “settlement agreements will be public”; this is inconsistent with NERC’s claim that settlement agreements are “privileged” or “CEII.” For Docket No. NP19-4-000 specifically, a redacted settlement agreement that would perpetually omit the identity of the standard violators will never be “public” in any meaningful way and therefore is in apparent violation of FERC Order 672.

CEII is defined by FERC as “specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that...could be useful to a person planning an attack on critical infrastructure.” FERC has not given the public an

⁴ The concealment of violators of vegetation management standards may be due to associated violations of cybersecurity standards in the same Notice of Penalty.

explanation why the disposition of *corrected standards violations* should be classified as “CEII.” Standard violations that have been corrected by means of a settlement agreement do not fall within a commonsense interpretation of the CEII definition, because a corrected standard violation should be of minimal usefulness in planning an attack—or not useful at all.

It is clearly not in the public interest for FERC to unnecessarily conceal the identity of standards violators and their settlement agreements for long periods. When FERC allows information on security-related standards violations to be perpetually withheld from public scrutiny, it reduces motivation for electric utilities to avoid future violations. Alternatively, if FERC were to establish a process whereby information on standards violations would be withheld from public disclosure for an arbitrarily long and/or fixed length of time, such as three years, this could unnecessarily harm transparency and accountability. Instead, we propose that in nearly all cases, the proper time to publicly release information on security-related standards violations is in the immediate aftermath of confirmation that the violations have been corrected.

In cases such as Docket NP19-4-000, serious standards violations have been ongoing for years; the public has a compelling interest in knowing which utilities continue to put electric reliability at risk. In these relatively infrequent instances of systemic violations extending over multiple years, the benefits of transparency and accountability may significantly outweigh the security risks of disclosure in the immediate aftermath of effective corrective actions; such situations should be examined by the Commission on a case-by-case basis. This policy that FERC adopted via Order No. 672 more than a decade ago should be reaffirmed.

On the matter of Docket No. NP19-4-000, the Commission has the opportunity to reduce longstanding noncompliance with reliability standards and to follow its own Order 672. When the standards violations in Docket No. NP19-4-000 have been corrected, FERC should soon thereafter release the identities of the violators and also release the unredacted text of the settlement agreement. If the standards violators in Docket No. NP19-4-000 put reliability at risk by unreasonably delaying correction of ongoing violations, FERC should consider sooner releasing the identities of the standards violators and the settlement agreement, as motivation

for promptness in correcting violations. With these actions, FERC can better serve the public interest.

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