

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

<b>NERC Full Notice of Penalty regarding</b>	)	
<b>Unidentified Registered Entities</b>	)	<b>Docket No. NP19-4-000</b>
<b>“The Companies”</b>	)	

**REPLY COMMENTS TO THOSE OF THE TRADE ASSOCIATIONS**

Submitted by the Foundation for Resilient Societies on April 24, 2019

The Foundation for Resilient Societies (hereafter “Resilient Societies”) files these comments in response to those submitted by the Trade Associations (the American Public Power Association (“APPA”), the Edison Electric Institute (“EEI”), and the National Rural Electric Cooperative Association (“NRECA”)) filed on Docket NP19-4-000. The Trade Association comments contained a Petition for Rulemaking:<sup>1</sup>

**The Commission should initiate a rulemaking to evaluate transparency and security concerns before changing precedent on its disclosure of information related to CIP Standards violations.**

The Commission has recently begun establishing criteria to evaluate such disclosures on a case-by-case basis. However, the Commission appears to be developing and evaluating these criteria without input from stakeholders, including Registered Entities, NERC, and the public. To support transparency to the public and to Registered Entities, the Trade Associations encourage the Commission to institute a public rulemaking proceeding to allow stakeholders to weigh in on the criteria and the Commission’s procedures on what information can and should be disclosed and how to best evaluate potential disclosure of this information.

Resilient Societies respectfully observes that the Commission has already conducted multiple rulemakings and made multiple orders for release of compliance information, some resulting in formal additions to the Code of Federal Regulations (CFR).

---

<sup>1</sup> Comments of the Trade Associations on FERC Docket NP19-4-000. March 28, 2019. p. 19.

18 CFR § 39.7 (b)(4) directs that Reliability Standard violations are nonpublic only until the Notice of Penalty is filed with the Commission:

*Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk Power System violated a Reliability Standard or by a settlement or other negotiated disposition. The disposition of each violation or alleged violation that relates to a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed shall be nonpublic unless the Commission directs otherwise. (Emphasis added.)*

18 CFR § 388.113(d)(iv) allows the Commission discretion to publicly release Critical Energy Infrastructure Information (CEII) to carry out its jurisdictional responsibilities:

The information for which CEII treatment is claimed will be maintained in the Commission's files as non-public until such time as the Commission may determine that the information is not entitled to the treatment sought. By treating the information as CEII, the Commission is not making a determination on any claim of CEII status. The Commission retains the right to make determinations with regard to any claim of CEII status at any time, and *the discretion to release information as necessary to carry out its jurisdictional responsibilities. (Emphasis added.)*

FERC Order 672, “Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,” definitively states that settlement agreements will be made public:<sup>2</sup>

[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.)

FERC Order No. 833, “Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information; Availability of Certain North American Electric Reliability Corporation Databases to the Commission,” rejects

---

<sup>2</sup> 71 FR 8736, Feb. 17, 2006 at p. 230, 598.

the industry notion that information encompassing compliance with Reliability Standards is CEII on a blanket basis:<sup>3</sup>

*36. The Commission does not agree that the scope of CEII should be modified, as suggested by the Trade Associations, to encompass information “related to compliance with the Reliability Standards.” The Trade Associations’ proposal is unduly broad and inconsistent with the FAST Act because it could lead to all infrastructure information, whether critical or not, being treated as CEII. For the same reason, we do not agree that the blanket presumption that information relating to compliance with Reliability Standards is CEII, proposed by the Trade Associations, is appropriate. Like other forms of CEII, however, information on compliance with Reliability Standards may be treated as CEII if the submitter justifies its treatment as CEII under the Commission’s regulations. (Emphasis added.)*

Moreover, in May 2018 the Commission via FERC Order No. 833-A rejected an industry claim (from the Edison Electric Institute) that the provisions of the FAST Act enable only voluntary sharing of Critical Electric Infrastructure Information (CEII) “by and between” registered entities.<sup>4</sup> To the contrary, the Commission determined that the FAST Act expressly authorizes sharing of CEII by federal authorities, including by the Commission. Specifically, the Federal Power Act Section 215A(d)(2)(D)(i) , as enacted in December 2015, provides that the Commission’s regulations should “facilitate voluntary sharing of critical electric infrastructure information with, between, and by— (i) Federal, State, political subdivision, and tribal authorities ...”

In FERC Order No. 833-A the Commission observed, unanimously, “It would be incongruous to read the FAST Act’s reference to ‘voluntary sharing ... by ... Federal ... authorities’ not to include voluntary sharing by the Commission of CEII in its possession.”<sup>5</sup>

FERC has an obligation to weigh the benefits of CEII protection versus the benefits of public disclosure at the Commission’s discretion. Such public disclosure can prevent corporate complacency arising from:

---

<sup>3</sup> 157 FERC ¶ 61,123. p. 24.

<sup>4</sup> FERC Order No. 833-A, Regulations implementing FAST Act Section 61003, Docket RM16-15-001, issued May 17, 2018, 163 FERC ¶ 61,125, at para. 10.

<sup>5</sup> *Ibid.*, para. 11.

- Negotiated settlements that have blanket shielding from public scrutiny
- Small or even trivial fines viewed by violators as a modest cost of doing business
- Longstanding patterns of noncompliance with Reliability Standards without significant consequence to regulated utilities

Earlier this year in the Western Interconnection, a major combined gas and electric utility filed for bankruptcy after reportedly engaging in a persistent pattern of noncompliance with both cybersecurity standards and California vegetation management standards.<sup>6 7</sup> The utility's cybersecurity violations were shielded from disclosure by the Commission, through Notices of Penalty that were not attributed by NERC to the registered entity.<sup>8</sup>

It is time for the Commission to improve regulatory compliance through full implementation of Commission Order No. 672. Registered entities that receive Notices of Penalty should be identified publicly by name:

1. Shortly after cybersecurity violations have been mitigated, per the "Mitigation Completion Date" specified in the Notice of Penalty;
2. Or upon filing with the Commission as a Notice of Penalty for violations that cannot be plausibly exploited by human adversaries (such as violations of vegetation management standards for transmission systems).

In summary, the Petition for Rulemaking of the Trade Associations cannot be based on a lack of FERC rules or lack of FERC authority for disclosure of information on compliance (or noncompliance) with Reliability Standards. Instead, the Trade Associations' petition apparently

---

<sup>6</sup> Smith, Rebecca. "PG&E Among Utilities Cited for Failing to Protect Against Cyber and Physical Attacks." *Wall Street Journal*, April 9, 2019. Available at <https://www.wsj.com/articles/pg-e-among-utilities-cited-for-failing-to-protect-against-cyber-and-physical-attacks-11554821337>

<sup>7</sup> St. John, Jeff. "PG&E Accused of Violating State Law in 8 Northern California Wildfires." *Greentech Media*, June 11, 2018. Available at: <https://www.greentechmedia.com/articles/read/pge-accused-of-violating-state-law-in-8-northern-california-wildfires#gs.7j7c6f>. More generally, the [CPUC Order to Implement the Recommendations of the Northstar Report](#), issued on December 5, 2018 by an Administrative Law Judge of the California Public Utilities Commission, would require Pacific Gas & Electric and PG&E Corp. to comply with 61 recommendations of the Commission's Safety and Enforcement Division concerning an allegedly inadequate "culture of safety" preceding the January 2019 bankruptcy filing of those companies.

<sup>8</sup> NERC Notice of Penalties NP14-41-000 dated May 29, 2014 and NP17-2-000 dated October 31, 2016.

results from industry concerns that FERC may reengage disclosure rules abandoned in July 2010 without formal rulemaking or begin to follow additional disclosure rules established under authority of the 2015 FAST Act. If granted, the Petition for Rulemaking of the Trade Associations would likely advance narrow industry interests but not the public interest. This petition should be summarily dismissed by the Commission as redundant with previous FERC rulings.

Respectfully submitted by:



Thomas S. Popik, Chairman and President  
[thomasp@resilientsocieties.org](mailto:thomasp@resilientsocieties.org)



William R. Harris, Attorney and Director  
[williamh@resilientsocieties.org](mailto:williamh@resilientsocieties.org)

Foundation for Resilient Societies  
24 Front Street, Suite 203  
Exeter, NH 03833  
[www.resilientsocieties.org](http://www.resilientsocieties.org)