



VIA E-MAIL

Mr. Leonard M. Tao
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Re: Submitter's Rights Letter, FOIA-2019-19

Dear Mr. Tao,

On behalf of our members, the American Public Power Association ("APPA"), the Edison Electric Institute ("EEI") and the National Rural Electric Cooperative Association ("NRECA"), (collectively, the "Trade Associations") respectfully submit the following comments in response to your January 18, 2019 Submitter's Rights Letter to Mr. Kichline and Ms. Mendonca, regarding a Freedom of Information Act ("FOIA") request made by Mr. Michael Mabee to obtain the NERC Full Notice of Penalty ("Full NOP") in various dockets ("the FOIA Request").¹

APPA is the national service organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities account for 15% of all sales of electric energy (kilowatt-hours) to ultimate customers and collectively serve over 49 million people in every state except Hawaii. Approximately 261 public power utilities are registered entities subject to compliance with NERC mandatory reliability standards.

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 65 international electric companies as International Members, and hundreds of industry suppliers and related organizations as Associate Members. EEI's U.S. members include Generator Owners and Operators, Transmission Owners and Operators, Load-Serving Entities, and other entities that are subject to the mandatory Reliability Standards developed by the North American Electric Reliability Corporation ("NERC") and enforced by NERC and the Federal Energy Regulatory Commission ("FERC" or "the Commission"). EEI's members are committed to the reliability and security of the Bulk-Power System.

NRECA is the national service organization for the nation's member-owned, not-for-profit electric cooperatives. More than 900 rural electric cooperatives are responsible for keeping the lights on for more than 42 million people across 47 states. Because of their critical role in

¹ FOIA No. FY19-019 (January 18, 2019).

providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve. Cooperatives serve 56% of the nation’s land area, 88% of all counties, and 12% of the nation’s electric customers, while accounting for approximately 11% of all electric energy sold in the United States. NRECA’s member cooperatives include entities that are subject to the mandatory reliability and cybersecurity standards. Accordingly, NRECA members are directly affected by this FOIA request.

The explanation in the FOIA Request appears to request only the names of the Unidentified Registered Entities (“UREs”) for six dockets,² but the actual request seeks public disclosure of the Full NOPs and “Spreadsheet NOP.” In addition, the requester has also submitted requests for the same information for not only these six dockets, but from 236 additional dockets covering Critical Infrastructure Protection (“CIP”) Reliability Standards violations over the past ten years.³

The Trade Associations object to the release of the information requested by Mr. Mabee because its disclosure is not required by FOIA and—more importantly—because disclosing this information broadly would unnecessarily jeopardize national security by providing sensitive information about the Bulk-Power System. For these reasons, the Commission should not release the documents requested. Also, this information has previously been protected by the Commission from public disclosure.⁴ As discussed below, this is not a new policy, but one carefully crafted by the Commission over nine years ago in its 2011-2012 Find, Fix, and Track and Report (“FFT”) proceeding—an open and transparent proceeding in which stakeholders and the public were able to weigh in on policy concerns, ultimately striking a careful balance between information disclosure and national security throughout the six months of that proceeding.⁵ Disclosing the requested information in response to the underlying FOIA Request before the Commission would represent a significant change to the Commission’s policy on the protection of such information related to the security of the Bulk-Power System. Due to the risks posed to national security, the Commission should not abrogate the process established in these previous proceedings in response to this or any other FOIA request. Instead, before contemplating such a change in policy, the Commission should provide all stakeholders an opportunity for notice and comment in a full rulemaking similar to the FFT proceeding.

The Trade Associations oppose the release of the requested documents because risks to the Bulk-Power System from disclosure far outweigh any benefit to the public from disclosure.

² FERC Docket Nos.: NP14-29-000, NP14-30-000, NP14-32-000, NP14-37-000, NP14-39-000, and NP14-41-000.

³ Request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (Dec. 18, 2018), *available at* <https://michaelmabee.info/wp-content/uploads/2018/12/FERC-FOIA-Request-2018-12-18-R.pdf>; Request under the Freedom of Information Act (FOIA), 5 U.S.C § 552 (Jan. 12, 2018), *available at* <https://michaelmabee.info/wp-content/uploads/2019/01/FERC-FOIA-Request-Mabee-2019-01-12-R.pdf>.

⁴ Significant information on penalties and specific violations (e.g., specific standard and requirements) is made publicly available in the NOPs posted on NERC’s website, but the more sensitive information (e.g., registered entity names and mitigation measures) has been protected from disclosure as privileged and confidential to protect public safety and security.

⁵ *See* FFT Order, 138 FERC ¶ 61,193 (Mar. 15, 2012).

Security threats to utility systems and the Bulk-Power System continues to grow. For example, in the last year, the following has occurred:

1. The FBI and United States Department of Homeland Security publicly revealed that a foreign nation-state engaged in a prolonged, “multi-stage intrusion campaign” against US utilities.⁶
2. The United States Department of Justice indicted foreign hackers who successfully penetrated hundreds of US institutions. In releasing the indictment, the Department of Justice specifically called out the grave risk posed by malicious actors targeting the US electric sector, including the Commission itself, for sensitive information.⁷

In other words, the array and capabilities of hostile forces seeking to attack the U.S. electric grid and destabilize the nation has increased in size and sophistication. The FOIA request to publicize sensitive information about the U.S. electric grid could—as FERC noted earlier—assist these terrorists and nation-states in attacking the U.S. grid. Even information that some may deem innocuous—such as revealing the names of UREs involved in a remediated NOP—can result in unintended consequences. For example, in some instances, a URE may have remediated a particular instance of regulatory noncompliance. However, that URE may have experienced a pattern of similar noncompliance—not because of a lack of will to fix, but because there are significant other factors at play. In addition, UREs face challenges in integrating modern information technology systems with older operational technology systems that were never designed with modern cybersecurity needs in mind. Sophisticated bad actors, like the ones discussed above, may be able to discern points of attack and vulnerabilities in publicly disclosed UREs based on their patterns of NOPs. The Trade Associations recognize that public access to information is important, and appreciate the goal of FOIA, but believe the line must be drawn where a requested disclosure might risk the security of the Bulk-Power System.

The release of the information by the Commission is not required by FOIA.

The release of the information requested in the December 18, 2018 FOIA request, as amended January 4, 2019, is not required by FOIA or under the Commission’s FOIA regulations. The requested information is exempt from disclosure pursuant to 5 U.S.C. 552(b)(3) (“Exemption 3”) and 5 U.S.C. 552(b)(7)(F) (“Exemption 7(F)”). Exemption 3 precludes disclosure of information that is prohibited from disclosure by another federal law and Exemption 7(F) precludes the disclosure of “records or information compiled for law enforcement purposes” if the release of

⁶ United States Computer Emergency Readiness Team (US-CERT), Alert TA18-074A, Russian Government Cyber Activity Targeting Energy and Other Critical Infrastructure Sectors (March 16, 2018), *available at* <https://www.us-cert.gov/ncas/alerts/TA18-074A>.

⁷ Daniel Voltz, *U.S. charges, sanctions Iranians for global cyber attacks on behalf of Tehran*, Reuters (Mar. 23, 2018), <https://www.reuters.com/article/us-usa-cyber-iran/u-s-charges-sanctions-iranians-for-global-cyber-attacks-on-behalf-of-tehran-idUSKBN1GZ22K>

such information “could reasonably be expected to endanger the life or physical safety of any individual.”⁸

In addition, Section 39.7(b)(4) of the Commission’s enforcement of Reliability Standards regulations provides the exception that “[t]he 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 non-public unless the Commission directs otherwise.”⁹ The information found within the requested Full NOPs contains details, including the identities of the URE, URE mitigation plans, and other specific security measures taken by particular UREs to address actual security risks identified either in audit or by self-reports, which the Commission has consistently protected from public disclosure to prevent jeopardizing the security of the Bulk-Power System. This information provides details and strategic security information on the generation and transmission system that would be useful to a person planning an attack on critical infrastructure. Because this information is protected by FOIA Exemption 3 and “it is reasonably foreseeable that disclosure would harm” the interests protected by that exemption, this information should not be disclosed by the Commission under Exemption 3.¹⁰

The Fixing America’s Surface Transportation Act, Pub. L. No. 118-94, §61003 (2015); 16 U.S.C. 824o-1(d)(1) (“FAST Act”), specifically exempts Critical Electric Infrastructure Information (“CEII”) from disclosure. The FOIA request seeks copies of documents providing information concerning the critical cyber assets and the NERC CIP violations of the UREs treated in the dockets he has identified, which is CEII. The Commission has a longstanding recognition of the need to protect information associated with critical electric infrastructure as CEII from public disclosure.¹¹ In addition, FERC has previously responded to a similar request, determining that identification of an Unidentified Registered Entity (“URE”) is protected from disclosure by 5 U.S.C. §§ 552(b)(3) and 7(f).¹² FERC’s response letter noted that:

with respect to the name of the Unidentified Registered entity, disclosing such name could provide potential bad actor with information that would make a cyber intrusion less difficult. In this regard, public release of the requested documents would provide information which could help breach its network, and allow possible access to non-public, sensitive, and/or confidential information that could be used to plan an attack on energy infrastructure, endangering the lives and safety of citizens.¹³

⁸ 15 U.S.C. §§ 552(b)(3) and 7(F).

⁹ Enforcement of Reliability Standards, 18 C.F.R. § 39.7 (b)(4).

¹⁰ 18 C.F.R. § 388.109(c)(5).

¹¹ See, e.g., *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order 706, 122 FERC ¶ 61,040 at P 330 (2008).

¹² FERC Response, FOIA No. FY18-75 (May 25, 2018) available at <https://michaelmabee.info/wp-content/uploads/2018/06/DETERMINATION-LETTER-FOIA-2018-75-R.pdf>.

¹³ *Id.* at 2. The Trade Associations are aware that the Commission has previously released the name of a URE in response to a similar FOIA request. However, the Commission has not made its decision or reasoning behind it public. As a result, we cannot comment on the applicability of that decision. However, the circumstance is distinguishable based solely on the fact that this request seeks the wholesale release of Full NOPs contained in up to

Accordingly, the release of the information requested is not required by FOIA because Exemptions 3 and 7(F) apply as well as the Commission's regulations on enforcement of the Reliability Standards. Not only is this information not required to be disclosed pursuant to FOIA Exemptions 3 and 7(F), but it is reasonably foreseeable that disclosure would harm the security interests that the exemptions and the FAST Act explicitly protect.¹⁴

If the Commission decides to change its disclosure policy regarding the CIP Reliability Standards, then the Commission should first provide public notice and opportunity to comment.

The Trade Associations appreciate the delicate task before the Commission—to balance the need for public transparency with the need to protect national security and public safety. As described above, granting the FOIA request poses significant risks to public safety and national security and as discussed below, granting Mr. Mabee's FOIA request would constitute a sweeping policy change with respect to the Commission's protection of information related to the Bulk-Power System. Releasing the information requested in the current FOIA request would set precedent for future requests such as those made for the other 236 dockets without allowing the other affected entities adequate notice and time to comment on the consequences of such a change in policy and its potential detrimental impact to the security of the Bulk-Power System. If the Commission believes that disclosure may be warranted, then such a departure from longstanding Commission precedent should be considered in a public notice and comment proceeding, not in the context of a FOIA request that provides little notice to limited interested parties and an unrealistically short comment period.

In addition, the Commission has previously addressed many of the policy issues raised in the FOIA request. Specifically, in 2011, NERC submitted to this Commission for approval its FFT process "to more efficiently process and track lesser risk violations in order to focus their resources on issues that pose the greatest risk to reliability."¹⁵ On March 15, 2012, the Commission issued the FFT Order approving this process.¹⁶ The issue of publicly identifying registered entities was squarely addressed in the FFT Order.¹⁷ The Commission held that while the identity of the entity generally would be provided, the exception enshrined in 18 C.F.R. § 39.7(b)(4) for violations that relate to "a Cybersecurity Incident or that would jeopardize the security of the Bulk-Power System if publicly disclosed. . . . [would] continue to apply in the

242 separate dockets. In addition, that one release appears to have been an outlier, and thus has limited (if any) decisional value. For example, the Commission initially denied that request using the same reasoning listed above, and then without explanation reversed that decision. Since the Commission did not explain its reasoning for releasing the information, that decision has limited bearing here. In addition, the Trade Associations understand that two different parties filed FOIA requests for the URE name that was eventually released. We also understand that the Commission released the URE name in response to one FOIA request and withheld it in response to the other. We do not understand why the Commission faced two FOIA requests seeking what we believe to be the same information at approximately the same time, and yet reached two different results, especially since the Commission has not been transparent in its decision-making process.

¹⁴ 18 C.F.R. § 388.109(c)(5).

¹⁵ FFT Order, 138 FERC ¶ 61,193 at P 2.

¹⁶ *Id.*

¹⁷ *Id.* at P 16, 67-69.

FFT context.”¹⁸ Moreover, at that time the Commission stated that as it “gain[ed] further experience with the FFT program and review[ed] the data provided by NERC in its compliance and informational filings, [it] will consider and evaluate ways to improve the program” by “soliciting input from NERC, the Regional Entities, and industry when addressing such issues.”¹⁹ The Trade Associations encourage the Commission not to use a FOIA request to depart substantially from this policy. To the extent that the Commission is now considering a different approach, we ask that the Commission adhere to its prior commitment to invite these stakeholders to discuss the matter and avoid straying from the original approach in a response to the underlying FOIA request.

In a June 2013 FFT Order on Compliance related to implementation of the FFT and enhancements thereto, the Commission reiterated the general rule that “FFT informational filings must publicly identify the registered entity with a possible violation,”²⁰ but stated “[f]or FFTs involving the **CIP Reliability Standards, the Regional Entities would continue to redact the identity of the registered entities** involved in the issue and provide access to the non-public versions of these FFTs to NERC and FERC.”²¹ The Commission approved this compliance filing without modifying this aspect, designating information associated with CIP Reliability Standard violations as non-public information not subject to disclosure.²² Importantly, the Commission emphasized the importance of protecting the identity of entities with CIP Standards violations:

The Commission emphasizes that Regional Entities must continue to take precautions to protect non-public, confidential information and **redact any details** that could be used with publicly available information with respect to violations of the CIP Reliability Standards, such as the Regional Entities’ audit schedule, **to identify the registered entity**. This is especially relevant in cases where the FFT is posted with ongoing mitigation activities because the registered entity may not have fully addressed any vulnerabilities resulting from the possible violation at the time of filing or posting.²³

This approach to confidentiality with respect to the CIP Standards is settled, and a change to this policy requires a new proceeding with a broad opportunity for notice and comment to consider the implications of changing the existing Commission policy relied upon by NERC, Regional Entities, and registered entities.

The Trade Associations do not support a change in policy, especially in a response to a FOIA request. As noted above, publicizing the name of the registered entity with ongoing or repeated CIP or cybersecurity violations, even minor ones, may exacerbate cybersecurity risks and harm

¹⁸ *Id.* at P 69.

¹⁹ *Id.* at P 3 and n.2.

²⁰ *North American Electric Reliability Corporation*, 143 FERC ¶ 61,253, P 4 (2013) (“FFT Order on Compliance”).

²¹ *Id.* at P 19 (emphasis added).

²² *Id.*

²³ *Id.* at P. 37 n.50 (emphasis added).

the public. For example, the Commission, while redacting certain information could, in theory, mitigate some risks, but such case-by-case consideration of confidentiality will vitiate any efficiency gains created through the FFT process. Moreover, subjecting utilities to subsequent disclosure under FOIA for violations could chill incentives for submitting nonpublic self-reports and undermine the existing enforcement and mitigation regime enshrined in the FFT process.²⁴ The broad request for disclosure of NOPs, which runs counter to existing FERC policy, is more appropriately considered in a public notice and comment proceeding, with the benefit of full stakeholder input and careful vetting of the ramifications.

Finally, it is worth noting that the registered entities have relied on NERC's and the Commission's existing approach to confidentiality, when engaging in good faith settlement negotiations and submitting self-reports. If FERC believes that it may now be appropriate to consider broad disclosure of sensitive information under FOIA that has historically been treated as confidential, any departure from the past practice should be applied on a prospective basis only, after public notice and an opportunity to comment on the proposed changes.

If the Commission decides to disclose any nonpublic information in responding to the FOIA Request, then the Commission must only provide information that will not risk jeopardizing the security of the Bulk-Power System.

To determine whether the information will jeopardize security, the Commission should provide the implicated UREs and NERC the opportunity to review the relevant records to determine the specific information that should be redacted to protect cybersecurity and the reliability of the Bulk-Power System. The Commission's FOIA process only provides parties five business days to respond, which is insufficient time to replicate the thoughtful decision-making processes provided by a rulemaking. For example, if FERC is considering disclosing a list identifying the registered entities that received an NOP, the Commission should work with NERC and the UREs to ensure that there are no ongoing security issues related to the violations that might jeopardize security. This may be even more important if the Commission anticipates disclosing a particular NOP and its disclosure also plans to tie the NOP to the identification of a specific registered entity.

In conclusion, the Trade Associations recognize the delicate task before the Commission in balancing the public's need for information against the nation's need to protect itself from some of the gravest cyber threats in the world. We respectfully ask the Commission to deny Mr. Mabee's request completely in order to protect public safety and national security as described above.

Alternatively, if the Commission believes that it should change its disclosure policy, then the Commission should do so in a full and open proceeding where all parties and interested actors

²⁴ Courts have recognized this concern about the government's ability to acquire information. The D.C. Circuit's test for the application of FOIA Exemption 4 asks whether disclosure of confidential information would "(1) [. . .] impair the Government's ability to obtain necessary information in the future; or (2) [. . .] cause substantial harm to the competitive position of the person from whom the information was obtained. The test for confidentiality set forth in *National Parks* was subsequently adopted by nearly all of the other circuits, including the Ninth Circuit." *Dow Jones Co. v. F.E.R.C.*, 219 F.R.D. 167, 176-77 (C.D. Cal. 2003) (citing *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 at 770 (D.C. Cir. 1974) ("*National Parks*")).

may participate and comment on the policy risks involved. Where the public and the nation is at risk from a proposed change in Commission policy, the public can only benefit if the Commission weighs and adjudicates on these issues in an open rulemaking proceeding. If the Commission decides to disclose any nonpublic information, then it must ensure that the disclosure of any of that information will not risk jeopardizing the security of the Bulk-Power System.

Respectfully submitted,

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