

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Joint Staff White Paper on  
Notices of Penalty Pertaining to  
Violations of Critical Infrastructure  
Protection Reliability Standards

Docket No. AD19-18

**Comments of Public Citizen, Inc.**

Over the last year and a half, Public Citizen has intervened in at least six different cybersecurity-related proceedings at the Commission, consistently pushing FERC to require public disclosure of the names of utilities violating cybersecurity standards.<sup>1</sup> We therefore applaud the FERC/NERC Joint Staff White Paper recommendation to require public disclosure of the names of utilities in Notice of Penalty filings.

But the White Paper does not go far enough in addressing other cybersecurity concerns Public Citizen has raised in our previous pleadings. We urge FERC to include four additional reforms:

- The private corporation to which FERC has delegated cybersecurity oversight and enforcement is inadequately independent of the utilities it oversees, thereby compromising its effectiveness as a regulator.
- FERC and NERC reliance on industry self-reporting fails to keep us secure.
- FERC should promote formal roles for whistleblowers as an enforcement tool.
- FERC can encourage Regional Advisory Bodies as authorized by statute.

**About Public Citizen**

Public Citizen is a national, not-for-profit, non-partisan, research and advocacy organization representing the interests of household consumers. We are active before FERC promoting just and reasonable rates, and supporting efforts for utilities to be accountable to the public interest. Our financial details are located at our web site.<sup>2</sup>

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<sup>1</sup> See *Public Citizen Protest*, June 24, 2019, Dockets Nos. NP19-10 and NP19-11; *Comments of Public Citizen*, May 24, 2019, Docket No. AD19-12; *Comments of Public Citizen*, April 11, 2019, Docket No. RD19-3; *Protest of Public Citizen*, April 2, 2019, Docket No. AC19-75; *Comment of Public Citizen*, February 19, 2019, Docket No. NP19-4; and *Motion to Intervene and Comment of Public Citizen, Inc. and The Utility Reform Network*, April 16, 2018, Docket No. NP18-7.

<sup>2</sup> [www.citizen.org/about/annual-report/](http://www.citizen.org/about/annual-report/)

## **In Support of Public Disclosure of The Identities of Utilities That Violate Cybersecurity Standards**

We applaud the Commission's proposal to require public disclosure of the names of utilities that violate cybersecurity standards. In our six different filings on this subject over the last year and a half, we have argued that it is in the public interest to reveal identities of violators. Concealing the names of utilities committing serious cybersecurity violations sends confusing messages to the public that large financial penalties are not accompanied with full accountability, as future violators may be able to hide behind a veil of anonymity.

Public release of the names of the utilities will *improve* cybersecurity, as regulators and stakeholders will use such public information to better educate and prepare the utility's practices to improve cybersecurity compliance. The more information that regulators and the public have about violators and their violations, the better able we all are to learn from past mistakes and reduce the likelihood of future ones. Keeping the public and state utility regulators in the dark about the cybersecurity track record of our electric utilities creates a false sense of security, and reduces the likelihood of enhanced public awareness and vigilance needed to protect cybersecurity.

## **NERC's Lack Of Independent Board Governance Compromises Its Effectiveness**

In 2006, FERC granted legal authorities to a private corporation—the North American Electric Reliability Corporation—to serve as America's front-line regulator and enforcer of electric reliability and cybersecurity rules. The NERC Board of Trustees is dominated by individuals hailing from the utility sector, rendering it inadequately independent from the electric utility industry it oversees: ten of the twelve members hail from the utility sector.<sup>3</sup>

Having a board controlled by former utility executives compromises NERC's independence and limits its effectiveness. While it is reasonable for NERC's Board of Trustees to feature one or two members with ties to utilities, it is a liability for ten of twelve Board members to have ties to utilities. The Commission should require board and governance reforms to ensure NERC independence.

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<sup>3</sup> [www.nerc.com/gov/bot/](http://www.nerc.com/gov/bot/)

## **Commission Reliance On Industry Self-Reporting Fails To Keep Us Secure**

NERC's cybersecurity compliance strategy relies upon utility company self-reporting. While self-reporting by utilities to ensure industry compliance to cyber security standards can play a role as part of a comprehensive regulatory regime, NERC's oversight of utility self-reporting is need of significant improvement. Indeed, FERC is on record raising questions about the effectiveness of NERC's emphasis on self-reporting:

*David Ortiz, deputy director of FERC's Office of Electric Reliability, said cyberattacks are happening in large numbers, but utilities seldom report successful attacks as required, even when assured of confidentiality.<sup>4</sup>*

Three trade associations representing nearly every utility in the nation even threatened non-compliance with cyber security self-reporting requirements should the Commission disclose the identities of utilities that commit cyber security violations:

*If the Commission begins releasing entity names in addition to the information already made public in the posted Notices of Penalty, then Registered Entities may re-evaluate whether they will continue to self-report security information knowing that providing such information to their regulators may be disclosed to the public, including to people seeking to attack their systems...This will make entities reluctant to share information with the Commission and have a chilling effect on the quality of the information communicated to FERC, NERC and the Regional Entities.<sup>5</sup>*

The Commission should be alarmed that the three trade associations representing nearly every single electric utility in the nation issued an implied promise of non-compliance with federal cyber security regulations on behalf of their members. Utilities should be pledging to self-report cyber security violations regardless of the circumstances, because that is what the law requires. For them to portend to do otherwise should be a clear indication that the electric utility industry of the United States cannot be trusted with self-regulation, and requires FERC vigilance.

## **FERC Can Promote and Protect Roles For Whistleblowers**

Promoting a formal role for whistleblowers to assist the commission with identifying cybersecurity problems and violations should be encouraged. For example, Congress passed Section 748 of the Dodd-Frank Wall Street Reform and Consumer Protection

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<sup>4</sup> Rebecca Smith, "PG&E Among Utilities Cited for Failing to Protect Against Cyber and Physical Attacks," *The Wall Street Journal*, April 9, 2019.

<sup>5</sup> *Motion to Intervene and Protest of The American Public Power Association, The Edison Electric Institute, and the National Rural Electric Cooperative Association*, March 28, 2019 Docket No. NP19-4, at pages 16-17.

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Act, which amended the Commodity Exchange Act by adding Section 23, entitled “Commodity Whistleblower Incentives and Protection.” Since then, the CFTC has enthusiastically embraced this authority and actively promotes whistleblowers as a component of its enforcement and oversight capabilities. There is nothing preventing FERC from similarly encouraging a formal role for whistleblowers to find safe harbor in helping to identify cyber security weaknesses and violations.

**FERC Should Encourage Regional Advisory Bodies As Authorized By Statute**

Federal law authorizes Regional Advisory Bodies comprised of representatives appointed by the Governors of states, which are empowered to “provide advice” to NERC and FERC on whether reliability or cyber security proposals are just, reasonable and in the public interest.<sup>6</sup> While the statute authorizes such Bodies “on the petition of at least two-thirds of the States within a region,” there is nothing in the statute preventing FERC from proactively encouraging states to create such Regional Advisory Bodies. Such Bodies would be useful to provide guidance on these matters for both NERC and FERC.

Respectfully submitted,

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<sup>6</sup> 16 USC § 824o(j).

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