

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL MABEE,

Plaintiff,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,

Defendant.

Civil Action No. 19-3448 (UNA)

**EMERGENCY MOTION TO AMEND ORDER SETTING PROCESSING SCHEDULE,
AND MEMORANDUM IN SUPPORT THEREOF**

Defendant, the Federal Energy Regulatory Commission (“FERC”), respectfully moves this Court to amend the portion of its January 28, 2020, Minute Order (“January 2020 Order”) stating the rate at which FERC must process records responsive to the three Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, requests that are the subject of this action.

SUMMARY

FERC seeks amendment of the January 2020 Order requiring that FERC “process 10-15 dockets per month” as follows:

“Defendant shall complete processing of the remaining dockets by January 31, 2022. All other aspects of the Court’s January 28, 2020 Minute Order relating to status reports shall remain unmodified.”

As explained below, some of the dockets require far more extensive analysis and additional notifications than other dockets, thereby rendering the processing rate of even 10 dockets per month no longer achievable. FERC is requesting this relatively brief enlargement of time and this modification of the production schedule for the remaining approximately 19 dockets.¹

¹ Pursuant to LCvR 7(m), the parties have conferred about a revised production schedule. Plaintiff opposes any modification of the production schedule.

BACKGROUND

A. Brief Procedural History

Plaintiff filed his Complaint on November 15, 2019. *See* ECF No. 1.

This case arose from Plaintiff's three requests for records, made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to FERC on or about December 18, 2018, January 12, 2019, and August 3, 2019, which were assigned the numbers FOIA FY19-19, FOIA FY19-30, and FOIA FY19-99, respectively. Plaintiff's three FOIA requests seek the identities of the Unidentified Registered Entities ("URE") associated with 253 FERC Notice of Penalty ("NOP") dockets.²

Defendant filed its Answer on December 24, 2019. *See* ECF No. 8.

On January 28, 2020, the Court entered a Minute Order which provided:

In light of the representations in the parties' [ECF No. 9] Joint Status Report, it is hereby ORDERED that: Defendant shall process a minimum of 10-15 dockets per month and shall issue a response to Plaintiff's FOIA requests on the 30th day of each month or the next business day if the 30th falls on a weekend or holiday, until production is complete. It is FURTHER ORDERED that Defendant shall file a monthly status report regarding the processing of Plaintiff's FOIA requests on the 7th day of the month or the next business day, if the 7th day falls on a weekend or holiday, and that, beginning 3/7/2020, the parties shall meet, confer, and file a Joint Status Report every third month.

See Jan. 28, 2020 Minute Order. In the intervening months, FERC has processed all but approximately 19 of the 253 dockets at issue in this case. *See* ECF Nos. 10-11, 13-31.

² Plaintiff has clarified that, as to all three FOIA requests, he is seeking only the identities of the UREs with respect to each underlying public NOP docket—as opposed to any underlying non-public documents or information. Specifically, Plaintiff is seeking the public version of each NOP supplemented with the name of the URE and docket number associated with each public NOP.

B. Issues Surrounding the Processing of the Dockets

1. Cyber Security Critical Infrastructure Protection Standards

The North American Electric Reliability Council (“NERC”) is responsible for enforcing certain mandatory Critical Infrastructure Protection (“CIP”) Standards (“CIP Standards”) applicable to utilities throughout the country. In certain situations where NERC determined that a violation or potential violation has occurred, it files a Notice of Penalty (“NOP”) or a Spreadsheet Notice of Penalty (“SNOP”) with FERC. Additionally, when NERC determined the existence of potential or actual CIP Standards violation for which it did not issue a penalty, NERC filed a “Find Fix Track” (“FFT”) report with FERC. Each Notice of Penalty, Spreadsheet Notice of Penalty, and Find Fix Track report was assigned a unique “docket number.” Until recently, NERC filed two versions of each Notice of Penalty, Spreadsheet Notice of Penalty, and Find Fix Track report with FERC: a public version with the names of the utilities redacted – referred to as “Unidentified Registered Entities” or “UREs” when so redacted – and a non-public version with the names of the utilities contained therein.

2. Plaintiff’s FOIA Request and FERC’s Processing of Dockets

As mentioned above, Plaintiff’s three FOIA requests that are the subject of the Complaint collectively seek the identities of Unidentified Registered Entities associated with 253 FERC dockets. Processing the request for release of the identity of each of the Unidentified Registered Entities that is contained in a FERC docket identified in each of Plaintiff’s FOIA requests requires multiple levels of FERC staff review and analysis, and each docketed matter is unique, with some dockets requiring significantly more review and analysis time than other dockets. *See* Exhibit 1 (Declaration of Jonathan E. O’Connell) at ¶ 4. Each FERC determination as to disclosure or release of a URE identity requires FERC staff, including its cyber-security subject matter expert(s), to engage in an in-depth analysis of multiple factors and materials.

FERC cybersecurity staff performs an initial case-by-case assessment of each docket. For each Unidentified Registered Entity contained in a docket, FERC must perform a case-by-case assessment to determine whether that specific Unidentified Registered Entity's identity can be disclosed. The factors relevant to FERC staff's determinations include, but are not limited to:

- (i) the nature of the Critical Infrastructure Protection violation, including whether there is a Technical Feasibility Exception involved that does not allow the Unidentified Registered Entity to fully meet the CIP requirements;
- (ii) whether vendor related information is contained in the NOP or FFT docket;
- (iii) whether mitigation is complete; the content of the public and non-public versions of the NOP or FFT docket;
- (iv) the extent to which the disclosure of the identity of the Unidentified Registered Entity and other information would be useful to someone seeking to cause harm;
- (v) whether a successful audit has occurred since the violation(s);
- (vi) whether the violation(s) or potential violation(s) was administrative or technical in nature; and
- (vii) the length of time that has elapsed since the filing of the public NOP or FFT docket.

If based on staff's initial assessment, it appears that disclosure of the Unidentified Registered Entity's identity may be appropriate, then FERC must notify the entities with an interest in the potential release of the information at issue of the request via a "Notice of Freedom of Information Act Request" to allow the entity to object to the disclosure. *See* 18 C.F.R. § 388.112(d) (2020). Here, such notice is provided to NERC *and* the relevant URE(s). FERC staff then receives comments or otherwise coordinates telephone calls to receive relevant input. Assuming the additional information and feedback provided by NERC and/or the Unidentified Registered Entity does not impact FERC staff's initial assessment that release appears appropriate, FERC then issues a "Notice of Intent to Release." *See* 18 C.F.R. § 388.112(e) (2020). Subsequently, no sooner than five (5) days later, FERC releases the name or names of the

Unidentified Registered Entity or Entities *via* a “Release” letter, along with the public version of the docket with the name(s) of the relevant UREs inserted therein. *Id.*; *see also* Exhibit 1 (Declaration of Jonathan E. O’Connell) at ¶ 7-8.

Alternatively, if, based on FERC cyber-security staff’s assessment and judgment, disclosure of the identity of a particular Unidentified Registered Entity would reasonably be expected to create a risk to the bulk electric system or is otherwise subject to protection under FOIA, then FERC simply denies release of the identity of the Unidentified Registered Entity, without providing notification to NERC and the relevant Unidentified Registered Entity or Entities.

This process is consistent with FERC’s regulations and is necessary to ensure that FERC has not overlooked or is otherwise unaware of any information that may impact its decision relative to disclosure. Regardless of whether the ultimate decision is to disclose or to withhold the identity of the Unidentified Registered Entity, there can be no doubt that this process is time-consuming and necessarily impacts the pace at which FERC is able to process each docket.

ARGUMENT

Amending the January 2020 Order Is Reasonable and Necessary In Light of the Varying Nature of the Dockets Being Processed By FERC

Defendant requests that the Court amend its January 2020 Order so that, rather than mandating that Defendant “process 10-15 dockets per month,” the Order will instruct Defendant to complete the processing of the remaining approximately 19 dockets by January 31, 2022. This request is made necessary due to the great disparity in the number of Unidentified Registered Entities contained in the three types of dockets being processed: *i.e.*, standard Notice of Penalty dockets, Spreadsheet Notice of Penalty dockets, and Find Fix Track docket.

The majority of the dockets at issue in this case involve a Notice of Penalty in which only a single Unidentified Registered Entity (or parent of an Unidentified Registered Entity) is at issue for certain violations of CIP Standards. *See* Exhibit 1 (Declaration of Jonathan E. O’Connell) at ¶ 4. Each Spreadsheet Notice of Penalty docket and Find Fix Track docket generally contains numerous Unidentified Registered Entities and associated potential and actual CIP Standard violations. *Id.*

For example, whereas four standard Notice of Penalty dockets listed in Plaintiff’s FOIA request would typically include only 4-5 Unidentified Registered Entities in total, five of the Spreadsheet Notice of Penalty dockets contain a combined total of 83 Unidentified Registered Entities.³

Consequently, the sheer volume of Unidentified Registered Entities generally associated with a Spreadsheet Notice of Penalty docket or Find Fix Track docket means that each of these types of dockets will require more time to assess and reach a final determination. *See* Exhibit 1 (Declaration of Jonathan E. O’Connell) at ¶ 4. By way of example, FERC staff estimates that it spent 27 hours in conducting its analysis of the 17 Unidentified Registered Entities that were identified in Find Fix Track docket RC12-11. *Id.* at ¶ 5. Additionally, as discussed above, where FERC is considering the potential disclosure of a Unidentified Registered Entity identity, notification, review of information, and/or verbal consultation with the relevant Unidentified Registered Entity and/or the North American Electric Reliability Corporation (NERC) may be necessary. *Id.* at ¶ 6.

³ The four dockets are:

Docket NP11-270, which concerns 21 Unidentified Registered Entities;
Docket NP12-10, which concerns 21 Unidentified Registered Entities;
Docket NP12-12, which concerns 18 Unidentified Registered Entities; and
Docket NP12-18, which concerns 23 Unidentified Registered Entities.

CONCLUSION

WHEREFORE, FERC respectfully requests that the Court amend the January 2020 Order as follows:

“Defendant shall complete processing of the remaining dockets by January 31, 2022. All other aspects of the Court’s January 28, 2020 Minute Order relating to status reports shall remain unmodified.”

A proposed Order is attached.

Dated: October 8, 2021

Respectfully submitted,

CHANNING D. PHILLIPS
D.C. Bar No. 415793
Acting United States Attorney

BRIAN P. HUDAK
Acting Chief, Civil Division

By: /s/ T Anthony Quinn
T. ANTHONY QUINN
D.C. Bar No. 415-213
Assistant United States Attorney
Civil Division
555 Fourth St., NW
Washington, D.C. 20530
(202) 252-7558
Tony.Quinn2@USDoJ.Gov