

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Joint Staff White Paper on )  
Notices of Penalty Pertaining to ) Docket No. AD19-18-000  
Violations of Critical Infrastructure )  
Protection Reliability Standards )

COMMENTS OF MEMPHIS LIGHT, GAS AND WATER DIVISION

Memphis Light, Gas and Water Division (“MLGW”) appreciates the opportunity to submit its comments in response to the joint White Paper (the “White Paper”) prepared by the staffs of the Federal Energy Regulatory Commission (the “Commission”) and the North American Electric Reliability Corporation (“NERC”).<sup>1</sup> MLGW understands the Commission’s desire to provide transparency of its actions while simultaneously meeting its obligations to protect the security and reliability of the Bulk Power System (“BPS”). The recommendations in the White Paper attempt to find the appropriate balance between these sometimes-competing interests. However, MLGW is concerned that the implications of adopting this Paper’s suggestions can pose a severe risk to the nation’s vital electric grid.

**I. Background**

A. Memphis Light, Gas and Water Division

Memphis Light, Gas and Water Division is a municipal utility in Memphis, Tennessee. Providing electricity, natural gas, and water to Shelby County, MLGW serves more than 420,000 electric customers.

MLGW is registered with NERC as a Transmission Owner, Transmission Planner, Transmission Operator, and Distribution Provider. Our contact information is

Cheryl Patterson  
Vice President and General Counsel  
Chief Compliance Officer  
Memphis Light, Gas and Water Division  
P.O. Box 430  
Memphis, TN 38101-0430  
(901) 528-4343  
[cpatterson@mlgw.org](mailto:cpatterson@mlgw.org)

Allan Long  
Manager of Ethics and Compliance  
Memphis Light, Gas and Water Division  
P.O. Box 430  
Memphis, TN 38101-0430  
(901) 322-5770  
[along@mlgw.org](mailto:along@mlgw.org)

---

<sup>1</sup> White Paper Docket, “Joint Staff White Paper on Notices of Penalty Pertaining to Violations of Critical Infrastructure Protection Reliability Standards,” Docket No. AD19-18-000 (filed Aug. 27, 2019) (“White Paper”)

B. The White Paper's Proposal

NERC has been designated by the Commission as the Electric Reliability Organization, and, as such, it is tasked with developing standards related to the security and reliability of the North American Bulk Power System, per orders by the Commission. An important role of NERC is to evaluate compliance with these standards, including transmitting details of its findings and proposed Notices of Penalties for the Commission's consideration and enforcement.

This White Paper proposes a change in the manner a Notice of Penalty ("NOP") for a violation of the Critical Infrastructure Protection ("CIP") standards is processed. The CIP Reliability Standards contain requirements that provide for the cybersecurity of the Bulk Power System. The CIP NOP documentation that NERC submits to the Commission typically includes information about the nature of the violation, potential vulnerabilities to cyber systems caused by the violation, and related mitigation activities. The White Paper's recommendation is to release the name of the Registered Entity and the amount of any penalty in a public cover letter while details, including the specific Requirement/Part, would be in a separate document that, presumably, would be treated as confidential.

C. The Commission's Responsibility to Protect Critical Energy/Electric Infrastructure Information ("CEII")

Information useful to a person in planning an attack on critical electric infrastructure may be subject to the Commission's Critical Energy/Electric Infrastructure Information ("CEII") regulations<sup>2</sup> and/or 18 CFR § 39.7(b)(4), which provides 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 nonpublic unless the Commission directs otherwise" (emphasis added). As a result, NERC's practice has been to request certain information in CIP NOPs, including the identity of the violator be designated as non-public and CEII pursuant to the Commission's rules and regulations. This CEII designation for certain sensitive information is intended to protect the security of the Bulk-Power System.

According to the White Paper, the Commission's practice is to treat information received under a CEII designation as nonpublic until such time as Commission staff determines that the information is not entitled to CEII treatment (for example, in response to a third-party Freedom of Information Act ["FOIA"] request). While NERC has submitted CIP NOPs containing CEII requests since 2010, Commission staff did not assess a NERC request for CEII designation until 2018 when, for the first time, the Commission received a FOIA request seeking the name of an undisclosed CIP violator (referred to by NERC as an "unidentified registered entity" or "URE").<sup>3</sup>

---

<sup>2</sup> See 18 C.F.R. § 388.113 (2018). CEII or information that would otherwise pose a risk to the security of a NERC registered entity are exempt from public disclosure under the Freedom of Information Act (FOIA) Exemptions 3 and 7(F). See 5 U.S.C. § 552(b)(7)(F) (2012) (protecting law enforcement information where release "could reasonably be expected to endanger the life or physical safety of any individual."); see also the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 61003 (2015) (specifically exempting the disclosure of CEII and establishing applicability of FOIA Exemption 3, 5 U.S.C. § 552(b)(3)).

<sup>3</sup> 5 U.S.C. § 552; 18 C.F.R. § 388.108.

As has been referenced by at least one other commenter to this White Paper<sup>4</sup>, the Commission recognized the risk presented by disclosing the name of an entity during the rulemaking process through which it established the original CIP NOP regulations in 2006. In Order No. 672,<sup>5</sup> in which the Commission promulgated regulations to address NERC's development and enforcement of Reliability Standards, the Commission emphasized the risks inherent in revealing the name of an entity with a cybersecurity vulnerability:

As explained in the NOPR, and confirmed by numerous commenters, a proceeding involving a Cybersecurity Incident requires additional protection because it is possible that Bulk-Power System security and reliability would be further jeopardized by the public dissemination of information involving incidents that compromise the cybersecurity system of a specific user, owner or operator of the Bulk-Power System. For example, even publicly identifying which entity has a system vulnerable to a "cyber attack" could jeopardize system security, allowing persons seeking to do harm to focus on a particular entity in the Bulk Power System. While the Commission recognizes the benefit of transparency in Commission proceedings . . . the benefits of transparency are overridden in the limited situation of cases in which such transparency would jeopardize Bulk Power System security. . . . [I]n balance, Commission authority to establish a nonpublic proceeding if necessary and lawful, including but not limited to, a proceeding involving a Cybersecurity Incident, serves an important public interest that outweighs the competing goals of openness and transparency.<sup>6</sup>

Clearly, the Commission felt that the proposed NOPs and supporting documents transferred from NERC contained information that had the potential to be highly damaging to the Bulk Power System. FERC has not explained what argument has now allayed its clearly-stated concerns that BPS security and reliability would be jeopardized by the release of the information requested in the FOIA requests.

The United States Congress also felt so strongly about protecting information potentially dangerous to the Bulk Power System that it created a clear exemption from the FOIA's disclosure requirements for CEII with the passage of the FAST Act<sup>7</sup> in 2015.

#### C. A flood of FOIA requests

According to the White Paper<sup>8</sup>, FERC has received an unprecedented number of requests for NOP records under the provisions of the Freedom of Information Act ("FOIA"). These requests have sought the identities of UREs, as well as many other details contained in the CIP NOP information for which NERC has requested a CEII designation. It is not evident how the value of releasing these details might outweigh the exposure and exploitation of possible weaknesses in Cyber Systems that are responsible for controlling and protecting the electric grid. It was exactly instances like these that the FOIA exemptions and the protections of the FAST act were enacted into law.

#### D. NERC Posting of Lessons Learned

---

<sup>4</sup> Wolverine Power Supply Cooperative, Inc., "Comment of Wolverine Power Supply Cooperative, Inc. under AD19-18," *Federal Energy Regulatory Commission* [website], Accession Number 20191015-5173, accessed 28 October, 2019.

<sup>5</sup> *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

<sup>6</sup> Order No. 672 at P. 538-39

<sup>7</sup> Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 61,003, 129 Stat. 1312, 1773-1779 (2015) (codified at 16 U.S.C. § 824o-1).

<sup>8</sup> *Ibid*, Page 9.

Under the presumption that the data transmitted to FERC is non-public as CEII, NERC posts a significant amount of anonymized information about the compliance cases it processes on its public website. This is extremely useful to Registered Entities in understanding issues encountered by others and learning approaches to better protect their own facilities.

## **II. Comments by MLGW**

The intent of the Freedom of Information Act was to provide transparency into the workings of the federal government's agencies to aid in oversight of efficiency, effectiveness, and consistency. Those are admirable objectives. However, disclosure of information that could prove harmful to the national security and the reliability of the United States' critical infrastructure was specifically exempted in the Act. In addition, protection of CEII was strengthened by being made specifically exempt from disclosure under the FAST Act. Release of information should be the minimum necessary to facilitate the oversight objectives of the FOIA, but CEII must not be compromised in the process.

MLGW asks that FERC work closely with NERC in determining what criteria will be used to identify CEII and share that information with the industry. FERC has made clear that it expects a "culture of compliance," including the voluntary reporting of instances of possible non-compliance. Statistics support that the vast majority of issues are, indeed, self-reported by the industry. This remarkable performance relies on trust that information that may pose a risk to the reliability and security of the BPS will receive appropriate protection.

Any decision made by the Commission on processing FOIA requests must be mindful that it would be relatively easy, considering the volume of NOP postings, to link the information released by FERC with the anonymous information made available by NERC. Anyone meaning harm to the Bulk Power System would be handed very valuable information regarding potential weaknesses of specific Registered Entities. The ability to find the relationships in the data must not be allowed.

MLGW feels strongly that protecting the security and sustaining the reliability of the BPS were the core objectives of FERC's adoption of mandatory reliability standards. The Registered Entities work tirelessly to achieve those goals, and we assert that our joint obligation to secure the BPS by protecting the details of CIP violations should be pursued with the same passion.

Document Content(s)

MLGW Comments under AD19-18.PDF.....1-4