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VIA E-FILE

Re: Proposed Revisions to the Federal Energy Regulatory Commission's Notices of Penalty Pertaining to Violations of Critical Infrastructure Protection Reliability Standards, Docket No. AD19-18-000

Dear Mr. First:

The Reporters Committee for Freedom of the Press (the “Reporters Committee” or “RCFP”) writes regarding the Federal Energy Regulatory Commission’s (“FERC”) proposed revisions to the processing of Notices of Penalty (NOPs) for violations of Critical Infrastructure Protection (CIP) Reliability Standards, which contain requirements that provide for the cybersecurity of the Bulk-Power System (hereinafter, the “Proposed Revision”). The Reporters Committee is a nonprofit association that was founded by leading journalists and media lawyers in 1970 when the nation’s news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. As stated herein, the Reporters Committee is supportive of the increased transparency that the Proposed Revision will yield.

The Freedom of Information Act, 5 U.S.C. § 552 (“FOIA” or the “Act”) was enacted to create an enforceable, statutory right of “access to official information long shielded unnecessarily from public view. . .” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citation omitted). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Under FOIA, all agency records must be disclosed upon request unless they (1) fall within one of the Act’s nine exemptions and the agency reasonably foresees that disclosure would harm and interest protected by that exemption, or (2) disclosure is prohibited by law. 5 U.S.C. § 552(a)(3) & 552(a)(8). In addition, FOIA mandates that any “reasonably segregable” non-exempt portion of a record be released even if other portions are exempt from disclosure. *Id.* § 552(b).

The Reporters Committee and other members of the press and the public have long used FOIA to hold both public and private actors accountable. Meaningful oversight, accountability, and reform are predicated on the ability of the press and public to examine and scrutinize government records. With respect to the identities of electric utilities that violate rules designed to protect the nation’s grid against cyber and physical attacks, logic and practice illustrate that disclosure will yield greater accountability, and ultimately promote greater compliance with applicable cybersecurity laws. *See* Chuck Grassley, *Grassley at FOIA Hearing: Transparency brings Accountability* (March 13, 2018), <https://perma.cc/6P2R-Q255> (discussing how “constant oversight” by the public leads to greater accountability of institutions).

The information that the Proposed Revision will place on the cover sheet of the Notices of Penalty is within the public interest. *See* Rebecca Smith, *Regulator Weighs Disclosing Names of Utilities That Violate Grid Security Rules*, *The Wall Street Journal* (Sept. 6, 2019), <https://perma.cc/XFB5-CRX2>. Given the public interest in this information, as well as the large number of FOIA requests FERC has received asking for this information, the Reporters Committee also recommends that the cover sheets of the Notices of Penalty be proactively disclosed to the public per 5 U.S.C. § 552(a)(2); *see Jordan v. DOJ*, 591 F.2d 753, 756 (D.C. Cir. 1978) (*en banc*) (observing that subsection (a)(2) records must be made “automatically available for public inspection; no demand is necessary”). Proactive disclosure of the cover sheets is appropriate given the “unprecedented number” of FOIA requests for NOPs, Federal Energy Regulatory Commission, *Joint Staff White Paper on Notices of Penalty Pertaining to Violations of Critical Infrastructure Protection Reliability Standards* (Aug. 27, 2019) at 3, and the rationale of the Proposed Revision recognizing such information belongs in the hands of the public.

The Reporters Committee also writes to stress that while the cover sheets will be immensely useful to reporters and the public, other information comprising the Notices of Penalty, e.g., the records behind the cover sheet, remains subject to FOIA and FERC is required by law to disclose all non-exempt segregable material. 5 U.S.C. §§ 552(a)(3), 552(a)(8), & 552(b).

Reporting on “events of legitimate concern to the public . . . fall[s] within the responsibility of the press.” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Because the public has an interest in knowing key contents of Notices of Penalty, including the identities of utilities that are violating the rules designed to protect the nation’s grid against attacks, the Reliability Standards violated, and the penalties levied, the Proposed Revision furthers the ability of the press to fulfill its role of informing the public about which electric utilities are meeting their mandate to effectively protect our electric grid and what the government is doing about those who fail to do so.

For the foregoing reasons, the Reporters Committee supports the Proposed Revision of the Federal Energy Regulatory Commission.

Sincerely,

The Reporters Committee for Freedom of the Press