

**CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA**

October 28, 2019

Ms. Kimberly Bose  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, D.C. 20426

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

Dear Secretary Bose:

The U.S. Chamber of Commerce (“the Chamber”) appreciates the opportunity to respond to the White Paper jointly prepared by the staffs from the North American Electric Reliability Corporation (“NERC”) and the Federal Energy Regulatory Commission (“FERC” or “Commission”) as the Commission reviews a proposed new format for NERC Notices of Penalty involving violations of Critical Infrastructure Protection (“CIP”) Reliability Standards (the “White Paper”).<sup>1</sup>

Maintaining a cyber-secure environment for our nation’s electric grid should remain a top priority of NERC, FERC, and the electric utility industry as a whole. The development and enforcement of mandatory CIP standards is a cornerstone of that effort and as such, great care should be taken to ensure that those standards – and the environment within which they operate – is maximally conducive to ensuring compliance with those standards and the maintenance of a cyber-secure electric grid. Any effort that has the potential to compromise the effectiveness of the CIP standards, and the enforcement regime thereof, should be subject to heightened scrutiny from both the industry and the Commission.

**I. Background to the Notice of Penalty White Paper**

The Freedom of Information Act (“FOIA”) serves as a powerful tool in maximizing government transparency, but it should not be weaponized in a fashion where it serves to accomplish more harm than good. While multiple FOIA requests have been directed toward FERC, with the apparent intent of exposing the identities of the entities subject to NERC Notices

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

of Penalty regarding potential CIP violations, the mere presence of these FOIA requests does not, on their own, indicate that the entities named in such NERC notices should be subject to public disclosure.

To date, the names of the parties against whom penalties are proposed by NERC to FERC have been designated as Critical Energy/Electric Infrastructure Information (“CEII”) by NERC when Notices of Penalty are submitted. NERC similarly designates many other sensitive portions of Notices of Penalty as CEII upon their submittal to FERC. CEII is specifically protected from FOIA disclosure by provisions within the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>2</sup> The Commission treats all nonpublic versions of these Notices of Penalty as confidential, due to their inclusion of CEII, until a FOIA request is submitted. Upon receipt of such a request, the Commission must then determine which aspects of a Notice of Penalty are entitled to continued protection from public disclosure as CEII. Our understanding is that the Commission has revealed the identities of a limited number of the entities subject to Notices of Penalty in response to FOIA requests seeking that information, but has generally withheld and treated as CEII most entities identified in Notices of Penalty submitted for Commission review by NERC.

The White Paper proposes a new and arguably simplified format for the submission of Notices of Penalty, through the inclusion of a public “cover sheet” that identifies the entity subject to the notice, the specific CIP Reliability Standard(s) that was violated by that entity, and the amount of the penalty proposed in response to the cited violation(s). The details of the cited violation, the mitigation undertaken, and any potential general cyber vulnerabilities identified as a result would all be submitted as a non-public attachment designated in whole as CEII. Thus, the proposal has the potential to enhance the overall scope of information protected as CEII, while simultaneously unmasking the majority<sup>3</sup> of the entities for which NERC has filed a Notice of Penalty.

## **II. The Continued Protection of CEII Should be a Primary Goal of Any FERC Change to its CIP Notice of Penalty Format**

The protection of CEII from public disclosure is central to the CIP Reliability Standards and enforcement regime. If CEII were subject to disclosure in response to a FOIA inquiry, the benefits of the electric utility industry’s regime of mandatory and enforceable CIP Reliability Standards would be outweighed by the harm that would occur through the broad and detailed disclosure of the particularities of each and every deviation from what are considered good cyber practices. The exposure of potential cyber vulnerabilities and attack vectors for their exploitation could potentially have a greater adverse impact on the overall security of the electric grid than the wholesale elimination of the NERC self-reporting and enforcement regime focused on the cybersecurity of the electric power grid. Therefore, CEII contained in Notices of Penalty related to CIP reliability standard violations must remain fully protected from inadvertent or intentional disclosure via FOIA or any other means.

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<sup>2</sup> See FAST Act, Pub. L. No. 114-94, § 61003.

<sup>3</sup> The White Paper notes that NERC would still have the option to designate the identities of registered entities subject to a Notice of Penalty as CEII, but is unclear as to how this would be accomplished within the proposed new filing format.

However, the protection of CEII from disclosure must stop short of preventing the public-private information sharing of timely and actionable cyber vulnerability information that is essential to electric utilities in mitigating general cyber-vulnerabilities or impending cyberattacks upon the electric grid or the enterprise or control systems of those responsible for its operations. Notices of Penalty can provide valuable information to other registered entities about potential vulnerabilities and mitigation options of which other industry participants may not otherwise be aware. However, while the sharing of information among regulated entities can improve the security posture of the industry, providing such information to the public has no corresponding benefit that outweighs the increased risk of targeted attacks resulting from public disclosure, as the public is unable to perform meaningful actions to mitigate any perceived threat. Maximum protection from CEII disclosure *via* FOIA is warranted given the cost/benefit imbalance associated with the disclosure of critical cyber security and electric infrastructure information, and NERC and FERC must continue to ensure that the “lessons learned” from CIP infractions are shared, as can be helpful, among other entities responsible for CIP reliability standard compliance.

### **III. Exposing Utilities Subject to Notices of Penalty Would Work at Counter Purposes with the NERC CIP Reliability Regime**

The White Paper’s default proposal is to publicly disclose the identity of any entity subject to a CIP Reliability Standards Notice of Penalty, regardless of whether an inquiry under FOIA has been tendered. It is unclear, however, what benefit this default disclosure provides to the public or otherwise. Additional incentives for utilities to comply with the nation’s only mandatory and enforceable cybersecurity standards are not necessary, given that significant penalties already accrue from non-compliance. Further, utilities already have a vested interest in ensuring that they provide electricity on a safe and reliable basis to their customers. The public disclosure of entities subject to potential CIP Reliability Standard violations provides little additional incentive to avoid a shortfall in compliance.

However, such disclosure of an entity subject to a CIP standard violation might very well discourage the self-reporting of violations, which is one of the main sources of information leading to a NERC Notice of Penalty filing. Electric utilities are a leading critical sector of the economy. The high-profile nature of the industry is, in part, why it is subject to mandatory, enforceable cybersecurity standards specifically designed around their industry. The routine public disclosure of electric utilities, with incremental financial impacts beyond NERC-certified penalty amounts, would unfairly disadvantage utilities that operate within publicly-traded markets, as compared to other entities outside of the FERC-regulated community.

Any disincentive to self-reporting could serve to undermine, rather than support, overall cyber compliance efforts. Thus, the routine disclosure of entities subject to a Notice of Penalty would be counterproductive, and should be rejected.

### **IV. Conclusion**

The Commission’s CIP Reliability Standards serve a vital role in incentivizing best practices across the electric utility industry to support the cybersecurity of the North American

power grid. The NERC Notice of Penalty filings similarly serve an important role in documenting a failure by an electric utility to comply with FERC-approved CIP standards. Given the importance of the power grid's integrity to our daily lives, our economy, and national security, the protection of CEII from inappropriate disclosure – even in light of a FOIA request – should be paramount. The Chamber supports the White Paper's proposal to thoroughly protect the content of a Notice of Penalty filing as CEII. However, given the potentially high costs and low benefits associated with the public disclosure of any utility subject to a Notice of Penalty, the White Paper's proposed default disclosure of affected entities should be discarded.

The Chamber appreciates the opportunity to comment on the White Paper. If you have any questions or need additional information, please contact Heath Knakmuhs, Vice President and Policy Counsel, at [hknakmuhs@uschamber.com](mailto:hknakmuhs@uschamber.com) or 202-463-5874.

Sincerely,

A handwritten signature in black ink that reads "Marty Durbin". The signature is fluid and cursive, with the first name "Marty" and last name "Durbin" clearly legible.

Marty Durbin  
President  
Global Energy Institute

A handwritten signature in black ink that reads "Christopher D. Roberti". The signature is cursive and somewhat stylized, with the first name "Chris" and last name "Roberti" being the most prominent parts.

Christopher D. Roberti  
Senior Vice President for Cyber,  
Intelligence, and Security Policy