

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation

Docket No. NP19-4

**Motion to Intervene and Request of Public Citizen, Inc. for the Commission to Direct the
Public Release of the Violator Under 18 C.F.R. § 39.7(b)(4)**

On January 25, 2019, the North American Electric Reliability Corporation submitted a Notice of Penalty against an unidentified electric utility for 127 cybersecurity violations between 2015 and 2018, with the unnamed company agreeing to pay a \$10 million fine, the highest on record for a utility committing cybersecurity violations, but a fraction of the maximum penalty authorized by law. Despite the serious nature of the violations, NERC is shielding the name of this violator from the public. While numerous media reports identify the offender as Duke Energy, the official record in this docket fails to publicly identify the worst utility violator of cybersecurity rules in history.

This is now the second record-breaking Notice of Penalty in a year where NERC has refused to identify the name of a violator. In February 2018, NERC assessed a then-record \$2.7 million fine against an unnamed utility for cybersecurity violations, which Public Citizen identified as PG&E in a FERC filing.¹ In last year's docket, Public Citizen requested the Commission to formally unmask the identity of the violator. FERC declined.

Public Citizen submits this Motion to Intervene and Comment asking for the disclosure of the name of the utility—Duke Energy—as part of the public record in this docket. The Commission has full authority to compel NERC to publicly release the name of the violator, and public identification of the violator is necessary for the benefit of the public interest. Failure to do so will establish Commission precedent that the agency does not take cybersecurity seriously enough to undertake the most basic tenant of enforcement: public disclosure of violators.

¹ FERC Docket No. NP18-7.

Motion to Intervene

Public Citizen is a not-for-profit, public interest research and advocacy organization representing the interests of our more than 400,000 members and supporters across the United States. Public Citizen frequently intervenes and comments in FERC dockets on behalf of household consumers.

Background

The heavily-redacted Notice of Penalty NERC filed with the Commission details 127 cybersecurity violations committed by the unnamed utility, some of which were only discovered after Critical Infrastructure Protection audits.² NERC's investigation concluded that "the 127 violations collectively posed a serious risk to the security and reliability of the [electric Bulk Power System]".³ NERC's probe determined that the utility's violations stemmed, in part, from a "Lack of management engagement, support, and accountability relating to the CIP compliance program."⁴

The Need for Public Disclosure of the Names of the Offenders

18 C.F.R. § 39.7(b)(4) states: "Each violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty . . . The 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]. Public Citizen requests that the Commission direct the public release of the name of the utility under 18 C.F.R. § 39.7(b)(4) for the reasons outlined below.

First, multiple media reports have already identified the utility. *Energywire* broke the story on February 1,⁵ followed by *The Wall Street Journal*,⁶ *RTO Insider* on February 2,⁷ the

² www.nerc.com/pa/comp/CE/Enforcement%20Actions%20DL/Public_FinalFiled_NOP_NOC-2605_Part%201.pdf

³ *NERC Notice of Penalty*, at Page 12.

⁴ *NERC Notice of Penalty*, at Page 10.

⁵ Blake Sobczak and Peter Behr, "Duke agreed to pay record fine for lax security – sources," www.eenews.net/stories/1060119265

⁶ Rebecca Smith, "Duke Energy Broke Rules Designed to Keep Electric Grid Safe," www.wsj.com/articles/duke-energy-broke-rules-designed-to-keep-electric-grid-safe-11549056238

⁷ Rich Heidorn Jr., "NERC Seeks \$10M Fine for Duke Energy Security Lapses," www.rtoinsider.com/nerc-fine-duke-energy-cip-110308/

Charlotte Business Journal,⁸ and *Utility Dive* on February 4.⁹ If the utility has already been publicly identified, than Commission action to direct the release of the name would be a mere formality, and help alleviate any confusion about similarities between the violations that identify Duke Energy and similar violations described in the NERC Notice of Penalty.

Second, since the electric utility that committed the violations is also subject to state rate regulation, keeping its name secret may mean that the state regulatory commissions with jurisdiction over the utility and any customer intervenors do not know about the violations and the assessed penalty. Keeping the identity of the utility non-public from state utility regulators and from customer intervenors participating in state utility commission proceedings could allow the utility to seek retail rate recovery for compliance costs associated with the Notice of Penalty. Absent the knowledge of the violation, state utility commissions and any customer intervenors would be unable to assess whether these costs are properly recovered from ratepayers or should be borne by shareholders. This outcome would defeat the entire purpose of the Penalty by forcing ratepayers to absorb the costs of utility imprudence. Furthermore, to the extent that the utility submits cybersecurity-related rate recovery requests to state utility regulators, knowing a utility's track record on such issues may materially affect regulators' assessment of such requests.

Third, it is in the public interest to reveal the identity of the violator. Concealing the name of the recipient of the largest fine in history sends a confusing message to the public that large penalties do not come with full accountability, as future violators may be able to similarly hide behind of the veil of anonymity. In fact, this is exactly what another utility, PG&E, has been able to do, as FERC failed to act on Public Citizen's request last year to require NERC to reveal its name.

Fourth, directing the public release of the name of the utility will not jeopardize cybersecurity, the security of the Bulk-Power System, or national security. We are not requesting the public release of any information other than the name of the utility. Public release of the name of the utility could *improve* cybersecurity, as regulators and stakeholders could use such public information to better educate and prepare the utility's practices. In general, the more

⁸ John Downey, "Reports: Duke Energy fined \$10 million for cybersecurity failures on grid," www.bizjournals.com/charlotte/news/2019/02/02/reports-duke-energy-fined-10-million-for.html

⁹ Iulia Gheorghiu, "Duke fined \$10M for cybersecurity lapses since 2015," www.utilitydive.com/news/duke-fined-10m-for-cybersecurity-lapses-since-2015/547528/

information that regulators and the public have about violators, the better able we all are to learn from past mistakes and reduce the likelihood of future ones. But keeping the public in the dark about the cybersecurity track record of our electric utilities may actually create a false sense of security, and reduce the likelihood of more public awareness and vigilance needed to protect cybersecurity.

In last year's Notice of Penalty docket, the Commission punted on addressing the substantive comments filed by Public Citizen and others requesting FERC to require NERC to make the name of offenders public. Instead of issuing an order, FERC allowed last year's Notice of Penalty to "be deemed affirmed by operation of law,"¹⁰ thereby avoiding responsibility to take substantive comments into account as part of an order, and denying intervenors like Public Citizen the ability to appeal such an order to a federal court for review. Taking cybersecurity responsibilities seriously should mean that the Commission issues orders on Notice of Penalty dockets that address comments and protests of intervenors.

Respectfully submitted,

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¹⁰ May 30, 2018 FERC *Notice* in Docket No. NP18-7.

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