



government which affect these two areas. Plaintiff has written, blogged, lectured and has been extensively interviewed on these topics. Plaintiff seeks records from the Defendant toward the goal of distributing information to Congress and the American people for the purposes of broadening and deepening the public policy debate surrounding critical infrastructure protection and emergency preparedness. Plaintiff's actions are taken without any personal financial motive.

4. Plaintiff is the author of "Prepping for a Suburban or Rural Community: building a civil defense plan for a long-term catastrophe." The identifying information on this book is found at ISBN 14: 8273125 and ISBN-13:9781482731217 and the book was published July 4, 2013.

5. Plaintiff is also the author of "The Civil Defense Book: emergency preparedness for a rural or suburban community." The identifying information on this book is found at ISBN-13-978187-432094 and ISBN-10:19704320944 and the book was published on October 17, 2017.

6. Plaintiff has been quoted in the specialty publication *Inside Cybersecurity* on September 30, 2019 in the article "Energy Regulators' Proposal to name violators of cyber standards complicated by cost, liability and concerns" on September 30, 2019. This article is directly related to the subject matter of Plaintiff's Freedom of Information Act (FOIA) requests.

7. Plaintiff has also been quoted in the *Wall Street Journal* in the article "Regulator weighs disclosing names of utilities that violate grid security rules," on September 6, 2019. This article is directly related to the subject matter of Plaintiff's Freedom of Information Act (FOIA) requests.

8. Plaintiff was quoted on the legal professional publication, *Law360* on February 19, 2019, in an article entitled "FERC pressured to disclose cyber security violators." This article is directly related

to the subject matter of Plaintiff's three Freedom of Information Act (FOIA) requests at issue in this action.

9. As a direct result of one of his Freedom of Information Act (FOIA) requests, Plaintiff was quoted in the *Wall Street Journal* on August 24, 2018 in the article, "PG&E identified as utility that lost control of confidential information."

10. As a direct result of another one of his FOIA requests, Plaintiff was quoted in the *Wall Street Journal* on April 4, 2019 in the article, "PG&E Among Utilities Cited for Failing to Protect Against Cyber and Physical Attacks."

11. Plaintiff published an article entitled "Life Support – Ensuring Proper Regulation of the Electric Grid" in the September 2019 issue of *DomPrep Journal* (a publication about domestic preparedness).

12. In addition to all of these interviews, articles and books, Plaintiff is an active blogger on issues related to critical infrastructure protection and civil defense at [www.MichaelMabee.info](http://www.MichaelMabee.info). Plaintiff posts both his FOIA requests, the Defendant's responses, and analysis of the data received (and denied) on his website.

13. Plaintiff has also participated in numerous Federal Energy Commission (FERC) rulemaking, administrative, and other types of FERC proceedings related to Critical Infrastructure Protection (CIP) standards.

14. Plaintiff seeks access to certain public records to research and write popular news and/or articles for use on his blog, and to inform Congress and policy makers of issues connected to the security of

America's electric power grid. His connections and relationships with a wide range of media organizations will ensure that any story he drafts, based on the information contained in these documents, will be published and reprinted. The purpose for seeking access to these records and for publishing articles on the topic of grid security is to inform the public policy discourse on regulatory issues that adversely affect grid security and therefore threaten the national security of the United States. These efforts are not undertaken for personal financial gain, self-aggrandizement, or any other reason outside of increasing the security and resilience of the nation's critical infrastructure.

15. Defendant Federal Energy Regulatory Commission (FERC) is an agency of the United States.

16. FERC has possession, custody and control of the records Plaintiff sought from FERC in his three FOIA requests to that agency.

#### JURISDICTION AND VENUE

17. This action arises under 5 USC § 552.

18. This Court has jurisdiction over the parties and subject matter pursuant to 5 USC § 552(a)(4)(B).

19. Venue is proper in this district pursuant to 5 USC § 552(a)(4)(B).

## **STATEMENT OF FACTS**

### **BACKGROUND**

20. Beginning in the Winter of 2018, Plaintiff became aware through his independent research that the North American Electric Reliability Corporation (NERC), the federal government's designated "Energy Reliability Organization" ("ERO"), had withheld the identities of all Critical Infrastructure Protection (CIP) standard violators since July of 2010. NERC acts with quasi-governmental authority in its role as the "ERO" under the Federal Power Act. NERC's regulation of the "bulk power system" (generally the portion of the electric grid operating at 100,000 volts or more) is overseen by the Federal Energy Regulatory Commission (FERC) pursuant to 16 USC § 824o. When NERC, through its inspections, investigations and audits finds an electric utility or grid operator in violation of mandatory reliability standards, including CIP standards, NERC submits a "Notice of Penalty" to FERC for approval. Thus, NERC performs a regulatory function overseen by the United States government. Plaintiff's research uncovered that, as of July 31, 2019, there had been 253 FERC Dockets, involving close to 1,500 entities whose identities had been withheld from the public. NERC continues to withhold the identities of CIP violators from the public each month when NERC files new Notices of Penalties with FERC.

21. In the course of Plaintiff's research, Plaintiff became aware of and began to report on what he believes are regulatory "red flags" related to the lack of transparency in the regulation of the electric grid. Plaintiff discovered what appears to be, based on the publicly available information, instances of inadequate enforcement of cybersecurity and physical security standards. At the heart of the public understanding whether or not the enforcement of these CIP standards is adequate, lies the need for the names of regulatory violators to be released. Without this information, neither the public,

investors, Congress nor state regulators can hold utilities accountable for protecting the portion of the electric grid that these utilities own or operate. In fact, Plaintiff believes there is little incentive for companies to do more than the minimum - if even that - to protect the grid absent public scrutiny. Plaintiff most recently submitted the results of his research to FERC Docket No. AD19-18-000 on October 25, 2019 as well as to Congress.

22. Plaintiff made three FOIA requests for documents revealing the names of these regulatory violators: the requests were made on December 18, 2018, January 12, 2019 and August 3, 2019. Defendant assigned the following control numbers to each of these three requests, FOIA # 2019-0019, #2019-0030 and # 2019-0099.

23. Plaintiff's three FOIA requests seek records pertaining to the Notices of Penalty ("NOPs") that NERC has submitted to FERC regarding "Unidentified Registered Entities" (UREs) who have violated mandatory CIP standards since July of 2010. The term "Unidentified Registered Entity" or "URE" is the industry euphemism for CIP standard violators whose names are being withheld by the regulators: The Federal Energy Regulatory Commission (FERC) and the North American Electric Reliability Corporation (NERC). Plaintiff's FOIAs seek records disclosing the names of these regulatory violators described in these NOPs.

24. Plaintiff anticipates that the records to which he seeks access will begin to answer the following questions: How many regulated electric utility companies have been issued Notices of Penalty in the past few years? What are the names of the regulated electric utility companies that have been issued penalties for violation of Critical Infrastructure Protection (CIP) standards? Are there repeat violators? Have companies properly disclosed their cyber security and physical security risk to investors? Are regulators doing enough to ensure the security of the electric grid? Are regulated

electric utility companies doing enough to ensure the security of the electric grid? Who is paying for the penalties and mitigation – the ratepayers or the shareholders? Are the state Public Utility Commissions aware of the critical infrastructure protection violations in their jurisdiction? And many other public policy questions.

25. Plaintiff has in good faith negotiated with the staff of FERC and consented to a substantial reduction in the scope of his FOIA requests. Plaintiff's requests were for the "NERC Full Notice of Penalty version which includes the name of the registered entity (and which has been previously withheld from the public)." A Notice of Penalty can range from a few pages to hundreds of pages. The 253 FERC Dockets covered under Plaintiff's FOIA request could potentially cover thousands of pages of documents. The FERC staff proposed, and Plaintiff agreed to reduce the scope of the FOIAs to the public cover page of each Notice of Penalty with the names(s) of the violator(s) and the docket number inserted on the page. This reduces the number of pages from potentially many thousands to 253 pages and eliminates the need for any redactions to be made to the non-public version of the NOP. It should be emphasized that this was FERC's proposal which plaintiff accepted as his main goal was the disclosure of the names of the violators associated with each FERC docket number.

## PLAINTIFF'S FOIA REQUESTS

### FIRST REQUEST

26. In his first request, on December 18, 2018, Plaintiff made a written request to Defendant for the "NERC Full Notice of Penalty version which includes the name of the registered entity (and which has been previously withheld from the public)" for 52 docket numbers, covering the period January 30, 2014 to September 27, 2018.

27. On December 19, 2019, Defendant accepted Plaintiff's first FOIA request and assigned it reference number FOIA-2019-0019. Defendant stated, "This request will be processed for 'a copy of the spreadsheet that lists the name(s) of the entity subject to the regulatory action. There is a total of 52 docket numbers covered under this request'."

28. On December 21, 2019 Plaintiff wrote to Defendant to clarify his request.

29. On December 21, 2019, Defendant wrote to Plaintiff and stated, "Mr. Mabee Thank you for the clarification stating that you are seeking the following material: 'NERC Full Notice of Penalty' version which includes the name of the registered entity (and which has been previously withheld from the public). '[S]preadsheet NOP which contains the name(s) of the registered entities.'"

30. On January 4, 2019, Plaintiff wrote Defendant and amended his request, adding one FERC docket number (NP15-18-000, dated December 30, 2014) which was "inadvertently" omitted from his first request (making his total request 53 docket numbers).

31. On March 10, 2019, Defendant informed Plaintiff that: "By letter dated February 28, 2019, I advised the submitter and the concerned Unidentified Registered Entities (URE) that a copy of the public version of the Notice of Penalty associated with Docket Nos. NP14-32 and NP14-41, along with the name of the URE inserted on the first page, would be disclosed to you no sooner than five calendar days from the date of my letter. See 18 C.F.R. § 388.112(e). The five-day notice period has elapsed and I am now releasing the first page of these public NOPs with the associated URE names to you."



32. Defendant's letter of March 10, 2019 to Plaintiff also included this paragraph, "Ordinarily, any appeal from a FOIA determination must be filed within 90 days of the date of issuance as provided by the Freedom of Information Act and 18 C.F.R. § 388.110(a)(1) of the Commission's regulations. However, because your request is being processed on a rolling basis, the Commission will hold your appeal rights in abeyance pending a final determination. This will allow you to file a single appeal at the conclusion of our processing of your request."

33. On April 2, 2019 Defendant wrote to Plaintiff, "In reviewing the request in its entirety and based on staff discussion's with you via telephone, your request is primarily for the name of the UREs associated with various dockets, including: NP14-29-000; NP14-30-000; NP14-32-000; NP14-37-000; NP14-39-000; and NP14-41-000.1."

34. Defendant's letter of April 2, 2019 also stated, "On February 28, 2019, I issued a Notice of Intent to Release as to the identities of the UREs in NP14-32 and NP14-41, which were subsequently provided to you. This letter addresses NP14-30, NP14-37, and NP14-39."

35. Defendant's letter of April 2, 2019 also stated, "Accordingly, the names of the UREs associated with NP14-30, NP14-37, and NP14-39 will not be disclosed."

36. On April 17, 2019, Plaintiff made an administrative appeal of the denial of FOIA-2019-0019; seeking the records responsive to his request.

37. On October 21, 2019, Defendant wrote to Plaintiff, "For these reasons, your appeal is denied." Defendant also added that, Judicial review of this decision is available to you in the United States

District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek.”

38. On August 3, 2019, Plaintiff requested an estimated completion date for FOIA-2019-0019. To date, Defendant has not responded to this request.

39. Plaintiff calculates that there are remaining 51 of the 53 dockets requested and seeking review of Defendant’s failure to release, in full, 51 docket records.

40. Plaintiff has actually exhausted his administrative rights and has a right to judicial review.

#### SECOND REQUEST

41. In his second request, on January 12, 2019, Plaintiff made a written request to Defendant for the “NERC Notice of Penalty version which includes the name of the registered entity (and which has been previously withheld from the public)” for 190 docket numbers, covering the period July 6, 2010 through December 31, 2013.

42. On January 16, 2019, Defendant accepted Plaintiff's FOIA request and assigned it reference number FOIA-2019-0030.

43. On May 17, 2019, Defendant authorized the release of the first page of the public NOP in FERC Docket No. NPI0-139-000 with the associated URE name to Plaintiff. Defendant also informed Plaintiff that he had 90 days to administratively appeal this decision, although Plaintiff need not appeal as Defendant anticipated a "rolling" response.

44. On August 3, 2019, Plaintiff requested an estimated completion date for FOIA-2019-0030. To date, Defendant has not responded to this request.

45. On September 3, 2019, Defendant wrote Plaintiff and stated, "By letter dated June 13, 2019, I advised the submitter and the concerned Unidentified Registered Entities (URE) that a copy of the public version of the Notice of Penalty associated with Docket Nos. NP10-130, NP10-131, NP10-137, NP10-138, and NP10-140, along with the name of the URE inserted on the first page, would be disclosed to you no sooner than five calendar days from the date of my letter. See 18 C.F.R. § 388.112(e). The five-day notice period has elapsed and I am now releasing these public NOPs with the associated URE names on the first page to you."

46. Defendant stated that Plaintiff has 90 days to administratively appeal this decision, although Defendant stated that Plaintiff could wait to administratively appeal as this is anticipated to be a "rolling" release.

47. On September 13, 2019 Plaintiff made an administrative appeal of the denial of FOIA-2019-0030; seeking the remaining 184 of the 190 dockets requested, and seeking review of Defendant's failure to release, in full, 184 docket records.

48. By letter dated October 25, 2019 Defendant denied Plaintiff's administrative appeal.

49. Plaintiff has exhausted his administrative rights and has a right to judicial review.

THIRD REQUEST

50. In his third request, on August 3, 2019, Plaintiff made a written request to Defendant to release “NERC Notice of Penalty version which includes the name of the registered entity (and which has been previously withheld from the public)” for 10 FERC dockets from January 1, 2019 to July 31, 2019.

51. On September 3, 2019, Defendant wrote to Plaintiff, informing him that the agency had assigned FOIA 2019-0099 and that the agency has "extended the time limit to make an initial determination on your request."

52. On September 17, 2019, Defendant wrote to Plaintiff and stated, "Accordingly, the unredacted Notice of Penalties in FERC docket numbers NP19-4; NP19-5; NP19-6; NP19-7; NP19-9; NP19-10; NP19-11; NP19-12; NP19-14; and NP19-15 will not be disclosed."

53. On September 24, 2019, Plaintiff administratively appealed the aforementioned decision; seeking the records responsive to his request.

54. Plaintiff has received no records responsive to his request.

55. By letter dated November 6, 2019, FERC denied Plaintiff's administrative appeal.

56. Plaintiff has exhausted his administrative rights and is entitled to judicial review.

57. In all but one of the 253 dockets covered by Plaintiff's three FOIA requests, the CIP violations have already been mitigated according to NERC's publicly available records.

58. As of this date, Defendant has processed only 21 of the 253 dockets, releasing 8 "URE" names and denying 13. In accordance with the agreement that Plaintiff reached with Defendant's staff, only 8 pages of the 253 pages of documents have been released. At the rate at which Defendant is releasing records, Plaintiff estimates that Defendant will complete release (or denial) of records in 43 years.

59. Plaintiff has been required to seek the services of a law firm and lawyers, attorneys, law clerks and paralegals to represent him in the action.

60. Plaintiff's rights to records have been and continue to be violated by Defendant's actual and constructive denial of his FOIA request.

61. Plaintiff's rights have been and continue to be violated by the denial of 13 of 253 dockets.

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Declare Defendant's failure to comply with FOIA to be unlawful;
- (2) Declare that Plaintiff is entitled to records responsive to his three FOIA requests;
- (3) Review and order the release of records which have been unlawfully denied;
- (4) Grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 USC § 552(a)(4)(E)(i);

(5) Grant Plaintiff such other and further relief which the Court deems proper.

Respectfully Submitted on this 15th day of November 2019.

/s/ C. Peter Sorenson \_\_\_\_\_  
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