

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL MABEE,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. 19-3448 (KBJ)
)	
FEDERAL ENERGY REGULATORY)	
COMMISSION,)	
)	
<i>Defendant.</i>)	
_____)	

JOINT STATUS REPORT

Pursuant to the Court’s January 28, 2020 Minute Order, Defendant the Federal Energy Regulatory Commission (“FERC”) and Michael Mabee (“Plaintiff”), by and through their respective undersigned counsel, submit the following Joint Status Report in the above-referenced matter.

Joint Statement Regarding Relevant Background and Status

1. The above-captioned case concerns three Freedom of Information Act (“FOIA”) requests filed by Plaintiff seeking the identities of Unidentified Registered Entities (“URE”) associated with numerous FERC Notice of Penalty (“NOP”) dockets.
2. On January 28, 2020, the Court issued a Minute Order (“January 28th Order”) directing FERC to “process a minimum of 10-15 dockets per month and . . . issue a response to Plaintiff’s FOIA requests on the 30th day of each month . . . until production is complete.”
3. The January 28th Order also requires FERC to file a monthly status report regarding the processing of Plaintiff’s FOIA requests on the 7th day of each month.
4. Finally, beginning March 7, 2020, the January 28th Order requires the parties to meet, confer, and file a Joint Status Report, and thereafter every third month.

5. The parties have been in compliance with the Minute Order since its issuance.

**Defendant's Status Report Regarding Processing of Dockets
During May 2020 and Other Issues**

6. On May 27, 2020, FERC provided Plaintiff with a determination as to the following ten additional dockets: NP11-136, NP11-137, NP11-140, NP11-145, NP11-150, NP11-156, NP11-157, NP11-161, NP11-166, and NP11-167.
7. Based on its internal assessments, FERC denied the release of the URE identities associated with the foregoing ten dockets. *See* Jt. Status Report (ECF No. 9) ¶¶ 10-14 (describing assessment process).
8. On March 2, 2020, FERC issued a "Submitter's Rights Letter" in connection with NP11-3-000 to the North American Electric Reliability Corporation ("NERC"), as well as the underlying URE(s) associated with this docket. On May 19, 2020, FERC issued a "Notice of Intent to Release" the identity of the URE associated with NP11-3 by issuing a copy of the public NOP, along with the name of the URE inserted on the first page.¹
9. FERC anticipates that it will process ten or more additional dockets during the month of June and will file its next status report on Tuesday, July 7, 2020.
10. In the parties' last joint status report filed on March 9, 2020, Plaintiff asked that FERC bates label its responses to the FOIA requests. FERC has advised Plaintiff that it would prefer to wait until the end of the production to Bates label any additional FOIA responses produced in this case, as it will be far more efficient than bates labeling the materials in small batches at the issuance of each response. FERC also notes that Plaintiff has not

¹ FERC's regulations require the Agency to notify an entity of its intent to disclose certain information prior to such disclosure (at least five days) in order to allow such entity the opportunity to pursue appropriate judicial relief if it deems it appropriate to do so. *See id.*

identified any urgency in the need for bates labeled documents. Nevertheless, on June 1, 2020, in connection with FOIA FY19-30, FERC re-issued its prior productions, along with its most recent productions, *see supra* ¶¶ 6-8, with updated bates labeling affixed to the documents. FERC will continue to issue updated bates labeled documents, and therefore FERC considers this issue to be resolved and moot.

11. FERC has no other issues to bring to the Court's attention regarding the litigation at this time.
12. The following responds to selected issues raised by Plaintiff below. In the Joint Status Report filed on January 13, 2020, the Parties each provided their proposed schedules for processing the NOPs in this litigation. *See* ECF No. 9. At that time, FERC estimated that it would be able to process 5 to 10 dockets per month and provided a detailed factual basis supporting that estimate. *Id.* at 10. Plaintiff proposed that FERC process 25 dockets per month. *Id.* at 24. As discussed above, the Court considered the identical supporting arguments by both parties that Plaintiff reiterates below and ultimately ruled that FERC must process 10 to 15 dockets per month. *See* Minute Order of 1/28/2020. Consistent with the Court's Order, FERC has indeed processed 10 to 15 dockets per month. Plaintiff has not identified any changed circumstances or new arguments justifying the Court's reconsideration of its previous decision in this regard.
13. Plaintiff also asserts that FERC should provide copies of any comments received from UREs and NERC in response to Submitters' Rights Letters. *See infra* ¶ 27. For the reasons already articulated by FERC in the Parties' March 9, 2020, Joint Status Report, requiring FERC to provide such responses would be inappropriate and would unnecessarily delay FERC's efforts to review and process the dockets in this litigation. *See* Jt. Status Report

of 3/9/2020 (ECF No. 11) at 12 (explaining that such records are not responsive to the FOIA requests and would require substantial review and redactions because producing an unredacted version of a URE's comments would necessarily result in the disclosure of its identity and potentially sensitive information).

14. Lastly, Plaintiff "requests that the Court order Defendant to send NERC a "Submitter's Rights Letter" covering all remaining dockets. *See infra* ¶ 25. Plaintiff's request would drastically extend the timeline necessary for FERC to process the remaining dockets in this case. In this regard, in order to expedite its review, FERC first conducts an internal review and analysis of a NOP. If such analysis determines that disclosure of the associated URE is inappropriate, then Plaintiff is advised that the name will not be disclosed, via a denial letter. *See, e.g.*, 18 C.F.R. § 388.112(a) (stating, "[t]he Commission reserves the right to restrict access to previously filed information as well as Commission-generated information containing CEII"). Thus, in these cases, no Submitters' Rights Letter is issued by FERC to the underlying UREs. However, if FERC's internal review and analysis is inconclusive or suggests that disclosure may indeed be appropriate, a Submitters' Rights Letter is sent to NERC and the URE for comment. *See* 18 C.F.R. § 388.112(d). FERC has taken this approach specifically to expedite the review of NOPs and avoid unnecessary back and forth communications with UREs in those instances in which FERC has already determined that disclosure would risk the security of the bulk electric system. In sum, issuing Submitters' Rights letters with respect to all remaining dockets would delay the resolution of this matter.

Plaintiff's Status Report and Other Issues

15. Plaintiff wishes to express his concern to the Court about the ongoing delays and the unreasonable amount of time Defendant is taking to process his FOIA requests. Of the 253 dockets covered under Plaintiff's FOIA requests, Defendant has processed only 78 dockets thus far (9 disclosed and 69 denied). At the present rate of production, it will take Defendant 18 months to process the 175 remaining dockets. For each of these dockets, all that Plaintiff's FOIAs ask to be produced is the name of the regulatory violator(s). Because Plaintiff and Defendant have agreed that for each Docket, Defendant will produce page 1 of the already publicly available Notice of Penalty (NOP) with the name of the standard violator inserted, the number of pages to be processed under this FOIA are minimal. Plaintiff has been extremely reasonable and accommodating in agreeing to this reduction in scope.
16. As described below, Defendant has established a clear pattern of delay and obstruction. Defendant's practice is to send a "Submitters Rights Letter" to the North American Electric Reliability Corporation (NERC) – the electric grid's self-regulatory body – and to the company that was cited for violating the mandatory standard seeking their "comments on whether release of the information is required under the FOIA." Defendant is required by 18 CFR § 388.112(d) to send a copy of its "Notification of request and opportunity to comment" letter to the requestor (Plaintiff). However, Defendant refuses to send Plaintiff the responses unless Plaintiff files a separate FOIA request for them. Moreover, although Defendant has provided NERC with Plaintiff's full FOIA requests, Defendant has established a pattern of only requesting comments on a few dockets at a time in their notifications to NERC and the standard violator.

17. To date, Defendant has only sent four “Submitter’s Rights Letters” to NERC, covering only 26 dockets. Plaintiff’s first FOIA was filed on December 18, 2018 – almost a year and a half from the date of this JSR, and yet in almost a year and a half, Defendant has only sought comments on 26 of the 253 dockets. Below are the details on the four “Submitter’s Rights Letters”:

FOIA #	Date	Event
2019-0019	1/18/2019	Submitters Rights Letter sent to NERC (6 dockets)
2019-0030	2/8/2019	Submitters Rights Letter sent to NERC (10 dockets)
2019-0019	4/16/2019	Submitters Rights Letter sent to NERC (9 dockets)
2019-0030	3/2/2020	Submitters Rights Letter sent to NERC (1 docket)

18. This is an unacceptable rate of processing. Plaintiff believes that Defendant is engaging in delay tactics, supported and enabled by the very industry that wishes not to be held accountable for regulatory violations in order to avoid public, state regulatory and Congressional accountability to protect the electric grid.
19. Defendant’s continued delays in production on Plaintiff’s FOIA requests are likely in order to withhold information from the public until legislation can be passed which would eliminate the ability of the public to hold FERC and the industry accountable for their lack of action on cybersecurity and physical security – areas in which these FOIA requests seek to cast light. On May 12, 2020 Senators Lisa Murkowski (R-Alaska), and James Risch (R-Idaho) introduced Senate bill S.3688 entitled: “A bill to amend the Federal Power Act to authorize the Federal Energy Regulatory Commission and the Secretary of Energy to offer assistance in securing the assets of the owners and operators of energy infrastructure against threats and increasing the security of the electric grid, and for other purposes.” This bill, if passed into law, specifically exempts certain information from disclosure under the Freedom of Information Act. Thus, if passed into law, the very information sought by

Plaintiff in his FOIA requests could arguably fall under Exception 3 of the FOIA. This is a key issue in this litigation: Plaintiff is arguing that Defendant is improperly withholding the names of the regulatory violators of mandatory Critical Infrastructure Protection (CIP) standards that are the subject of Plaintiff's FOIA requests by inappropriately asserting Exemption 3 of the FOIA. The names of these regulatory violators are of paramount public interest. It is highly unlikely that a staffer on the Senate Energy Committee just came up with this bill on their own. It is more likely that the industry's lobbyists drafted or assisted in drafting this bill.

20. Plaintiff notes that industry lobbyists and trade organizations have devoted a great deal of resources to fighting Plaintiff's FOIAs and Plaintiff's other attempts to increase the transparency of CIP standards enforcement in several public FERC dockets. Such groups, with a clear connection to Congressional committees responsible for their industry, may be attempting to eviscerate the applicability of FOIA through proposed legislation. Codifying this cover-up would be an elegant solution to the "problems" Plaintiff is causing for the industry with his FOIA requests. (The "problems" being the public's right to know if the industry they depend on for electricity is following the FERC approved rules.)
21. Next, Defendant seems to only provide the names when NERC and the industry do not object. Although Defendant refuses to send Plaintiff the responses to the "Submitter's Rights Letters," Plaintiff notes that in a "Notice of Intent to Release" letter Defendant sent to NERC on May 19, 2020 Defendant stated that no comments were received in response to their March 2, 2020 "Submitter's Rights Letters." Plaintiff also notes that, according to Defendant's "Notice of Intent to Release Letter" dated June 13, 2019, NERC did not oppose the release of the name in docket number NP10-139, and so Defendant released

that name to Plaintiff. (As it turns out, at the time of disclosure, that particular entity was identified on NERC's website as a "Deregistered Entity.")

22. Finally, it is relevant that on May 1, 2020 the President of the United States declared a national emergency and issued Executive Order 13920: "Securing the United States Bulk-Power System." This Executive order is an indictment of the Defendant's and the electric industry's lack of action over the last decade to protect the electric grid from cyber threats. The Executive Order specifically targets supply chain cybersecurity – one of the CIP standards which are subject to Plaintiff's FOIA requests.
23. It is crucial to the security of the United States that this Court put an end to Defendant's delays and obstruction which perpetuate the cover-up of the identities of mandatory CIP standard violators. The cover-up has not made the United States safer. In fact, the opposite is true as evidenced by the necessity for the President to declare a national emergency and issue an Executive Order related to the cybersecurity of the electric grid. Plaintiff's FOIA requests specifically seek to disclose the names of cybersecurity standards violators since 2010. In Plaintiff's view, the lack of action and transparency by Defendant and the regulated industry has placed the nation in danger, and contributed to the necessity of this extraordinary Presidential declaration of a national emergency.
24. In conclusion, while Defendant may be in technical compliance with the Court's January 28th Order by denying 10 dockets a month (and occasionally releasing a name when the industry does not object), the impact of this 18 month delay in litigation endangers the public, and allows the industry to attempt to lobby Congress for a law to prevent the names of regulatory violators from ever being released.

25. Plaintiff requests that the Court order Defendant to send NERC a “Submitter’s Rights Letter” covering all remaining dockets. NERC has had almost a year and a half’s notice of Plaintiff’s FOIA requests already.
26. Plaintiff also requests that the Court order defendant to then promptly process the remaining dockets so that this case can proceed to litigation on the merits.
27. Plaintiff further requests that the Court order FERC to provided copies of all NERC and industry responses to its “submitter rights letters” relevant to Plaintiff’s FOIAs in this action.

Dated: June 8, 2020

Respectfully submitted,

By: /s/C. Peter Sorenson
C. PETER SORENSON
D.C. Bar No. 438089
Sorenson Law Office
PO Box 10836
Eugene, OR 97440
(541) 606-9173
petesorenson@gmail.com

Counsel for Plaintiff

MICHAEL R. SHERWIN
Acting United States Attorney

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

By: /s/ Paul A. Mussenden

PAUL A. MUSSENDEN
Assistant United States Attorney
555 Fourth Street, NW
Washington, DC 20530
(202) 252-7874

Attorneys for the United States of America