UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL MABEE,	)	
Plaintiff,	)	
v.	)	Civil Action No. 19-3448 (FYP)
FEDERAL ENERGY REGULATORY COMMISSION,	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff submits its Reply to Defendant's Memorandum in Opposition to Plaintiff's Cross-Motion for Summary Judgment ("Def.'s Opp'n"). [Document 48].

Defendant opposes Plaintiff's Cross-Motion on three major grounds:

1. Defendant argued that it properly applied FOIA Exemption 3; and

2. Defendant argued that it properly applied FOIA Exemption 7(F); and

3. Defendant further argued that each exemption must apply to *every* record withheld.

Defendant bears the burden of proof in this case. Plaintiff argued, and this Honorable Court can see, Defendant failed to meet its burden on either FOIA Exemption 3 or 7(F) for any redacted material.

Plaintiff further argued that Defendant offered no analysis to either FOIA Exemption that applied to any unnamed redacted entity associated with any specific Notice of Penalty

("NOP") in its Defendant's Motion for Summary Judgment ("Def.'s Mot. Summ. J."). [Document 41]. Defendant offered only conclusory statements mirroring the language of the FOIA Exemptions. *Id*. Defendant was given the chance to remedy its defect in Def.'s Opp'n. [Document 48]. Defendant chose not to remedy its defect in its 11 page (with footnotes) opposition. *Id*.

II. SUMMARY OF THE FACTS AND PROCEDURAL POSTURE

Defendant in this case is the Federal Energy Regulatory Commission ("FERC"). Plaintiff, Michael Mabee, ("Plaintiff"), duly requested Freedom of Information Act (FOIA) disclosure of records showing the names of regulatory violators. The requested records at issue are Entities that own or operate portions of the electric grid, which have been previously found to have violated FERC-approved North American Electric Reliability Corporation's ("NERC's") mandatory reliability standards, and for which those specific violations have already been long mitigated.

Plaintiff specifically made three written requests, seeking records showing the names of electric utility companies who have received an NOP for violations of mandatory reliability standards, known as Critical Infrastructure Protection ("CIP") standards.

In good faith, at Defendant's request, Plaintiff agreed to narrow the scope of its request, to the name of the regulatory violator, inserted with the docket number, onto the first page of the public version of the NOP. Declaration of Michael Mabee ("Mabee Decl.") ¶ 35, Ex. 106 [Document 43-2]. Defendant agreed to provide this. Declaration of Barry W. Kuehnle ¶ 11 ("Kuehnle Decl.") [Document 41-2]. Plaintiff pointed out that FERC approves NERC's enforcement actions by issuing "No Further Review" letters. FERC accepts, *inter alia*,

NERC's representations of completed mitigation of violations. *See* Mabee Decl. [Document 43-2]. In 2010, NERC began withholding from the public the names of the regulatory violators at issue in this case, and FERC then followed suit.

These withheld regulatory violator names are known by NERC and FERC as Unidentified Registered Entities ("UREs"). Mabee Decl. ¶ 11 [Document 43-2].

The timeframe of the violations, long since mitigated, committed by the UREs, range from three to twelve years old. The oldest violation was dated July 6, 2010; the most recent violation was dated July 31, 2019. Mabee Decl. ¶ 39 [Document 43-2].

III. ARGUMENT

This judicial review presents two issues for the Court:

1) Does the "FAST Act" addition to Section 215A to the Federal Power Act, 16 U.S.C. § 824*o*-1, allow FERC, via Exemption 3, to withhold the entity names associated with long since mitigated NOPs? and,

2) Did the Defendant illegally use Exemption 7(F) to redact the names of the regulatory violators associated with long since mitigated NOPs?

Plaintiff presented multiple declarations proving both that FERC has violated FOIA, and that this Honorable Court should compel Defendant to release the records that were requested. The Supreme Court has "repeatedly [] stressed [that] the fundamental principle of public access to Government documents" lies at the heart of FOIA. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 150 (1989). The purpose of this principle is so that the public knows "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

A. <u>FERC IMPROPERLY APPLIED FOIA EXEMPTION 3.</u>

The "FAST Act" addition to Section 215A to the Federal Power Act, 16 U.S.C. § 824*o*-1, does not allow FERC, via Exemption 3 of FOIA, to withhold the entity names associated with long since mitigated NOPs.

The Court of Appeals for the District of Columbia Circuit has held that records may only be withheld under the authority of another statute, pursuant to Exemption 3, "if -- and only if -- that statute meets the requirements of Exemption 3." *Reporters Comm. for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). Those requirements include "the threshold requirement that [the statute] specifically exempt matters from disclosure." *Id.*

1. FAST Act Section 215A does not apply to the requested records in this case.

Defendant argued that all the withheld URE names are critical energy/electrical infrastructure information ("CEII"), and thus exempt from disclosure, pursuant to FOIA Exemption 3. However, Defendant provided no evidence that any names have ever been designated CEII. Def.'s Opp'n [Document 48].

FOIA Exemption 3 only allows withholding if the statute either: "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A).

Defendant argued that "Section 215A unequivocally requires that Critical Information is exempt from mandatory disclosure without any discretion." Def.'s Opp'n at 4 (internal quotation marks omitted) [Document 48]. Defendant failed to prove how the name of a

regulatory violator, inserted with the docket number, onto the first page of the public version of the NOP, is Critical Information. Def.'s Opp'n [Document 48].

Defendant asserted that it had no discretion in withholding critical energy/electrical infrastructure information. *See* Def.'s Opp'n [Document 48]. However, Defendant, despite having the burden, never proved that the name of a regulatory violator, whose violation has long since been mitigated, inserted with the docket number, onto the first page of the public version of the NOP, is critical energy/electrical infrastructure information.

Defendant cited *Union of Concerned Scientists v. Dep't of Energy*, 998 F.3d 926, 927 (D.C. Cir. 2021). Def.'s Opp'n at 4 [Document 48]. The redacted material in *Concerned Scientists* was highly technical information. The illegally withheld information in this case is the name of a regulatory violator, whose violation has long since been mitigated, inserted with the docket number, onto the first page of the public version of the NOP, which is not highly technical information.

Defendant cited Section 215A of the FAST Act. Def.'s Opp'n [Document 48]. Section 215A of the FAST Act defines Critical Information as:

> [I]nformation related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency other than classified national security information, that is designated as critical electric infrastructure information by the Commission or the Secretary of the Department of Energy pursuant to subsection (d). Such term includes information that qualifies as critical energy infrastructure information under the Commission's regulations.

16 U.S.C. § 824o-1(a)(3).

Defendant failed to show that the name of a regulatory violator, whose violations have long since been mitigated, inserted with the docket number, onto the first page of the public

version of the NOP, is "designated as critical electric infrastructure information by the Commission or the Secretary of the Department of Energy pursuant to subsection (d)." *Id*.

Defendant also failed to show that the name of a regulatory violator, whose violations have long since been mitigated, inserted with the docket number, onto the first page of the public version of the NOP, "qualifies as critical energy infrastructure information under the Commission's regulations." *Id*.

"Before a court inquires into whether any of the conditions are met, however, it must first determine whether the statute is a withholding statute at all by deciding whether it satisfies the threshold requirement that it specifically exempt matters from disclosure." *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice,* 816 F.2d 730, 734 (D.C. Cir. 1987) (internal quotation marks omitted), rev'd on other grounds, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). *See also Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813-14 (D.C. Cir. 2008).

Exemption 3 only allows an agency to withhold records that are specifically exempted from disclosure by statute under conditions dictated by FOIA. An Exemption 3 statute must either (i) require that the relevant "matters be withheld from the public in such a manner as to leave no discretion on the issue;" or (ii) establish "particular criteria for withholding or refer[ ] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A). The Defendant has proved neither in this case.

"When reviewing Exemption 3 claims, this Court seeks to balance the inherent tension between the public's interest in government goings–on with the protection of an agency's legitimate, and statutorily recognized need for secrecy in certain matters." *Labow v. U.S. Dep't of Just.*, 278 F. Supp. 3d 431, 438 (D.D.C. 2017).

"When Congress narrowed the scope of Exemption 3 in 1976, it did so to eliminate from the Exemption's scope 'statutory language granting vast discretion over vast materials.'" *Labow*, 278 F. Supp. 3d at 441 (quoting *Ass'n of Retired R.R. Workers v. U.S. R.R. Ret. Bd.*, 830 F.2d 331, 333 (D.C. Cir. 1987)).

According to FERC's own orders and regulations, the names of UREs are not CEII and therefore are not exempt under the FAST Act. *See* Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Pl.'s Mem.") at 16 [Document 43-9]; Mabee Decl. [Document 43-2].

Thus, unless the regulations specifically state that names of violators are critical energy/electrical infrastructure information, then there is no indication that the statute specifically exempts these matters from disclosure.

As Defendant provided no evidence that the name of a regulatory violator, whose violations have long since been mitigated, when inserted with the docket number onto the first page of the public version of the NOP, has been designated as CEII, Defendant failed to meet its burden.

2. FERC improperly designated Entity Identities as CEII.

Defendant erroneously relied on 18 C.F.R. § 388.113(c)(2) to justify its withholding. Subsection (c)(2) of 18 C.F.R. § 388.113 defines CEII as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that (i) relates details about the production, generation, transportation, transmission, or distribution of energy;

(ii) could be useful to a person in planning an attack on critical infrastructure . . .” 18 C.F.R. § 388.113 (c)(2).

CEII factors are stated at the outset, “specific engineering, vulnerability or detailed design information.” *Id*. A publicly available entity name is not one of those criteria.

Plaintiff is not seeking any specific design or detailed plans secreted by FERC, NERC, or the UREs. Plaintiff sought only the name of a regulatory violator, whose violation has long since been mitigated, inserted with the docket number, onto the first page of the public version of the NOP. This is not critical energy/electrical infrastructure information.

The name of a regulatory violator, whose violation has long since been mitigated, inserted with the docket number, onto the first page of the public version of the NOP could not be “useful to a person in planning an attack on critical infrastructure.” 18 C.F.R. § 388.113 (c)(2).

Further, FERC does not point to any names of any companies that have been designated as CEII by FERC or by the Secretary of Energy. 18 C.F.R. § 388.113 (1). The remainder of the CEII definition does not apply to the facts pertinent to Plaintiff’s requests.

Defendant argued that the name of every withheld, mitigated regulatory violator in every NOP is CEII. This argument directly contradicts FERC’s own regulation, which states that the general location of the critical infrastructure, or simply the name of the facility, is not CEII. 81 Fed. Reg. 245 ¶ 24 (quoting 18 C.F. R. § 388.113 (c)(1)(iv)).

Plaintiff’s request for records is not seeking even the name of a facility (which is generally not CEII) but instead seeks the name of the URE that owns the facility.

Paragraph 24 of 81 Fed. Reg. 245 states that "[u]nder certain circumstances, information regarding the location of infrastructure or its name that is not already publicly known *could be* CEII. Therefore, we [FERC] clarify that, while as a general matter the location or name of infrastructure is not CEII, a submitter [i.e., URE, utility company] of information to the Commission may ask that non-public information about the location, or the name, of critical infrastructure be treated as CEII. The submitter would have to provide a justification for the request and explain why the information is not already publicly known." (emphasis added). Defendant has provided no evidence that any submitter provided such "justification."

Defendant relied on the seven-page Declaration of Barry W. Kuehnle to prove its case. Kuehnle Decl. [Document 41-2].

Kuehnle stated that "the disclosure of an Entities' identity, when combined with public information about the Entities' vulnerabilities set out in the publicly available Notices of Penalty, would be useful to those seeking to target the nation's electric grid." Kuehnle Decl. ¶¶ 12, 17–18 [Document 41-2]. This statement is conclusory.

"In FOIA cases, [s]ummary judgment may be granted on the basis of agency affidavits' when those affidavits contain reasonable specificity of detail rather than merely conclusory statements, and when they are not called into question by contradictory evidence in the record or by evidence of agency bad faith." *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013) (internal quotation marks emitted).

Plaintiff offered the Declaration of cybersecurity expert Joseph Weiss ("Weiss Decl.") [Document 43-7]. Mr. Weiss pointed out that "[t]he information which NERC

asserts is CEII, such as the name of the CIP violator in docket No. NP-18-7-000 [,] . . . often is not actually CEII. Assuming the utility has mitigated their CIP violations, identifying the utility by name does not constitute CEII nor can it be reasonably expected to endanger any individual or property." Weiss Decl. ¶ 14 [Document 43-7].

Substantial evidence shows that no danger exists. NERC's own annual report cites a 98% mitigation rate in February, 2022. Mabee Decl. ¶ 31 [Document 43-2].

Plaintiff offered the Declaration of Thomas Waller Jr. ("Waller Decl.") [Document 43-6]. Mr. Waller pointed out that, even though "FERC might claim that the name of the company "could be useful to a person planning an attack on critical infrastructure" [] this argument is null and void because the offending utilities have already [long since] mitigated the vulnerabilities which caused the enforcement actions in the first place." Waller Decl. ¶ 10 [Document 43-6].

Mr. Waller "further conclude[d] that releasing the names of these regulatory violators will not be a breach of CEII, nor will it pose any threat to any person." Waller Decl. ¶ 30 [Document 43-6].

Plaintiff argued, and urges this Honorable Court to agree, that FERC cannot form an artificial nexus between violator names, FERC's own disclosure of some of the details of the violations, and CEII to justify its illegal withholding. Such an analysis is not based on the statutory CEII factors. FERC has not provided any evidence that the names of UREs are actually CEII. *See* Pl.'s Mem. [Document 43-9].

In this case, Defendant relied on administrative factors to illegally withhold Plaintiff's requested records. Defendant claimed to have used these administrative factors to designate the names of regulatory violators as CEII, and automatically concluded, without evidence, that

these factors designate the names Registered Entities as critical energy/electrical infrastructure information.

Additional factors considered by FERC included the following:

> 1. the nature of the Critical Infrastructure Protection Reliability Standard violation, including whether there is a Technical Feasibility Exception involved that does not allow the Entity to fully meet the standards;
> 2. whether vendor-related information is contained in the Notices of Penalty;
> 3. whether mitigation is complete;
> 4. the extent to which the disclosure of the identity of the Entity and other information would be useful to someone seeking to cause harm;
> 5. whether a successful audit has occurred since the violation(s);
> 6. whether the violation(s) was administrative or technical in nature; and
> 7. the length of time that has elapsed since the filing of the public Notice of Penalty.

Def.'s Opp'n at 8 citing Kuehnle Decl. ¶¶ 13-14, Ex. A. [Document 48].

However, FERC's seven factor analysis, designed for this request, did not follow the CEII definition. The names of violators *are not* specific engineering, vulnerability, or detailed design information. The names are not useful to bad actors, as all of these entities are presumably public companies. The names do not give strategic information beyond the location of infrastructure. In fact, if the location were disclosed, which this statute allows, the name of the entity would be discernible. As some entities operate across multiple geographic entities including States, disclosing the location would provide more information than the mere disclosure of the name of the violator. Plaintiff is seeking less than what CEII would allow, even if the other factors were applicable, which is not the case.

FERC has explained that "section 388.113 pertaining to CEII documents is crafted to strike a balance between preventing the risk of harm if sensitive materials are disclosed to bad actors and allowing parties to fully participate in Commission

proceedings.” *NEXUS Gas Transmission, LLC Texas E. Transmission, LP DTE Gas Co. Vector Pipeline L.P.*, 164 FERC ¶ 61,054, at 4 (2018).

Further, FERC’s own regulations require the disclosure of the name of the violator at the time an NOP is filed with the Commission. In 18 CFR § 39.7(b)(4), FERC states that “[e]ach violation or alleged violation shall be treated as nonpublic until the matter is filed with the Commission as a notice of penalty or resolved by an admission that the user, owner or operator of the Bulk-Power System violated a Reliability Standard or by a settlement or other negotiated disposition."

Moreover, in accordance with 18 CFR § 39.7(d)(1), the notice of penalty must include “[t]he name of the entity on whom the penalty is imposed.” Therefore, when NERC filed the 253 NOPs subject to this judicial review, the names of the entities should have been disclosed publicly. The Federal regulations are very clear that the name of the entity on whom the NERC penalty is imposed must be disclosed.

Therefore, by FERC regulations the requested information should have been disclosed and Plaintiff’s Motion for Summary Judgment should be granted.

B. <u>FERC IMPROPERLY APPLIED FOIA EXEMPTION 7(F).</u>

Defendant cannot be allowed to illegally shield records from the public, lest other government agencies soon follow suit, and defeat the government accountability FOIA was meant to help foster.

Defendant, to justify its withholding, cited 18 C.F.R. § 388.113(c)(2)(ii): "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that could be useful to a person in planning an attack on critical infrastructure.” *See* Def.'s Mot. Summ. J. [Document 41]. Defendant stated that "the release and use of these

documents could reasonably be expected to endanger the life or physical safety of any individual." *Id.* at 9, citing Kuehnle Decl., ¶ 17.

However, the URE names, which are public, have no nexus to any potential danger once the violation has been mitigated. Either the vulnerabilities were mitigated and the regulators (NERC, overseen by FERC) are confirming [the dangers have been mitigated], or the utilities have not taken necessary protective measures to address the relevant threat or issue that they stated they had. If the latter is the case, NERC and FERC grossly misrepresent the status of the mitigation of these violations to the public, Congress, ratepayers and shareholders.

Given the definitions of mitigation plan and mitigating activities, Plaintiff has verified that, according to NERC's own publicly available documents, the entities which were involved in these NOPs have completed their mitigation plans and activities, and this was verified by the regulator, in 252 of 253 dockets. In the one docket, it is unknown whether mitigation is complete because NERC stopped disclosing the mitigation status to the public. Mabee Decl. ¶ 42 [Document 43-2]. NERC's own annual report cites a 98% mitigation rate in February, 2022. Mabee Decl. ¶ 31 [Document 43-2].

Plaintiff's narrowed request, made in good faith, agreed to by the Defendant, was only for the cover sheet of the public version of the NOPs, nearly all of which have been mitigated according to FERC, and each of which is a minimum of three years old, with the name of the URE and docket number at the top of each cover sheet. *See* Mabee Decl., ¶ 31 [Document 43-2]; Kuehnle Decl. [Document 41-2]; Waller Decl. [Document 43-6].

Defendant's argument relied on the assumption that the fact that a public company has a penalty is enough to assist a cyber-terrorist:

> [T]he knowledge about an Entities' cyber security vulnerability, even if mitigated, creates a very real target for those intent on hacking into the system. Were the

> computers and networks comprising the industrial control system of an Entity hacked, it could leave the system inoperable. [Kuehnle Decl. ¶ 17]. Such a cyberattack of the electric grid system and the distribution of electricity undeniably could reasonably be expected to endanger the life and physical safety of those people whose power has been cut off.

Def.'s Opp'n at 9 [Document 48].

Plaintiff offered the Declaration of Tyson Slocum, Director of Public Citizen's Energy Program. Declaration of Tyson Slocum ("Slocum Decl.") [Document 43-4]. Mr. Slocum stated that "[r]eleasing just the name of a utility subject to a notice of penalty cannot be expected to result in the endangerment of the life or physical safety of any individual. Releasing just the name of the utility will not compromise the utility's operations, or recklessly expose any sensitive information. In fact, publicly identifying the names of utilities subject to NOP violations can help improve and strengthen cybersecurity standards –thereby helping consumers and keeping our electricity system more secure." Slocum Decl. ¶ 6 [Document 43-4].

Center for Security Policy's Infrastructure security expert, Thomas Waller Jr., concludes that Defendant's use of Exemption 7(F) is inappropriate here. Waller Decl. ¶ 12 [Document 43-6]. Mr. Waller drew upon his experience as a Lieutenant Colonel in the United States Marine Corps and as a commander of an elite unit to provide the Court with a real-world example of the proper use of Exemption 7(F) to protect a sailor under his charge. *Id*.

Defendant cited two cases to show agency deference. The inundation map and ongoing emergency plan cases cited by FERC, *Living Rivers, Inc. v. U.S. Bureau of Reclamation, 272 F. Supp. 2d 1313, 1321-22 (D. Utah 2003),* and *Public Employees for Environmental Responsibility (PEER) v. United States Section, International Boundary & Water Commission,*

740 F.3d 195 (D.C. Cir. 2014), are fundamentally factually different from this case. Def.'s Mot. Summ. J. at 21 [Document 41].

Defendant's reliance on *PEER* does not justify withholding records under Exemption 7(F) in this case. The facts in this case are different from the facts that were properly reviewed in *PEER*. Plaintiff is drawing a factual distinctual analysis, and not a change in the interpretation of *PEER*.

The plaintiff in *PEER* was seeking the disclosure of records related to the emergency action plans and inundation maps of two dams located on the border between the United States and Mexico. *PEER*, 740 F.3d at 199. The United States Court of Appeals for the District of Columbia Circuit held that the ongoing emergency action plans (which also included inundation maps) were compiled to enforce statutory duties to establish programs and policies to enhance ongoing dam safety for protection of human life and property, and thus met the Exemption 7 threshold. *Id.* at 206. Those facts are different from this case.

Plaintiff, in this case, is not asking for maps, schematics or emergency action plans of any kind. Plaintiff is only requesting the names of electric power companies (UREs) which were issued NOPs, from three to thirteen years ago. The violations for which these NOPs were issued have already been mitigated according to FERC. The rate-payers, shareholders and taxpayers involved with these UREs are among those for whom FOIA was enacted.

When reviewed de novo, this Court should conclude that disclosing the names of UREs does not violate Exemption 7(F). These companies (1) have violated NERC Reliability Standards, (2) have been issued NOPs by NERC in its quasi-governmental capacity under the Federal Power Act (all mitigated), and (3) have been informed that there will be no further

action. This is not the same as PEER's on-going emergency action plans (which include the inundation maps) produced to model flooding after potential dam breaches.

Defendant argued that "Such information [similar to what the Plaintiff is asking for], gathered over time, could render entities vulnerable on the basis of future cybersecurity shortfalls connected with these same transmission control rooms." Def.'s Mot. Summ. J. at 22 [Document 41].

It is bad policy to allow an Exemption 7(F) here. "No other Federal civil enforcement agency has tried to hide behind Exemption 7(F) in this manner. Mabee Decl. ¶¶ 68, 69 [Document 43-2]; Waller Decl. ¶ 30 [Document 43-6].

Other Federal agencies regularly name entities violating rules, including the following: the Nuclear Regulatory Commission (NRC), Mabee Decl. ¶ 31 [Document 43-2], Waller Decl. ¶¶ 14-16 [Document 43-6]; the Department of Transportation (DOT), Waller Decl. ¶¶ 17-24 [Document 43-6]; and the Federal Communications Commission (FCC), Waller Decl. ¶¶ 25-29 [Document 43-6]. If Defendant is allowed to shield entities violating rules, and precedent is established allowing Defendant to shield entities violating rules, then other agencies could follow suit.

Defendant's attempt to make this double-standard argument to prevent transparency surrounding regulatory violations is the type of government secrecy FOIA was enacted to prevent. Defendant would shroud for time immemorial the requested records. This government behavior goes against the spirit and purpose of FOIA.

The Supreme Court has "repeatedly [] stressed [that] the fundamental principle of public access to Government documents" lies at the heart of FOIA. *John Doe Agency*, 493 U.S. at 150. The purpose of this principle is so that the public knows "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

Exemption 7(F) is not appropriate in this case, as the violations have been long since remediated or concluded. As Defendant failed to meet its burden, this Honorable Court should grant Plaintiff's Motion for Summary and Judgment and deny Defendant's Motion for Summary Judgment.

C. <u>FERC FAILED TO MEET ITS BURDEN OF PROOF.</u>

Defendant argued that the Kuehnle Declaration "affords the Court fully adequate grounds to determine the appropriateness of the Critical Information designation and the law enforcement exemption." Def.'s Opp'n at 10 [Document 48]. Defendant cited *Tax Analysts v. IRS*, 414 F. Supp. 2d 1, 4 (D.D.C. 2006) to show that the declaration is enough to meet its burden of proof through "reasonably detailed affidavits." *Id*.

Defendant's Kuehnle Declaration is full of conclusory language that just mirrors the language of the inapplicable FOIA Exemptions. "In FOIA cases, '[s]ummary judgment may be granted on the basis of agency affidavits' when those affidavits 'contain reasonable specificity of detail rather than merely conclusory statements,' and when 'they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.'" *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 215 (D.C. Cir. 2013).

Plaintiff offered direct contradictory evidence, in the record, through Declarations submitted from experts. *See* Declaration of Michael Mabee [Document 43-2]; Declaration of

George R. Cotter [Document 43-3]; Declaration of Tyson Slocum [Document 43-4]; Declaration of Christopher R. Vickery [Document 43-5]; Declaration of Thomas J. Waller Jr. [Document 43-6]; Declaration of Joseph M. Weiss [Document 43-7].

"[FOIA] should be administered with a clear presumption: In the face of doubt, openness prevails." *Jud. Watch, Inc. v. U.S. Dep't of State*, 344 F. Supp. 3d 77, 78 (D.D.C. 2018), citing Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

A core purpose of FOIA, as articulated by the Supreme Court in dealing with a FOIA privacy exemption, is "whether disclosure of a private document is 'warranted' within the meaning of the Exemption turns upon the nature of the requested document and its relationship to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties, rather than upon the particular purpose for which the document is requested or the identity of the requesting party." *U.S. Dep't of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 750 (1989).

"In a judicial review of a request, the burden of persuasion is on the government agency, and doubts are to be resolved in favor of disclosure." 5 U.S.C. § 552. FERC has the burden of proving that the release of a record "could reasonably be expected to endanger the life or physical safety of an individual." 5 U.S.C. § 552(b)(7)(F). As mitigation is critical to the conclusion of the Court in this case, FERC has clearly not met its burden to justify nondisclosure, as any violation that has been mitigated for a minimum of three years would not constitute a danger, absent some evidence to the contrary. FERC did not provide any evidence to the contrary, rendering their invocation of Exemption 7(F) invalid under the facts of this case.

Further, FERC does not explain the alleged danger to the life or physical safety of any individual from specific UREs. These are public utility companies whose names are already known to the public. Additionally, FERC does not cite the statutory language of 5 U.S.C. § 552(b)(7) in its discussion of how it evaluated Mr. Mabee's requests. Kuehnle Decl. ¶ 14 [Document 41-2]. Thus, Defendant failed to meet its burden.

IV. CONCLUSION

The name of a regulatory violator, whose violation has long since been mitigated, inserted with the docket number onto the first page of the public version of the NOP is not CEII. Plaintiff has demonstrated to the Court that Defendant has still offered no proof to support their Exemption 3 and 7(F) claims to illegally withhold all records. Def.'s Opp'n [Document 48].

A publicly available entity name does not meet the criteria of "specific engineering, vulnerability, or detailed design information" or that "(i) relates details about the production, generation, transportation, transmission, or distribution of energy; [and] (ii) could be useful to a person in planning an attack on critical infrastructure . . . ." 18 C.F.R. § 388.113 (c)(2).

Plaintiff is not seeking any specific design or detailed plans secreted by FERC, NERC, or UREs. FERC does not point to any names of any companies that have been designated as CEII by FERC or by the Secretary of Energy.

Plaintiff has proven that the FAST Act, as applied to the facts of this case, does not allow Defendant to use Exemption 3.

"[C]ritical electric infrastructure" is defined as "a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such

matters." [16 U.S.C.] § 824o-1(a)(2). The name of a regulatory violator, whose violation has long since been mitigated, inserted with the docket number onto the first page of the public version of the NOP does not meet this definition.

Plaintiff has shown through significant and unchallenged Declarations that the facts of this case do not allow use of Exemption 7(F).

Defendant made no attempt to rebut the facts contained in the Declaration of Michael Mabee. [Document 43-2]. Defendant made no attempt to rebut the facts contained in the Declaration of George R. Cotter. [Document 43-3]. Defendant made no attempt to rebut the facts contained in the Declaration of Tyson Slocum. [Document 43-4]. Defendant made no attempt to rebut the facts contained in the Declaration of Christopher R. Vickery. [Document 43-5]. Defendant made no attempt to rebut the facts contained in the declaration of Thomas J. Waller Jr. [Document 43-6]. Defendant made no attempt to rebut the facts contained in the declaration of Joseph M. Weiss. [Document 43-7]. The Court, when reviewing the entire record *de novo*, should rule that Defendant is blocking public access to the records – with no legal justification.

Def.'s Opp'n offered nothing new and simply rehashed their vague, speculative, unsupported and conclusory statements that releasing the names of regulatory violators on mitigated violations somehow would endanger the electric grid. [Document 48]. Defendant offered no evidence that there has ever been a designation of the name of an electric power company as CEII, nor does the name of an electric power company meet the definition of CEII by regulation. FERC's eight factor analysis, designed for this request, did not follow the CEII definition.

Defendant made no attempt to rebut the nine specific examples provided by Plaintiff where Defendant either misapplied the FOIA exemptions, or denied releasing information to Plaintiff (and thus to the public) that it had previously released to other parties. [Document 43-9]. The Court should interpret Defendant's silence as an admission of the facts as alleged by Plaintiff and their expert declarants and grant Plaintiff's motion for summary judgment. [Document 43]; [Document 43-1].

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Respectfully Submitted,

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