

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Complaint of Michael Mabee Related to) Docket No. EL20-46-000
Critical Infrastructure Reliability Standards)

MOTION TO INTERVENE AND COMMENTS OF TRADE ASSOCIATIONS

Pursuant to Rules 211, 212 and 214 of the Federal Energy Regulatory Commission’s (“Commission’s”) Rules of Practice and Procedure,¹ the American Public Power Association (“APPA”), Edison Electric Institute (“EEI”), Electric Power Supply Association (“EPSA”), Large Public Power Council (“LPPC”), and National Rural Electric Cooperative Association (“NRECA”), (collectively, the “Trade Associations”) move to intervene and submit comments in connection with the complaint (“Complaint”), filed by Michael Mabee (“Complainant”), alleging that (1) Critical Infrastructure Protection Reliability Standard CIP-013-1 (Cyber Security Supply Chain Risk Management) does not comport with Executive Order 13920: Securing the United States Bulk-Power System (“Executive Order”); and (2) the Commission has not “ensured that mandatory CIP standards fully address leading federal guidance for critical infrastructure cybersecurity - specifically, the National Institute of Standards and Technology (“NIST”) Cybersecurity Framework.” As discussed below, the Commission should dismiss the Complaint because the allegations are unsupported and fail to clearly, and with any specificity, articulate any action or inaction that is alleged to violate applicable statutory or regulatory requirements.²

¹ 18 C.F.R. §§ 385.211, 212, 214 (2019).

² The Commission’s Rules of Practice and Procedure require a complainant to meet certain minimal requirements. Specifically, Rule 203 requires that all pleadings contain the “relevant facts,” and the “position taken by the participant...and the basis in fact and law for such position.” 18 C.F.R. § 385.203(a). Rule 206 requires complainants to, among other things, clearly identify the action or inaction which is alleged to violate the applicable statutory standards or regulatory requirements; and explain how the action or inaction violates applicable statutory

I. MOTION TO INTERVENE

Pursuant to Rules 212 and 214, Trade Associations move to intervene in the proceeding.³ Commission Rule 214 requires that a movant show that it represents an interest that may be directly affected by the outcome of the proceeding.

APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally owned electric utilities in the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hours sales to ultimate customers and serve over 49 million people, doing business in every state except Hawaii. Over 250 public power utilities are registered entities subject to compliance with mandatory Reliability Standards.

EI is the association that represents all investor-owned electric companies in the United States providing electricity for about 220 million Americans. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EI's members are committed to providing affordable and reliable electricity to customers now and in the future.⁴

EPSC is the national trade association representing competitive power suppliers in the United States. EPSC members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSC seeks to bring the benefits of competition to all power customers. This pleading represents the position

standards or regulatory requirements. 18 C.F.R. § 385.206(b). *See also, Complaint of Michael Mabee Related to Critical Infrastructure Reliability Standard, Order Denying Complaint*, 171 FERC ¶ 61,205 at PP 11 and 16 (2020)(denying complaint because the assertions were unsupported.).

³ 18 C.F.R. § 385.212 and 214 (2019).

⁴ 18 C.F.R. § 214(b)(2)(ii) requires that a movant represent an interest that may be directly affected by the outcome of the proceeding. As noted above, EI meets the Commission's rules for intervening in a proceeding because any change to the Reliability Standards directly affects EI members. Complainant's motion to preemptively exclude EI from participating or requiring a certification to participate has no legal foundation and is a procedural nullity.

of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

LPPC is the association of the 27 largest state-owned and municipal utilities in the nation. LPPC's members are located throughout the nation, both within and outside the boundaries of regional transmission organizations and independent system operators. The members comprise the larger, asset-owning utilities in the public power community, owning approximately 90 percent of the transmission assets owned by non-federal public power entities. LPPC members are also members of APPA.

NRECA is the national trade association representing nearly 900 local electric cooperatives. America's electric cooperatives belong to the communities that they serve and comprise a unique sector of the electric industry. From growing suburbs to remote farming communities, electric cooperatives power 1 in 8 Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation's landscape. NRECA's member cooperatives include 62 generation and transmission ("G&T") cooperatives and 831 distribution cooperatives. The G&Ts generate and transmit power to distribution cooperatives that provide it to the end of line co-op consumer-members. Collectively, cooperative G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives in the nation. The remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

Trade Associations' diverse memberships include electric utilities that are registered entities subject to mandatory Reliability Standards developed by NERC and enforced by NERC and the Commission, including Reliability Standard CIP-013-1. Accordingly, Trade

Associations' members will be directly affected by any Commission decision in this proceeding. Trade Associations also provide additional information and a perspective on broader grid security issues that cannot be adequately represented by any other party. Therefore, Trade Associations request that the Commission grant this Motion to Intervene and allow them to become parties to the above-captioned proceeding.

II. NOTICES AND COMMUNICATIONS

All communications and correspondence with respect to this Motion to Intervene should be served upon the following individuals who should be included on the official service list compiled by the Secretary of the Commission in this proceeding:⁵

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⁵ The Trade Associations request waiver of 18 C.F.R. § 385.203(b)(3) to permit more than two persons to be added to the service list.

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III. COMMENTS

1. The Executive Order and Reliability Standard CIP-013-1.

The President issued the Executive Order on May 1, 2020, which directed the Department of Energy to make, among other things, certain determinations and to develop regulations to protect the bulk-power system from potential supply chain threats. The Secretary of Energy has 150 days from the date of the Executive Order to complete these directives. The Executive Order prohibits the installation or acquisition of any bulk-power system equipment for which the Secretary of Energy, in consultation with other agencies, has identified as having been “designed, developed, manufactured, or supplied” by persons owned or controlled by a foreign adversary and where the transaction poses a risk to the bulk-power system.⁶ The Executive Order gives the Secretary of Energy the authority to prohibit certain transactions, to develop procedures as preconditions for approval of such transactions for the bulk-power system, and to pre-qualify certain equipment, vendors, and manufacturers. The Executive Order explains that rules and regulations developed by the Secretary of Energy may define particular countries and persons as foreign adversaries and may identify specific equipment and countries that need scrutiny. The Secretary of Energy also is charged with developing procedures to license certain transactions that the Executive Order otherwise would prohibit and other processes for mitigating

⁶ Executive Order at 1.

vulnerabilities posed by the designated equipment and manufacturers. The Secretary of Energy has yet to promulgate any rules or regulations or make any determinations regarding any of the powers delegated to it in the Executive Order.

Trade Associations support the national security goals of the Executive Order, which will capitalize on the foundational efforts of Reliability Standard CIP-013-1.⁷ Understanding that sophisticated adversaries may attempt to exploit supply chain vulnerabilities to attack the electric grid, Trade Associations look forward to working with the Department of Energy on the Executive Order while our members continue with their ongoing, significant efforts to protect the electric grid. Trade Associations member companies play a crucial role in strengthening bulk-power system resilience, expect to use new tools that the Executive Order provides in ways that reflect the industry's unique expertise and responsibilities, while maintaining the safe and reliable delivery of energy to the customers and communities they serve.

The focus of Reliability Standard CIP-013-1 is on the steps that registered entities must take to address cybersecurity risks from vendor products and services during cyber system planning and procurement. The purpose of the Reliability Standard is to help ensure that registered entities establish processes that integrate a cybersecurity risk management framework into the system development lifecycle. The standard addresses Commission objectives outlined in Order No. 829 regarding the risk associated with information system planning, as well as vendor risk management and procurement controls.

⁷ The Commission approved Reliability Standard CIP-013-1, which will be enforceable starting on October 1, 2020.

2. The Complaint Fails to Articulate Any Connection between the Executive Order and Reliability Standard CIP-013-1.

Complainant claims that Reliability Standard CIP-013-1 “does not comport with” the Executive Order claiming it invalidates CIP-013-1 regarding treatment of low impact cyber systems.⁸ The Complaint makes references to the Executive Order and Reliability Standard CIP-013-1 and offers conclusory statements that there is a disconnect between the two. These unsubstantiated statements fail to satisfy the Commission’s complaint requirements and are speculative as to what effect, if any, the Executive Order has on Reliability Standard CIP-013-1 before promulgation of any Department of Energy rules or regulations required by the Executive Order. The Department of Energy has yet to develop regulations implementing the Executive Order that will identify assets of particular concern, and the nexus to low impact assets may be quite limited, given the Executive Order's focus on assets which would pose an undue risk of catastrophic impact or an unacceptable risk to national security if compromised.

The Complaint’s claim (at 3), that registered entities have “discretion” to decide what is a low impact cyber system, is simply untrue. They do not have the discretion to determine the impact rating. Reliability Standard CIP-002-5.1a provides specific “Impact Rating Criteria” that each registered entity must include in its methodology for categorizing and classifying assets. In Order No. 850, the Commission was mindful of the potential risks of low impact cyber systems and deemed it appropriate for NERC to study cybersecurity supply chain risks presented by low impact cyber systems.⁹ Subsequently, NERC completed a study on the nature and complexity of cyber security supply chain risks, including those associated with low impact cyber systems. In

⁸ Commission Rules 206(a) and (b) require a complaint to “[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;” and “[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements.” 18 C.F.R. § 385.206(a) and (b)(2019).

⁹ *Supply Chain Risk Management Reliability Standards*, Order No. 850, 165 FERC ¶ 61,020 (2018).

addition, at its February 2020 meeting, the NERC board approved a resolution directing NERC staff to address low impact cyber systems and to evaluate the effectiveness and sufficiency of the supply chain standards and related actions and regularly report to the Board its findings and identification of further actions. Clearly, NERC continues to monitor low impact systems. Moreover, Trade Associations members continue to be vigilant in protecting their supply chains so that they can continue to provide safe and reliable energy to the customers and communities they serve.

3. The Complaint Does Not Identify Any Basis for Requiring the Commission to Address the NIST Framework in the CIP Standards.

The Complaint is unclear, but it appears that Complainant asks the Commission to direct NERC to rewrite the CIP Reliability Standards to address the NIST framework. Complainant strings together references to various statements from Congressional hearings, blogs and references a 2019 Government Accountability Office report (“GAO Report”) recommending that the Commission take certain actions on the CIP standards, none of which explain how any action or inaction by the Commission violates any statute, rule or regulation.¹⁰ Nevertheless, in the response to the GAO Report, found in its Appendix IV (*see* Complainant’s Exhibit 2 at 74), the Chairman of the Commission found the GAO recommendations constructive and directed Commission staff to develop appropriate next steps to implement them. This underscores that Complainant’s assertions regarding the Commission’s actions are unfounded.

NERC also responded to the GAO recommendations, found in Appendix V (*see* Complainant’s Exhibit 2 at 74-76). NERC provided technical input, notably on the differences between the NIST framework and the mandatory Reliability Standards. NERC explained the difference between the voluntary nature of the NIST framework, which allows entities to

¹⁰ *See* n.2, *supra*, and 18 C.F.R. § 385.206(b).

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On behalf of the
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June 11, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 11th day of June 2020.

/s/

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