121 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 388

(Docket No. RM06-23-000; Order No. 702)

Critical Energy Infrastructure Information

(Issued October 30, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this final rule amending its regulations for gaining access to critical energy infrastructure information (CEII). The final rule reflects comments filed in response to the September 21, 2006 notice seeking public comment on proposed changes to the Commission's CEII rules. The final rule: modifies non-disclosure agreements; modifies the Commission's process to allow the CEII Coordinator to respond to CEII requests by letter; provides landowners access to alignment sheets for the routes across or in the vicinity of their properties; includes a fee provision; limits the portions of forms and reports the Commission defines as containing CEII; eliminates as a category of documents the Non-Internet Public designation; and provides that the Commission will seek a requester's date and place of birth on a case-by-case basis rather than require that information with every request for CEII. Finally, the request for social security numbers is being eliminated.

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EFFECTIVE DATE: The rule will become effective **[insert date 30 days after publication in the FEDERAL REGISTER]**.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Critical Energy Infrastructure Information Docket Nos. RM06-23-000

ORDER NO. 702

FINAL RULE

(Issued October 30, 2007)

1. On September 21, 2006, the Commission issued a Notice of Proposed Rulemaking (NOPR) on its procedures for dealing with critical energy infrastructure information (CEII).[1] After receiving comments in response to the NOPR, the Commission amends and clarifies 18 CFR 388.113 and its CEII process.

Background

2. Shortly after the attacks on September 11, 2001, the Commission began its efforts with respect to CEII.[2] As a preliminary step, the Commission removed from its public files and Internet page documents such as oversized maps that were likely to contain detailed specifications of facilities, and directed the public to use the Freedom of

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[1] Critical Energy Infrastructure Information, 71 Fed. Reg. 58,325 (October 3, 2006), FERC Stats. & Regs. ¶ 32,607 (2006).

[2] See Statement of Policy on Treatment of Previously Public Documents, 66 Fed. Reg. 52,917 (Oct. 18, 2001), 97 FERC ¶ 61,130 (2001).

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Information Act (FOIA) request process to obtain such information.[3] The Commission established its CEII rules in Order Nos. 630 and 630-A.[4]

3. On the same day as the Commission issued the NOPR in this docket it also issued an instant and final rule that clarified the definition of CEII, required requesters of CEII to submit executed non-disclosure agreements with their requests, and provided that the notice and opportunity to comment on a CEII request would be combined with the notice of release of information.[5] Thus, the current procedures require that each CEII requester file a signed, written request in which he or she provides to the CEII Coordinator detailed information about himself or herself and his or her need for the information, along with an executed non-disclosure agreement. Commission staff verifies and utilizes this information to determine whether to release the CEII to the requester. The current process requires that Commission staff verify each requester when each request is made. This final rule under consideration here reflects the Commission's ongoing commitment to evaluate the effectiveness of the CEII regulations and make changes as necessary.

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[3] The FOIA process is specified in 5 U.S.C. 552 and the Commission's regulations at 18 CFR 388.108.

[4] Critical Energy Infrastructure Information, Order No. 630, 68 Fed. Reg. 9,857 (Mar. 3, 2003), FERC Stats. & Regs. ¶ 31,140 (2003); order on reh'g, Order No. 630-A, 68 Fed. Reg. 46,456 (Aug. 6, 2003), FERC Stats. & Regs. ¶ 31,147 (2003).

[5] See Critical Energy Infrastructure Information, Order No. 683, 71 Fed. Reg. 58,273 (October 3, 2006), FERC Stats. & Regs. ¶ 31,228 (2006) (September 21 Order); order on reh'g, Order No. 683-A, 72 Fed. Reg. 18,572 (April 13, 2007) (Order No. 683-A).

Summary and Discussion of Comments Received

A. Introduction

4. In the NOPR, the Commission invited comments on the following issues: (1) annual certification for repeat requesters, (2) execution of non-disclosure agreements by authorized representatives of organizations on behalf of all of the organizations' employees, (3) charging fees, (4) issuing letter responses to CEII requests; (5) providing alignment sheets to landowners for the routes across or in the vicinity of their properties; (6) limiting the portions of forms and reports the Commission now defines as containing CEII; and (7) eliminating the Non-Internet Public (NIP) designation. The Commission received thirteen responses to the NOPR.[6] While some of the comments address the specific questions raised by the Commission, many of the comments relate to other aspects of the CEII process. Commenters raise issues regarding verification of requesters and the use of non-disclosure agreements and how to ensure compliance with such agreements. In addition, at least one commenter raises concerns about CEII claims in the context of market-based rate filings, and how the typical CEII response times makes it difficult to participate in such proceedings. Several commenters raise issues regarding state agency requests for CEII. These issues are discussed below.

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[6] See Appendix A for a list of commenters. In addition to the submitted comments, in the Commission's final rule on Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, the Commission stated that copies of the comments submitted by Western Energy Board, NARUC, and California Resources will be placed in the official record in Docket No. RM06-23-000, and will be addressed in this proceeding. See Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 71 Fed. Reg. 69,440 (Dec. 1, 2006); FERC Stats. & Regs. ¶ 31,234 (2006).

B. Annual Certification for Repeat Requesters

5. Several commenters support the Commission's proposal to allow an annual certification for repeat requesters.[7] AGA states that expediting access to frequent requesters is appropriate, particularly since many parties, such as local distribution companies, need repeated access to CEII to evaluate proposed certificate or rate and tariff-related proposals.[8] MidAmerican and Williston Basin both support annual certification for repeat requesters provided that the submitter of the CEII is given notice of each request.[9] Similarly, INGAA requests that the Commission clarify that submitters of CEII receive notice of subsequent requests by certified requesters.

6. Although several commenters generally support eliminating redundant requirements, they contend that an annual certification period that does not require an non-disclosure agreement for each requester is not appropriate in all instances.[10] The Department of the Interior suggests that once the CEII Coordinator determines that a requester does not pose a security risk, there should be some mechanism to consider changed circumstances.[11] In addition, Dominion contends that the Commission lacks

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[7] Department of the Interior at p. 3, APPA and TAPS at pp. 5-6, AGA at p. 3, and EEI Reply Comments at p. 5.

[8] AGA at p. 3.

[9] MidAmerican at pp. 2-3 and Williston Basin at p. 3.

[10] Dominion at p. 6 and EEI Reply Comments at p. 5.

[11] Department of the Interior at p. 3.

meaningful sanctions for violations of a non-disclosure agreement.[12] EEI asserts that the Commission's proposal does not clearly state that the first non-disclosure agreement signed by a requester in a given year will apply to all subsequent releases of CEII in that year to that requester.[13]

7. The California Agencies contend that the NOPR relaxes the required showing of a particular need for CEII for a twelve-month period.[14]

Commission Determination

8. The Commission takes this opportunity to clarify several aspects of its CEII procedures. First, the Commission encourages filers to negotiate with requesters to provide data directly to the requesters, where appropriate. Second, if a CEII requester receives an annual certification, it simply means that the Commission does not have concerns about releasing CEII to that individual. In response to the concerns raised by MidAmerican, Williston Basin, and INGAA, such an annual certification does not eliminate the current requirement to notify the submitter of CEII and give the submitter an opportunity to comment on all requests for CEII.[15] In answer to the California Agencies' concerns, as the Commission explained in the NOPR, with each request, the requester will be required to provide detailed information as to why he or she needs the

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[12] Dominion at p. 4.

[13] EEI at pp. 10-11.

[14] California Agencies at p. 9.

[15] See 18 C.F.R. § 388.112.

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CEII.[16] In response to EEI's concern, the Commission clarifies that the executed non-disclosure agreement originally submitted by the requester will apply to all CEII the requester receives from the Commission that year. In answer to the Department of the Interior's concern for a mechanism to consider changed circumstances, the Commission will modify the sample non-disclosure agreements posted on its website to require that a requester notify the Commission of any change in the information the requester originally provided, e.g., a change in employment status.[17]

9. The commenters' concerns regarding the Commission's ability to enforce the terms of the non-disclosure agreements are unwarranted. The Commission will address any violations and utilize sanctions, where appropriate, including civil penalties and criminal referrals. To date, no violations of non-disclosure agreements have been alleged against those granted access to CEII.

C. Authorized Representative of an Organization to Execute a Non-Disclosure Agreement

10. A few commenters generally support allowing an authorized representative of an organization to execute a non-disclosure agreement on behalf of the organization's employees.[18] Williston Basin requests that the submitters of the CEII receive notice of

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[16] NOPR at P 5.

[17] The Commission clarifies that it will continue to use the five types of NDAs posted on its website, www.ferc.gov, with the modifications discussed above. The five types of NDAs posted on the Commission's website are: (1) a general NDA, (2) a media NDA, (3) a state agency employee NDA, (4) a consultant NDA, and (5) a Federal Agency Acknowledgement and Agreement.

[18] Williston Basin at p. 3, APPA and TAPS at p. 5, and EEI Reply Comments at p. 5.

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all requests for release and have an opportunity to comment, i.e., Williston Basin requests that the Commission clarify that this current practice will continue.[19]

11. Several commenters oppose allowing a single representative to execute a non-disclosure agreement on behalf of an entire organization.[20] A couple of commenters contend that certifying all employees of a requesting organization is too broad as it would allow access to CEII by individuals who may not need to review it.[21] Similarly, INGAA states that the NOPR proposal that a "member or employee of an organization" may obtain CEII on behalf of an organization is too broad and undefined.[22] The Allegheny Energy Companies and Dominion express concerns regarding whether a representative could bind an organization.[23]

Commission Determination

12. After reviewing the comments received, the Commission is making the following changes to its proposal in the NOPR. First, all individuals in an organization with access to CEII must be named in the non-disclosure agreement and must also execute the non-disclosure agreement. Second, any subsequent additions to or deletions of names on the non-disclosure agreement must be sent to the Commission as well as to the submitter of

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[19] Williston Basin at p. 3.

[20] SCE at p. 2, AGA at p. 4, Dominion at p. 8, INGAA at pp. 2-3, MidAmerican at p. 3, and EEI at p. 10.

[21] AGA at p. 4 and MidAmerican at pp. 3-4.

[22] INGAA at p. 3.

[23] Allegheny at p. 7, Dominion at pp. 5-6.

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the CEII. Further, the revised non-disclosure agreement should be executed by the newly-named individuals. If there is no written opposition within five (5) days of notifying the CEII Coordinator and the submitter concerning the addition of any newly-named individuals, the CEII Coordinator will issue a standard notice accepting the additions of names to the non-disclosure agreement. If there is a timely opposition from the submitter, the CEII Coordinator will issue a formal determination addressing the merits of such opposition. These changes attempt to ensure that all persons with access to CEII acknowledge their responsibilities while avoiding multiple filings from each organization.

D. Fee Provision

13. The Commission sought comments on its proposal to extend the fee schedule used for FOIA requests to CEII requests. One commenter, MidAmerican, states that it is appropriate to charge fees for processing CEII requests.[24] MidAmerican further states that, provided the Commission's administrative costs for processing CEII requests are similar to the costs of processing FOIA requests, it supports the Commission's proposal.

14. As explained in the NOPR, Commission staff expends valuable time and resources searching, reviewing, and copying documents responsive to CEII requests. The administrative costs of processing CEII requests are similar to the costs of processing FOIA requests. Therefore, the Commission's regulations will be modified to extend the FOIA fee schedule to CEII requests.

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[24] MidAmerican at p. 4.

E. Responding to CEII Requests with Letters

15. While most commenters do not address the Commission's proposal to issue letters rather than delegated orders in response to CEII requests, one commenter supports the proposal[25] and two commenters oppose it.[26] EEI asserts that the NOPR "forc[es] submitters who oppose release to pursue complex 'reverse FOIA' litigation rather than the much more straight forward rehearing request and appellate review."[27] SCE contends that the Commission's CEII regulations were specifically designed to protect security and safety information, which is different from other confidential information. Therefore, SCE asserts that parties should not be denied remedies, including the right to rehearing, if they believe a serious security risk is posed by the release of CEII.[28]

Commission Determination

16. In response to EEI's observation that those who object to the CEII Coordinator's and General Counsel's decisions concerning access to CEII will have to seek judicial rather than Commission remedies, we take this opportunity to clarify and reiterate that a CEII Coordinator's decision denying access to CEII may be appealed by a requester to the General Counsel as a FOIA appeal pursuant to section 388.110. That is the process

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[25] MidAmerican at p. 2.

[26] SCE at pp. 3-4; EEI at pp. 5-6.

[27] EEI at p. 5. EEI contends that the September 21 Order's combination of the notice and opportunity to comment with the notice of release eliminates due process rights of CEII submitters by reducing the notice period. The Commission addressed these concerns in Order No. 683-A at P 9-11.

[28] SCE at pp. 3-4.

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contemplated in the Administrative Procedure Act[29] for seeking information under the FOIA and there is no reason to have a different process for CEII requests.[30]

17. SCE is mistaken that the Commission has separate regulations for CEII because the information is "more sensitive than other non-public information."[31] To the contrary, as CEII, by definition, is exempt from disclosure pursuant to FOIA,[32] the Commission developed its CEII regulations as a disclosure mechanism to provide CEII to those with a legitimate need for it.[33]

F. Landowners' Access to Alignment Sheets

18. In the NOPR, the Commission proposed to grant access to alignment sheets filed pursuant to section 380.12(c)(3)(ii) to landowners for routes across or in the vicinity of their properties.[34] SCE does not oppose the proposal provided that the landowners receive only those sheets related to their properties and the alignment sheets retain the

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[29] 5 USC Subchapter II.

[30] Consistent with FOIA procedures, a CEII determination that withholds information will explain the appeal rights of the CEII requester.

[31] SCE at p. 3.

[32] In its comments, AGA states that there appears to be the potential for requesters to circumvent CEII protection by filing FOIA requests. AGA at pp. 5-6. But in the event documents containing CEII are deemed responsive to FOIA requests, they are exempt from mandatory disclosure pursuant to Exemption 7(F). See 5 U.S.C. § 552 (b)(7)(F). Therefore, CEII can only be obtained through the CEII process.

[33] See, e.g., Order No. 630 at P 16.

[34] NOPR at P 13.

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CEII designation.[35] Several commenters oppose this proposal and allege that granting access should be accompanied by a non-disclosure agreement or some other restriction on the publication of the information.[36] EEI asserts that the Commission's proposal is overbroad that that there must be a limit on access such as to those showing a substantial property nexus to the project.[37] INGAA suggests that the Commission specify which landowners may obtain detailed alignment sheets by utilizing the definition of landowners entitled to notice under section 157.6(d)(2)[38] of the Commission's regulations.[39] Dominion and Williston Basin state that there is some ambiguity concerning the proper classification of alignment sheets as CEII and seeks clarification of the type of information found in alignment sheets that could be considered CEII.[40] Williston Basin also seeks clarification on whether companies will be required to post the alignment sheets on their websites.[41]

Commission Determination

19. The Commission notes that alignment sheets can be labeled CEII only if they contain qualifying detailed engineering information. Alignment sheets often do not

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[35] SCE at p. 4.

[36] INGAA at pp. 3-4, AGA at pp. 4-5, Dominion at pp. 8-9, and EEI at p. 10.

[37] EEI at p. 10.

[38] 18 CFR 157.6(d)(2) (2007).

[39] INGAA at pp. 3-4.

[40] Dominion at p. 9 and Williston Basin at p. 4.

[41] Williston Basin at p. 4.

contain such detail, and, therefore, will simply be public information. The Commission clarifies its proposal that, for alignment sheets that do contain CEII, each landowner access only the alignment sheet for the limited portion of a project that would affect his or her land and the adjacent parcel on each side (or those on the same alignment sheet). The Commission understands that a landowner may want to discuss the proposed project with other family members, with legal counsel, or others. The Commission will not limit such discussions by requiring a landowner to sign a non-disclosure agreement. The Commission further clarifies that it does not require that companies post alignment sheets on their websites yet acknowledges that companies may choose to do so based on their public participation plans.

20. The Commission accepts INGAA's proposal to use the definition of landowner at 18 CFR 157.6(d)(2) as the means of identifying which landowners may obtain alignment sheets containing CEII without executing non-disclosure agreements.

G. Forms containing CEII

21. In the NOPR, the Commission provided guidelines for labeling specific documents submitted to the Commission as CEII. There were several comments regarding the guidelines.[42] APPA and TAPS support the guidance.[43] MidAmerican suggests that the Commission incorporate the guidelines into specific filing instructions

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[42] APPA and TAPS at pp. 6-7, MidAmerican at p. 4, INGAA at pp. 6-7, and Williston Basin at p. 6

[43] APPA and TAPS at pp. 6-7.

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for documents regularly filed with the Commission.[44] INGAA and Williston Basin both note that the Commission did not include Exhibit G-II, which contains flow diagram data, in its guidelines for identifying CEII.[45] They contend that this exhibit includes information that may be useful to those with intent to do harm and request that the Commission include Exhibit G-II in its guidelines as a document that contains CEII.[46]

Commission Determination

22. The Commission clarifies that Exhibit G-II may contain CEII. Further, if an applicant believes that information in Exhibit G-II meets the definition of CEII, then the relevant part of the exhibit should be filed as CEII. Therefore, the Commission adopts the guidelines proposed in the NOPR with the addition of the Exhibit G-II as a document that may contain CEII.[47]

H. Elimination of the Non-Internet Public Category

23. Two commenters support the Commission proposal to eliminate the NIP category of documents.[48] Dominion states that abolishing NIP category will be more efficient and will make the information more accessible to interested parties. AGA asserts that the Commission's proposal to eliminate NIP "appears to reflect the reality of the public's

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[44] MidAmerican at p. 4.

[45] INGAA at pp. 6-7 and Williston Basin at p. 6.

[46] Id.

[47] NOPR at P 10-15.

[48] Dominion at p. 5 and AGA at p. 3.

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continued access to energy infrastructure data from sources beyond the Commission's control."[49]

24. Several commenters oppose the elimination of the NIP designation claiming that elimination will make it easier for individuals with malicious intent to obtain locational information.[50] Further, these commenters contend that the fact that such information is publicly available from other sources is not a valid reason to abolish the NIP designation. Rather, they contend that the Commission should set an example by retaining the NIP category to encourage other sources to be more cautious in their treatment of sensitive information. Before abolishing the NIP designation, NHA suggests that the Commission "make a last attempt to resolve the confusion through the issuance of additional guidance or outreach[.]"[51]

Commission Determination

25. The Commission does not agree that NIP should be retained. Much of the information now designated as NIP is easily available on-line from other sources, such as the United States Geological Survey or commercial mapping firms. As such, retaining the NIP designation does not enhance security or safety. Further, the information is publicly available from the Commission's Public Reference Room. Withholding this information from the Commission's website may be perceived as a hindrance to individuals seeking to access public information.

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[49] AGA at p. 3.

[50] EEI at pp. 9-10, Williston Basin at pp. 4-5, and INGAA at pp. 4-6.

[51] NHA at p. 2.

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26. Regarding the approximately 5,400 NIP documents currently in the Commission's e-library records, the NOPR proposed that these documents simply retain the NIP designation in e-library.[52] The Commission has determined that this will create confusion. Therefore, the Commission will provide a sixty-day time period from the date this order is issued in which previous submitters of NIP may specifically identify any documents they believe may now qualify for CEII protection. After the sixty-day period, all NIP documents not identified as CEII will be made publicly available.

27. Submitters of NIP who believe that the documents contain CEII should file requests with the Secretary in this docket (RM06-23-000) within sixty-days requesting that the designations be changed. Such requests should identify the specific documents by accession numbers and provide an accurate description of the documents.

I. State and Local Agencies' Comments

28. Several state agencies, organizations of states, and a county government requested that state agencies and those similarly situated be allowed to obtain CEII outside the normal process because they are entrusted with the public safety of their citizens.[53] EEI contends that such agencies should not be allowed special access to CEII.[54]

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[52] A list of these documents may be obtained by performing an advanced search on e-library, selecting only "Non-Internet Public" in the "Availability" section.

[53] California State Agencies at pp. 8-10, County of Butte at pp. 2-3, WIEB and CREPC at pp. 7-8, NARUC at p. 12, and California Resources Agency at pp. 1-2.

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Commission Determination

29. The Commission will not allow state agencies and local governments special access to CEII on a generic basis because such entities (unlike other federal agencies) may not be required to maintain the documents in the way the Commission maintains them. Moreover, state FOIA laws vary, and generic access to CEII for state agencies and local governments may not sufficiently protect CEII from release pursuant to state law. Nonetheless, the Commission will utilize a case-by-case approach that may permit states and other governmental entities to enter into memoranda of understanding with the Commission to simplify access to CEII while ensuring appropriate protection of CEII.

J. A Requestor Shall Submit a Date and Place of Birth upon Request; Social Security Numbers are not needed

30. Currently, section 388.113(d) requires that a requester provide his or her date and place of birth in each request for CEII. Experience in processing requests for CEII since issuance of Order No. 630 has shown that the legitimacy of a particular requester can usually be determined from information other than the requester's date and place of birth. However, occasionally, a date and place of birth are needed to assess the legitimacy of a requester. Therefore, we are revising section 388.113(d) to obtain that information on a case-by-case basis rather than obtain it in every instance. When needed, the CEII Coordinator will ask the requester to provide his or her date and place of birth to process the request for CEII.

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[54] EEI Reply Comments at p. 6

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31. In a similar vein, the Commission will revise section 388.113(d) to eliminate the request for voluntary submission of social security numbers. Again, experience has shown that social security numbers are not needed to determine the legitimacy of requesters.

32. These revisions will minimize privacy concerns regarding the Commission's collection and maintenance of personally identifiable information without compromising security regarding the release of CEII.

K. Miscellaneous Issues

33. The Department of the Interior states that the NOPR offers a more efficient process for handling CEII requests. Nonetheless, the Department of the Interior contends that it needs ready access to such information.[55] In Order No. 662, the Commission modified its CEII regulations to simplify federal agencies' access to CEII.[56] Pursuant to section 388.113(d)(2) of the Commission's regulations, "An employee of a federal agency acting within the scope of his or her federal employment may obtain CEII directly from Commission staff without following the procedures outlined in paragraph (d)(3) of this section."

34. APPA and TAPS state that the time frame for requesting, obtaining, and reviewing CEII is insufficient in market-based rate proceedings that routinely provide a notice

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[55] Department of the Interior at p. 2.

[56] See Critical Energy Infrastructure Information, Order No. 662, 70 FR 37,031 (June 28, 2005), FERC Stats. & Regs. ¶ 31,189 (2005) (Order No. 662).

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period of 21 days.[57] As the Commission explained in Order No. 662, it is willing to consider on a case-by-case basis requests for extensions of time to prepare protests to market-based rate filings where an intervenor demonstrates that it needs additional time to obtain and analyze CEII.[58] The Commission further encourages the parties in cases in which CEII is filed to promptly negotiate a protective order in the proceeding.[59] Moreover, the Commission, in its NOPR regarding market-based rates for wholesale sales of electric energy, capacity and ancillary services by public utilities, sought comments on whether CEII designations remain a concern since issuance of Order No. 662.[60] In the market-based rate Final Rule, the Commission adopted procedures, now codified as section 37.35(f) of the Commission's regulations, to ensure that intervenors have prompt access to relevant information for which privileged treatment, including CEII, is claimed.[61]

35. In the NOPR, the Commission stated that it "retains its concern for CEII filing abuses and will take action against applicants or parties who knowingly misfile

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[57] APPA and TAPS at pp.4-5.

[58] Order No. 662 at P 25.

[59] Id.

[60] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 71 FR 33102, FERC Stats. & Regs. ¶ 32,602 (2006) (MBR NOPR).

[61] See also Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 119 FERC ¶ 61,295 (June 21, 2007) (market-based rate Final Rule).

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information as CEII, including rejection of an application where information is mislabeled as CEII."[62] While some commenters welcome the Commission's reminder regarding filing abuses,[63] several commenters express concern.[64] Dominion requests that the Commission clarify that errors in classification based upon a reasonable, good faith interpretation of the Commission's regulations will not result in a rejection of a filing.[65] Dominion and NHA both recommend that the Commission reject a license application only as a measure of last resort and only for the most egregious of cases.[66] NHA further recommends continued outreach to the industry to reduce designation errors.[67] EEI urges the Commission to notify the submitter of the information if the Commission believes that he or she has improperly labeled information as CEII or if the submitter has failed to provide a justification for treating the information as CEII.[68]

36. The Commission has continuously sought to dissuade applicants from carelessly using the CEII designation because such misuse prevents interested parties and other members of the public with a legitimate need from accessing information in a timely manner. The Commission stated as a reminder in the NOPR that applications may be

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[62] NOPR at P 16.

[63] APPA and TAPS at p. 6 and AGA at p. 3.

[64] NHA at pp. 1-2, Dominion at pp. 10-12, and EEI at pp. 8-9.

[65] Dominion at p. 11.

[66] Dominion at p. 12 and NHA at p. 2.

[67] Id.

[68] EEI at p. 9.

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rejected for failing to comply with the Commission's regulations at 18 CFR 388.112(b)(1).[69] As the Commission explained in the Order No. 683-A, "[i]n instances in which documents are rejected for filing, the rejection is usually without prejudice and no substantive rights are lost. The application must merely be refiled in accordance with the procedural requirements."[70]

37. The Commission agrees that continued outreach will help to diminish designation errors. To this end, the Secretary of the Commission will continue to post filing guidance on the Commission's website.

38. The Commission will also revise section 388.112(d) to reflect an internal procedural change. Section 388.112(d) currently provides that, when a FOIA or CEII request is received for information that was submitted to the Commission with a claim of privilege or CEII status, or when the Commission is considering release of such information, the Commission official who will determine whether to release the information will notify the submitter and provide an opportunity to comment. But in many instances, it is practical for an individual other than the official responsible for determining whether to release the information to provide such notice. Therefore, the Commission has decided to revise section 388.112(d) of its regulations to provide that any appropriate official may provide notice to the submitter.

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[69] NOPR at P 16-17.

[70] Order No. 683-A, P 12.

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Information Collection Statement

39. The Office of Management and Budget's (OMB's) regulations require that OMB approve certain information collection requirements imposed by agency rule.[71] This final rule does not impose any additional information collection requirements. Therefore, the information collection regulations do not apply to this final rule.

Environmental Analysis

40. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[72] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusions are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[73] This rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration is necessary.

Regulatory Flexibility Act Certification

41. The Regulatory Flexibility Act of 1980[74] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number

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[71] 5 CFR 1320.12.

[72] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 Fed. Reg. 47,897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

[73] 18 CFR 380.4(a)(2)(ii).

[74] 5 U.S.C. 601-612.

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of small entities. The Commission is not required to make such analyses if a rule would not have such an effect. The Commission certifies that this rule would not have such an impact on small entities.

Document Availability

42. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (http://www.ferc.gov) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

43. From FERC's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

44. User assistance is available for eLibrary and the FERC's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@FERC.gov), or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

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Effective Date

45. These regulations are effective **[insert 30 days after publication in the FEDERAL REGISTER]**.

46. The provisions of 5 U.S.C. 801 regarding Congressional review of Final Rules do not apply to this Final Rule, because the rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties.

List of subjects in 18 CFR Part 388

Confidential business information, Freedom of information.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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In consideration of the foregoing, the Commission amends part 388, Chapter I, Title 18, Code of Federal Regulations, as follows:

PART 388 – INFORMATION AND REQUESTS PART 388 – INFORMATION AND REQUESTS

1. The authority citation for part 388 continues to read as follows:

Authority: 5 U.S.C. 301-305, 551, 552 (as amended), 553-557; 42 U.S.C. 7101-7352.

2. Section 388.109 is amended by revising paragraph (b) to read as follows:

§ 388.109 Fees for record requests.

* * * * *

(b) *Fees for records not available through the Public Reference Room (FOIA or CEII requests).* The cost of duplication of records not available in the Public Reference Room will depend on the number of documents requested, the time necessary to locate the documents requested, and the category of the persons requesting the records. The procedures for appeal of requests for fee waiver or reduction are set forth in Sec. 388.110.

3. Section 388.112 is amended by deleting paragraph (a)(3) and revising paragraph and (b) to read as follows:

§ 388.112 Requests for special treatment of documents submitted to the Commission.

* * * * *

(b) Procedures. A person claiming that information warrants special treatment as CEII or privileged must file:

(1) A written statement requesting CEII or privileged treatment for some or all of the information in a document, and the justification for special treatment of the information; and

(2) The following, as applicable:

(i) An original plus the requisite number of copies of the public volume filed and marked in accordance with instructions issued by the Secretary;

(ii) An original plus two copies of the CEII volume, if any, filed and marked in accordance with instructions issued by the Secretary; and

(iii) An original only of the privileged volume, if any, filed and marked in accordance with instructions issued by the Secretary.

(d) Notification of request and opportunity to comment. When a FOIA or CEII requester seeks a document for which privilege or CEII status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information or any other appropriate Commission official will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.

* * * * *

4. Section 388.113 is amended by adding paragraph (d)(3), redesignating paragraph (d)(3) as paragraph (d)(4), revising newly designated paragraph (d)(4), redesignating paragraph (d)(4)(iii) as paragraph (d)(4)(vii), adding new paragraphs

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(d)(4)(ii),(iii), (iv), (v) and (vi) and adding a new paragraph (e) to read as follows:

§ 388.113 Accessing critical energy infrastructure information.

* * * * *

(d) * * *

(3) A landowner whose property is crossed by or in the vicinity of a project may receive detailed alignment sheets containing CEII directly from Commission staff without submitting a non-disclosure agreement as outlined in paragraph (d)(4) of this section. A landowner must provide Commission staff with proof of his or her property interest in the vicinity of a project.

(d)(4) * * *

(i) File a signed, written request with the Commission's CEII Coordinator. The request must contain the following: requester's name (including any other name(s) which the requester has used and the dates the requester used such name(s)), title, address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. A requester shall provide his or her date and place of birth upon request, if it is determined by the CEII Coordinator that this information is necessary to process the request. Unless otherwise provided in Section 113(d)(3), a requester must also file an executed non-disclosure agreement.

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(ii) A requester who seeks the information on behalf of all employees of an organization should clearly state that the information is sought for the organization, that the requester is authorized to seek the information on behalf of the organization, and that all the requesters agree to be bound by a non-disclosure agreement that must be executed by and will be applied to all individuals who have access to the CEII.

(iii) After the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information.

(iv) If the CEII Coordinator determines that the CEII requester has not demonstrated a valid or legitimate need for the CEII or that access to the CEII should be denied for other reasons, this determination may be appealed to the General Counsel pursuant to § 388.110 of this Chapter. The General Counsel will (1) decide whether the information is properly classified as CEII, which by definition is exempt from release under FOIA, and (2) whether the Commission should in its discretion make such CEII available to the CEII requester in view of the requester's asserted legitimacy and need.

(v) Once a CEII requester has been verified by Commission staff as a legitimate requester who does not pose a security risk, his or her verification will be valid for

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the remainder of that calendar year. Such a requester is not required to provide detailed information about him or herself with subsequent requests during the calendar year. He or she is also not required to file a non-disclosure agreement with subsequent requests during the calendar year because the original non-disclosure agreement will apply to all subsequent releases of CEII.

(vi) If an organization is granted access to CEII as provided by paragraph (d)(4)(iii) of this section, and later seeks to add additional individuals to the non-disclosure agreement, the names of these individuals must be sent to the CEII Coordinator with certification that notice has been given to the submitter. Any newly added individuals must execute a supplement to the original non-disclosure agreement indicating their acceptance of its terms. If there is no written opposition within five (5) days of notifying the CEII Coordinator and the submitter concerning the addition of any newly-named individuals, the CEII Coordinator will issue a standard notice accepting the addition of names to the non-disclosure agreement. If the submitter files a timely opposition with the CEII Coordinator, the CEII Coordinator will issue a formal determination addressing the merits of such opposition.

(e) Fees for processing CEII requests will be determined in accordance with 18 C.F.R. § 388.109.

* * * * *

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APPENDIX A

List of Commenters

Abbreviation	Name
Alleghany	Allegheny Power and Allegheny Energy Supply Company, L.L.C.
AGA	American Gas Association
APPA and TAPS	American Public Power Association and Transmission Access Policy Study Group
Butte County	Butte County, California
California Resources	California Resources Agency
California State Agencies	California Coastal Commission, California Energy Commission, California Electricity Oversight Board, and California State Lands Commission
Dominion	Dominion Transmission Inc., Dominion Cove Point, LNG, LP, and Dominion South Pipeline Company, LP
EEI	Edison Electric Institute
INGAA	Interstate Natural Gas Association of America
MidAmerican	MidAmerican Energy Company
NARUC	National Association of Regulatory Utility Commissioners
NHA	National Hydropower Association
SCE	Southern California Edison Company
Western Energy Board	Western Interstate Energy Board and Committee on Regional Electric Power Cooperation
Williston Basin	Williston Basin Interstate Pipeline Company
Department of the Interior	United States Department of the Interior