

**UNITED STATES OF AMERICA  
BEFORE THE  
DEPARTMENT OF ENERGY**

Critical Electric Infrastructure Information;     )  
New Administrative Procedures                    )     RIN 1901-AB44

**COMMENTS OF ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.**

Electric Reliability Council of Texas, Inc. (ERCOT) submits these comments in response to the Department of Energy’s (DOE) Notice of Proposed Rulemaking concerning the treatment of Critical Electric Infrastructure Information, which was published in the Federal Register on October 29, 2018. *See* 83 Fed. Reg. 54,268. ERCOT requests that the DOE further revise the propose rule to preclude disclosure of CEII to non-Federal Entities, consistent with DOE’s treatment of other confidential information under the Freedom of Information Act (FOIA). ERCOT also requests that the DOE clarify the proposed rule to provide automatic CEII status for OE-417 submissions.

**I. The DOE should modify the rule to prohibit disclosure of CEII to non-Federal Entities.**

Section 1004.13(k) of the proposed rule recognizes the authority of the DOE to share CEII with non-Federal Entities by establishing a process for such disclosure. ERCOT urges the DOE to reconsider this approach and revise the rule to prohibit disclosure of CEII to non-Federal Entities. The FAST Act does not require the DOE (or, for that matter, FERC) to disclose CEII. In fact, it explicitly recognizes that CEII is exempt from disclosure under the FOIA. *See* 18 U.S.C. 215A(d)(1)(A) (“Critical electric infrastructure information . . . shall be exempt from disclosure under section 552(b)(3) of title 5, United States Code.”). Because the disclosure of CEII, by definition, creates a security risk if it is divulged—intentionally or unintentionally—to inappropriate parties, ERCOT suggests that the DOE should prefer not to disclose CEII to non-Federal Entities. For CEII that DOE obtains from external sources, those who can demonstrate a legitimate need for that information should be able to obtain the information directly from the source of that CEII rather than obtaining it from DOE by way of a FOIA request. Prohibiting

disclosure of CEII to non-Federal Entities would be consistent with the treatment of other types of confidential information under the FOIA, which are not subject to public disclosure based on a claim of need.

Restricting disclosure of CEII is further warranted by the lack of criteria for disclosure in the proposed rule. The rule provides that CEII may be disclosed to non-Federal Entities if the CEII Coordinator “determine[s] . . . the need for CEII and the protection afforded to the CEII should result in sharing CEII for the limited purpose made in the request.” The absence of any specificity as to what circumstances will justify disclosure increases the possibility that CEII could at some point be disclosed to one or more inappropriate persons.

For these reasons, ERCOT proposes that DOE modify the rule to bar any disclosure of CEII by DOE to parties other than Federal Entities.

## **II. The DOE should clarify the rule concerning the treatment of information submitted on Form OE-417.**

The NOPR suggests that the DOE intends to “automatically” classify information submitted on schedule 2 of Form OE-417 as CEII upon submission of a request for CEII treatment of that information. 83 Fed. Reg. 54,271. However, the proposed definition of CEII indicates that information submitted on Form OE-417 will be confidential only if it meets the definition of CEII. In relevant part, the definition states as follows:

CEII-designated material may include information related to Defense Critical Electric Infrastructure, consistent with section 215A(a)(4) of the FPA; information on electric incidents and emergencies reported to DOE through the Electric Emergency Incident and Disturbance Report (Form OE-417); and/or Federal spectrum information managed by the National Telecommunications and Information Administration (NTIA), to the extent such information also qualifies as CEII.

The proviso that Form OE-417 information is CEII only to the extent such information qualifies as CEII essentially undermines the purpose of the carve-out for Form OE-417 information because it appears to require a separate showing of CEII status in any case involving such a submission. If such a showing is required, then CEII status cannot be considered “automatically” conferred, as the NOPR elsewhere suggests. ERCOT recommends that the DOE revise the rule to treat all

information submitted on schedule 2 of Form OE-417 as CEII without requiring a further showing of CEII status or even requiring a request for CEII treatment. Otherwise, ERCOT would suggest that the DOE remove the mention of OE-417 from the definition of CEII to avoid confusion.

ERCOT appreciates the DOE's consideration of these comments.

Respectfully Submitted,

Chad V. Seely  
General Counsel  
[Chad.Seely@ercot.com](mailto:Chad.Seely@ercot.com)

Nathan Bigbee  
Assistant General Counsel  
[Nathan.Bigbee@ercot.com](mailto:Nathan.Bigbee@ercot.com)

Electric Reliability Council of Texas, Inc.  
7620 Metro Center Drive  
Austin, Texas 78744  
(512) 225-7093

December 28, 2018