

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

Critical Electric Infrastructure Information:)
Administrative Procedures)

Docket # RIN 1901-AB44

**COMMENTS OF THE SUSTAINABLE FERC PROJECT AND
NATURAL RESOURCES DEFENSE COUNCIL**

The Sustainable FERC Project and Natural Resources Defense Council appreciate the opportunity to comment on the U.S. Department of Energy’s (DOE) October 29, 2018 Proposed Rule to promulgate regulations regarding DOE’s Critical Electric Infrastructure Information (CEII) designation authority under Section 215A of the Federal Power Act.¹ Promulgating regulations in this area is an important step toward ensuring a clear, consistent, and fair process for the designation and disclosure of CEII.

Through these comments, we recommend several small modifications to the Proposed Rule. First, we recommend that DOE better align the Proposed Rule with the Federal Energy Regulatory Commission’s (FERC) existing CEII regulations by (a) explaining what must be included in the detailed statement of need filed by a CEII requester and by (b) adopting FERC’s timelines regarding declassification, reconsideration of classification decisions, and notice of sharing. Second, we recommend that DOE provide additional guidance on the classification of common types of CEII, such as through the creation and dissemination of data tables. Last, we recommend that DOE better facilitate data sharing among non-DOE entities, such as through “whitelisting” certain frequent users of CEII. These recommendations will improve DOE’s

¹ 16 U.S.C. § 824o-1.

administrative efficiency and help to facilitate the useful sharing of CEII among stakeholders—while continuing to protect the grid from national security threats.

I. PROCEDURAL BACKGROUND

On December 4, 2015, President Obama signed the Fixing America’s Surface Transportation (FAST) Act into law.² As part of the FAST Act, Congress added Section 215A to the Federal Power Act.³ Section 215A vested authority in both FERC and DOE to designate information as CEII.⁴ Section 215A further mandated that FERC promulgate regulations establishing its criteria and procedures for designating information as CEII.⁵ On November 17, 2016, via Order 833, FERC issued its Final Rule.⁶ Congress did not mandate DOE to promulgate its own regulations, but such is the purpose of the Proposed Rule.

II. COMMENTS

A. Defining Need

Proposed Section 1004.13(k) of the Proposed Rule outlines the material that any person seeking access to CEII must provide to DOE. Specifically, proposed Section 1004.13(k)(2) requires that a CEII requester “[p]rovide a detailed statement explaining the particular need for and intended use of the information.” FERC’s CEII regulations have a similar section, but FERC also explains what must be included in such a statement:

the extent to which a particular function is dependent upon access to the information; why the function cannot be achieved or performed without access to the information; an explanation of whether other information is available to the

² Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

³ 16 U.S.C. § 824o-1.

⁴ 16 U.S.C. § 824o-1(d)(3).

⁵ 16 U.S.C. § 824o-1(d)(2)(A).

⁶ *Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information et al*, 157 FERC ¶ 61,123 (2016) (hereinafter Order 833).

requester that could facilitate the same objective; how long the information will be needed; whether or not the information is needed to participate in a specific proceeding (with that proceeding identified); and an explanation of whether the information is needed expeditiously.⁷

Conversely, the Proposed Rule offers no explanation as to what should be included in the statement of need. This creates unnecessary ambiguity as to what DOE considers a sufficient demonstration of need. Given that there is a pre-existing definition in the FERC regulations, we recommend that DOE adopt FERC's language so that there is consistency across agencies.

B. Timelines for Declassification, Reconsideration, and Notice of Sharing

DOE states in the introduction to the Proposed Rule that, during the drafting process, it sought the “informal input from industry representatives, who are the submitters of CEII, regarding enhancements that DOE could make when adapting CEII to the unique role of DOE as the Sector-Specific Agency for the Energy Sector.” DOE does not mention having consulted with any other stakeholders who regularly work with or request access to CEII. As FERC noted in Order 833, common requesters for CEII include “public utilities, gas pipelines, hydro developers, academics, landowners, public interest groups, researchers, renewable energy organizations, and consultants.”⁸ According to DOE, based on its discussions with industry, it modified several of the timelines established in FERC's regulations regarding declassification, reconsideration of classification decisions, and notice of sharing. DOE does not explain how changing these timelines helps DOE more effectively execute its role. As outlined below, we recommend that DOE maintain FERC's timelines to create consistency across agencies.

⁷ 18 C.F.R. § 388.113(g)(5)(i)(B).

⁸ Order 833 at P 98 n.152.

1. *Declassification*

Section 1004.13(h)(2) of the Proposed Rule outlines the timeline by which a CEII submitter will be notified that DOE has decided to remove a CEII designation. Specifically, DOE's CEII Coordinator or their designee will give the submitter "(at least ten (10) business days) in which to comment in writing prior to the removal of the designation." Further, the CEII Coordinator or their designee will provide the CEII submitter notice of DOE's final removal decision "no less than twenty (20) business days before disclosure." This timeline differs from FERC's regulations, under which the CEII submitter has at least five business days to both comment on and receive notice of final declassification.⁹ DOE provides no explanation for this change other than the one sentence provided in the Proposed Rule's introduction. Simply stating that discussions with industry representatives led to this change is an insufficient explanation for introducing inefficiency and inconsistency across agencies. Further, there may be instances where both FERC and DOE are simultaneously reviewing the same CEII requests; inconsistent deadlines will muddy the process. For these reasons, we recommend that DOE adopt FERC's existing timeline to avoid confusion and streamline the CEII process.

2. *Reconsideration*

Section 1004.13(i)(1) of the Proposed Rule outlines the timeline by which a person can seek reconsideration of a DOE decision regarding CEII designation or disclosure. Under the Proposed Rule, a CEII submitter seeking reconsideration of a DOE decision must file its initial notice of administrative appeal "within ten (10) business days of notification by DOE of its CEII decision." However, under FERC's regulations, a CEII submitter must file its initial notice of

⁹ 18 C.F.R. § 388.113(e)(4).

administrative appeal within five business days.¹⁰ As above, DOE provides no explanation for this change. But FERC did provide an explanation for establishing its five-business-day window. In Order 833, FERC stated that “[r]equiring the submitter to inform the Commission of its intent to appeal within 5 business days will allow the Commission to know sooner rather than later whether the submitter plans to challenge the decision and, if not, allow the Commission to disclose the information sooner.”¹¹ Thus, FERC determined that five business days balanced the interests of both CEII submitters and CEII requesters. For the same reasons, we recommend that DOE amend the Proposed Rule to match FERC’s existing timeline.

Similarly, Section 1004.13(i)(1)(ii) of the Proposed Rule describes the procedures for an individual seeking reconsideration of a DOE decision denying the release or re-designation of CEII. DOE states that an individual seeking such reconsideration should file a “statement in support of the request for reconsideration ... within twenty (20) business days of the date of the determination.” This is slightly different from FERC’s regulations, which state that such persons must submit their appeals within 20 business days—without any mention of a statement in support.¹² This is confusing because, when addressing CEII submitters, both the Proposed Rule and the FERC regulations assign different timelines to filing the notice of administrative appeal and filing a statement in support.¹³ Therefore, we recommend that DOE modify the Proposed Rule such that individuals seeking reconsideration of a release or declassification denial have twenty business days to file an appeal with DOE—matching the language of FERC’s regulations.

¹⁰18 C.F.R. § 388.113(j)(1). Both the Proposed Rule and FERC’s regulations provide CEII submitters with twenty days to file a statement in support. *Id.*

¹¹ Order 833 at P 79 n.129.

¹² 18 C.F.R. § 388.113(j)(2).

¹³ 18 C.F.R. § 388.113(j)(1).

3. *Notice of Sharing*

Section 1004.13(j)(5) of the Proposed Rule discusses the notice procedures for sharing CEII that is not generated by DOE. Specifically, DOE proposes to provide electronic notice to the CEII submitter “no less than ten (10) business days before DOE releases CEII submitted to and not generated by DOE” and DOE’s CEII Coordinator or their designee will “convene a phone call, within five (5) business days of electronic notice with the CEII submitter, to discuss concerns about the proposed release[.]” This is double the length of time outlined in FERC’s regulations, which state that notice will be provided no less than five business days before disclosure.¹⁴ For the same reasons highlighted above, we recommend that DOE amend the Proposed Rule to be consistent with FERC’s regulations.

C. Classification of Common Types of CEII

The FAST Act introduced two new terms into the energy lexicon: Critical Electric Infrastructure and Critical Electric Infrastructure Information.¹⁵ When FERC promulgated its regulations, it declined requests to publish more detailed criteria and guidelines for what qualifies as CEII. Having dealt with the review and classification of CEII for two years, FERC can now better identify what are common types of CEII, as well as common types of information for which CEII is requested but denied. This data would prove helpful for both those seeking CEII designation and CEII release and could help prevent inconsistencies in classification decisions within and across agencies. As such, we recommend that DOE work with FERC to provide such guidance, such as through data tables that provide suggested classifications for

¹⁴ 18 C.F.R. § 388.113(d)(1)(vi).

¹⁵ 16 U.S.C. § 824o-1(a)(2)–(3).

common data types. DOE should seek feedback on these data tables from the wide range of stakeholders identified by FERC in Order 833¹⁶ and not purely from “industry representatives.”

D. Whitelisting and Universal Non-Disclosure Agreements

As noted above, the entities that reasonably need access to CEII is broad. As the grid continues to evolve, this list likely will expand. The FAST Act recognized the need to facilitate data between and among different types of stakeholders. As such, it required FERC, and enabled DOE, to “facilitate voluntary sharing of [CEII] with, between, and by” these entities.¹⁷ FERC’s regulations, however, did nothing to help facilitate this sharing. Instead, the FERC regulations vaguely state that while any entity “receiving CEII must execute either a non-disclosure agreement or an acknowledgement or agreement,” FERC reserves the right to “impose additional restrictions on how the information may be used and maintained.”¹⁸

As some commenters explained during the FERC promulgation process, this “catch-all” provision creates the risk for inconsistent requirements being placed on raw data. These inconsistencies could hamper valuable research that depends on raw data—research that could lead to solutions that strengthen the reliability and resilience of the grid. This is because a key part of the analytical process is the validation of studies, a process that is difficult or impossible to achieve when access to raw data, including CEII, is unreasonably restricted. The Proposed Rule keeps this “catch-all” provision and fails to further explain the types of additional restrictions that may be placed on CEII. We maintain our previous concerns with respect to this provision.

¹⁶ Order 833 at P 98 n.152.

¹⁷ 16 U.S.C. § 824o-1(d)(2)(D).

¹⁸ 18 C.F.R. § 388.113(f)(3)–(4).

The Proposed Rule does, however, modify the types of arrangements into which CEII requesters may enter to receive CEII. Specifically, the Proposed Rule states that, in addition to entering into a non-disclosure agreement or acknowledgement or agreement, an entity seeking CEII may “participate in an Electric Reliability Organization or Regional Entity information sharing program.” But this in no way better streamlines information sharing than FERC’s regulations, as an entity seeking CEII may still need to participate in several of these programs to obtain the full data it needs—and these organizations may themselves have different requirements for how CEII can be obtained and shared. For example, researchers studying interconnection-wide electric impacts in the Western Interconnection would need to execute or meet the CEII sharing requirements of four different planning regions, as well as with the Western Electricity Coordinating Committee—a practical impossibility.

Accordingly, we recommend that DOE more explicitly facilitate sharing between and by non-DOE entities by including more guidance in its regulations. By failing to be explicit on data sharing, DOE is sanctioning a culture of denying data to researchers and policymakers necessary to improve grid reliability, efficiency and security. As a first step toward enabling the sharing of data necessary to improve grid operations, DOE should consider a process for “whitelisting” certain entities, like national laboratories and universities, through a universal non-disclosure agreement. This would eliminate the hurdles created by inconsistent sharing regimes.

III. CONCLUSION

We appreciate the opportunity to provide comments on the Proposed Rule. We further appreciate DOE’s efforts to create clear and explicit criteria for CEII designation and disclosure. By adopting the suggested modifications provided herein, DOE’s Final Rule will better facilitate

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the development of a more reliable, resilient and well-designed electric grid while maintaining our security.

Respectfully submitted this 28th day of December, 2018,

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