

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

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

**COMMENTS OF THE  
MIDCONTINENT INDEPENDENT SYSTEM  
OPERATOR, INC.**

**I. INTRODUCTION**

The Midcontinent Independent System Operator, Inc. (“MISO”) submits these comments in response to the Notice of Proposed Rulemaking issued by the Department of Energy (“Department” or “DOE”) that was published on October 29, 2018. The DOE proposes new administrative procedures to implement the Department’s critical electric infrastructure information (“CEII”) designation authority under the Fixing America’s Surface Transportation Act (“FAST Act”).<sup>1</sup> The FAST Act authorized both the Secretary of Energy and the Federal Energy Regulatory Commission (“FERC”) to independently designate CEII.

MISO is not taking a position on the need for any information that might be desired by the DOE for its use. However, MISO offers these comments in hopes that it will assist in the development of appropriate treatment of CEII by the DOE.

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<sup>1</sup> Critical Electric Infrastructure Information; New Administrative Procedures, Notice of Proposed Rulemaking, 10 C.F.R. Part 1004 (2018) (“NOPR”).

## II. COMMENTS

The NOPR provides for many processes for the handling of CEII, which will likely be the subject of commentary by interested stakeholders. MISO is aware of the interest in the NOPR by the Edison Electric Institute (“EEI”), the representative of many U.S. investor-owned electric companies who participate in industry activities conducted by MISO members. In these Comments, MISO emphasizes two key (and related) subjects of comment by EEI.<sup>2</sup> First, the DOE should establish criteria to be used by the DOE to determine what constitutes CEII. In addition, the DOE should establish criteria regarding the entities that may receive such CEII information and for what purposes. These requirements expand the scope of the DOE’s task beyond only reviewing the procedures by which the DOE will make decisions regarding the treatment of CEII and are necessary to help ensure the dissemination of CEII information is appropriately limited.

### A. The DOE Should Specify CEII Designation Criteria.

The criteria that the DOE uses for determining what constitutes CEII is at least as important to effective sharing of information as the procedures used by the DOE. The proposed procedure in §1004.13(f)(4)(i) states:

The DOE CEII Coordinator, or a Coordinator’s designee, will execute the Department’s evaluation as to whether the submitted information or portions of the information meets the definition of CEII, as described at section (c)(2) of this Part, with the appropriate DOE Office with delegated CEII designation authority.

The title to §1004.13(f) is “[c]riteria and procedures for designating CEII,” but the content of that provision only addresses the procedures that submitters of CEII must follow and does not address the criteria the DOE will use to designate CEII. While FERC’s rulemaking regarding criteria for designating CEII might have helped guide DOE decision-making, FERC’s rulemaking did not address

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<sup>2</sup> MISO encourages discussion of topics on other matters in response to the NOPR, but comments separately for emphasis on the theme contained in the instant Comments.

the important subject of specifying criteria that governs the designation of CEII.<sup>3</sup>

The proposed rules leave unclear what criteria DOE personnel will use to evaluate whether information will qualify as CEII. Clarifying CEII designation criteria is particularly important in the DOE's proposed rules in order to help ensure consistent treatment of CEII by all DOE personnel. In this regard, MISO notes that the proposed DOE rules permit the delegation of CEII designation authority to any DOE Office.<sup>4</sup> The designation criteria must be specified to enable consistent designation of CEII by each DOE Office, and for CEII submitters to understand the kind of information the DOE will designate as CEII. The determination of what qualifies as CEII is also important since information provided to the DOE and not protected by the DOE as CEII may become the subject of a FOIA request and subsequent release.<sup>5</sup> Providers of information must have some form of advanced knowledge that information provided to the DOE may not receive CEII designation and treatment.

**B. The DOE Should Specify Criteria for Its Approval of CEII Requests from outside the Department.**

The criteria that the DOE uses for determining who may access CEII and for what purpose is at least as important to effective sharing of information as the procedures used by the DOE. Under proposed § 1004.13(j)(3), entities that may request CEII information are those included in a long list that extends to “other entities determined appropriate.” Proposed §1004.13(k)(4) also describes that upon a CEII Request, the CEII Coordinator, in consultation with the DOE Office, “shall determine if the need for CEII and the protection afforded to the CEII should result in sharing CEII for the limited

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<sup>3</sup> Also, FERC declined to “identify specific designation criteria and CEII procedures for DOE.” Order No. 833, 157 FERC ¶ 61,123, P 39.

<sup>4</sup> §1004.13(d).

<sup>5</sup> The proposal states that “[i]f a FOIA request is received for the non-CEII [as decided by the DOE] prior to its return or destruction, DOE will work with the submitter to review whether the information is subject to other FOIA exemptions.” §1004.13(h)(3).

purpose made in the request.”<sup>6</sup> Neither the provisions regarding which entities may make a CEII Request nor the procedures regarding the purposes that may benefit from the release of CEII address the criteria that will be used in DOE’s evaluation of whether a requestor or the request should be approved.

The DOE should specify criteria for the review of requestors and requests, and consistently abide by those criteria throughout the DOE Offices when making decisions about sharing CEII. The purpose of the CEII designation is to protect Critical Electric Infrastructure, “the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.”<sup>7</sup> The exemption from the FOIA supports DOE sharing of CEII as a limited exception that requires justification by the requestor based on a public good being served by access to the CEII stored by the DOE, a national or at least inter-regional application of the information, an explanation for why the information could not be obtained from the persons who provided the CEII to the DOE, and periodic reporting to both the DOE and persons who provided the CEII to the DOE (including any final report) regarding progress on the intended purpose for which the CEII was requested. Because anyone can make a CEII request for any purpose, CEII submitters should be informed by such review criteria and preferably provided examples concerning how the review criteria will be applied in DOE decision-making to share CEII.

### **III. CONCLUSION**

MISO respectfully requests that the DOE consider these Comments regarding the need for criteria specifying what information will be accepted as CEII as well as who may receive the information and for what purposes.

Respectfully submitted,

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<sup>6</sup> §1004.13(k)(4).

<sup>7</sup> §1004.13(c)(2).

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