

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

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

COMMENTS OF PJM INTERCONNECTION, L.L.C.

I. INTRODUCTION

PJM Interconnection, L.L.C. (“PJM”) respectfully submits these Comments in response to the Notice of Proposed Rulemaking (“NOPR”) issued by the Department of Energy (“the Department” or “DOE”) and published at 83 Fed. Reg. 54268 on October 29, 2018 under Regulation Identifier Number 1901-AB44. PJM has proposed specific language additions and modifications to the proposed rule and has attached those proposals as Appendix A to these Comments. In addition, these Comments outline the rationale supporting each of PJM’s proposed additions to the final rule.

PJM is a regional transmission organization (“RTO”) established pursuant to regulations and orders of the Federal Energy Regulatory Commission (“the Commission” or “FERC”). PJM is a transmission provider under, and the administrator of, the PJM Open Access Transmission Tariff, operates the PJM markets, and conducts the day-to-day operations of the bulk power system in the PJM region, which includes all or parts of thirteen states and the District of Columbia. As the transmission provider for the PJM region, PJM possesses and has an interest in protecting Critical Electric Infrastructure Information (“CEII”), as defined in the NOPR, which it may submit to the Department. Such CEII includes, in many cases, information from PJM members, including transmission owners in the PJM region, concerning the topology of their system. PJM uses this information both to operate the grid in real time as well as in its regional planning process.

As discussed herein, PJM believes the final rule should ensure protection of this highly sensitive information. In keeping with Congress’ direction in the Fixing America’s Surface Transportation Act

(“FAST Act”), the final rule should ensure that disclosure of this information is subject to a DOE review of the requester’s actual ‘*need to know*’ this highly sensitive information. Too often in the past, CEII disclosure rules have been written by the Commission and other agencies to establish procedures with a going-in assumption of implementing the requester’s *right* to know the critical information in question. Moreover, many of these past efforts relied upon imperfect, if not unenforceable, tools such as non-disclosure agreements (“NDAs”) as the sole means to protect highly confidential security information. PJM urges the DOE to approach its review in a more focused way requiring a greater showing of a requester’s ‘need to know’ before any release of CEII is authorized. PJM makes suggestions below to ensure that the final rule carries through on this approach.

II. COMMENTS

In the NOPR, the DOE proposes to establish procedures for the designation of CEII under the FAST Act.¹ The FAST Act authorized both the Secretary of Energy (“the Secretary”) and the Commission to independently classify CEII.² The Commission established its own criteria for the designation and protection of CEII in 2016.³ The DOE is now proposing to establish administrative procedures by which the Secretary would designate, protect, and share CEII under new section 215A of the FPA, according to criteria FERC has established and codified at 18 CFR 388.113.⁴

PJM believes that matters concerning critical infrastructure warrant a cautionary approach and, as such, is supportive of the DOE’s efforts with respect to designating, protecting, and sharing CEII. Due to the importance of these matters, PJM recommends that the Department consider further refinements to its proposed CEII procedures. Specifically, with respect to sharing CEII, PJM suggests that the Department (1) elaborate or provide further guidance on the requirement that requesters provide detailed statements

¹ Critical Electric Infrastructure Information; New Administrative Procedures, Notice of Proposed Rulemaking, 10 CFR Part 1004 (2018) (“NOPR”).

² 16 U.S.C. § 824o-1(d)(2)(D) (2017).

³ Regulations Implementing FAST Act Section 61003 — Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information, Availability of Certain North American Electric Reliability Corporation Databases to the Commission, Order No. 833, 157 FERC ¶ 61,123 at P 39 (2016).

⁴ NOPR at 54269.

explaining the need for and how requesters intend to use the CEII, (2) require requesters of CEII to first attempt to obtain the requested CEII from the submitter, (3) clarify when requesters would be required to submit another CEII NDA upon request of additional CEII, and (4) provide disciplinary action and remedies to the submitter for knowing or willful disclosure of CEII in an unauthorized manner by non-Department employees or contractors.

A. PJM Urges the Department to Elaborate or Provide Further Guidance on the Requirement that Requesters Provide Detailed Statements Explaining the Need for and How Requesters Intend to Use the Information.

The proposed rule in this area is somewhat vague as to how a non-federal entity requester of CEII demonstrates its “need” and “intended use” in its request to the Department. Specifically, the proposed §1004.13(k)(2) states that requesters must “[p]rovide a detailed statement explaining the particular need for and intended use of the information[;]” however, the proposed regulation does not provide any guidance on what would constitute a sufficient statement of need. PJM commends the Department for incorporating such a requirement in its proposed procedures, but recommends that the Department further elaborate or provide additional guidance on the requirement by providing certain additional criteria for determining legitimate needs and uses of CEII.

PJM believes that the Department should deny a non-federal entity request that merely provides a broad need statement, such as general explanations of the business or profession of the requester or generalized statements that the requester intends to use the CEII in the normal course of the requester’s business or profession. By way of example, the Department should consider the following types of need explanations as insufficient: “conducting reviews or research on the operation of the grid,” “analyzing the electricity transmission flows and congestion,” “advising clients on specific development projects,” or other broad statements without additional detailed information to support the request. The detailed information should include the *specific* reason a requester is conducting reviews or research of the operation of the grid, analyzing the electricity transmission flows and congestion, or advising clients on specific development projects by providing the project or assignment name, location, and timeframe in

order to give the Department all information necessary to make an informed decision. Moreover, the statement of need should also detail:

1. why the requester cannot reasonably meet its needs without obtaining the actual CEII information requested; and
2. why the request for information is reasonably tailored to meet the requester's needs rather than merely constituting a broad brush for, as an example, "all modeling data involving the Eastern Interconnection."

As a result, PJM recommends that for purposes of the final DOE rule, the requester should be required to detail *with specificity* its need to know the requested information and why a request to DOE for release of CEII is the sole means for it to accomplish the purpose outlined in its request. Accordingly, PJM suggests that proposed §1004.13(k)(2) include the additional language set forth in Appendix A, which language largely mirrors the statement-of-need language in the Commission's CEII rules.⁵

PJM has seen many examples of requests made to FERC where the justification was very general, with little justification to meet a showing of the requester's need to know the information in question. Thus, it is important, regardless of whether the Department incorporates the language suggested above, that the Department strictly enforce the language already incorporated within the proposed rule that requires that requesters "provide a *detailed* statement explaining the *particular* need for and intended use of the information."⁶ Furthermore, the Department should articulate a standard for appropriate uses such as the use should be directly related to the safe and reliable operation and planning of the interconnected transmission system. Requiring the level of detail suggested above is essential for all parties to understand the conditions under which the Department would grant a request for CEII and when the information needs to be destroyed or returned as contemplated by proposed §1004.13(j)(2)(iii).

⁵ See 18 C.F.R. 388.113(g)(5)(i)(B) (2018).

⁶ §1004.13(k)(2) (emphasis added).

B. PJM Encourages the Department to Require Requesters to First Attempt to Obtain the CEII from Certain Submitters of the CEII.

FERC Order 890 required that “transmission providers, in consultation with affected parties, develop mechanisms, such as confidentiality agreements and password-protected access to information, in order to manage confidentiality and CEII concerns.”⁷ PJM, as a transmission provider, has its own procedures under which requesters may submit requests and obtain CEII directly from PJM.⁸ Many other RTOs have also developed their own CEII rules, which provide for a rigorous review of requests prior to the release of CEII to requesters from the general public.⁹ PJM is concerned that as written, the proposed DOE rule potentially allows for requesters to circumvent the more rigorous CEII processes of the RTOs by simply going directly to the DOE for the requested information.

As the information in question generally was created or compiled by a RTO or an individual transmission owner, PJM urges the DOE to incorporate within the procedures set forth in §1004.13(k) a requirement that requesters first attempt to obtain CEII from submitters that have established their own procedures for requesting CEII, as is the case for PJM and other RTOs, prior to seeking its release through the Department’s CEII procedures. In short, the fact that the DOE is a repository of CEII information created and designated by a private entity should not, in and of itself, create a pathway for non-federal entity requesters to request the information from the Department and thus avoid first seeking its release from the creator and designator of that CEII pursuant to the process and procedures it has adopted as required by FERC Order 890. Accordingly, PJM recommends that the Department revise §§1004.13(j)(2) and 1004.13(k) as set forth in Appendix A to require a requestor to first seek the information from the submitter of the CEII.

⁷ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 FR 12,266 at P 460 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007) (“Order No. 890”).

⁸ PJM, *Manual 14B: PJM Region Transmission Planning Process*, § 1A (rev. 42, Aug. 23, 2018), <https://www.pjm.com/~media/documents/manuals/m14b.ashx>.

⁹ See e.g., *Request for Data Information*, ISO-NE.COM, <https://www.iso-ne.com/participate/support/request-information/> (last visited Dec. 20, 2018); see also, *Critical Energy Infrastructure Information (CEII) Request Instructions*, NYISO.COM, https://www.nyiso.com/documents/20142/1410683/CEII_Request_Form_and_NDA_complete.pdf/a6b8d9d0-e2e7-a2f5-9352-af2dfa16cf9a.

Directing requests for CEII to the creators of the information that have established their own processes for requesting CEII makes sense because they are best situated to efficiently evaluate whether a particular request aligns with the need and intended use provided with the request. Additionally, the requirement would likely have the collateral benefit of alleviating the number of requests the Department would receive, thereby reducing the Department's burden to make a determination of whether or not a stated need is sufficient. To be clear, PJM is not suggesting including this requirement in order to impede legitimate requests for CEII. Ultimately, if a requester is denied access to CEII from the submitter of the information, the requester could still seek the CEII from the Department, which would independently evaluate the request in accordance with the procedures set forth in §1004.13(k). PJM is only suggesting this first step as an additional means to help safeguard CEII by way of the entities that are most familiar with and well-versed on the CEII requested—the generators or original compilers of such information. In addition, the Department should consider any reasons articulated in any denial of access by the submitter in its decision-making process.

C. PJM Encourages the Department to Clarify When Requesters Would be Required to Submit Another CEII NDA Before Receiving Additional CEII.

It is unclear from the proposed rule whether the Department intends for the contemplated CEII NDA to apply to each individual request, thereby requiring the requester to enter into the CEII NDA with each request, or whether the Department intends for the requester to enter into the CEII NDA once, with such CEII NDA applying to all requests made by the requester for a certain period of time. For example, the Commission's CEII rules state that a requester is not required to enter into another non-disclosure agreement for subsequent requests in the same calendar year that such requester has already submitted a signed non-disclosure agreement because the original non-disclosure agreement applies to all subsequent releases of CEII.¹⁰ PJM believes it is reasonable for the DOE's CEII NDAs to be specific to the requested information, be specific to named individuals, and sunset on their own terms, absent specific requests for renewal after twelve (12) months. Incorporating these parameters into the Department's

¹⁰ 18 C.F.R. § 388.113(g)(5)(v) (2018).

procedures would avoid the perpetuation of stale NDAs not tied to specific data or signed by individuals no longer employed by the particular entity under which the request was made to the DOE. Thus, it would be helpful for the Department to clarify its position on this aspect of the Department's proposed rule.

D. PJM Encourages the Department to Consider Providing Disciplinary Action and Remedies to the Submitter for Knowing or Willful Disclosure of CEII in an Unauthorized Manner by Non-Department Employees or Contractors.

The proposed §1004.13(l)(2) provides for disciplinary action for Department employees or contractors who knowingly or willfully disclose CEII in an unauthorized manner. PJM encourages the Department to consider also specifying disciplinary action for non-Department employees or contractors who knowingly or willfully disclose CEII in an unauthorized manner. PJM believes that such disciplinary action should include the prohibition of making future requests by the requester.

Additionally, the Department should consider providing remedies to submitters for incidents of knowing or willful disclosure of CEII in an unauthorized manner. PJM suggests that the Department consider providing submitters with notice of any audit of a requester's compliance with the CEII NDA, rights to request an audit of a requester's compliance with the CEII NDA, rights to access the results of any audit, whether initiated at the request of the submitter or independently by the Department,¹¹ and rights to enforce the CEII NDA¹² or, in the alternative, require that the requester enter into an additional and separate non-disclosure agreement with the submitter prior to the Department disclosing the CEII. Providing submitters with rights to enforce the DOE's CEII NDA or requiring the additional and separate non-disclosure agreement would offer submitters contractual remedies they would not otherwise have under the proposed rule.

¹¹ Proposed §1004.13(j)(2)(v) states that the CEII NDA will provide the Department with rights to audit a requester's compliance with the provisions of the CEII NDA.

¹² PJM believes that the Department should make submitters third party beneficiaries of the DOE's CEII NDA, thereby providing submitters with the ability to enforce the DOE's CEII NDA.

III. Conclusion

PJM respectfully requests the Department consider these Comments in the NOPR.

Respectfully submitted,

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Dated: December 28, 2018

Appendix A

§1004.13(j)(2)

(2) *Non-Federal Entities.* The Secretary or the DOE Coordinator shall make a final determination whether to share CEII materials requested by non-Federal entities that are within the categories specified in section 215A(d)(2)(D) of the FPA. A request by such a non-Federal entity shall not be entertained unless the requesting non-Federal entity has **attempted first to obtain the CEII materials from the submitter of the information, to the extent that the submitter has an established processes for requesting CEII, and** entered into a Non-Disclosure Agreement with DOE that ensures, at a minimum:(i) Use of the information only for authorized purposes and by authorized recipients and under the conditions prescribed by the Secretary or CEII Coordinator;

(ii) Protection of the information in a secure manner to prevent unauthorized access;

(iii) Destruction or return of the information after the intended purposes of receiving the information have been fulfilled;

(iv) Prevention of viewing or access by individuals or organizations that have been prohibited or restricted by the United States or the Department from viewing or accessing CEII;

(v) Compliance with the provisions of the Non-Disclosure Agreement, subject to DOE audit; and

(vi) No further sharing of the information without DOE's permission.

§1004.13(k)

(k) *Procedures for requesting CEII.* Any person requesting CEII must include the following material with the request:

(1) *Contact Information.* Provide your name, title and employer, work address, work phone number, and work email. If you are requesting the information on behalf of a person or entity other than yourself, you must also list that person's or entity's work contact information, including name, title, address, phone number, and email.

(2) *Explanation of Need.* Provide a detailed statement explaining the particular need for and intended use of the information, **which statement must include, at a minimum, 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 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.**

(3) **Statement Regarding Attempt to Obtain CEII from Submitter.** Provide a detailed statement confirming your attempt to first obtain the information requested from the submitter of the information, to

the extent that the submitter has an established process for requesting CEII, and explaining the outcome of that request.

(4) *Signed Non-Disclosure Acknowledgement/Agreement.* Provide an executed Non-Disclosure Acknowledgement (if the requester is a Federal entity) or an executed Non-Disclosure Agreement (if the requester is not a Federal entity) requiring adherence to limitations on the use and disclosure of the information requested.

(45) *DOE evaluation.* Upon receiving a request for CEII, the CEII Coordinator shall contact the DOE Office or Federal agency that created or maintains the CEII. In consultation with the DOE Office, the CEII Coordinator shall determine if the need for CEII and the protection afforded to the CEII should result in sharing CEII for the limited purpose made in the request. In the event the CEII Coordinator or Coordinator's designee denies the request, the requestor may seek request for reconsideration, as provided in §1004.13(i).