

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Rule Regarding Critical Energy)
Infrastructure Information Policy,)
Statement on the Treatment of)
Previously Public Documents)

Docket No. RM02-4-000

**COMMENTS OF THE
PUBLIC UTILITIES COMMISSION OF OHIO,
THE OKLAHOMA CORPORATION COMMISSION, AND
THE MICHIGAN PUBLIC SERVICE COMMISSION**

The Public Utilities Commission of Ohio, the Oklahoma Corporation Commission, and the Michigan Public Service Commission (“state commissions”) respectfully files this response to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Notice of Inquiry (NOI) regarding the public availability of critical energy infrastructure information (CEII).

In light of the events of September 11, 2001, new measures must be taken to guard critical energy infrastructure information from misuse. At the same time, because such data has generally been publicly available, and often relied on by regulators, utilities and citizens in regulatory proceedings, the questions raised by the Commission’s NOI are novel and difficult. The state commissions share the Commission’s interest in assuring that the questions raised by the NOI are squarely addressed and correctly answered, so that any CEII limitations be on firm legal and practical footing, with full and due regard for the central role of public participation in utility regulatory proceedings. We therefore applaud the Commission for its good faith effort to seek public comment on these questions. In light of the obvious importance of this matter to all of us, and the commonality of the questions raised by the Commission with those that are being

addressed by other federal and state public agencies, the state commissions respectfully suggest that in responding to public comments and formulating policy the Commission may wish to consult with the Office of Homeland Security and consider whether new legislation is needed to effectuate some of what the NOI proposes. There needs to be a cohesive approach to solving these very serious matters.

Our comments below cover three main topics. First, we address the Commission's request for comments on the applicability of Freedom of Information Act (FOIA) exemptions for CEII (NOI, Topic 6) and comment generally on the Commission's statutory authority for the proposals outlined in the NOI. As explained below, there are significant questions about the applicability of the exemptions. Our discussion of the FOIA exemptions and the legal basis for the Commission's proposed course of action also comments on the use of non-disclosure agreements (NOI, topic 5). Second, we comment on the potential ramifications of the Commission's proposals on state public utility commissions (addressed in part in NOI, Topic 6). Specifically, we explain our concern that the Commission's proposed path of dealing with CEII may have ramifications for: (1) state commission ability to obtain information that is routinely required; (2) state commission ability to use information in public proceedings; and (3) the obligations of state commission staff and officials who handle CEII to do so in ways that do not violate yet-to-be specified governing rules or principles. Third, we provide several comments and questions that the Commission will need to address in defining CEII (NOI, Topic 2).

The comments below were prepared without access to the Commission's non-public appendix. We note that the time period for requests for access to the non-public appendix was significantly shorter than the time period for filing comments.

I. Statutory Impediments to the Commission’s Proposal¹

A. Federal Information Law: Background Relevant to CEII

The Federal government is obliged to make public all information that is not exempt from disclosure under the Freedom of Information Act, 5 U.S.C. sec. 552.² “Records” (including electronic records) possessed by Federal “agencies” must, upon written request by any “person” pursuant to agency FOIA rules, be made available to any requestor unless they fall under one (or more) of nine exemptions. The statute excludes federal agencies from the definition of “persons” but state agencies can make FOIA requests.³

Once information is released under FOIA it is available to all requestors; the government cannot place restrictions on reuse of the information.⁴ A requestor may republish the information on a website, for example. Moreover, the determination to release information cannot depend on the identity of the requestor.

B. The NOI’s Presumption That CEII Can Largely Be Withheld Under Freedom of Information Act (FOIA) Exemptions Merits Careful Scrutiny

The NOI states, at 22, that the Commission's proposed approach is “premised on the belief that CEII is exempt from disclosure under the Freedom of Information Act.” This premise

¹ Our comments in this part address NOI, topic 6, Applicability of FOIA Exemptions; topic 5, Non-disclosure Agreements; and comment generally on the Commission's authority to pursue the policies identified in the NOI.

² The Department of Justice publishes a detailed standard guide to FOIA procedures and case law. See *Freedom of Information Act Guide* (May 2000), available at <http://www.usdoj.gov/oip/foi-act.htm>.

³ See, e.g., Texas v. ICC, 935 F. 2d 728 (5th Cir.1991).

⁴ It appears that the only reuse restrictions placed on documents released under FOIA are those relating to potential copyright issues (*i.e.*, notification that reuse may pose copyright payment obligations).

is key because, as the Commission explains, *id.*, disclosure to anyone under FOIA requires disclosure to all requestors. However, the kinds of documents at issue have hitherto been available under FOIA, and it is not obvious that more than a fraction of CEII can be readily exempted under FOIA.

As a threshold matter, the Notice does not suggest that the CEII at issue is subject to “national security” exemption. While the Commission does not explain why it does not invoke the exemption, there may be several bases for the omission. First, of course, exemption one has not previously been invoked in regard to the documents; however, this also can be said regarding the FOIA exemptions on which the Commission does propose to rely. Second, there is no precedent for “classifying” information that is produced by the private individuals (*e.g.*, utilities) who do not otherwise have access to government generated classified information.⁵

The Commission suggests (at 23-24) that FOIA exemptions 2, 4, and 7 may be employed to prevent dissemination of CEII. However, inspection of these exemptions indicates that there may be problems shoehorning CEII into the statutory language and traditional framework of these three exemptions.

Exemption 2: Exemption 2 protects from disclosure documents “related solely to the internal personnel rules and practices [such as IRS enforcement practices] of an agency.” In fact, following September 11, this exemption is now being used by agencies to exempt “threat

⁵ There has been debate as to whether “atomic secrets” deduced by private citizens with no access to classified data (such as a college physics student) may be classified. However, there appears to be no precedent (at least no public precedent) for the classification of privately produced information that, like FERC data produced by utilities, has never been classified.

assessments” or “vulnerability” studies they may perform to assess possible internal risks to their own agencies and Federal facilities.⁶

However, the Commission’s position raises novel questions: the statutory language, as just quoted, refers to matters “internal” to the government (“of an agency”); we are aware of no precedent for applying this exemption to information developed by the private sector and which relates to vulnerability of the private sector.

Exemption 4: Exemption 4 protects “trade secrets and financial or commercial information obtained from a person [that is] privileged or confidential.”

The proposed use of Exemption 4 also raises novel questions. By definition, the information at issue has not hitherto been viewed as commercially sensitive -- utility providers of the information have not previously sought to invoke this exemption and, indeed, may not be doing so even today.⁷ Arguably the events of September 11 present changed circumstances that may render previously public information commercially sensitive (e.g., potential terrorist conduct may damage a business). However, this proposition is untested, and it is not clear that this logic is even proposed by the FERC Notice.

Exemption 7: Exemption 7 applies to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to endanger the life or physical safety of any individual.”

⁶ See the website of the National Archives, which indicates it is using the exemption regarding agency vulnerability studies.

⁷ The NOI, at 9, explains that in granting Williston Basin’s request to treat portions of Williston’s tariff sheets as confidential, it took into account that customers or prospective customers will be able to obtain the map directly from the pipeline company.

Here, once again, FERC's proposed use of an exemption raises novel questions. While FERC calls for utility comment on the matter,⁸ the information at issue has not been previously protected under this exemption. It would seem necessary to argue, again, that the events of September 11 somehow render previously public information subject to the exemption. Perhaps the Commission could conclude that all CEII information is now deemed to be placed in a law enforcement file, and, *ipso facto*, subject to exemption 7; however such a method of invoking the exemption raises questions of public policy since such an assertion could substantially expand the previous application of this exemption.

In sum, it is possible that, by invoking September 11 concerns, a fair amount of CEII might qualify for an exemption under FOIA, but this would be a basic departure from the historic treatment of the information (and of the construction of the FOIA exemptions). Moreover, even if available, the exemptions may only cover a portion of information at issue. Therefore, it is respectfully requested that FERC, in consultation with the Office of Homeland Security, provide careful consideration of the extent to which existing FOIA exemptions can reasonably be applied to CEII, and the possibility that a further and new exemption may be needed to treat CEII. After all, this will affect all of us, both in public safety and job performance.

C. The Commission's Proposal to Make Documents Available on a Need to Know Basis May Call for A New Class of Protected Documents For Which There is No Provision Under Current Law

⁸ The FERC Notice, at 24, asks:

“What kinds of documents containing CEII are compiled by the Commission for law enforcement purposes that could reasonably be expected to endanger the life or physical safety of individuals?”

The NOI explains that to release documents on a need to know basis, it must release them outside of FOIA (because release under FOIA would require release to the public at large). However, there does not appear to be any current law that would permit such selective release.⁹ Presumably, the Commission must point to some specific statutory authorization for selective release in light of the Freedom of Information Act's presumption that all federal agency records must be disclosed unless FOIA itself provides for an exception to the disclosure requirement. See DOJ Freedom of Information Act Guide, supra.

National security laws, as summarized above, do permit selective release of documents (to those who have “clearances”). However, the NOI does not propose to invoke these laws. Moreover, national security secrecy laws apply to documents generated by the government (or its contractors and consultants), and to individuals who are under restrictive agreements. The documents at issue in the Notice are not produced by the government or contractor officials under security restrictions; nor (to the extent that they have been publicly available) do they likely embody classified data.

In sum, the statutory basis for the proposed selective release of CEII is uncertain and may be subject to legal challenge.¹⁰ The state commissions share with the Commission a special

⁹ The Notice states, at 16 (footnote omitted), that: “[a]t present, the Commission is considering an approach that would strive to process most requests for CEII outside of the FOIA process.”

¹⁰ FOIA exemption 3 allows the withholding of information prohibited from disclosure by another statute. It might be argued that the Federal Power or Natural Gas Acts provide a basis for withholding information under this exemption. However, such argument has not previously been made and the criteria contained in exemption 3 render its success doubtful. Specifically, the exemption requires that the statutory provisions precluding disclosure must “(A) require that the matters be withheld from the public in such a manner as to leave no

interest in assuring that FERC's new policy thoroughly consider whether existing legal regimes for providing documents on a restricted basis are sufficient to cover CEII needs, and, if not, what additional rules or laws may be needed.

D. FERC's Proposal to Limit Disclosures on a Need-to-Know Basis Requires Nondisclosure Agreements That May Raise Questions of Lawfulness and Practicability That Should Be Addressed In Advance

The legal basis and the procedures the Commission will utilize for implementing the non-disclosure agreements that will be required if CEII is to be disclosed on a selective basis are unclear. As just noted, our federal laws provide for selective disclosure of national security information. In addition, as the NOI points out, they provide for selective disclosure of documents to parties to judicial or administrative proceedings ("protective orders").

However, the NOI does not suggest that the documents will be governed by existing national security regulations, and protective orders have been employed only in connection with proceedings and then to parties to the proceeding.

In short, if the FERC does propose to limit disclosure on a need to know basis, then it also may need to develop a new scheme for binding recipients of the data to nondisclosure. This, in turn, suggests the need to police nondisclosure agreements, and to have real sanctions for their violations. If, as the NOI suggests, the Commission is not seeking to bar access to members of the public at large, nondisclosure and enforcement requires considerable thought.

The Commission, in consultation with the Office of Homeland Security, should consider and explain how such agreements could be crafted and policed. For example:

discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of documents to be withheld." See 5 U.S.C. sec. 552(b)(3).

- (1) Would the Commission require signed agreements as a condition for receipt of information?
- (2) How would the conditions be policed -- particularly in regard to those who intend to violate them? Would enforcement rely on an honor system? What kind of investigation would be undertaken, and by whom, if, for example, a press report appeared concerning a document released by FERC on a selective basis?
- (3) What kinds of sanctions would be imposed for violations?
- (4) Would FERC propose to bar private utilities from disclosing the information on their own volition? If so, how could this be enforced (assuming it were legal)? If not, would private utilities use the bar as a broad tool to avoid disclosure of information that the public plainly has a need to know? Who would police this?

II. The FERC Notice Raises Special Questions for State Commissions¹¹

The NOI raises special questions for state public utility commissions, both as users of information and providers of information. Below we note some of the questions of significance to the state commissions that the Commission will need to consider in adopting a CEII policy.

A. The Proposal Could Affect the Legitimate Need of State Commissions for Access to Utility Information

The information at issue is the raw material from which state public utility commissions (PUC) conduct day-to-day analysis, inquiries, and proceedings. Thus, it is crucial that the Commission fully explore the ramifications for its treatment of CEII on state commission access to information. The Commission will need to examine the following types of questions regarding PUC access to information:

Will PUCs be entitled to all CEII possessed by the Commission, at least upon reasonable assertion of need?

¹¹ This part of our comments addresses NOI Topic 3, "Requester's Status," and provides additional comment on informational issues of importance to state regulators.

The NOI states, at 17-18, that because PUCs are public agencies, FERC may provide them CEII data without triggering general public availability. However, FERC notes that this arrangement may raise *ex parte* problems where the PUCs receive such data to the exclusion of other interested parties.

- (2) What, if any, preemptive effect will the Commission's CEII policy have on PUCs?
 - (a) Does FERC intend that its definition of CEII, whatever it may be, dictates the state definition?
 - (b) Will states themselves be obliged to amend their own disclosure rules and laws to comport with CEII requirements?
 - (c) If so, on what legal authority does the Commission base this view?

Does the Commission agree that states should continue to be entitled to directly access CEII from utilities subject to their jurisdiction? ()
What will happen when/if a utility invokes a CEII claim as a basis for restricting state PUC access? Who gets to decide this claim, the PUC or the FERC?

- (3) Assuming PUCs can continue to require data from jurisdictional utilities as they have previously, will states have access to relevant data which may not be possessed by jurisdictional entities (e.g., data related to regional grids that extend beyond a state's border)?

B. State Commission Use of CEII Data in PUC Proceedings or Other Appropriate Fora (e.g., Legislatures)

- (2) Does the Commission propose that its rules will govern state PUC use of CEII data?
 - (a) If so, what is the legal basis for this view?
 - (b) Does it matter where the PUC got the data from? Does it matter if the utility is generally making the data available?
- (2) How will Commission rules interact with state public records laws?

- (3) If there is reasonable disagreement about PUC use of documents, who gets to determine the use? Must the PUC report to the Commission?

C. PUC Compliance with Nondisclosure Requirements

- (1) What practical changes will be required in the storage and management of records at the PUC? (E.g., Will there be a requirement that documents be reviewed and CEII documents segregated, or stamped?)
- (3) What requirements will be placed on staff who handle CEII data?

III. The Definition of Critical Energy Infrastructure Information¹²

The NOI, at 14-15, seeks comment on the CEII status of certain types of information. The “non-public appendix” apparently identifies categories of information that likely merit this status. As noted above, we have not reviewed the non-public appendix in light of the early deadline for requesting access to the appendix. As a result, below we provide a brief list of factors, in the form of three questions, which the Commission should consider in determining what constitutes CEII for which public access may be restricted:

- (1) What kinds of information will remain publicly available whether or not the Commission limits its availability?

For example, much information may already be available on the web on nongovernmental sites that are beyond Commission jurisdiction. Other information, such as plant location, is relatively accessible by physical review. How should such information be handled?

- (3) What have other agencies done in regard to information that is normally considered to be an essential part of a public review process but, in some cases, cannot be broadly disclosed?

¹² This part comments on NOI topic 2, regarding the definition of CEII.

For example, the National Environmental Policy Act, 42 U.S.C. sec. 4321 *et seq* (NEPA) does provide for the conduct of classified environmental impact statements.

- (4) What kinds of disclosures are potentially dangerous when located on websites, but of less danger if limited to public records room disclosure?

The Environmental Protection Agency, for example, currently provides certain data only at public records rooms, and then may limit copies and/or numbers of requests.

Conclusion

We commend the Commission for its effort to address important issues of energy security. The NOI raises complex questions for which there appears to be little precedent. Appropriate and cohesive resolution will require very careful scrutiny and deliberation, due to the far-reaching implications to public safety and state and federal agency performance. Given the commonality of the issues raised by the NOI with those facing other agencies, and the difficult legal and practical questions that may be raised by restrictions on CEII, the Commission should consult with the Office of Homeland Security in responding to comments, and formulating its further proposal. In addition, depending on the results of the Commission's analysis of current Freedom of Information Act exemptions and existing protocol for limiting disclosures on a need to know basis, the Commission may wish to identify issues which would benefit from legislative attention and direction. In any event, if the Commission prefers to move forward, there is a need to flesh out and address questions regarding the effect of the Commission's proposal on state commissions beyond those questions raised in the NOI.

Respectfully submitted,

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