

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

Rule Regarding Critical Energy )  
Infrastructure Information Policy, ) Docket No. RM02-4-000  
Statement on the Treatment of )  
Previously Public Documents )

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

The Public Utilities Commission of Ohio, the Michigan Public Service Commission, and the staff of the Oklahoma Corporation Commission (“State Commissions”) respectfully file this response to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) September 5, 2002, Notice of Proposed Rulemaking (“NOPR”) regarding the public availability of critical energy infrastructure information (CEII). The Ohio Public Utilities Commission, the Oklahoma Corporation Commission and the Michigan Public Service Commission previously commented on FERC’s Notice of Inquiry (“NOI”) on CEII, and respectfully request that the FERC consider those comments as well as the additional comments set forth below. The State Commissions welcome the opportunity to once again comment on these proposed rules, and state as follows:

## **Introduction and Summary**

### **A. FERC's NOPR**

FERC's NOPR proposes that:

- (1) FERC will abide by the Freedom of Information Act, 5 U.S.C. Section 552 ("FOIA"), requirements for information disclosure and that CEII will consist only of information that can lawfully be withheld under one of the nine FOIA Exemptions. FERC states that Exemption 2 (internal agency personnel rules and practices); Exemption 4 (commercial information); and Exemption 7 (law enforcement information) provide a basis for withholding substantial amounts of CEII.
- (2) FERC will make CEII information available on a "need to know" basis.
- (3) FERC will generally not withhold information on facility location or information readily available by visual inspection.
- (4) FERC indicates it will permit state agencies to have broad access to CEII; however, it is concerned states would be obliged to disclose CEII in their possession under state open records laws. FERC suggests this problem can be resolved by declaring that Federal law preempts state open records laws and/or by "loaning" documents to states.

### **B. State Commission Comments**

In light of the NOPR and the State Commissions prior and continued concerns, our comments below cover two main topics.

First, we address the Commission's proposal to proceed under the Freedom of Information Act (FOIA) for CEII. The State Commissions applaud FERC's commitment

to abide by FOIA as the basic Federal law governing the release of information maintained by the Federal Government. However, the NOPR's proposed uses of Exemptions 4 and 7 raise questions that require further elaboration and consideration. The Commission now indicates that, in light of market based pricing, Exemption 4 can be the basis for broad withholding of commercial data on grounds that its release may cause competitive injury. This apparently new policy declaration<sup>1</sup> requires review to assure that the State Commissions' vital CEII concerns cannot be misused to keep secret, information central to the public conduct of public utility regulation. Similarly, the Commission's proposed use of Exemption 7 raises questions as to the breadth of the new withholding which the Commission proposes.

Second, we comment on the potential ramifications of the Commission's proposals on state public utility commissions. State Commissions stated in their Comments on the NOI 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.

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<sup>1</sup> See, for example 100 FERC 61, 328 Docket No. ER00-2998 001, et. al. ORDER DENYING REHEARING, DENYING RECONSIDERATION AND ADDRESSING COMPLIANCE WITH PRIOR ORDERS THAT DENIED CONFIDENTIAL TREATMENT OF LONG-TERM SERVICE AGREEMENTS, issued September 25, 2002, in which the Commission denies requests for confidential treatment of long-term service agreements filed pursuant to market-based rate tariffs. The Order states at page 6, "The Commission has consistently held that: the longstanding benefits of public access to filings under section 205 of the FPA outweighed the potential competitive disadvantage of public disclosure; a general policy against confidential treatment does not violate the Freedom of Information Act..."

In light of the NOPR, State Commissions continue to have concerns that require Commission response and consideration. These include:

(1) Whether, and on what basis, FERC proposes that its CEII rules will preempt state open records laws and rules?

(2) Whether state commissions will automatically be permitted to obtain all CEII data from FERC (or whether state commission access may be limited on a “need to know” basis)?

(3) Whether FERC’s rule will adequately preclude utilities from invoking the FERC rule to avoid providing CEII data to state commissions?

(4) Whether state commissions will have requisite access to CEII data from utilities not within a State Commission’s jurisdiction (*e.g.*, for purposes of examining regional transmission or generation capability)?

(5) Whether state commissions and/or their staff will be required to enter into “nondisclosure agreements,” and if so, on what terms?

Third, we comment on the process by which CEII will be made available to the public by the CEII “Coordinator,” to whom - the NOPR provides - FERC will delegate authority to review CEII requests; and also comment on FERC’s review of the costs of complying with the CEII rule.

As a result 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 as well as utilities and citizens in regulatory proceedings; the questions raised by

the Commission's NOPR are novel and difficult. State Commissions share the Commission's interest in assuring that the questions raised by the NOPR are squarely addressed and correctly answered, so that any CEII limitations are 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, and the commonality of the questions raised by the Commission along with those questions that are being addressed by other federal and state public agencies, the State Commissions respectfully suggest the need for a cohesive approach to resolving these very serious matters. The State Commissions further suggest that in responding to public comments and formulating its rule, the Commission may wish to consult with the Office of Homeland Security and consider whether new legislation is needed to effectuate all or part of what the NOPR proposes.

## **I. The NOPR's Proposed Application of FOIA Exemptions**

### **A. State Commissions Commend FERC's Commitment to Abide by the Freedom of Information Act .**

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 Therefore, in their Comments on the NOI, the State Commissions stated that, absent new Congressional enactment; any FERC CEII rule should stay within the bounds of FOIA. The NOPR confirms that this will be the case:

It was apparent from the responses received that the NOI

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<sup>2</sup> 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>.

did not sufficiently explain that the Commission intended to deny public access only to information that was exempt from disclosure under the FOIA. The Commission has no intention of adopting an approach that would ignore the agency's obligations under the FOIA, which requires that all non exempt information to be made available to the public. NOPR, at ¶ 10.

The State Commissions laud FERC's commitment to employ FOIA, subject to any new legislation that may be required; as the law governing CEII. Nonetheless, the State Commissions would remind the FERC that the Freedom of Information Act, because it provides for exceptions to the general public policy of allowing for the public disclosure of information, tends to be strictly construed by the courts. 466 U.S. 1, 8 (1988), *FBI v. Abramson*, 456 U.S. 615,630 (1982), *Dept. of Air Force v. Rose*, 425 U.S. 352, 361 (1976). Indeed, the basic purpose of FOIA is to open agency actions to the light of public scrutiny. There is no "need to know" test other than, perhaps, under possible national security exemptions.<sup>3</sup>

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<sup>3</sup> To date, the national security exemption has not been invoked with regards to documents produced by or submitted to the FERC. Accordingly, invocation of exemptions based upon the nation's national security would necessarily, require that the FERC directly address what types of CEII will be subject to such exemptions; including but not limited to the delineation(s) of the actual risks involved with each piece of data for which protection is sought. For example, knowing that several transmission lines are highly congested in real time might pose a threat if terrorist were to simultaneously attack the congested lines. In such a case, it might make sense to limit access to LMP data in real time to regulators and those who are legitimate market participants for whom it has been verified that the intent in obtaining the information is solely participation in the markets. However, retrospective examination of LMP data could be released for limited purposes such as transmission and generation expansion planning. The State Commission's submit that having a direct discussion of the policy implications of these CEII issues will avoid the charade of trying to identify and protect national security indirectly where a direct approach is more focused and appropriate.

**B. The NOPR's Presumption That CEII Can Largely Be Withheld Under Current Freedom of Information Act (FOIA) Exemptions Merits Further Elaboration and Consideration**

The NOPR states FERC's expectation that substantial amounts of CEII will be withheld under FOIA Exemptions 2, 4, and 7. NOPR at IIID. This premise is key because, as FERC recognizes, disclosure to any one requestor under FOIA, requires disclosure to all. NOPR, at ¶ 2. However, the types of documents at issue have hitherto, been available under FOIA.<sup>4</sup> As such, The FERC's proposed use of Exemptions 2, 4, and 7 appear to be overly broad and not narrowly construed. The State Commissions submit that information should be withheld from full public disclosure only where clear need to do so has been demonstrated. Notwithstanding the above however, the State Commissions assert that no such restrictions of access to CEII information can be utilized against the States, given their concurrent regulatory authority which parallels the FERC's.

**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." 5 U.S.C. 552(b)(2). In fact, following September 11, this exemption is now being used by agencies to exempt "threat assessments" or "vulnerability" studies that are performed

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<sup>4</sup> The NOPR 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 (National Security) 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.

to assess possible internal risks to an agency's own, as well as other Federal facilities.<sup>5</sup>

The NOPR states that according to guidance from the Department of Justice (DOJ), "any agency assessment of, or statement regarding, the vulnerability of such a critical asset; should be protected pursuant to Exemption 2." NOPR, at IIIB1a. FERC states that the DOJ has counseled agencies that "a wide range of information can be withheld under Exemption 2's 'circumvention' aspect." *Id.* FERC therefore, states its belief that "a portion of the CEII removed from public access may be exempt from disclosure under Exemption 2." *Id.*

The statutory language - as 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.

The NOPR explains (fn. omitted):

Illustratively, the Commission is expanding its efforts to help facility owners and operators assess security risks and protect facilities from attack. Information developed or created by the Commission as part of these efforts is quite likely to fall within the gambit of Exemption 2. Documents describing inspections of regulated facilities likewise may fall within Exemption 2. NOPR at ¶ 11.

FERC's illustration appears to confirm that FERC does not intend to use Exemption 2 to withhold information developed by the private sector. Should FERC intend to

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<sup>5</sup> See the website of the National Archives, which indicates it is using the exemption regarding agency vulnerability studies.

expand Exemption 2 to cover privately developed data, the State Commissions respectfully suggest that provision for further comment would be in order.

**Exemption 4:**

Exemption 4 protects “trade secrets and financial or commercial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4). By definition, the information at issue has not hitherto, been viewed as commercially sensitive.

Nonetheless, the NOPR states that FERC “has determined that much of the information that may be withheld as CEII may fall within the scope of Exemption 4, because release of the information could cause competitive harm to submitters, impair the Commission's ability to obtain similar information in the future, or impair the effectiveness of the Commission's programs.” NOPR at ¶ 12.

As discussed below, it appears that in a NOPR directed to protecting CEII; FERC declares a potentially broad new readiness to permit withholding from the public, of information that has long been publicly available, on grounds that it is commercially sensitive. Of particular concern is the use of Exemption 4 to protect “trade secrets and financial or commercial information obtained from a person that is privileged or confidential.” To create workably competitive markets in a market structure that is highly concentrated with high barriers of entry, there must be information transparency in the market place, as well as vigilant market monitoring. Otherwise, incumbent utilities and others that have obtained market power will have yet another tool (*e.g.*, asymmetry of information) to keep workably competitive markets from developing. Also, without

transparent market information, there is no outside check on the market monitoring process since there is no way to open FERC's agency actions to the light of public scrutiny. A better approach would be to address directly, the national security issues connected with CEII. Accordingly, FERC's proposal must be carefully scrutinized to assure that the essential ends of protecting CEII do not become the means for broad - and potentially abusive - withholding of data that has long been at the center of public regulatory proceedings.

*FERC's Exemption 4 Analysis*

The NOPR explains that Exemption 4 precedent provides differing tests for information that is voluntarily submitted to the government versus information for which production is compelled. NOPR at ¶. 14. The NOPR states that most submissions to a regulatory agency like FERC appear to be compelled, though this may not necessarily be the case. NOPR at fn. 22. The NOPR explains that where information is compelled, its release (or withholding) under Exemption 4 must be determined under a "three pronged" test established by the courts. NOPR at ¶ 15. The three prongs are the competitive harm prong, the impairment prong and the program effectiveness prong. *Id.* If any of the three prongs are met, the information can be withheld. *Id.*

FERC asserts that the change to market based pricing, is a changed condition which permits a finding that the release of commercial information may now - if not previously - be a source of commercial harm; and therefore, can be withheld under Exemption 4. FERC states:

Under the competitive harm prong, there must be evidence of actual competition, and a likelihood of substantial competitive injury... This inquiry tends to be fact specific, so it is not possible to identify with certainty which categories of information would meet the test. However, as utilities transition from monopolies to competitive markets, it may be easier for them to demonstrate actual competition. NOPR at ¶ 15.

FERC further suggests that the demonstration of competition may not be difficult:

The Commission's analysis of a submitter's competitive situation under FOIA is not the same as, and indeed is less rigid than, the analysis it must perform to establish lack of market power for charging market-based rates. For FOIA purposes, the competition requirement is satisfied if the submitter faces some level of actual competition. NOPR at fn. 23.

With regard to competitive harm, FERC explains:

The test most frequently applied under the competitive harm prong is whether use of the information by competitors is likely to harm the submitter...This may be fairly challenging to demonstrate in the case of CEII because the primary concern is that the information could be used to plan an attack on the infrastructure, not that it could be used to steal customers or undercut prices. On the other hand, a submitter may be able to show competitive harm where use of the information by someone other than a competitor could cause financial harm to the submitter...As relevant here, a terrorist attack on the energy infrastructure could cause financial harm to the owners and operators of the facilities because of lost opportunity costs as well as repair costs. NOPR at ¶ 16.

FERC next explains that the "impairment" prong may also be met (fns. omitted):

For compelled submissions, the impairment prong is satisfied where disclosure may affect the reliability or quality of the information received. If companies are worried that information they submit will be subject to public disclosure,

they may choose not to submit the same level of detail that they might otherwise submit. In such circumstances, and assuming the submissions would otherwise comply with the Commission's regulations, the information may be exempt from disclosure under the impairment prong of Exemption 4. NOPR at ¶ 17.

Finally, FERC concludes that the “program effectiveness” prong may also be met if (fns. omitted):

Release of CEII could threaten the effectiveness of the Commission's programs...Inappropriate release of CEII could make the infrastructure more vulnerable to attack, threatening those industries and resulting in potentially devastating economic and environmental consequences. As noted above, release of CEII also could make regulated entities less forthcoming in the information they provide to the Commission, especially where they have discretion as to what they submit. Finally, release of CEII could harm the relationship between Commission staff and the regulated companies, impairing trust, and causing the parties to deal with each other in a more adversarial manner than necessary. For all of these reasons, much of the CEII could be exempt from disclosure under the third prong of Exemption 4 as it relates to compelled submissions. NOPR at ¶ 19.

*FERC's Exemption 4 Analysis Requires Elaboration and Reconsideration*

FERC's proposed use of Exemption 4 appears to be a case of the (“competition”) tail wagging the (“energy infrastructure”) dog. Prior to the effectuation of the proposed application of Exemption 4, the proposal must be carefully reviewed to assure that: (1) FERC's competitive injury analysis comports with FOIA and further relevant law; and (2) FERC's criteria cannot and will not be abused by utilities to withhold from public disclosure, commercial information which lacks legitimate CEII status and that has historically been central to public regulatory proceedings.

For example, FERC's NOPR recognizes (at ¶ 16) that the "test [for commercial injury] most frequently applied under the competitive harm prong is whether the use of the information by competitors is likely to harm the submitter." However, the NOPR declares that competitive injury can be shown where the person or entity submitting the information shows that "someone other than a competitor could cause financial harm" to the submitter. *Id.* FERC cites no precedent for finding competitive injury where the source of damage is not a market participant (*e.g.*, buyer, seller, customer).. By contrast and in the context of antitrust law, the courts have construed competitive injury narrowly, to exclude even some injuries that admittedly stem from the competitive process itself.<sup>6</sup>

Similarly, FERC's explication of the "impairment" prong relies on circumstances that are not obviously analogous to those at issue before FERC. With regard to the "impairment" prong, the NOPR cites a holding that Exemption 4 protects the National Institute of Health's royalty data, "because release of the information would make com

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<sup>6</sup> The "antitrust injury" test for standing under Federal antitrust law was initially prescribed by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-a-Mat, Inc.*, 429 U.S.477 (1977). In *Brunswick*, bowling centers claimed that they were injured when the largest bowling center (also a large seller of bowling equipment) acquired bowling centers that had defaulted on equipment payments. Plaintiffs' claimed they would have been more profitable if the failing bowling centers had been permitted to fail, and not been acquired. The question was whether antitrust damages are available where the "sole injury alleged is that competitors were continued in business" and plaintiffs' therefore lost profits. The Court found that Plaintiffs' alleged damages would have been no less if the failing centers had been acquired by a smaller competitor. Holding that Plaintiffs have to allege "antitrust injury" (and not simply injury), the Court dismissed the damage claim, holding that plaintiffs cannot claim antitrust injury from the natural effect of the competitive process.

panies reluctant to enter into agreements with NIH, thus impairing the effectiveness of NIH's licensing program" (see footnote 27, and related text). However, in the NIH case, it may well be that NIH researchers and NIH itself benefit from the royalty arrangement, while private researchers have opportunities to forego working with NIH in lieu of alternative partners or research approaches. In the case of FERC, by contrast, it would appear *a priori*, that the incentives for agency and potential licensee differ from those at issue in the NIH royalty context. Specifically, entities that wish to do business with the utilities subject to FERC's reporting requirement can be distinguished from the NIH case's private researchers because the exemption from disclosure found in the NIH case, may or not be duplicated in the instant matter.

Finally, it is not clear whether a utility must even make a CEII claim to withhold data under the new Exemption 4 criteria. FERC should therefore, make it clear that a bona fide CEII claim is the predicate to the newly proposed basis for Exemption 4 withholding. In addition, FERC should state what means will be employed to assure that the utility is not seeking to abuse the Exemption by invoking it to withhold hitherto, routinely available commercial data.

**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." 5 U.S.C. § 552(b)(7).

FERC states that for purposes of CEII, the most relevant Exemption 7 provision is 7(F), which allows information to be withheld in order to protect a person's life or physical safety. 5 U.S.C. § 552(b)(7)(F). FERC states that in order to invoke Exemption 7, the agency must be able to demonstrate that the document at issue involves enforcement of a statute or regulation that the agency is authorized to enforce. NOPR at ¶ 23.

FERC states that because it has broad enforcement authority under the Federal Power and Natural Gas Acts, “much of the information the Commission collects qualifies as information collected for a law enforcement purpose,” and therefore, may be withheld under Exemption 7(F) if the release of the information may reasonably be expected to endanger life or safety. NOPR at ¶ 23.

FERC’s declaration that it has broad law enforcement powers and therefore, can withhold unspecified amounts and categories of data (under Exemption 7F) requires elaboration and reconsideration.

In *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), the Supreme Court explained there must be a nexus between FERC’s exercise of its authority and the statutory missions with which it is entrusted by Congress. *NAACP* considered whether the Commission could regulate discriminatory practices of utilities admittedly within its jurisdiction:

The issue in this case is to what extent, if any, the Federal Power Commission, in the performance of its functions under the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. § 791a et seq. (Power Act), and the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. § 717 et seq. (Gas Act), has authority to prohibit discriminatory employment practices on the part of its regulatees. *NAACP* at 663.

The Commission refused the NAACP's request to adopt a proposed EEO rule, holding that it had no jurisdiction to do so because "the purposes of the Natural Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource developments: "So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify [adopting petitioners' proposed rule]." 48 F.P.C. 40, 44.

The Supreme Court upheld the Commission, explaining:

"We agree, in short, with the Court of Appeals that the Federal Power Commission is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest." *NAACP*, at 771.

Here, similarly, the NOPR cites the Commission's broad authority over utility matters. Thus, for example, it relies on the Commission's authority to set "just and reasonable rates." However, the prevention of terrorist attacks is not plainly a direct component of the obligation to establish just and reasonable rates. To be clear, the prevention of terrorist attacks is, of course, a central mission of government – just as are the protection of civil rights and the elimination of racial discrimination, as discussed in *NAACP*. However, Congress has responded to September 11 by creating agencies – the Transportation Safety Agency and the proposed Department of Homeland Security – with direct authority and responsibility for the "homeland security" task. The State Commissions therefore, respectfully suggest that it would be useful for FERC to consider its Exemption 7 proposal in light of the dictates of *NAACP*; as well as the primary

and direct Homeland Security authority accorded to other agencies.

In addition, the NOPR's construction of Exemption 7 raises the question of whether, given FERC's broad enforcement authority, any and all data collected by FERC can be said to be collected pursuant to this authority, and therefore subject to Exemption 7. If this were the case, it would seem that Exemption 7 would be a near all-encompassing Exemption. If this is not the case, then FERC should state how it will determine which categories of data do and do not potentially qualify for Exemption 7.

In sum, it is possible that, by invoking September 11 concerns, a fair amount of CEII might qualify for an exemption under FOIA, despite the basic departure from the historic treatment of such information (and of the construction of the FOIA exemptions). However, the Commission's proposed construction of the Exemptions 4 and 7 raise novel questions of law and policy. 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, as well as the possibility that further and new exemptions may be needed to treat CEII. After all, this will affect all levels of regulatory process, both in public safety and job performance.

## **II. The FERC Notice Raises Special Questions for State Commissions**

In response to the NOI, the State Commissions raised questions of particular significance to state commissions. We review below, the NOPR's response to issues raised by State Commissions previously; and respectfully reiterate those concerns not yet addressed.

**A. FERC's Preemptive Authority over State Public Records Laws**

The NOPR indicates that FERC desires to provide the State Commissions with routine access to CEII. FERC explains that state public records laws make the means for providing access to state agencies a difficult question (fn. omitted):

A more difficult issue pertains to state agency requesters. Respondents rightly are concerned about state agencies' ability to agree to NDAs [nondisclosure agreements] given state FOIA laws that may compel disclosure of information. In other words, while a state requester may have the best intentions to protect CEII, state law may mandate release of the information obtained from the Commission. NOPR at ¶ 44.

The NOPR suggests that the question of state access may be resolved because Federal law "may trump state FOIA law:"

As a general matter, however, Federal law preempts state law. Thus, the Federal FOIA law may trump state FOIA law where the information at issue is Federal information. NOPR at ¶ 44.

FERC specifically invites comments on whether it would be:

Appropriate to permit use of a modified NDA for state agency representatives wherein they would agree to protect the information to the extent permitted by Federal law. Another option might be for the Commission to reserve control of CEII documents "on loan" to state agencies, potentially taking the documents outside of the state FOIA law. NOPR at ¶ 44.

In response to this invitation, the State Commissions respectfully request that FERC clarify, and provide specific basis for the statement that, "as a general matter, Federal law preempts state law," NOPR at ¶ 44 in regard to the questions of CEII data at hand. The State Commissions recognize that the Federal Power and Natural Gas

Acts provide FERC with substantial preemptive authority over wholesale transactions and utility services in interstate commerce. See, 16 U.S.C. § 791 *et seq*; 15 U.S.C. § 791, *et seq*. At the same time however, these laws make it clear that states retain substantial – and non-preempted – authority over retail and intrastate electric and gas utility services. In short, FERC provides no basis for its claims to preemptive authority over the totality of access to information regarding gas and electric utility regulation.

Moreover, FERC’s NOPR refers to the information at issue as “Federal information.” If, and where the information is created by or for a Federal agency, State Commissions could better appreciate and understand the basis for FERC’s claim to preemptive authority. However, the bulk of the information at issue is not likely to be “Federal information,” in the sense of information generated by or for the Federal government. Rather, it will be information generated by non-Federal entities that have long provided similar, even identical, data to state regulators. Hitherto, State Commissions have had no less right than FERC to obtain that information from utilities within their jurisdiction. (The NOPR itself declares that FERC’s rule does not propose to alter the traditional ability of State Commissions to obtain such data directly).

In short, State Commissions question whether a FOIA-based mechanism to protect CEII will preempt State public record laws, since FOIA applies to Federal information in the hands of Federal agencies. In other words, it is not clear that all state commissions would lawfully be permitted to rely exclusively on a FOIA-based exemption (as opposed to state law changes/ additions or a Federal law of general applicability) to protect all CEII. Changes to state open records laws may be warranted, that mirror the

exemptions FERC will use under FOIA. Other state law changes may also be necessary in order to carry out the necessary duties of a state commission under this new “protected” regulatory paradigm. In the alternative – and only where state laws fall short – passage of a Federal law of general application could deem information confidential across-the-board and may ultimately be the most effective means of ensuring that CEII remains uniformly protected on a nationwide basis. However, the autonomy of the States and the State Commissions must not be sacrificed in favor of a Federal law of general application. Short of the enactment of State and Federal legislation to address this concern, FERC may wish to consider using some other Federal law; and avoid relying on FOIA as the sole basis for confidentiality of information.

State Commission ongoing access to CEII is vital and it is the State Commissions’ intention to assist FERC in formulating a legally defensible solution to protect CEII. PUCs will do everything in their power, consistent with their obligations under State law, to maintain confidentiality of CEII. For its part, FERC should attempt to resolve the NOPR issues in a manner consistent with both Federal and State law.

The State Commissions therefore, respectfully request that FERC elaborate on the bases (in law and/or policy) for any view that FERC has preemptive authority in regard to CEII – at least insofar as CEII emanates from nongovernmental entities who are also subject to State Commission jurisdiction.

#### **B. Further Questions That Merit FERC Attention**

The NOPR leaves a number of concerns raised by State Commissions in their Comments on the NOI unanswered. These include concerns about the legal basis for

FERC's proposed actions, and the practical terms and consequences of FERC's proposal. The State Commissions request that the Commission consider and address the following concerns, followed by an additional opportunity for comment in response to FERC's then proposed views:

- (1) Will State Commissions be entitled to all CEII possessed by FERC?

As noted above, the NOPR, at ¶ 44, indicates an intent to make CEII available to state agencies, an end which State Commissions applaud. (State Commissions presume that information such as utility emergency response plans will be expeditiously made available to state commissions and other state agencies charged with health and safety oversight responsibility). However, the NOPR does not make it clear whether all CEII material will be available to State Commissions, or whether there will be limitations on a further "need to know basis." If FERC does propose to limit State Commissions' access to CEII in any respect, on what specific terms and bases will access be limited? For instance, the time frame within which FERC proposes to make CEII information available to State Commissions – if at all – is critical. For many issues within the responsibility of a State Commission, any significant delay in access to CEII could result in irreparable damage and could thus, be equivalent to no access in terms of fulfilling that State Commission's responsibilities.

- (2) Does FERC intend that its definition of CEII dictate the state definition?

As discussed above, FERC provides strong suggestion that it can preempt state information law. However, it does not declare that it will do so and, if so, on what specific legal basis.

Similarly, is it FERC's view that states themselves, are obligated to amend state open records laws and rules to comport with the resulting criteria established through FERC's NOPR? If this is the case, then further elaboration and support for this proposal is requested.

(3) The NOPR appears to make plain that State Commissions will continue to have direct access to CEII from utilities within their jurisdiction. Indeed, paragraph 45 states that "there is nothing to prevent someone from obtaining CEII directly from the submitter." State Commissions welcome FERC's confirmation on this point. However, what will happen if a utility cites FERC's CEII rules as the basis for declining to provide data to a State Commission? FERC should make clear that its final rule does not apply – and cannot be relied upon by public utilities – when State agencies are seeking to directly obtain information from public utilities under State law (as opposed to obtaining the information through FERC).

(4) Assuming State Commissions can continue to require and obtain CEII data directly from jurisdictional utilities, will State Commissions have access to relevant data which may not be possessed by jurisdictional utilities (*e.g.*, data related to regional transmission grids that extend beyond the state's borders)? If so, how and under what circumstances and/ or limitations?

(5) Will FERC require State Commissions to enter into signed nondisclosure agreements as a condition of release of CEII data to states? If so, what will they provide and how will they be policed? Will enforcement rely on an honor system? What kind of requirements does FERC propose to impose on states to assure compliance with the

rules? What kinds of sanctions would be imposed for violation?

(6) With regard to information related to site planning and applications: the NOPR, recognizing the traditional role of public review in the siting process, states, at ¶ 30, that information that can be gleaned by visual inspection – *i.e.*, facility location – will not be deemed CEII. However, the NOPR does not make clear what further informational components of the siting and application process will be available to the public during the review process.

In summary, these questions are but a few of the difficult issues that must be addressed when potential restrictions of CEII (the raw material from which state public utility commissions – the State Commissions – conduct day-to-day analysis, inquiries, and proceedings) are contemplated. Thus, it is crucial that the Commission fully explore the ramifications for its treatment of CEII on state commission access to information.

### **III. Further Comments on The Need to Assure the Fairness of the CEII Review Process and on the Cost of Compliance**

#### **A. The Rules and Procedures Governing Determinations of Access to CEII Must Be Reviewed for Fairness**

The NOPR proposes that FERC will delegate CEII decisions to a CEII “Coordinator.” The NOPR provides that actions by the coordinator will be subject to rehearing by the Commission itself. NOPR at fn. 67. The State Commissions appreciate that, by definition, decisions regarding CEII may necessarily permit a review process that is less than fully public. By the same token - and particularly given the newness of the matters involved - the State Commissions stress the importance of clear procedures at the out-

set. These procedures must be sufficient enough to ensure protection of all the critical public interests involved. In this regard, the State Commissions offer the following questions and suggestions:

(1) Since the Coordinator's process for reviewing access to CEII will, presumably, be kept secret; what procedures will be employed to assure that requestors are treated in a fair and non-discriminatory manner? For example, while the CEII itself cannot be disclosed; will FERC make available upon request, the basic information used to make these decisions – *e.g.*, information broad enough for the public discernment of: (a) The kinds of requestors permitted access to CEII (*e.g.*, citizens, journalists, utilities, public agencies); (b) What provisions appear in NDAs, and how they may vary across requests and requestor class; (c) What analysis are used for denying information to some requestors, when the data is provided to others?

Whether or not the Commission proposes to make such information public, what method will be used to assure consistency in the application of the new rules? For example, will the Commission audit Coordinator decisions to check for fairness and consistency? Will there be an authority beyond that of the Commission available for subsequent appeals?

(2) Similarly, in regard to the determination of what information is to be classified as CEII, equity dictates that review of FERC's decisions be carried out by those with qualified and specific expertise in CEII (*e.g.*, the Office of Homeland Security or the (proposed) new Department of Homeland Security). For example, FERC rules might provide for coordination with the new Department (or its equivalent) through a

memorandum of agreement that permitted periodic consultation and audit of FERC determinations. (The State Commissions submit that it would be preferable for a single “CEII expert” agency to be in charge of vetting and reviewing FERC CEII decisions).

(3) State Commissions appreciate the need for a “penumbra” of protection (i.e., secrecy) to surround CEII data. However, the NOPR, as discussed *supra*, also appears to provide broad new basis for withholding of data upon utility claims that release may cause competitive damage. It is respectfully requested that the Commission review the proposed rules carefully to assure that – to the extent that it will not compromise CEII data – there be full disclosure regarding the basis of decisions to withhold data based on claims of competitive injury. For example and subject to the need to protect CEII, requestors should be able to fairly challenge “evidence of actual competition” that utilities may submit on behalf of an Exemption Four (4) claim under FOIA; as provided for under the NOPR. In any event, the CEII rules should not – in any way – impede full access by the State Commissions, to information that is claimed to be competitively or commercially sensitive as long as the State Commissions take adequate precautions to protect this information from public disclosure. Given the ongoing investigations regarding the behaviors of Enron, Dynegy, Tyco, etc., it is imperative that claims of commercial secrecy not impede full regulatory access to information.

(4) The relation of the proposed Coordinator procedures to the Freedom of Information Act appears to require clarification. For example, we presume that the Commission will not publicly identify - in detail - the types of information that are CEII. If this is the case, how will someone seeking information know from whom to request

the information (*e.g.*, under a basic FOIA request or through the Coordinator)? What will happen if the request is filed under FOIA? Will it automatically be referred to the CEII Coordinator where CEII is involved? If so, what review and appeal rights will the requestor than have? Will the requestor be entitled to seek appeal under the new CEII/Coordinator rules and FOIA rules?

#### **B. The Costs of Compliance**

Finally, with regard to the costs of complying with the new rule, the State Commissions appreciate the critical public interest in protecting CEII information. Therefore, it is appropriate that the reasonable costs of complying with this rule be passed on to ratepayers. However, the State Commissions respectfully request that there be a benchmark to ensure that requests for pass-through are reasonable. In this regard, we note that the NOPR – as required by Office of Management and Budget Regulations – contains a section (“Public Reporting Burden: Estimated Annual Burden”) that estimates “costs to comply with these requirements.” The State Commissions propose that, upon establishment of the reasonableness of the baseline used to estimate compliance costs (as provided by the FERC), that this baseline should be the measure used for evaluation of the reasonableness of costs to be passed through to ratepayers. (Of course, upon reasonable utility showing, pass-through of more than the baseline may be in order).

In this context, State Commissions note that the FERC estimate for costs of compliance shows a cost that, given the importance of the task, is quite small – 50 hours/utility annually. NOPR at ¶ 49. State Commissions understand that the NOPR

is seeking utility comments on this estimate. The State Commissions therefore request that, on review of any comments, FERC may wish to note that the estimate (as revised by FERC) will be used as a baseline for reviewing the reasonableness of requests to pass through compliance costs. Notwithstanding the above; the State Commissions believe that this baseline standard is critical to protecting the ratepayers and should therefore, be passed through only after the FERC (or its delegate) is assured of the prudence of the costs incurred.

### **Conclusion**

The State Commissions commend the Commission for its effort to address the important issues of energy security. The NOPR raises complex questions for which there appears to be little precedent. Appropriate and cohesive resolution will require the strictest 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 NOPR with those facing other agencies, as well as 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, the Commission may wish to identify issues which would benefit from legislative attention and direction.

In any event, and as discussed *supra*, if the Commission prefers to move forward, there is a need to address the critical questions raised regarding the effect of the Commission's proposal on state commissions – both as addressed in the NOPR, as well as those matters that have yet to have been declared.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served in accordance with 18 C.F.R. Sec. 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

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**Thomas W. McNamee**  
Assistant Attorney General

Dated at Columbus, Ohio this November 14, 2002