

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 388

(Docket No. RM06-24-001; Order No. 683-A)

Critical Energy Infrastructure Information

(Issued April 9, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule, Order on Rehearing.

SUMMARY: On September 21, 2006, the Commission issued a final rule that clarified the definition of Critical Energy Infrastructure Information (CEII), required requesters of CEII to submit executed non-disclosure agreements with their requests, and provided that the notice and opportunity to comment on a CEII request would be combined with the notice of release of information. The Commission is denying the petition for rehearing filed by Edison Electric Institute.

EFFECTIVE DATE: This order denying rehearing of the final rule will become effective **[insert date 30 days after publication in the FEDERAL REGISTER]**.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Critical Energy Infrastructure Information

Docket No. RM06-24-001

ORDER NO. 683-A

ORDER ON REHEARING

(Issued April 9, 2007)

1. This order addresses the request for rehearing filed by Edison Electric Institute (EEI) of the Commission's September 21, 2006 Order in this proceeding (September 21 Order), a final rule that clarified the definition of Critical Energy Infrastructure Information (CEII), required requesters of CEII to submit executed non-disclosure agreements (NDA) with their requests, and provided that the notice and opportunity to comment on a CEII request would be combined with the notice of release of information. Critical Energy Infrastructure Information, Order No. 683.¹ This order denies EEI's request for rehearing for the reasons explained below.²

¹ 71 Fed. Reg. 58,273 (October 3, 2006), FERC Stats. & Regs. ¶ 31,228 (2006).

² The California Coastal Commission, California Energy Commission, California Electricity Oversight Board, and California State Lands Commission (collectively the California State Agencies) filed a request for reconsideration. Although labeled as a "Request for Reconsideration," the request is actually an untimely request for rehearing. As explained below, the Commission has long held that it lacks authority to consider requests for rehearing filed more than 30 days after issuance of a Commission order.

Background

2. The Commission began its efforts with respect to CEII shortly after the attacks of September 11, 2001. See Statement of Policy on Treatment of Previously Public Documents.³ The Commission issued a final rule on CEII on February 21, 2003, defining CEII to include information about proposed facilities, as well as facilities already licensed or certificated by the Commission, and to exclude information that simply identified the location of the infrastructure. See Order No. 630.⁴ The final rule also established the position of CEII Coordinator. The Commission issued Order No. 630-A on July 23, 2003,⁵ which made several minor procedural changes and clarifications, added a reference in the regulation regarding the filing of Non-Internet Public (NIP) information, a term first described in Order No. 630,⁶ and added a commitment to review the effectiveness of the new process after six months.

³ 66 Fed. Reg. 52917 (Oct. 18, 2001), 97 FERC ¶ 61,130 (2001).

⁴ 68 Fed. Reg. 9857, FERC Stats. & Regs. ¶ 31,140 (Mar. 3, 2003).

⁵ 68 Fed. Reg. 46456, FERC Stats. & Regs. ¶ 31,147 (Aug. 6, 2003)

⁶ NIP information includes location maps and diagrams that do not rise to the level of CEII. Order No. 630 provided the following examples of NIP: “(1) USGS 7.5 minute topographic maps showing the location of pipelines, dams, or other aboveground facilities, (2) alignment sheets showing the location of pipeline and aboveground facilities, right of way dimensions, and extra work areas; (3) drawings showing site or project boundaries, footprints, building locations and reservoir extent; and (4) general location maps.” 68 FR 9857, FERC Stats. & Regs. ¶ 31,140.

3. Simultaneous with the issuance of the September 21 Order, the Commission issued a notice of proposed rulemaking (NOPR) in Docket No. RM06-23-000.⁷ In the September 21 NOPR, the Commission sought comments on the revisions to its regulations to: (1) allow an annual certification for repeat requesters; (2) allow an authorized representative of an organization to execute an NDA on behalf of the organization's employees; (3) include a fee provision; (4) respond to CEII requests by letters from the CEII Coordinator rather than by Commission orders with rights to rehearing; and (5) allow landowners access to alignment sheets for the routes across or in the vicinity of their properties. The September 21 NOPR also proposed to narrow the scope of information on Commission forms that are defined as containing CEII and proposed to abolish the NIP designation.

Requests for Rehearing

4. On October 23, 2006, EEI filed a timely request for rehearing of the September 21 Order, and requested that the Commission revoke its September 21 Order and reissue it as a new notice of proposed rulemaking to be considered with the September 21 NOPR. EEI alleged that the Commission did not provide the due process protections of the Administrative Procedure Act (APA), 5 USC § 553, because the September 21 Order:

⁷ 71 Fed. Reg. 58,325 (October 3, 2006), FERC Stats. & Regs. ¶ 32,607 (2006) (September 21 NOPR).

(1) modified the definition of CEII without proper notice and comment; (2) combined the notice and opportunity to comment with the notice of release; and (3) permitted the CEII Coordinator to enforce the CEII regulations by rejecting applications if information is mislabeled or legal justifications for CEII are not provided.

5. On November 2, 2006, the California State Agencies filed an untimely request for reconsideration. The California State Agencies requested that the CEII Coordinator allow flexibility to allow state agencies to execute non-disclosure agreements which depart from the standard state agency NDA found on the Commission's website. The California State Agencies further requested that the Commission amend its CEII regulations to exclude state agencies from the requirement of showing a need for access in their CEII requests, and to require the CEII Coordinator to grant state agencies access to CEII upon receiving a completed CEII request, including an executed NDA in a format acceptable to the Commission.

Discussion

Procedural Issues

6. The California State Agencies' request for reconsideration is equivalent to an untimely request for rehearing.⁸ Rule 713 of the Commission's Rules of Practice and

⁸ We decline to treat the request for rehearing as a request for reconsideration. Granting such a request would in effect treat the rehearing request as if it had been timely filed. See Midwest Independent Transmission System Operator, Inc., 112 FERC ¶ 61,211 at P 10 (2005); Golden Valley Power Company, 114 FERC ¶ 61,212 at P 6 (2006).

Procedure requires that requests for rehearing be made within thirty days of the date of the order.⁹ Rule 713(a)(1) provides that the rule is applicable “to any request for rehearing of a final Commission decision or other final order.”¹⁰ The final date for filing a request for rehearing of the September 21 Order was October 23, 2006,¹¹ a deadline not met by the California State Agencies. However, the California State Agencies also filed their “Comments and Request for Reconsideration” in response to the September 21 NOPR. Their comments address issues raised in the September 21 NOPR and will be considered in that proceeding.

EEI’s Request for Rehearing

Clarification of the Definition of CEII

7. EEI’s contention that any modification to the definition of CEII is substantive is without merit. The APA provides exemptions to its notice and comment rulemaking requirements. See 5 USC § 553 (b)(A). Specifically, interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice are exempt. Id. As the Commission’s September 21 Order interprets its definition of CEII, it is not a substantive change requiring notice and comment. The Commission may interpret and

⁹ 18 CFR § 385.713 (2006).

¹⁰ 18 CFR § 385.713 (a)(1) (2006).

¹¹ The expiration of the thirty-day period, October 21, 2006, fell on a Saturday; therefore, the filing deadline for requests for rehearing was October 23, 2006, the next business day.

clarify its regulations without making a substantive change. Courts have found that agency rules explaining terms in statutes and regulations are interpretive.¹² Courts have also held that rules that merely restate existing duties, rather than creating new duties, are interpretive.¹³

8. A clarification “does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted.”¹⁴ Previously, the regulation stated that “Critical energy infrastructure information means information about proposed or existing critical infrastructure that: (i) Relates to the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 USC 552; and (iv) Does not simply give the location of the critical infrastructure.” 18 CFR § 388.113(c)(1). The September 21 Order

¹² See, e.g., American Postal Workers Union v. United States Postal Service, 707 F.2d 548, 559-60 (D.C. Cir. 1983) (finding that the postal service’s new method of calculating retirement benefits was interpretive because adoption of the method turned on the agency’s understanding of the statutory term “average pay”), cert. denied, 465 U.S. 1100 (1984).

¹³ See, e.g., General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (finding interpretive a rule that restated consistent agency practice based on the Environmental Protection Agency’s understanding of the recall provision of the Clean Air Act), cert. denied, 471 U.S. 1074 (1985).

¹⁴ American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).

explained that “information about proposed or existing critical infrastructure” means “specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure.”¹⁵ The clarification explained the existing term “information.” The clarification serves to advise the public of the Commission’s construction of the term information as defined in Order No. 630. The September 21 Order also clarified the meaning of “relates to the production, generation, transportation, transmission, or distribution of energy.” The September 21 Order advised the public that it is the “details about the production, generation, transportation, transmission, or distribution of energy” that the Commission deems CEII.¹⁶ These explanations and clarifications are merely interpretations and notice and comment are unnecessary.

Combination of the Notice and Opportunity to Comment with the Notice of Release

9. EEI is mistaken that the combination of the notice and opportunity to comment with the notice of release eliminates due process rights of CEII submitters or reduces the notice from ten days to five days. Pursuant to 18 CFR § 388.112, any person submitting documents to the Commission may request special treatment of some or all of the information found in the documents. Paragraph (d) of this section provides the standards for notifying the submitter of a request for the information, and states:

¹⁵ September 21 Order at P 6.

¹⁶ Id.

When a FOIA or CEII requester seeks a document for which privilege or CEII status has been claimed, or when the Commission itself is considering release of such information, the Commission official who will decide whether to release the information will notify the person who submitted the document and give the person an opportunity (at least five calendar days) in which to comment in writing on the request. A copy of this notice will be sent to the requester.

Paragraph (e) of this section provides the standards for notification prior to release of documents for which privileged treatment was requested, and states:

Notice of a decision by the Director, Office of External Affairs, the Chairman of the Commission, the General Counsel or General Counsel's designee, a presiding officer in a proceeding under part 385 of this chapter, or any other appropriate official to deny a claim of privilege in whole or in part, or to make a limited release of CEII, will be given to any person claiming that information is privileged or CEII no less than five days before public disclosure. The notice will briefly explain why the person's objections to disclosure are not sustained by the Commission. A copy of this notice will be sent to the FOIA or CEII requester.

Thus, when the submitter of information requests confidential or CEII treatment of that information and opposes its release, the Commission will, by regulation, notify the submitter at least five days prior to disclosure. This allows the submitter an opportunity to respond, as well as to pursue an injunction against release in district court.

10. The Commission's regulations do not require separation of the opportunity to comment and notice of release. However, it was the Commission's practice in processing CEII requests to issue these notifications separately. As the Commission explained in its September 21 Order, combining the two will increase the efficiency of processing CEII requests. See September 21 Order at P 9-10. But those opposing release will continue to have ten days of notice before the information is released.

11. Contrary to EEI's assertion, there is no inconsistency in the application of the rules to CEII and FOIA requests. The combined notice that the Commission sends pursuant to the September 21 Order explains that a submitter has an opportunity (5-day minimum) to submit timely comments opposing release. See 18 CFR § 388.112(d). It further explains that if the submitter provides timely comments, he or she will be notified in advance of the release of any information in accordance with 18 C.F.R § 388.112(e) (another 5-day minimum). In other words, if the submitter provides comments, a second notice of release follows the first (a total of 10-day minimum). In the event timely comments opposing release are not received, the combined notice constitutes notice of release of the specified document in accordance with 18 CFR § 388.112(e), subject to an appropriate

non-disclosure agreement. The combined opportunity to comment and notice of release does not reduce the submitter's opportunity to respond or to pursue judicial relief.

Requirements to Comply with Procedural Requirements

12. The September 21 Order states that an application will be rejected in its entirety if information is mislabeled as CEII or a legal justification for CEII is not provided. The purpose of that rule is to dissuade applicants from carelessly using the CEII designation because such misuse prevents interested parties and other deserving members of the public from accessing needed information in the timeliest manner. As the Commission said in the September 21 NOPR, the "Commission retains its concern for CEII filing abuses and will take action against applicants or parties who knowingly misfile information as CEII."¹⁷ The Commission disagrees with EEI's assertion that rejection is unacceptably harsh. Applications are frequently rejected for failure to comply with procedural requirements. See, e.g., ANR Pipeline Co., 103 FERC ¶ 61,261 at P 8 (2003) (rejecting filing without prejudice to filing a fully supported application in accordance with the Commission's regulations). In instances in which documents are rejected for filing, the rejection is usually without prejudice and no substantive rights are lost. Id. The application must merely be refiled in accordance with the procedural requirements. That is not harsh, but rather promotes the proper use of the CEII designation.

¹⁷ September 21 NOPR at P 17.

The Commission orders:

EEI's request for rehearing is denied as described above. The California State Agencies' request for reconsideration is rejected in this docket as untimely filed.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.