

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Critical Energy Infrastructure
Information

Docket Nos. RM02-4-003
PL02-1-003

NOTICE SOLICITING PUBLIC COMMENT

(March 3, 2005)

1. On August 3, 2004, the Federal Energy Regulatory Commission (the Commission) issued a final rule in Order No. 649 amending its regulations for gaining access to critical energy infrastructure information (CEII).¹ The Commission issued Order No. 649 in response to public comments it had solicited on the operation of its newly-implemented CEII rules. In Order No. 649, the Commission committed to continue its monitoring and review of its CEII program and to examine the effectiveness of the rules within one year. In order to facilitate this review, the Commission is issuing this notice soliciting public comment on the effectiveness of its CEII process.

Background

2. Although the Commission's CEII process was established in Order No. 630 in March 2003,² its efforts began shortly after the attacks of September 11, 2001 with the issuance of a policy statement in PL02-1-000 (Policy Statement). See Statement of Policy on Treatment of Previously Public Documents, 66 Fed. Reg. 52,917 (Oct. 18, 2001), 97 FERC ¶ 61,130 (2001). In its Policy Statement, the Commission explained its removal of certain previously-public records from public access through the Public Reference Room, the Commission's document retrieval system, and the Internet. The documents affected by the Policy Statement included oversized maps and other categories of records likely to detail specifications of facilities licensed or certified by the Commission. The Policy Statement advised the public to request such information in accordance with the Freedom of Information Act (FOIA) process detailed in 5 U.S.C. § 552 and in the Commission's regulations at 18 C.F.R. § 388.108 (2004).

¹ Critical Energy Infrastructure Information, Order No. 649, 69 Fed. Reg. 48,386 (Aug. 10, 2004).

² Critical Energy Infrastructure Information, Order No. 630, 68 Fed. Reg. 9,857 (Mar. 3, 2003), FERC Stats. & Regs. ¶ 31,140 (2003).

3. In January 2003, the Commission issued a notice of inquiry (the NOI) that raised issues for public comment and provided guidance to those filing information that might warrant non-public treatment under the Policy Statement. See Notice of Inquiry and Guidance for Filings in the Interim, 67 Fed. Reg. 3,129 (Jan. 23, 2002), FERC Stats. & Regs. ¶ 35,542 (2002). The NOI identified information the Commission was seeking to protect as “critical energy infrastructure information,” or “CEII,” and asked for public comment on how to define the scope of the term. The NOI also invited public comment on the Commission’s legal authority to protect CEII (including applicability of FOIA exemptions), requester verification and access issues, use of non-disclosure agreements, and the process for requesting CEII.

4. After reviewing the comments received in response to the NOI, the Commission issued a notice of proposed rulemaking regarding CEII (the NOPR). 67 Fed. Reg. 57,994 (Sept. 13, 2002); FERC Stats. & Regs. ¶ 32,564 (2002). The NOPR expanded the proposed definition of CEII to include detailed information about proposed facilities as well as those already licensed or certificated by the Commission. In addition, it proposed a new process that would restrict general public access to CEII while at the same time permitting those with a need for the information to obtain it in a timely manner. To that end, the NOPR proposed a supplement to the FOIA request process that would enable requesters to get access to CEII that was otherwise exempt from mandatory disclosure under the FOIA. Under the proposed process, requesters would have to provide limited personal information about themselves and their need for the information. This information would be considered in determining whether or not to grant the request. In addition, release would generally be contingent upon the requester agreeing to abide by the terms of an appropriate non-disclosure agreement.

5. On February 21, 2003, the Commission issued its CEII rule in Order No. 630. The Commission defined CEII to include information about proposed facilities and to exclude information that simply identified the location of the infrastructure. In addition, the Commission’s related definition of “critical infrastructure” was broad enough to cover virtually all facilities within its jurisdiction. The Commission declined to limit protection to “high risk” projects or facilities, opting instead to include virtually all facilities and components, including computer systems that control or form part of the energy infrastructure.

6. After receiving a request for rehearing on Order No. 630, the Commission issued Order No. 630-A, denying the request for rehearing, but amending the rule in several respects.³ Specifically, the order on rehearing 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, and added a commitment to review the effectiveness of the new process after six months.

³ Critical Energy Infrastructure Information, Order No. 630-A, 68 FR 46,456 (July 23, 2003), FERC Stats. & Regs. ¶ 31,147 (2003).

7. The first CEII review was initiated with a notice soliciting public comment that was issued on February 13, 2004.⁴ After reviewing the comments received, the Commission made a few additional changes to the CEII process in Order No. 649.⁵ The Commission changed the treatment of boundary maps from CEII to NIP. It also agreed that federal agencies would not have to file more than one request for CEII in one docket, and that agents of owners and operators of facilities could get information on their clients' facilities outside the CEII process with written authorization from the owner/operator. As with the earlier order on rehearing, the Commission committed to re-examine the effectiveness of its CEII rules within the next year. This order is intended to facilitate that review.

Experience To Date

8. Since Order No. 630 became effective on April 2, 2003, the Commission has received many filings where the submitters have requested non-public treatment of documents because they contained CEII. In addition, Commission staff has designated certain internally-generated documents as CEII as well. Despite the amount of information that has been designated as CEII, the Commission has received relatively few complaints that the rules have impaired requesters' ability to participate meaningfully in Commission proceedings. As discussed below, the Commission has taken steps to minimize the harm to requesters in such cases. The Commission has not received any requests for rehearings of CEII Coordinator decisions to date.⁶

9. Once a CEII request is received, the appropriate staff members locate the document requested and provide the document to legal staff with a recommendation regarding whether or not the information qualifies as CEII. In cases where the requested document was submitted to the Commission with a request for CEII treatment, the Associate General Counsel for General Law notifies the submitter of the request and gives the submitter a period of at least five days in which to comment on both release to the particular requester and the non-public nature of the document itself, including FOIA exemptions applicable to the document. Each time a document is requested, the submitter receives a notice and opportunity to comment on release to that particular requester. Commission staff reviews each requested document to determine whether it qualifies as CEII, verifies the requester's identity and need for the information requested,

⁴ Notice Soliciting Public Comment, 69 FR 8,638 (Feb. 25, 2004).

⁵ Critical Energy Infrastructure Information, Order No. 649, 69 FR 48,386 (Aug. 10, 2004), FERC Stats. & Regs. ¶ 31,167(2004).

⁶ Commission action on CEII requests is delegated to the CEII Coordinator, whose decisions are subject to rehearing. No requester has pursued a request for rehearing of any of the CEII decisions rendered to date.

and seeks to obtain an appropriate non-disclosure agreement from the requester. Where the submitter of the document provides information regarding the request or requester, the staff factors such information into its recommendation to the CEII Coordinator. When the request involves a Commission-generated document, the CEII Coordinator releases the document to the requester with the order granting the request. In cases where the document has been submitted to the Commission, the CEII Coordinator issues a decision on release, but release of the document is delayed by at least five days to give the submitter notice prior to release of the document. Because of the required notice and comment period and the notice prior to release, it usually takes staff more time to process requests for documents submitted to the Commission than those that are internally generated.

10. The Commission has been largely successfully in its goal of processing CEII requests expeditiously. However, as discussed below, there have been some instances where the sensitivity of certain requested documents required additional research, and in one instance warranted a vote of the Commission to establish the appropriate standard for release of those documents.⁷ In those instances involving the Weaver's Cove application to construct a liquefied natural gas facility in CP04-36-000, the process took longer than usual. Some of those requests were denied for failure to agree to the terms of a non-disclosure agreement specified by the CEII Coordinator.⁸ In other instances, portions of one document were not released because the harm from release outweighed the requesters' need for the information.⁹ In order to minimize harm to requesters receiving CEII in the Weaver's Cove proceeding, the Secretary issued a notice giving such requesters additional time in which to file comments on the draft environmental impact statement.¹⁰ The Commission believes the steps it has taken have protected the due process rights of those involved in the proceeding.

11. The Commission received 79 requests for CEII in FY 2003, 304 CEII requests in FY 2004, and as of February 18, 2005, has received 162 CEII requests for FY 2005. As of February 18, 2005, there were 109 CEII requests pending. The vast majority of those pending were either filed after January 1, 2005 or are awaiting information from the requester, such as the non-disclosure agreement. The majority of the requests that have been denied were denied for failure to agree to the terms of a non-disclosure agreement. The other denials were either because of the extreme sensitivity of the information (in the case of one Weaver's Cove document), or because the information was subject to the attorney-client, attorney work product, or deliberative process privileges, or protected by

⁷ *Alfred Lima*, 110 FERC ¶ 61,002 (Jan. 5, 2005).

⁸ *Edward M. Lambert, Jr., et al.*, 110 FERC ¶ 62,050 (Jan. 21, 2005).

⁹ *See, e.g., Lima*, 110 FERC ¶ 61,002 (Jan. 5, 2005).

¹⁰ *Weaver's Cove Energy, L.L.C.*, 70 Fed. Reg. 4838 (Jan. 31, 2005).

statute (*e.g.*, cultural resource locations). The Commission generally does not intend to release privileged information, regardless of whether or not it falls within the definition of CEII. In addition to formal requests for CEII under 18 C.F.R. § 388.113, Commission staff also received numerous direct requests from owners or operators of facilities and their authorized agents for documents containing CEII relating to their own facilities. Staff generally satisfies those owner/operator requests within a few days of receipt.

12. As noted in Order No. 649, the Commission remains committed to examining the effectiveness of its CEII rules, and therefore seeks public comments regarding its CEII process. This notice invites the public to comment on its experience under the CEII procedures and to suggest ways to improve the process. While the public is free to provide comments on any aspect of the Commission's CEII rules, the Commission specifically invites comments on the following issues:

- i. Is the CEII designation being misused or claimed for information that does not meet the definition?
- ii. Is there a need for the non-Internet public designation? Is it currently too broad? Are there location maps that should be available on the Internet?
- iii. Does it make sense for the Commission to protect (either as CEII or NIP) information that is readily publicly available, for instance in USGS maps?
- iv. Are there classes of information that are not appropriate for release even when a legitimate requester agrees to the terms of an appropriate non-disclosure agreement?

The Commission orders:

Comments regarding the Commission's CEII process should be filed with the Office of the Secretary within 30 days of the issuance of this order.

By direction of the Commission.

Linda Mitry,
Deputy Secretary.