

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Critical Energy Infrastructure
Information

Docket No. RM06-23-000

**COMMENTS OF
THE AMERICAN PUBLIC POWER ASSOCIATION
AND THE TRANSMISSION ACCESS POLICY
STUDY GROUP**

On September 21, 2006, the Commission issued a Notice of Proposed Rulemaking (“NOPR”) and a Final Rule that would refine the program by which the Commission permits designation and release of Critical Energy Infrastructure Information (“CEII”).¹ The American Public Power Association (“APPA”) and Transmission Access Policy Study Group (“TAPS”) respectfully submit these comments in response to the NOPR and express their support for the Commission’s efforts in both the NOPR and the Final Rule to reduce the processing time for CEII requests and to prevent over-designation of information as CEII. They appreciate the Commission’s ongoing monitoring of the CEII program and its evident willingness to make the program work as well as possible for submitters, requesters and the Commission.

INTERESTS OF APPA AND TAPS

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000

¹ The NOPR is pending in Docket No. RM06-23-000, *Critical Energy Infrastructure Information*, 116 F.E.R.C. ¶ 61,265 (2006), 71 Fed. Reg. 58,325 (Oct. 3, 2006). The Final Rule, Order No. 683, was adopted in Docket No. RM06-24-000, *Critical Energy Infrastructure Information*, 116 F.E.R.C. ¶ 61,263, 71 Fed. Reg. 58,273 (Oct. 3, 2006).

public power systems provide over 16 percent of all kilowatt-hour (“kWh”) sales to ultimate customers, and do business in every state except Hawaii. Approximately 1,840 of these systems are cities and municipal governments that currently own and control the day-to-day operation of their electric utility systems. Public power systems own about 10 percent of the nation’s electric generating capacity, but purchase nearly 70 percent of the power used to serve their ultimate consumers. Because of their heavy reliance on purchases from regional wholesale power markets to obtain the power supplies they need to serve their loads, they have a vital interest in the application of the Commission’s transmission and market-based rate (“MBR”) policies and procedures by public utilities subject to the Commission’s jurisdiction. Public power utilities require timely access to CEII to ensure their effective participation in such proceedings.

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.² As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members have long been concerned about structural changes in the electricity and natural gas industries that could adversely affect competition, rates or regulation, or could expose consumers to harms from unmitigated market power. TAPS has commented on nearly all of the Commission’s major rulemakings and policy inquiries involving the electricity industry over the past decade.

² TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

APPA and TAPS (both individually and jointly) have followed and commented on the Commission's development of a policies and procedures for the submission of CEII.³ Communications regarding these comments should be directed to:

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COMMENTS

I. THE COMMISSION PROPERLY SEEKS TO REDUCE CEII-REQUEST PROCESSING TIME

In the NOPR, the Commission proposes, *inter alia*, to (1) “allow an annual certification for repeat requesters, i.e., repeat requesters would not be required to file a

³ See March 25, 2002 Comments of the American Public Power Association on the Commission's Notice of Inquiry and Guidance for Filings in the Interim (Docket Nos. RM02-4-000 and PL02-1-000); November 24, 2002 Comments of the Transmission Access Policy Study Group (Docket Nos. RM02-4-000 and PL02-1-000); March 21, 2003 Petition for Rehearing of the Transmission Access Policy Study Group (Docket Nos. RM02-4-000 and PL02-1-000); May 16, 2003 Comments of the American Public Power Association and Transmission Access Policy Study Group (Docket No. RM03-6-000); May 27, 2003 Motion of Transmission Access Policy Study Group to Supplement and For Reconsideration (Docket Nos. RM02-4-000 and PL02-1-000); March 15, 2004 Comment of the American Public Power Association and Transmission Access Policy Study Group (Docket Nos. RM02-4-002, PL02-1-002 and RM03-6-001); April 4, 2005 Comments of the American Public Power Associations (Docket Nos. RM02-4-003, PL02-1-003); April 4, 2005 Comments of the Transmission Access Policy Study Group (Docket Nos. RM02-4-003, PL02-1-003).

new non-disclosure agreement (NDA) with each subsequent request,” NOPR P 4,⁴ and (2) “allow an authorized representative of an organization to execute an NDA on behalf of all of that organization’s employees.” NOPR P 6. Meanwhile, in the Final Rule the Commission announced that it would combine (a) the notice and opportunity to comment on a CEII requester and (b) the notice prior to release of CEII. Final Rule P 10. These proposals are aimed at improving the efficiency of the CEII process, including by reducing the processing time for CEII requests. NOPR PP 2, 4; Final Rule P 10.

As APPA and TAPS expressed in their recent comments in the ongoing MBR rulemaking proceeding,⁵ the time required to obtain CEII cuts into the precious brief period available for market participants to respond to filings submitted to the Commission that contain CEII. For example, in MBR proceedings, public utilities often designate a portion of their simultaneous import capability study as CEII, necessitating either a CEII request or efforts to obtain the CEII from the submitter itself. The Commission routinely provides a notice period of only 21 days for MBR proceedings, which would rarely, if ever, allow sufficient time to obtain, let alone meaningfully use, the CEII. While the new proposals should help move the process along, the Commission should not assume that these improvements will address all timing issues. As it has

⁴ Repeat requesters would still be required to provide detailed information regarding the need for the information and to attest that the previously supplied information had not changed. NOPR P 5. The annual certification would be good from the time of the initial certification through the remainder of the calendar year. NOPR P 4.

The proposed regulation states: “Once a CEII request has been verified by Commission staff as a legitimate requester who does not pose a security risk, his or her verification will be valid for the remainder of that calendar year.” Proposed 18 C.F.R. § 388.113(d)(4)(iii). APPA and TAPS presume that the regulation applies to requests for CEII whether from the same submitter or from different submitters.

⁵ August 7, 2006 Comments of American Public Power Association and Transmission Access Policy Study Group, Docket No. RM04-7-000, at 35-36.

stated in the past, the Commission should continue its stated willingness “to consider on a case-by-case basis requests for extensions of time to prepare protests to market-based rate filings where an intervenor demonstrates that it needs additional time to obtain and analyze CEII.”⁶

The proposals should also facilitate participation by intervenors and their consultants that need to respond to multiple filings potentially containing CEII. For example, APPA and TAPS members, especially joint action agencies, often need to assess filings involving several public utilities, because their loads and resources span multiple control areas or even RTOs.⁷ Particularly if the Commission adopts the proposal for regional MBR reviews, which APPA/TAPS support, intervenors may need access to CEII for multiple systems simultaneously. Annual certification for repeat requesters and organizational certification, which will enable all personnel within an organization to have the same CEII access without each person’s having to receive separate CEII approval, should streamline the CEII process (including reducing the burden on the Commission itself). At the same time, the proposals include safeguards to prevent unauthorized release and use of CEII, including requirements for (1) execution of an NDA as part of the application process, Final Rule P 8, (2) specification of the need for the information, NOPR P 5, and (3) organizational verification of its CEII users.

⁶ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 F.E.R.C. ¶ 61,210, P 83 (2006).

⁷ That APPA/TAPS members serve load on multiple systems does not necessarily mean that they are large utilities. For example, members in states such as Indiana and Ohio find their operations split between MISO and PJM and, within MISO, among more than one control area.

NOPR P 6. APPA and TAPS therefore urge the Commission to adopt the NOPR's proposals.

II. THE COMMISSION'S GUIDANCE ON DESIGNATION OF CEII IS WELCOME

Another concern that APPA and TAPS have had about the CEII program is over-designation of information as CEII. They thus welcome the Commission's reminder in both the NOPR and Final Rule that:

The CEII process was not intended as a mechanism for companies to withhold from public access information that does not pose a risk of attack on the energy infrastructure. Therefore, in an effort to achieve proper designation while avoiding misuse of the CEII designation, the Commission requires submitters to segregate public information from CEII and to file as CEII only information which truly warrants being kept from ready public access. To this end, the Commission emphasizes that the Commission's regulation at 18 CFR 388.112(b)(1) requires that submitters provide a justification for CEII treatment. The way to properly justify CEII treatment is by describing the information for which CEII treatment is requested and explaining the legal justification for such treatment.

The Commission retains its concern for CEII filing abuses and will take action against applicants or parties who knowingly misfile information as CEII, including rejection of an application where information is mislabeled as CEII.

NOPR P 16-17; Final Rule PP 11-13. Where the Commission finds filing abuses, APPA and TAPS expect that the Commission will protect the interests of market participants disadvantaged by the unavailability of mislabeled CEII, including by affording such parties the time necessary to obtain, review and use the information to support their participation in Commission proceedings.

APPA and TAPS also support the guidance provided in the NOPR regarding information that should remain public and information that can be designated as CEII,

including information about electric facilities. NOPR PP 18-33. In a similar vein, the Final Rule refines the CEII definition, 18 C.F.R. § 388.113(c)(1), to emphasize that CEII is limited to “detailed” information, including “specific engineering, vulnerability, or detailed design” information. Final Rule P 6. APPA and TAPS urge the Commission to continue to review CEII designation practices and to offer similar guidance and refinements in the future.

Respectfully submitted,

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