

UNITED STATES OF AMERICA
BEFORE THE OFFICE OF ELECTRICITY
DEPARTMENT OF ENERGY

Critical Electric Infrastructure
Information; New Administrative
Procedures

RE: Notice of Proposed
Rulemaking and
Opportunity for Comment,
RIN 1901-AB44

**COMMENTS OF THE TRANSMISSION ACCESS
POLICY STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) submits these comments in response to the Notice of Proposed Rulemaking issued by the Department of Energy (“DOE”),¹ proposing regulations to govern the designation, sharing, and release of Critical Electric Infrastructure Information (“CEII”) under Section 61003 of the Fixing America’s Surface Transportation Act (“FAST Act”).² Section 61003 promulgated new Section 215A of the Federal Power Act (“FPA”), codified at 16 U.S.C. § 824o-1. These comments address the NOPR’s implications for Section 215A’s exemption of CEII from Federal, State, political subdivision, and tribal laws requiring the public disclosure of records.

INTERESTS OF TAPS

TAPS is an association of transmission-dependent utilities (“TDUs”) in more than 35 states, promoting open and non-discriminatory transmission access.³ As TDUs, TAPS

¹ Critical Electric Infrastructure Information; New Administrative Procedures, 83 Fed. Reg. 54,268 (proposed Oct. 29, 2018) (“NOPR”).

² Pub. L. No. 114-94, § 61003, 129 Stat. 1312, 1773 (2015).

³ David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

members have long recognized the importance of maintaining a reliable, capable grid at a reasonable cost. TAPS members often need to obtain CEII regarding their host transmission providers' systems, for planning and other purposes. Many TAPS members also provide CEII to the North American Electric Reliability Corporation ("NERC"), Federal Energy Regulatory Commission ("FERC" or "Commission"), or DOE. All TAPS members have a strong interest in limiting the dissemination of CEII, whether about their own facilities or others', beyond those with a need for the information. Finally, many TAPS members are subject to "State, political subdivision, or tribal law[s] requiring disclosure of information or records."⁴

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COMMENTS

I. DOE SHOULD CITE OR QUOTE THE SUNSHINE LAW EXEMPTION IN ITS CEII NON-DISCLOSURE AGREEMENT

The FAST Act's exemption of CEII from Sunshine Laws ("Sunshine Law Exemption" or "exemption") provides that:

Critical Electric Infrastructure Information . . . shall not be made available by any Federal, State, political subdivision

⁴ FPA § 215A(d)(1)(B), 16 U.S.C. § 8240-1(d)(1) ("Sunshine Laws").

or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records.

*Id.*⁵ This important provision is clearly intended to ensure that CEII does not become public due to the requirements of Sunshine Laws.

The NOPR proposes to include the text of the Sunshine Law Exemption in DOE's regulations.⁶ TAPS applauds this proposal. In order to carry out the FAST Act's intent, it is vital that entities looking into the rules governing CEII be made aware of the exemption. Although the exemption's validity is unaffected by its inclusion in DOE's regulations, such inclusion will significantly reduce the risk that the Act will be violated due to lack of awareness.

The NOPR does not indicate, however, whether the exemption will also be stated in the non-disclosure agreement ("NDA") under which entities may obtain CEII. TAPS urges the DOE to do so, as a further protection against accidental disclosure. Including the exemption in the NDA would ensure that a utility subject to Sunshine Laws that signs

⁵ In response to a TAPS request that FERC interpret the scope of the "political subdivision[s]" to which the exemption applies in a way that ensures that *all* entities subject to Sunshine Laws are able to avail themselves of the exemption, the Commission stated that it "believes that the broad language of section 215A(d)(1)(B), as it applies to 'any Federal, State, political subdivision or tribal authority,' should encompass the instrumentalities and components of States. Section 215A(d)(1)(B) was included to protect CEII from mandatory disclosure. It would be illogical to provide such protection to States, but not their instrumentalities and components." Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information; Availability of Certain North American Electric Reliability Corporation Databases to the Commission, Order No. 833, 81 Fed. Reg. 93,732, at 93,735 (Dec. 21, 2016), FERC Stats. & Regs. ¶ 31,389, P 22 (2016) ("Order 833"), *on reh'g and clarification*, Order No. 833-A, 83 Fed. Reg. 24,656 (May 30, 2018), 163 FERC ¶ 61,125 (2018). TAPS supports the Commission's interpretation of Section 215A.

⁶ Proposed 10 C.F.R. § 1004.13(f)(6)(ii).

the NDA to obtain CEII is made aware that the exemption exists, and that it applies to the CEII.⁷

II. DOE SHOULD DEFINE “PRE-DESIGNATION” IN ITS RULES

The Sunshine Law Exemption does not apply until information has been “designated” as CEII by DOE. The NOPR proposes that three categories of information submitted to DOE—information concerning Defense Critical Electric Infrastructure as defined in the statute, information concerning federal government agency spectrum use managed by the National Telecommunicating and Information Administration, and information on electric incidents and emergencies reported to DOE through Form OE-417—be automatically “pre-designated” as CEII by the CEII Coordinator immediately upon filing. The NOPR’s preamble refers to “pre-designation” as “immediate CEII designation,” but the term is not defined in the proposed regulations.

TAPS urges DOE to define pre-designation in its regulations as a type of CEII designation that is applied by the CEII coordinator immediately upon DOE’s receipt of the information, which is subject to later revision by the applicable DOE Office exercising its delegated CEII designation authority. To provide clarity regarding when the Sunshine Law Exemption becomes applicable, the final rule should state in the text of the regulations that “pre-designation” constitutes designation as CEII under the statute.

⁷ See Order 833, P 27 (determining that the FERC NDA should reference the Sunshine Law Exception).

III. DOE SHOULD “PRE-DESIGNATE” ALL INFORMATION MARKED AS CEII IMMEDIATELY UPON SUBMITTAL, SUBJECT TO REMOVAL OF THE DESIGNATION AFTER REVIEW

When a utility that is subject to Sunshine Law obligations submits information to DOE with a request for CEII treatment, it appears that (with the exception discussed in Part II above) there would be some lag before a DOE determination is made, during which the information would remain subject to involuntary disclosure pursuant to a Sunshine Law request.⁸ Although DOE intends to make determinations “as soon as practicable,”⁹ TAPS believes, given the importance of CEII protection, that this lag should be eliminated. To reduce the risk of disclosure of information that should be treated as CEII, TAPS thus requests that the final rule expand the proposed “pre-designation” procedures to apply to *all* information for which CEII protection has been requested.

Although FERC declined to adopt automatic designation, Order No. 833, P 49, DOE’s situation differs significantly enough from FERC’s to warrant a different approach. The volume of documents submitted to FERC for which CEII treatment is requested is very high. For example, in the year leading up to the issuance of DOE’s

⁸ These comments address only potential CEII *submitted to* DOE by a utility subject to Sunshine Law obligations, not information shared with such a utility by DOE under an NDA, because pursuant to proposed 10 C.F.R. § 1004.13(f)(3)(iii), DOE would determine whether to designate information as CEII before releasing the information, either publicly or pursuant to an NDA. If that portion of the proposed rules is enacted, TAPS does not believe that a utility subject to Sunshine Law obligations would obtain another entity’s material marked as CEII before that information was either formally designated, or determined not to be CEII, by DOE. Without proposed 10 C.F.R. § 1004.13(f)(3)(iii), however, the concern outlined herein would apply equally to potential CEII that the utility obtained from DOE pursuant to an NDA.

⁹ NOPR at 54,276.

NOPR, nearly 7000 such documents appear on FERC's eLibrary system.¹⁰ In contrast, as stated in the NOPR, "the Department anticipates receiving a smaller volume of CEII materials, due to DOE's nonregulatory role, which gives DOE the flexibility to engage in more proactive designations."¹¹ DOE therefore intends, unlike FERC, to make a determination on all CEII designation requests, and to do so as expeditiously as possible. As a result, the pre-designation status would not be of long duration. Thus, if DOE applied the pre-designation to all information for which CEII treatment was requested, any information that should in fact be made public would be released without significant delay, while information that merits CEII protection would receive such protection immediately.

And DOE is already proposing to pre-designate certain categories of information, also unlike FERC. Pre-designating all information for which CEII protection has been requested would, in fact, streamline DOE's procedures: the CEII Coordinator would not need to screen every submission for the three enumerated categories of information upon receipt, in order to pre-designate only that subset of submissions, prior to forwarding each submission to the appropriate DOE Office for a final CEII determination. Instead, all potential CEII would be immediately pre-designated and then sent to the appropriate DOE Office for a final CEII determination.

In the alternative, TAPS requests that the DOE implement procedures for utilities subject to Sunshine Laws to request and obtain an expedited CEII determination if the

¹⁰ Advanced Search, FERC Online eLibrary, <https://elibrary.ferc.gov/idmws/search/fercadvsearch.asp> (select in Category "Submittal"; then enter Filed Date range "10/30/2017" to "10/29/2018"; then select Availability "CEII"; then Submit).

¹¹ NOPR at 54,269.

utility receives a Sunshine Law request for the information at issue between the time that the information is submitted to DOE and the issuance of DOE's determination.

CONCLUSION

For the reasons discussed above, the DOE should issue a final rule that reflects the comments submitted by TAPS.

Respectfully submitted,

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