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In The
Supreme Court of Ohio

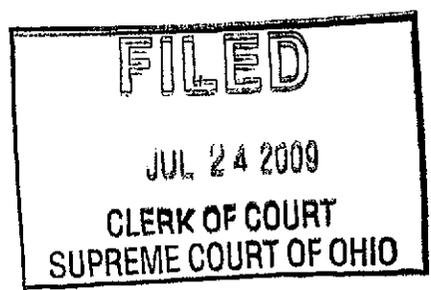
Citizens Advocating Responsible Energy,	:	
	:	
Appellant,	:	Case No. 09-0481
	:	
v.	:	On appeal from the Ohio Power Siting
	:	Board, Case No. 07-171-EL-BTX, <i>In the</i>
The Ohio Power Siting Board,	:	<i>Matter of the Application of American</i>
	:	<i>Transmission Systems, Incorporated and</i>
Appellee.	:	<i>The Cleveland Electric Illuminating</i>
	:	<i>Company for a Certificate of</i>
	:	<i>Environmental Compatibility and Public</i>
	:	<i>Need for the Geauga County 138 kV</i>
	:	<i>Transmission Line Supply Project.</i>

**MERIT BRIEF OF APPELLEE,
THE OHIO POWER SITING BOARD**

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Appellant,	:	Case No. 09-0481
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v.	:	On appeal from the Ohio Power Siting Board, Case No. 07-171-EL-BTX, <i>In the Matter of the Application of American Transmission Systems, Incorporated and The Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Line Supply Project.</i>
The Ohio Power Siting Board,	:	
Appellee.	:	

**MERIT BRIEF OF APPELLEE,
THE OHIO POWER SITING BOARD**

INTRODUCTION

The Ohio Power Siting Board (Board) has done its job. The Board must ensure that only necessary lines are built and, when they are built, appropriate consideration is given to a vast body of factors including environmental, social, historic, and many others. The Board has done so in this case. It has approved this project subject to forty-three conditions to assure that the minimum impact results from this construction. No home is to be taken and many adjustments to reduce the aesthetic impact have been made. The residual negative impacts of this project cannot be reduced, only relocated.

In the final analysis this project is a single line of wooden poles carrying a wire. Citizens Advocating Responsible Energy (CARE or Appellant) do not want this wire near them. This is unsurprising. Everyone wants electric power but no one wants electric power lines. The Board however must be objective. The power lines must, of necessity, go somewhere. The Cleveland Electric Illuminating Company and American Transmission Systems, Inc. used a reasonable method to identify the best practical route and the Board agreed. The Board then went on to impose a web of requirements to minimize the impacts. This is what the law requires and this is what happened, a balancing of *all* the relevant interests. The Board should be affirmed.

STATEMENT OF THE FACTS AND CASE

On September 28, 2007, American Transmission Systems, Inc. and the Cleveland Electric Illuminating Company (hereinafter, "Applicants") filed an application requesting a certificate to construct a 138 kV transmission line in northeast Geauga County and southern Lake County. The stated purpose of the proposed project is to provide additional capacity and reliability to the electric distribution systems in the project area, which has experienced significant load growth in recent years. As proposed, the new line would be supported by single wooden poles and would generally require a sixty-foot right of way.

The Preferred Route, as described in the application, is 14.7 miles long and runs cross-county through Huntsburg, Montville, and Thompson townships in Geauga County, and across the southern border of Lake County. The Alternative Route proposed by

Applicants is twelve miles long and runs primarily along Clay Street in the same townships.

The Chairman accepted the application on November 27, 2007 as being in compliance with Ohio Revised Code Chapter 4906. On January 2, 2008, the Applicants updated their application with typographical corrections, wetland data clarifications, and a minor revision to the Preferred Route. Following an investigation, the Board Staff filed a Staff Report on August 12, 2008.

Pursuant to a schedule issued by the administrative law judge, three local public hearings were held at locations near the project area. Numerous individuals provided testimony both supporting and opposing the application. Seven parties were granted intervention in the case.

The adjudicatory hearing began on September 16, 2008. Testimony was provided by the Applicants, intervenors, and Staff. Following the hearing, the parties filed initial and reply briefs.

On November 24, 2008, the Board met in a public session and unanimously voted to issue an Opinion, Order, and Certificate for construction of the transmission line on the Preferred Route, subject to forty-three conditions. *In the Matter of the Application of American Transmission Systems, Inc. and The Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Line Supply Project*, Case No. 07-171-EL-BTX (hereinafter *In re ATSI*) (Opinion, Order, and Certificate) (November 24, 2008), Appellant's App. at 24. Intervenor CARE filed an application for rehearing which was denied by the Board on

January 26, 2009. *In re ATSI* (Entry on Rehearing) (January 26, 2009), Appellant's App. at 7. This appeal ensued.

ARGUMENT

Proposition of Law No. I:

The Board has broad discretion in the conduct of its hearings. *Duff v. Pub. Util. Comm'n*, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264, 273 (1978).

CARE asserts that the Board unlawfully delegated its authority to grant a certificate of environmental compatibility and public need to an administrative law judge (ALJ). CARE bases this contention on its observation that the Board approved an order that had been drafted by an ALJ. CARE points to R.C. 4906.02(C), which provides that "the board's authority to grant certificates . . . shall not be exercised by any officer, employee, or body other than the board itself." Ohio Rev. Code Ann. § 4906.02(C) (Anderson 2009), App. at 16.

CARE's claim that the Board unlawfully delegated its decision-making responsibility to an ALJ is meritless. The Opinion, Order, and Certificate was considered and voted upon in a public meeting of the Board on November 24, 2008. The Opinion, Order, and Certificate was unanimously approved and signed by each Board member. Thus, it was the Board itself, not the ALJ, that issued the certificate as required by R.C. 4906.02(C).

CARE nevertheless asserts that the Board members failed to independently consider the order and simply signed what was placed before them. The Court should reject this claim. The Board is entitled to a presumption that its acts are valid and done in

good faith. This Court recently declared that “[w]e presume that a public official means what he says and that he is duly performing the function that the law calls upon him to perform.” *Toledo v. Levin*, 117 Ohio St. 3d 373, 380, 384 N.E. 2d 31, 38 (2008).

Likewise, the Court has stated that “in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner.” *State ex rel. Shafer v. Ohio Turnpike Comm’n*, 159 Ohio St. 581, 590, 113 N.E.2d 14, 19 (1953); *see also Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, 54 N.E.2d 132, paragraph seven of the syllabus (1944) (administrative action is presumed to be valid and taken in good faith). CARE has failed to present any evidence that overcomes the presumption that the Board members have properly performed their duties.

CARE suggests that it is somehow unlawful for an ALJ, rather than the Board itself, to draft an order. Under this reasoning, an opinion of this Court would be invalid if it were drafted by a law clerk or master commissioner. In either case, it is the tribunal that issues the decision, not the attorney who prepared a draft for its consideration.

This Court has upheld the use of hearing examiners by administrative agencies. In a case challenging the appointment of hearing examiners by a county hospital’s board of trustees, the Court noted that “[i]n the operation of any public administrative body, sub-delegation of authority, impliedly or expressly, exists - and must to some degree.” *Bell v. Bd. of Trustees of Lawrence Cty. General Hospital*, 34 Ohio St. 2d 70, 74, 296 N.E.2d 276, 278 (1973). The Court concluded that the board of trustees made the final decision

on termination of employment and therefore the board had not unlawfully delegated its authority. *Id.* at 76, 296 N.E.2d at 279. In another case, the Court rejected an argument that the Board of Tax Appeals had violated a taxpayer's due process rights by replacing the attorney examiner who had conducted the hearing with another who prepared the order. *Ritchie Photographic v. Limbach*, 71 Ohio St. 3d 440, 644 N.E.2d 312 (1994). The Court stated that the decision was the board's decision and the substitution of attorney examiners did not deprive the taxpayer of due process. *Id.* at 441, 644 N.E.2d at 313; *see also DeBlanco v. Ohio State Medical Bd.*, 78 Ohio App. 3d 194, 200, 609 N.E.2d 212, 215-216 (Ohio App. 10th Dist. 1992) (appointment of hearing examiner by medical board not a denial of due process).

CARE further alleges a violation of O.A.C. § 4906-7-16(A) because the ALJ failed to file a report following the hearing. That rule provides that “[i]f ordered by the board, the administrative law judge shall prepare a written report of his or her findings, conclusions, and recommendations following the conclusion of the hearing” and that “[s]uch report shall be filed with the board and served upon all parties.” Ohio Admin. Code § 4906-7-16(A) (Anderson 2009) emphasis added), App. at 13. Under this rule, the ALJ must file a written report only when ordered by the Board. No such order was issued in this case. Therefore, there has been no violation of the rule.

The Court has consistently recognized the Public Utilities Commission's broad discretion to regulate its proceedings and manage its docket. *Vectren Energy Delivery of Ohio, Inc. v. Pub. Util. Comm'n*, 113 Ohio St. 3d 180, 191, 863 N.E.2d 599, 610 (2007); *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775, 780 (2000); *Duff v.*

Pub. Util. Comm'n, 56 Ohio St. 2d 367, 379, 384 N.E.2d 264, 273 (1978). As the Court has stated, “the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort.” *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212, 214 (1982). The Court will only interfere with that discretion in extreme circumstances where the discretion is abused. *Sanders Transfer, Inc. v. Pub. Util. Comm'n*, 58 Ohio St. 2d 21, 23, 387 N.E.2d 1370, 1372 (1979).

The Court should accord the same deference to the Board in matters of procedure. In the case of the Board, this principle finds legislative support in R.C. 4906.02(C), which provides that “[t]he chairman of the public utilities commission may assign or transfer duties among the commission’s staff.” Ohio Rev. Code Ann. § 4906.02(C) (Anderson 2009), App. at 16. The only limitation imposed by the General Assembly is that the ultimate authority to grant certificates must be exercised by the Board itself. *Id.* As explained above, it was the Board that issued the certificate in this case. The Board should have the discretion to decide how it may best reach such decisions.

Proposition of Law No. II:

The Court will not reverse or modify a determination by the Power Siting Board unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Chester Township v. Power Siting Comm'n*, 49 Ohio St. 2d 231, 238, 361 N.E. 2d 436, 441 (1977).

The standard of review in appeals from Board decisions is the same as that for appeals from the Public Utilities Commission. R.C. 4906.12 provides that “[s]ections

4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906 of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.” Ohio Rev. Code Ann. § 4906.12 (Anderson 2009), App. at 19-20. One of the incorporated statutes, R.C. 4903.13, provides that “[a] final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.” Ohio Rev. Code Ann. § 4903.13 (Anderson 2009), App. at 15.

Applying this statute to an appeal from the Board, the Court stated that it “will not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Chester Township v. Power Siting Comm’n*, 49 Ohio St. 2d 231, 238, 361 N.E.2d 436, 441 (1977). This is the same standard the Court has applied to appeals from the Commission. *See, e.g., Ohio Partners for Affordable Energy v. Pub. Util. Comm’n*, 115 Ohio St. 3d 208, 210, 874 N.E.2d 764, 767 (2007); *Monongahela Power Co. v. Pub. Util. Comm’n*, 104 Ohio St. 3d 571, 577-578, 820 N.E.2d 921, 927 (2004).

The appellant bears the burden of demonstrating that the Commission’s or Board’s decision is against the manifest weight of the evidence or is clearly unsupported by the record. *AK Steel Corp. v. Pub. Util. Comm’n*, 95 Ohio St. 3d 81, 86, 765 N.E.2d 862, 867 (2002). In matters involving the agency’s special expertise and the exercise of

discretion, the Court will generally defer to the judgment of the agency. *Constellation New Energy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St. 3d 530, 541, 820 N.E.2d 885, 895 (2004); *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262, 264 (2001); *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St. 3d 150, 154, 555 N.E.2d 288, 292 (1990). The Court has consistently refused to substitute its judgment for that of the agency on evidentiary matters. *AK Steel Corp.*, 95 Ohio St. 3d at 84, 765 N.E.2d at 866.

The governing law is straightforward. The Ohio Power Siting Board is created by statute and its powers and duties are delineated under Chapter 4906 of the Ohio Revised Code. Simply, the Board must approve applications for certificates, either as filed or with conditions, or deny the application. Ohio Rev. Code Ann. § 4906.03(D) (Anderson 2009), App. at 17. Thus, the role of the Board is to evaluate and decide whether what the applicant has proposed in its application meets the statutory criteria. Again, the Board must render a decision based upon the record, either granting or denying the application, as filed, or granting it upon such terms, conditions, and modifications as it deems appropriate. Ohio Rev. Code Ann. § 4906.10(A) (Anderson 2009), App. at 18. R.C. 4906.10 requires that the Board must, to grant a certificate, make each of the following findings to grant a certificate:

- (1) The basis of the need for the facility if the facility is an electric transmission line or gas or natural gas transmission line;
- (2) The nature of the probable environmental impact;
- (3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature

and economics of the various alternatives, and other pertinent considerations;

- (4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;
- (5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.
- (6) That the facility will serve the public interest, convenience, and necessity;
- (7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.
- (8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

Ohio Rev. Code Ann. § 4906.10(A) (Anderson 2009), App. at 30.

After reviewing the evidence, the Board concluded that each of these criteria had been satisfied. The only criterion contested by CARE is the minimum adverse environmental impact.

CARE argues that the Board failed to properly consider another potential route, one along an abandoned railway line that is now used as a bike trail. This assertion ignores the extensive discussion in the Opinion and Order of the route selection process used by the Applicants. *See In re ATSI* (Opinion, Order and Certificate at 16-20) (November 24, 2008), Appellant's App. at 39-43. As summarized in the order, the record shows that the Applicants and their consultant (URS Corporation) undertook a comprehensive route selection study. After defining a study area, URS identified nearly 900 candidate routes. *Id.* at 19. The routes were then scored using environmental, cultural, land use, and engineering factors. *Id.* A route along Clay Street in the City of Chardon received the best overall score and was proposed as the Alternate Route. *Id.* In an effort to present the Board with two distinct alternatives, the Applicants selected the best-scoring cross-county route as the Preferred Route. *Id.* While the Clay Street route had the best score, the Applicants explained that they designated the cross-county route as the Preferred Route to avoid the need to take any homes. *Id.* at 19-20.

The Board concluded that the Applicants had undertaken "a detailed and comprehensive effort to consider numerous factors related to site selection, in order to seek the route with the minimum adverse environmental impact." *Id.* at 31. The validity of the Applicants' study was confirmed by the Staff Report. *Id.* The Board further determined that none of the alternative routes proposed by CARE was more advantageous than the routes proposed by the Applicants. *Id.*

CARE contends that it is paradoxical for the Board to find the route selection process to be reasonable when the Board had, in 1997, granted a certificate for another

route to serve the same general need. *In the Matter of the Application of The Cleveland Electric Illuminating Co. for Certification of the Rachel 138 kV Transmission Line Project*, Case No. 95-600-EL-BTX (Opinion, Order, and Certificate) (March 24, 1997), Supp. at 253. This argument ignores the change in conditions in the intervening eleven years. Most significantly, the abandoned railroad route had been converted to the Maple Highlands Trail operated by the Geauga Park District. Moreover, as the Board noted, it had a duty to evaluate the application before it at that time. *In re ATSI* (Entry on Rehearing at 11) (January 26, 2009), Appellant's App. at 17. The Board carried out this duty and determined that the Applicants had satisfied the statutory criteria for construction on the Preferred Route.

CARE also contends that two other possible routes, one along U.S. Route 322 and one along State Route 11, are viable options for the transmission line but were not properly considered. Aside from a passing reference, CARE did not raise this issue in its application for rehearing filed with the Board. *In re ATSI* (Application for Rehearing at 11) (December 19, 2008), Appellant's App. at 11. R.C. 4903.10 provides:

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Ohio Rev. Code Ann. § 4903.10 (Anderson 2009), App. at 13-15. The Court has applied the specificity requirement strictly. *See, e.g., Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247, 638 N.E.2d 550, 553 (1994) (substantial compliance argument rejected); *Agin v. Pub. Util. Comm'n*, 12 Ohio St. 3d 97, 98, 232 N.E.2d 828, 829 (1967)

(some similarity between grounds in rehearing application and arguments in brief insufficient to comply with statute). As the Court has explained:

It may fairly be said that, by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's application for rehearing used a shotgun instead of rifle to hit that question.

Cincinnati v. Pub. Util. Comm'n, 151 Ohio St. 353, 378, 86 N.E.2d 10, 23 (1949).

Having failed to raise the issues of the alternative routes in its application for rehearing, CARE is precluded from doing so on appeal.

Likewise, CARE failed to raise these issues in its notice of appeal. Notice of Appeal, Appellant's App. at 1. R.C. 4903.13 requires that an appellant file a notice of appeal "setting forth the order appealed from and the errors complained of." Ohio Rev. Code Ann. § 4903.13 (Anderson 2009), App. at 15. The Court has held that it has no jurisdiction to consider arguments not set forth in a notice of appeal. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 114 Ohio St. 3d 340, 349, 872 N.E.2d 269, 278 (2007); *Cincinnati Gas & Electric Co. v. Pub. Util. Comm'n*, 103 Ohio St. 3d 398, 816 N.E.2d 238 (2004). The Court should therefore decline to consider these issues.

Even had CARE preserved these arguments, they were considered by the Board. The Board concluded that "[o]n the basis of the evidence presented, we do not believe that any of the alternatives raised by CARE would be more advantageous, overall, than the routes presented by the Applicants." *In re ATSI* (Opinion, Order, and Certificate at 31) (November 24, 2008), Appellant's App. at 54. CARE has failed to show that this conclusion was unreasonable.

Another argument that CARE raises in its merit brief is that the Board failed to consider commercial, agricultural, and recreational land uses. CARE failed to include this argument in both its application for rehearing and its notice of appeal. Therefore, as explained above, CARE is precluded from raising this issue now. Nevertheless, the Board did discuss the Staff's evaluation of the project's impact on agricultural land. *In re ATSI* (Opinion, Order, and Certificate at 36) (November 24, 2008), Appellant's App. at 59. Based on this analysis, the Board found that the impact of the proposed project on farm land and agricultural districts will be minimal. Additionally, the Staff conducted a comprehensive analysis of all impacts of the proposed routes, including their recreational and economic consequences. *Id.* at 31. Thus, the Board did consider these impacts in its decision. While CARE may dislike the outcome, the Board fully performed its statutory duty.

As the Board recognized, all transmission line projects impose some burdens on adjoining landowners. *Id.* The Board has approved construction on a route that, overall, creates fewer negative consequences than other potential routes. The Board also imposed a total of forty-three conditions intended to ameliorate the impact of construction of the new line. The Board's determination is reasonable, is supported by the record, and should be upheld.

B. Trade Secrets Defined and Determined

A “trade secret” is defined as information that “derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use” and “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Ohio Rev. Code Ann. § 1333.61(D) (Anderson 2009), App. at 20. The Board has adopted rules to implement its obligation to protect trade secret information, specifically:

(H) Motions for protective orders.

(1) Upon motion of any party or person from whom discovery is sought, the board or the administrative law judge may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

...(g) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way.

Ohio Admin. Code § 4906-7-07(H)(1)(g) (Anderson 2009), App. at 8-9. Further, the Board has specified the procedure to be used when seeking a determination of trade secret status. Protection under the trade secret designation may only be sought under limited circumstances, specifically:

(2) No motion for a protective order shall be filed under this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order shall be accompanied by:

(a) A memorandum in support, setting forth the specific basis of the motion and citations to any authorities relied upon.

(b) Copies of any specific discovery request which are the subject of the request for a protective order.

(c) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party seeking discovery.

Ohio Admin. Code § 4906-7-07(H)(2) (Anderson 2009), App. at 9. The Board's rules go beyond the minimum required for making information available to the public. Merely being a trade secret is not enough to obtain confidential treatment from the Board. It will only afford confidential treatment where:

[B]oth of the following criteria are met: The information is deemed by the board or administrative law judge assigned to the case to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code.

Ohio Admin. Code § 4906-7-07(H)(4) (Anderson 2009), App. at 10. Confidential treatment by the Board is actually more difficult to obtain than the minimum that might be required under public records law. Additionally, it is more difficult to retain. Confidential treatment will be lost after eighteen months unless there is a new showing of continuing right to that confidentiality. Ohio Admin. Code § 4906-7-07(H)(6) (Anderson 2009), App. at 10-11.

In short, the Board understands its obligations regarding information handling and has adopted a thorough and effective mechanism to implement those obligations.

C. The Board Properly Identified Trade Secret Information

Having shown that trade secret information is exempt from disclosure under public records law and that the Board has an effective mechanism for considering claims

of trade secret status, it only remains to show that the Board implemented its mechanism correctly and it did.

The issue of trade secret status first arose in a series of three motions filed by the Applicants below on October 1, November 8, and November 26, 2007. The Applicants sought confidential status for a series of load flow studies conducted as part of the Applicants' internal effort to determine how best to remedy the power problems observed in the Geauga County area. The administrative law judge (ALJ) examined these materials *in camera*. An *in camera* review is the best method for determining whether information is exempt from disclosure. *State ex rel. Allright Parking of Cleveland, Inc. v. Cleveland*, 63 Ohio St. 3d 772, 776, 591 N.E.2d 708, 711 (1992). As a result of this review, the administrative law judge determined that all of the information was a trade secret and should be granted confidential status. *In re ATSI* (Entry at paragraphs 2-3) (March 3, 2008), Supp. at 73-74. These determinations were correct given the nature of the material. Load flow studies are tools used to understand the dynamic functioning of an electric system. See U.G. Knight, *Power Systems Engineering and Mathematics*, Pergamon Press, New York 1972, ISBN 0080166032 (a description of the various methods used for analysis of electrical systems). They are done using a mathematical model of the physical components of the system and their capacities. The location, nature, and operating characteristics of the Applicants' equipment is highly competitively sensitive given that this is what forms the basis of the Applicants' business. A proprietary computer program is then used to model the effects on this existing system of chosen stresses. The model provides an estimate of how the system would respond in

Proposition of Law No. III:

The Ohio Power Siting Board must maintain confidential treatment of information the release of which is prohibited by state or federal law. Ohio Rev. Code Ann. §§ 1333.61 et seq. (Anderson 2009)

A. Trade Secrets Are Not Public Records

The release of trade secret information without the approval of the owner is impermissible. Ohio Rev. Code Ann. § 1333.61 et seq. (Anderson 2009), App. at 20-23. Potential release may be enjoined. Ohio Rev. Code Ann. § 1333.62 (Anderson 2009), App. at 21. Improper release may subject persons to damages and attorney fees. Ohio Rev. Code Ann. §§ 1333.63, 1333.64 (Anderson 2009), App. at 21-22. State law therefore bars the release of trade secret information. The Public Records Act recognizes this and exempts from the definition of “public records” any “records the release of which is prohibited by state or federal law.” Ohio Rev. Code Ann. § 149.43(A)(1)(v) (Anderson 2009), App. at 22. Trade secret information, therefore, does not constitute a public record which must be released upon request. This Court has agreed stating:

Trade secrets are exempt from disclosure under the exemption of R.C. 149.43(A)(1)(v) for disclosures prohibited by state or federal law.

State ex rel. Carr v. Akron, 112 Ohio St. 3d 351, 358, 859 N.E.2d 948, 955 (2006), quoting *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St. 3d 535, 540, 721 N.E.2d 1044, 1049 (2000).

Since the Board identified certain information as trade secret, the non-disclosure of that information to the public at large (it was disclosed to the parties to the case) is correct and the decision below should be affirmed.

reaction to the chosen stress. For example, to determine the impact on a system of the failure of a particular piece of equipment, the base model would be adjusted to reflect the failure of that equipment and then the model would be run using a variety of demand assumptions. The series of outputs, load flow studies, would indicate what other problems might be created elsewhere in the system because of the failure of that equipment.¹

It is obvious that all of this information meets the standard for trade secret protection. None of this information is available to anyone; it is entirely proprietary. The operation of these facilities is the economic basis upon which these companies operate.

The record shows that this information:

- Could be used by FirstEnergy's competitors to learn about current and potential issues on FirstEnergy's system;
- Could place FirstEnergy at a competitive disadvantage in the power and transmission markets;
- Reveals FirstEnergy's secret internal planning;
- Reveals details about specific ratepayer/customer peak usage, load shapes, actual usage, and potential plans for future expansion at the customer sites which could be used to put FirstEnergy's customers at a competitive disadvantage.

¹ One use of this sort of analysis can be seen in the forecasting rules of the Public Utilities Commission. Ohio Admin. Code Section 4901:5-5-03(E) requires submission of a base case load flow of a company's electric system which is then stressed by running the model again against estimated increased demand levels for three years. The comparison of the results of these studies reveals the adequacy of the systems to support the assumed level of increased demand.

Applicants' Response to Intervenor's Motion to Unseal, September 15, 2008, Exhibit 4, Affidavit of Ebbers at paragraphs 13-15, Supp. at 417. It is Applicants' policy and they have taken every step to maintain the confidentiality of this information. Applicants' Response to Intervenor's Motion to Unseal, September 15, 2008, Exhibit 4, Affidavit of Ebbers at paragraph 12, Supp. at 417. The Board so found and it was correct.

Redaction is not possible. There is nothing meaningful in these studies that is not a trade secret. These studies consist of subjecting a trade secret description of the existing system to a trade secret stress assumption, analyzing the effect through a proprietary computer program and generating a trade secret result. It is all kept confidential by the companies and it all has economic value. Applicants' Response to Intervenor's Motion to Unseal, September 15, 2008, Exhibit 4, Affidavit of Ebbers, Supp. at 415. The Board's finding that the information was a trade secret and cannot be made available to the general public is correct and should be affirmed.

D. CARE Has Not Been Harmed

Even if CARE were correct in its claim that the protected information was not a trade secret, that would not warrant a reversal of the Board. This Court will not reverse an order of the Board² unless the party seeking reversal demonstrates the prejudicial effect of the order. *Elyria Foundry Co. v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 311, 871 N.E.2d 1176, 1184 (2007); *Tongren v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 92, 706

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The standard of review for decisions of the Board is the same as that for the Public Utilities Commission of Ohio. Ohio Rev. Code Ann. § 4906.12 (Anderson 2009), App. at 32.

N.E.2d 1255, 1259 (1999). CARE has failed to demonstrate how not revealing the trade secret information to the public at large harms CARE in any way.

All of the trade secret information was provided to CARE and was used at the hearing by CARE's witnesses. *In re ATSI* (Entry on Rehearing at 11-14) (January 26, 2009), Appellant's App. at 17-20. CARE was deprived of nothing and, therefore, suffered no harm. Whether or not other persons had access to the information does not impact CARE in any way. In the absence of harm, the Board's decision should be affirmed.

E. Public Records Issues Should Be Decided in Public Records Cases

Curiously, although CARE argues that the Board has not followed public records law, CARE itself tries to circumvent that very law. This is not a proper case in which to challenge the Board's determination on a public records basis. If a requestor of public records believes that records have been wrongly withheld or redacted, the proper and exclusive remedy is for the records requestor to seek a writ of mandamus. Ohio Rev. Code Ann. § 149.43(C)(1) (Anderson 2009), App. at 31; *State ex rel. McGowan v. Cuyahoga Metropolitan Housing Authority*, 78 Ohio St. 3d 518, 520, 678 N.E.2d 1388, 1389 (1997). CARE has taken no steps to invoke this Court's original jurisdiction by filing a mandamus action and the current appeal is not a mandamus case. Because it has failed to invoke the Court's jurisdiction, CARE has no remedy in this case.

F. Critical Energy Infrastructure Information

There is a second reason, entirely sufficient on its own, that the material determined to be confidential is exempt from the definition of "public record." Its

disclosure is barred by federal law as “critical energy infrastructure information” (CEII). Disclosure of the information by federal law being barred, the information does not constitute a “public record” under state law. Ohio Rev. Code Ann. § 149.43(A)(1)(v) (Anderson 2009), App. at 30.

The Federal Energy Regulatory Commission has defined CEII as:

...specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- (i) Relates details about 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 U.S.C. 552; and
- (iv) Does not simply give the general location of the critical infrastructure.

18 C.F.R. § 388.113(c)(1), App. at 102. “Critical infrastructure” is defined as:

Existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

18 C.F.R. § 388.113(c)(2), App. at 102. Disclosure of such information is barred unless the requestor has been shown not to constitute a security threat and all recipients are required to sign a non-disclosure agreement. *Id.* The Federal Energy Regulatory Commission has determined that the system maps and diagrams are CEII. *Critical Energy Infrastructure*, Federal Energy Regulatory Commission Docket Nos. RM02-4-000 and PL02-1-000, Order No. 630, Final Rule (February 21, 2003), 102 FERC ¶

61,190, App. at 32-121 (*see* transmission system maps and diagrams are CEII, App. at 61, technical information about proposed facilities is CEII, App. at 63-64, only those with legitimate need can obtain CEII, App. at 66-67, text of rule, App. at 102-104). The record reveals that this is exactly the information filed with the Board and held to be confidential. Applicants' Response to Intervenors Motion to Unseal, September 15, 2008, Exhibit 4, Affidavit of Ebbers, Supp. at 415. The ALJ examined the information previously held to be confidential a second time *in camera* and determined that, in addition to being trade secrets, the data also constituted CEII. Transcript Vol. I at 9-11, Supp. at 1. The Board considered the matter again and agreed with the ALJ. *In re ATSI* (Entry on Rehearing at 15) (January 26, 2009), Appellant's App. at 21.

Preserving the confidentiality of CEII is of great importance. The kind of information deemed confidential here is of interest to those who would harm the system.³ Maps and diagrams describe the system and load flow studies identify vulnerabilities in it. This is the very information needed if one were interested in disabling the grid. That is why federal law requires this information only be disclosed in a controlled way to those who have a legitimate reason to see it. CARE has a legitimate reason and got the information. That is what federal law requires. State law recognizes this and the Board acted correctly. Its order should be affirmed.

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We do not suggest in any way that CARE has this sort of intent. Quite to the contrary, CARE appears interested in maintaining a well functioning electric system. They simply have a different view of how this should be achieved.

G. The Board Complied With Sunshine Requirements

CARE argues that by maintaining confidential status for trade secret and critical energy infrastructure information, the Board violated the Ohio Sunshine Law. This is false because the Board did exactly what is required of it.

Ohio's sunshine requirements are actually quite simple. The Board, as a public body, must hold its meetings in the open.⁴ Ohio Rev. Code Ann. § 121.22(C) (Anderson 2009), App. at 23. Any action of the Board would be invalid unless done in a public vote. Ohio Rev. Code Ann. § 121.22(H) (Anderson 2009), App. at 26-27. The public must have notice of the proposed action and where the meeting will be held. Ohio Rev. Code Ann. § 121.22(F) (Anderson 2009), App. at 25. Minutes of the Board's actions must be made. Ohio Rev. Code Ann. § 121.22(C) (Anderson 2009), App. at 23.

The Board met its sunshine obligations. Notice of the two meetings where the Board considered the application below was provided. *See* Ohio Power Siting Board Meeting November 24, 2008 Agenda, App. at 125; Ohio Power Siting Board Meeting January 26, 2009 Agenda, App. at 124. A public vote was held on both the Opinion and Order and the Entry on Rehearing each of which was adopted. *See* Minutes, Regular Meeting of the Ohio Power Siting Board, November 24, 2008, App. at 123; Minutes, Regular Meeting of the Ohio Power Siting Board, January 26, 2009, App. at 122. Although it would have been permissible for the Board to have gone into executive session to discuss the confidential information in the record, *see* Ohio Rev. Code Ann. §

⁴ There are exceptions to this requirement that are of no relevance here.

121.22(G)(5) (Anderson 2009), App. at 26, it did not have an executive session, and all discussions were public. *See Minutes, Regular Meeting of the Ohio Power Siting Board, November 24, 2008, App. at 123; Minutes, Regular Meeting of the Ohio Power Siting Board, January 26, 2009, App. at 122.* Minutes of the meetings were produced. In short, the Board complied with all sunshine requirements.

Although the Board has complied with the sunshine requirements, Appellant has not. Enforcement of sunshine requirements is through an original action. Ohio Rev. Code Ann. § 121.22(I) (Anderson 2009), App. at 27. Appellant has not instituted such an original action, choosing this appeal instead. In addition to ignoring the controlling law, this creates an unnecessary practical problem for this Court. If sunshine claims could be raised in an appeal as of right, this Court is denied the benefits that would arise through the development of a factual record addressing sunshine compliance specifically. This Court is placed in the position of being a fact-finder on an issue without benefit of a trial on the issue. Avoiding just such a situation is the reason that sunshine claims are to be raised in separate litigation focused on whether or not the sunshine requirements were violated. While in this case establishing sunshine compliance is quite easy, other cases may not be so simple, as, for example, where there is a factual dispute as to what actually occurred at the agency. The law does not place the Court in this position and Appellant's sunshine arguments should be rejected.

H. The Process Due Has Been Provided

Appellant makes a vague argument that it has been denied due process because, although it was provided with all the information it sought weeks before the hearing below, it still did not have time to prepare adequately. This claim has no merit.

In administrative matters, the right to participate is statutory, not constitutional. *Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 248, 638 N.E.2d 550, 553 (1994); *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 38 Ohio St. 3d 266, 269, 527 N.E.2d 777, 780 (1988); *MCI Telecommunications Corp. v. Pub. Util. Comm'n*, 32 Ohio St. 3d 306, 310, 513 N.E.2d 337, 342 (1987); *Armco, Inc. v. Pub. Util. Comm'n*, 69 Ohio St. 2d 401, 409, 433 N.E.2d 923, 928 (1982); *Cleveland v. Pub. Util. Comm'n*, 67 Ohio St. 2d 446, 453, 424 N.E.2d 561, 566 (1981). The statutes, therefore, define the terms for participation. No statute provides that Appellant must receive as much time as it wants to prepare for a hearing in Board matters. Indeed the statute would appear to contemplate a much shorter timeframe than the Appellant was given. The General Assembly takes the view that intervenors must be prepared in less than ninety days. The law requires that the hearing in a siting application must be more than sixty but less than ninety days from the receipt of a complete application. Ohio Rev. Code Ann. § 4906.07(A) (Anderson 2009), App. at 17. In this case, the application was complete as of November 27, 2007. See Letter of Alan Schriber, Chairman, Ohio Power Siting Board to Michael Beiting, November 27, 2007. The General Assembly would take the view that CARE should have been ready for the hearing on that application no later than February 25, 2008. The evidentiary hearing did not actually begin until September 16, 2008,

providing CARE with six and a half months more time to develop its case than the General Assembly thought maximally necessary. CARE has been given more than adequate opportunities in the case below and there is no due process issue.

I. Summary

Appellant's Proposition of Law II is an amalgam of baseless claims and should be rejected. The Board properly shielded trade secret and critical energy infrastructure information from public disclosure, complying with public records requirements. The Board announced its meeting in advance, voted publicly, and provided minutes of its actions. The Board complied with all sunshine requirements. Appellant had notice of the hearing, was provided with all discovery sought, participated in the hearing of the case presenting evidence and witnesses, and submitted briefs. Nothing more is required. Appellant's Proposition of Law II should be rejected by this Court.

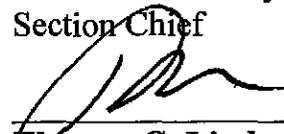
CONCLUSION

After reviewing all the evidence, the Board determined that the Preferred Route proposed by the Applicants was appropriate for construction of the transmission line. The Board imposed forty-three conditions to mitigate any adverse impacts. The Board's decision is reasonable, is supported by the record, and complies with the law in all respects. The decision should be affirmed.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief** submitted on behalf of Appellee, the Ohio Power Siting Board, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 24th day of July, 2009.



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4906-7-07 Discovery.

(A) Scope of discovery.

(1) The purpose of this rule is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in board proceedings.

(2) Except as otherwise provided in paragraph (A)(7) of this rule, any party to a board proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of that proceeding. It is not grounds for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions and requests for admission. The frequency of using these discovery methods is not limited unless the board orders otherwise under paragraph (H) of this rule.

(3) Any party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify. Thereafter, any party may discovery from the expert or other party facts or data known or opinions held by the expert which are relevant to the stated subject matter. A party who has retained or specially employed an expert may, with the approval of the board, require the party conducting discovery to pay the expert a reasonable fee for the time spent responding to discovery requests.

(4) Discovery responses which are complete when made need not be supplemented with subsequently acquired information unless:

(a) The response fully identified each expert witness expected to testify at the hearing and stated the subject matter upon which each expert was expected to testify.

(b) The responding party later learned that the response was incorrect or otherwise materially deficient.

(c) The response indicated that the information sought was unknown or nonexistent and such information subsequently became known or existent.

(d) An order of the board or agreement of the parties provides for the supplementation of responses.

(e) Requests for the supplementation of responses are submitted prior to the commencement of the hearing.

(5) The supplementation of responses required under paragraph (A)(4) of this rule and requests for supplementation of responses submitted pursuant to paragraph (A)(4)(e) of this rule shall be provided within five business days of discovery of the new information.

(6) Nothing in this rule precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.

(7) A discovery request under this rule may not seek information from any party which is available in prefiled testimony, prehearing data submissions, or other documents which that party has filed with the board in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.

(8) For purposes of this rule, the term “party” includes any person who has filed a notice or petition to intervene which is pending at the time a discovery request or motion is to be served or filed.

(9) The staff shall be deemed a “party” under this rule for purposes of conducting discovery, but no party shall conduct discovery against the staff.

(10) Discovery may not be used to harass or delay existing procedural schedules.

(B) Time period for discovery.

(1) Discovery may begin immediately after an application is filed or a proceeding is commenced and should be completed as expeditiously as possible. Unless otherwise ordered for good cause shown, discovery must be completed prior to the commencement of the hearing.

(2) The board or the administrative law judge may shorten or extend the time period for discovery upon their own motion or upon motion of any party for good cause shown.

(C) Filing and service of discovery requests and responses.

Except as otherwise provided in paragraphs (H) and (I) of this rule and unless otherwise ordered for good cause shown, discovery requests shall be served upon the party from whom discovery is sought and filed with the board. Upon a showing of good cause, the board or the administrative law judge may determine that the responding party may recover the reasonable cost of providing copies

from the party making the request. For purposes of this rule the term “response” includes written responses or objections to interrogatories, requests for the production of documents or tangible things, requests for permission to enter upon land or other property, and requests for admission.

(D) Interrogatories.

(1) Any party may serve upon any other party written interrogatories, to be answered by the party served. If the party served is a corporation, partnership, association, government agency, or municipal corporation, it shall designate one or more of its officers, agents, or employees to answer the interrogatories, who shall furnish such information as is available to the party. Each interrogatory shall be answered separately and fully, in writing and under oath, unless it is objected to, in which case the reason for the objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections shall be signed by the attorney or other person making them. The party upon whom the interrogatories have been served shall serve a copy of the answers or objections upon the party submitting the interrogatories and all other parties within twenty days after the service thereof, or within such shorter or longer time as the board or the administrative law judge may allow. The party submitting the interrogatories may move for an order under paragraph (I) of this rule with respect to any objection or other failure to answer an interrogatory.

(2) Subject to the scope of discovery set forth in paragraph (A) of this rule, interrogatories may elicit facts, data, or other information known or readily available to the party upon whom the interrogatories are served. An interrogatory which is otherwise proper is not objectionable merely because it calls for an opinion, contention, or legal conclusion, but the board or the administrative law judge may direct that such interrogatory need not be answered until certain designated discovery has been completed, or until some other designated time. The answers to interrogatories may be used to the extent permitted by the rules of evidence, but such answers are not conclusive and may be rebutted or explained by other evidence.

(3) Where the answer to an interrogatory may be derived or ascertained from public documents on file in this state, or from documents which the party served with the interrogatory has furnished to the party submitting the interrogatory within the preceding twelve months, it is a sufficient answer to such interrogatory to specify the title of the document, the location of the document or the circumstances under which it was furnished to the party submitting the interrogatory, and the page or pages from which the answer may be derived or ascertained.

(4) Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, and the burden of deriving the answer is substantially the same for the party submitting the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party submitting the interrogatory a reasonable opportunity to examine, audit, or inspect such records.

(E) Depositions.

(1) Any party to a board proceeding may take the testimony of any other party or person, other than a member of the board staff, by deposition upon oral examination with respect to any matter within the scope of discovery set forth in paragraph (A) of this rule. The attendance of witnesses and production of documents may be compelled by subpoena as provided in rule 4906-7-08 of the Administrative Code.

(2) Any party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to the deponent, to all parties, and to the board. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient for identification. If a subpoena duces tecum is to be served upon the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the notice.

(3) If any party shows that he or she was unable with the exercise of due diligence to obtain counsel to represent him or her at the taking of a deposition, the deposition may not be used against such party.

(4) The board or the administrative law judge may, upon motion, order that a deposition be recorded by other than stenographic means, in which case the order shall designate the manner of recording the deposition, and may include provisions to assure that the recorded testimony will be accurate and trustworthy. If such an order is made, any party may arrange to have a stenographic transcription made at his or her own expense.

(5) A party may, in the notice and in a subpoena, name a corporation, partnership, association, government agency, or municipal corporation and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its officers, agents, employees, or other persons duly authorized to testify on its behalf, and shall set forth, for each person designated, the matters on which he or she will testify. The persons so

designated shall testify as to matters known or reasonably available to the organization.

(6) Depositions may be taken before any person authorized to administer oaths under the laws of the jurisdiction in which the deposition is taken, or before any person appointed by the board or the administrative law judge. Unless all of the parties expressly agree otherwise, no deposition shall be taken before any person who is a relative, employee, or attorney of any party, or a relative or employee of such attorney.

(7) The person before whom the deposition is to be taken shall put the witness on oath or affirmation, and shall personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness. Examination and cross-examination may proceed as permitted in board hearings. The testimony shall be recorded stenographically or by any other means ordered under paragraph (E)(4) of this rule. If requested by any of the parties, the testimony shall be transcribed at the expense of the party making the request.

(8) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope upon the party taking the deposition, who shall transmit them to the officer, who in turn shall propound them to the witness and record the answers verbatim.

(9) At any time during the taking of a deposition, the board or the administrative law judge may, upon motion of any party or the deponent and upon a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party, order the person conducting the examination to cease taking the deposition, or may limit the scope and manner of taking the deposition as provided in paragraph (H) of this rule. Upon demand of the objecting party or deponent, the taking of the depositions shall be suspended for the time necessary to make a motion for such an order.

(10) If and when the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him or her, unless such examination and reading are expressly waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making the changes. The deposition shall then be signed by the witness unless the signing is expressly waived by the parties or the witness is ill or

cannot be found or refuses to sign. If the deposition is not signed by the witness within ten days after its submission to him or her, the officer shall sign it and state on the record the fact of the waiver or the illness or absence of the witness, or the fact of the refusal to sign together with the reason, if any, given for such refusal. The deposition may then be used as fully as though signed, unless the administrative law judge upon motion to suppress, holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(11) The officer shall certify on the deposition that the witness was duly sworn by him or her and that the deposition is a true record of the testimony given by the witness. Upon payment of reasonable charges therefore, the officer shall furnish a copy of the deposition to any party or to the deponent.

(12) Documents and things produced for inspection during the examination of the witness shall, upon request of any party, be marked for identification and annexed to the deposition, except that:

(a) The person producing the materials may substitute copies to be marked for identification, if all parties are afforded a fair opportunity to verify the copies by comparison with the originals.

(b) If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to deposition.

(13) Depositions may be used in board hearings to the same extent permitted in civil actions in courts of record. Unless otherwise ordered for good cause shown, any depositions to be used as evidence must be filed with the board at least three days prior to the commencement of the hearing.

(14) The notice to a party deponent may be accompanied by a request made in compliance with paragraph (F) of this rule for the production of documents or tangible things at the taking of the deposition.

(F) Production of documents and things, entry upon land or other property.

(1) Subject to the scope of discovery set forth in paragraph (A) of this rule, any party may serve upon any other party a written request to:

(a) Produce and permit the party making the request, or someone acting on his or her behalf, to inspect and copy any designated documents, including writings,

drawings, graphs, charts, photographs, or data compilations, which are in the possession, custody, or control of the party upon whom the request is served.

(b) Produce for inspection, copying, sampling, or testing any tangible things which are in the possession, control, or custody of the party upon whom the request is served.

(c) Permit entry upon designated land or other property for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(2) The request shall set forth the items to be inspected either by individual item or by category, and shall describe each category with reasonable particularity. The request shall also specify a reasonable time, place, and manner for conducting the inspection and performing the related acts.

(3) The party upon whom the request is served shall serve a written response within twenty days after the service of the request, or within such shorter or longer time as the board or the administrative law judge may allow. The response shall state, with respect to each item or category, that the inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reason for the objection shall be stated. If an objection is made to part of an item or category, that part shall be specified. The party submitting the request may move for an order under paragraph (I) of this rule with respect to any objection or other failure to respond to a request or any part thereof, or any failure to permit inspection as requested.

(4) Where a request calls for the production of a public document on file in this state, or a document which the party upon whom the request is served has furnished to the party submitting the request within the preceding twelve months, it is a sufficient response to such request to specify the location of the document or the circumstances under which the document was furnished to the party submitting the request.

(G) Request for admission.

(1) Any party may serve upon any other party a written request for the admission, for purposes of the pending proceeding only, of the truth of any specific matter within the scope of discovery set forth in paragraph (A) of this rule, including the genuineness of any documents described in the request. Copies of any such documents shall be served with the request unless they are or have been otherwise furnished for inspection or copying.

(2) Each matter for which an admission is requested shall be separately set forth. The matter is admitted unless, within twenty days after the service of the request, or within such shorter or longer time as the board or the administrative law judge may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection, signed by the party or by his or her attorney. If an objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully make an admission or denial. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer or deny only part of the matter of which an admission is requested, the party shall specify that portion which is true and qualify or deny the remainder. An answering party may not give lack of information as a reason for failure to admit or deny a matter unless the party states that he or she has made reasonable inquiry and that information known or readily obtainable is insufficient to enable him or her to make an admission or denial. A party who considers the truth of a matter of which an admission has been requested to be a genuine issue for the hearing may not, on that basis alone, object to the request, but may deny that matter or set forth the reasons why an admission or denial cannot be made.

(3) Any party who has requested an admission may move for an order under paragraph (I) of this rule with respect to any answer or objection. Unless it appears that an objection is justified, the board or the administrative law judge shall order that an answer be served. If an answer fails to comply with the requirements of this rule, the board or the administrative law judge may:

(a) Order that the matter be admitted for purposes of the pending proceeding.

(b) Order that an amended answer be served.

(c) Determine that final disposition of the matter should be deferred until a prehearing conference or some other designated time prior to the commencement of the hearing.

(4) Unless otherwise ordered by the board or the administrative law judge, any matter admitted under this rule is conclusively established against the party making the admission, but such admission may be rebutted by evidence offered by any other party. An admission under this rule is an admission for the purposes of the pending proceeding only and may not be used for any other purposes.

(H) Motions for protective orders.

(1) Upon motion of any party or person from whom discovery is sought, the board or the administrative law judge may issue any order which is necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Such a protective order may provide that:

(a) Discovery not be had.

(b) Discovery may be had only on specified terms and conditions.

(c) Discovery may be had only by a method of discovery other than that selected by the party seeking discovery.

(d) Certain matters not be inquired into.

(e) The scope of discovery be limited to certain matters.

(f) Discovery be conducted with no one present except persons designated by the board or the administrative law judge.

(g) A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way;.

(h) Information acquired through discovery be used only for purposes of the pending proceeding, or that such information be disclosed only to designated persons or classes of persons.

(2) No motion for a protective order shall be filed under this rule until the person or party seeking the order has exhausted all other reasonable means of resolving any differences with the party seeking discovery. A motion for a protective order shall be accompanied by:

(a) A memorandum in support, setting forth the specific basis of the motion and citations to any authorities relied upon.

(b) Copies of any specific discovery request which are the subject of the request for a protective order.

(c) An affidavit of counsel, or of the person seeking a protective order if such person is not represented by counsel, setting forth the efforts which have been made to resolve any differences with the party seeking discovery.

(3) If a request for a protective order is denied in whole or in part, the board or the administrative law judge may require that the party or person seeking the order provide or permit discovery on such terms and conditions as are just.

(4) Upon motion of any party or person filing a document with the board's docketing division relative to a case before the board, the board or the administrative law judge assigned to the case may issue any order which is necessary to protect the confidentiality of information contained in the document, to the extent that state or federal law prohibits release of the information, including where it is determined that both of the following criteria are met: The information is deemed by the board or administrative law judge assigned to the case to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purpose of Title 49 of the Revised Code. Any order issued under this paragraph shall minimize the amount of information protected from public disclosure. The following requirements apply to a motion filed under this paragraph.

(a) All documents submitted pursuant to paragraph (H) of this rule should be filed with only such information redacted as is essential to prevent disclosure of the allegedly confidential information. Such redacted documents should be filed with the otherwise required number of copies for inclusion in the public case file.

(b) Three unredacted copies of the allegedly confidential information shall be filed under seal, along with a motion for protection of the information, with the chief of the docketing division, or the chief's designee. Each page of the allegedly confidential material filed under seal must be marked as "Confidential," "Proprietary", or "Trade Secret".

(c) The motion for protection of allegedly confidential information shall be accompanied by a memorandum in support setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure, and citations of any authorities relied upon. The motion and memorandum in support shall be made part of the public record of the proceeding.

(5) Pending a ruling on a motion filed in accordance with paragraph (H) of this rule, the information filed under seal will not be included in the public record of the proceeding or disclosed to the public until otherwise ordered or released pursuant to this rule. The board and its employees will undertake reasonable efforts to maintain the confidentiality of the information pending a ruling on the motion. A document or portion of a document filed with the docketing division that is marked "Confidential", "Proprietary", "Trade Secret", or with any other such marking, will not be afforded confidential treatment and protected from disclosure unless it is filed in accordance with paragraph (H) of this rule.

(6) Unless otherwise ordered, any order prohibiting public disclosure pursuant to paragraph (E)(4) of this rule shall automatically expire eighteen months after the date of its issuance, and such information may then be included in the public

record of the proceeding. A party wishing to extend a protective order beyond eighteen months shall file an appropriate motion and shall include a detailed discussion of the need for continued protection from disclosure.

(I) Motions to compel discovery.

(1) Any party, upon reasonable notice to all other parties and any persons affected thereby, may move for an order compelling discovery, with respect to:

(a) Any failure of a party to answer an interrogatory served under paragraph (D) of this rule.

(b) Any failure of a party to produce a document or tangible thing or permit entry upon land or other property as requested under paragraph (F) of this rule.

(c) Any failure of a deponent to appear or to answer a question propounded under paragraph (E) of this rule.

(d) Any other failure to answer or respond to a discovery request made under paragraphs (D) to (G) of this rule.

(2) For purposes of this rule, an evasive or incomplete answer shall be treated as a failure to answer.

(3) No motion to compel discovery shall be filed under this rule until the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought. A motion to compel discovery shall be accompanied by:

(a) A memorandum in support, setting forth:

(i) The specific basis of the motion, and citations of any authorities relied upon.

(ii) A brief explanation of how the information sought is relevant to the pending proceeding.

(iii) Responses to any objections raised by the party or person from whom discovery is sought.

(b) Copies of any specific discovery requests which are the subject of the motion to compel, and copies of any responses or objections thereto.

(c) An affidavit of counsel, or of the party seeking to compel discovery if such party is not represented by counsel, setting forth the efforts which have been made

to resolve any differences with the party or person from whom discovery is sought.

(4) The board or the administrative law judge may grant or deny the motion in whole or in part. If the motion is denied in whole or in part, the board or the administrative law judge may issue such protective order as would be appropriate under paragraph (H) of this rule.

(5) Any order of the administrative law judge granting a motion to compel discovery in whole or in part may be appealed to the board in accordance with rule 4906-7-15 of the Administrative Code. If no application for review is filed within the time limit set forth in that rule, the order of the administrative law judge becomes the order of the board.

(6) If any party or person disobeys an order of the board compelling discovery, the board may:

(a) Seek appropriate judicial relief against the disobedient person or party under section 4903.04 of the Revised Code.

(b) Prohibit the disobedient party from further participation in the pending proceeding.

(c) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing evidence or conducting cross-examination on designated matters.

(d) Dismiss the pending proceeding if such proceeding was initiated by an application or petition, unless such a dismissal would unjustly prejudice any other party.

(e) Take such other action as the board considers appropriate.

Effective: 01/25/2009

R.C. 119.032 review dates: 11/10/2008 and 11/30/2013

Promulgated Under: 111.15

Statutory Authority: 4906.03

Rule Amplifies: 4903.06, 4903.082, 4906.03, 4906.12

4906-7-16 Administrative law judge reports and exceptions thereto.

(A) If ordered by the board the administrative law judge shall prepare a written report of his or her findings, conclusions, and recommendations following the conclusion of the hearing. Such report shall be filed with the board and served upon all parties.

(B) Any party may file exceptions to a an administrative law judge's report within twenty days after such report is filed with the board. Exceptions shall be stated and numbered separately, and shall be accompanied by a memorandum in support, setting forth the basis of the exceptions and citations of any authorities relied upon. If any exception relates to one or more findings of fact, the memorandum in support should, where practicable, include specific citations to any portions of the record relied upon in support of the exception.

(C) Any party may file a reply to another party's exceptions within fifteen days after the service of those exceptions.

R.C. 119.032 review dates: 11/10/2008 and 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4906.03

Rule Amplifies: 4906.12, 4906.03, 4903.22

Prior Effective Dates: 12/27/76, 7/7/80, 6/10/89, 8/28/98

4903.10 Application for rehearing

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the

original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

4903.13 Reversal of final order - notice of appeal

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal. Effective Date: 10-01-1953

4906.02 Power siting board organization.

(A) There is hereby created within the public utilities commission the power siting board, composed of the chairman of the public utilities commission, the director of environmental protection, the director of health, the director of development, the director of natural resources, the director of agriculture, and a representative of the public who shall be an engineer and shall be appointed by the governor, from a list of three nominees submitted to the governor by the office of the consumers' counsel, with the advice and consent of the senate and shall serve for a term of four years. The chairman of the public utilities commission shall be chairman of the board and its chief executive officer. The chairman shall designate one of the voting members of the board to act as vice-chairman who shall possess during the absence or disability of the chairman all of the powers of the chairman. All hearings, studies, and consideration of applications for certificates shall be conducted by the board or representatives of its members.

In addition, the board shall include four legislative members who may participate fully in all the board's deliberations and activities except that they shall serve as nonvoting members. The speaker of the house of representatives shall appoint one legislative member, and the president of the senate and minority leader of each house shall each appoint one legislative member. Each such legislative leader shall designate an alternate to attend meetings of the board when the regular legislative member he appointed is unable to attend. Each legislative member and alternate shall serve for the duration of the elected term that he is serving at the time of his appointment. A quorum of the board is a majority of its voting members.

The representative of the public and, notwithstanding section 101.26 of the Revised Code, legislative members of the board or their designated alternates, when engaged in their duties as members of the board, shall be paid at the per diem rate of step 1, pay range 32, under schedule B of section 124.15 of the Revised Code and shall be reimbursed for the actual and necessary expenses they incur in the discharge of their official duties.

(B) The chairman shall keep a complete record of all proceedings of the board, issue all necessary process, writs, warrants, and notices, keep all books, maps, documents, and papers ordered filed by the board, conduct investigations pursuant to section 4906.07 of the Revised Code, and perform such other duties as the board may prescribe.

(C) The chairman of the public utilities commission may assign or transfer duties among the commission's staff. However, the board's authority to grant certificates under section 4906.10 of the Revised Code shall not be exercised by any officer, employee, or body other than the board itself.

(D) The chairman may call to his assistance, temporarily, any employee of the environmental protection agency, the department of natural resources, the department of agriculture, the department of health, or the department of development, for the purpose of making studies, conducting hearings, investigating applications, or preparing any report required or authorized under this chapter. Such employees shall not receive any additional compensation over that which they receive from the agency by which they are employed, but they shall be reimbursed for their actual and necessary expenses incurred while working under the direction of the chairman. All contracts for special services are subject to the approval of the chairman.

Effective Date: 10-17-1985

4906.03 Powers and duties of power siting board

The power siting board shall:

(A) Require such information from persons subject to its jurisdiction as it considers necessary to assist in the conduct of hearings and any investigations or studies it may undertake;

(B) Conduct any studies or investigations that it considers necessary or appropriate to carry out its responsibilities under this chapter;

(C) Adopt rules establishing criteria for evaluating the effects on environmental values of proposed and alternative sites, and projected needs for electric power, and such other rules as are necessary and convenient to implement this chapter, including rules governing application fees, supplemental application fees, and other reasonable fees to be paid by persons subject to the board's jurisdiction. The board shall make an annual accounting of its collection and use of these fees and shall issue an annual report of its accounting, in the form and manner prescribed by its rules, not later than the last day of June of the year following the calendar year to which the report applies.

(D) Approve or disapprove applications for certificates;

4906.07 Public hearing on application

(A) Upon the receipt of an application complying with section 4906.06 of the Revised Code, the power siting board shall promptly fix a date for a public hearing thereon, not less than sixty nor more than ninety days after such receipt, and shall conclude the proceeding as expeditiously as practicable.

(B) On an application for an amendment of a certificate, the board shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the proposed change in the facility would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.

(C) The chairman of the power siting board shall cause each application filed with the board to be investigated and shall, not less than fifteen days prior to the date any application is set for hearing submit a written report to the board and to the applicant. A copy of such report shall be made available to any person upon request. Such report shall set forth the nature of the investigation, and shall contain recommended findings with regard to division (A) of section 4906.10 of the

Revised Code and shall become part of the record and served upon all parties to the proceeding.

Effective Date: 10-17-1985

4906.10 Basis for decision granting or denying certificate

(A) The power siting board shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the construction, operation, or maintenance of the major utility facility as the board considers appropriate. The certificate shall be conditioned upon the facility being in compliance with standards and rules adopted under sections 1501.33, 1501.34, and 4561.32 and Chapters 3704., 3734., and 6111. of the Revised Code. The period of initial operation under a certificate shall expire two years after the date on which electric power is first generated by the facility. During the period of initial operation, the facility shall be subject to the enforcement and monitoring powers of the director of environmental protection under Chapters 3704., 3734., and 6111. of the Revised Code and to the emergency provisions under those chapters. If a major utility facility constructed in accordance with the terms and conditions of its certificate is unable to operate in compliance with all applicable requirements of state laws, rules, and standards pertaining to air pollution, the facility may apply to the director of environmental protection for a conditional operating permit under division (G) of section 3704.03 of the Revised Code and the rules adopted thereunder. The operation of a major utility facility in compliance with a conditional operating permit is not in violation of its certificate. After the expiration of the period of initial operation of a major utility facility, the facility shall be under the jurisdiction of the environmental protection agency and shall comply with all laws, rules, and standards pertaining to air pollution, water pollution, and solid and hazardous waste disposal.

The board shall not grant a certificate for the construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the board, unless it finds and determines all of the following:

- (1) The basis of the need for the facility if the facility is an electric transmission line or gas or natural gas transmission line;
- (2) The nature of the probable environmental impact;
- (3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In the case of an electric transmission line or generating facility, that the facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems and that the facility will serve the interests of electric system economy and reliability;

(5) That the facility will comply with Chapters 3704., 3734., and 6111. of the Revised Code and all rules and standards adopted under those chapters and under sections 1501.33, 1501.34, and 4561.32 of the Revised Code. In determining whether the facility will comply with all rules and standards adopted under section 4561.32 of the Revised Code, the board shall consult with the office of aviation of the division of multi-modal planning and programs of the department of transportation under section 4561.341 of the Revised Code.

(6) That the facility will serve the public interest, convenience, and necessity;

(7) In addition to the provisions contained in divisions (A)(1) to (6) of this section and rules adopted under those divisions, what its impact will be on the viability as agricultural land of any land in an existing agricultural district established under Chapter 929. of the Revised Code that is located within the site and alternative site of the proposed major utility facility. Rules adopted to evaluate impact under division (A)(7) of this section shall not require the compilation, creation, submission, or production of any information, document, or other data pertaining to land not located within the site and alternative site.

(8) That the facility incorporates maximum feasible water conservation practices as determined by the board, considering available technology and the nature and economics of the various alternatives.

(B) If the board determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon that modification, provided that the municipal corporations and counties, and persons residing therein, affected by the modification shall have been given reasonable notice thereof.

(C) A copy of the decision and any opinion issued therewith shall be served upon each party.

Effective Date: 04-07-2004

4906.12 Procedures of public utilities commission to be followed

Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906. of

the Revised Code, in the same manner as if the board were the public utilities commission under such sections.

Effective Date: 11-15-1981

1333.61 Uniform trade secrets act definitions.

As used in sections 1333.61 to 1333.69 of the Revised Code, unless the context requires otherwise:

(A) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.

(B) "Misappropriation" means any of the following:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;

(2) Disclosure or use of a trade secret of another without the express or implied consent of the other person by a person who did any of the following:

(a) Used improper means to acquire knowledge of the trade secret;

(b) At the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret that the person acquired was derived from or through a person who had utilized improper means to acquire it, was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or was derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use;

(c) Before a material change of their position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(C) "Person" has the same meaning as in division (C) of section 1.59 of the Revised Code and includes governmental entities.

(D) "Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Effective Date: 07-20-1994; 2008 HB562 (Vetoed) 06-24-2008

1333.62 Injunction against misappropriation.

(A) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, unless the court finds that termination of the injunction is likely to provide a person who committed an actual or threatened misappropriation with a resulting commercial advantage, in which case the injunction shall be continued for an additional reasonable time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(B) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the time for which use could have been prohibited. Exceptional circumstances include a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(C) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

Effective Date: 07-20-1994

1333.63 Damages recoverable.

(A) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant in a civil action is entitled to recover damages for misappropriation. Damages may include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty that is equitable under the circumstances considering the loss to the complainant, the benefit to the misappropriator, or both, for a misappropriator's unauthorized disclosure or use of a trade secret.

(B) If willful and malicious misappropriation exists, the court may award punitive or exemplary damages in an amount not exceeding three times any award made under division (A) of this section.

Effective Date: 07-20-1994

1333.64 Attorney's fees.

The court may award reasonable attorney's fees to the prevailing party, if any of the following applies:

- (A) A claim of misappropriation is made in bad faith.
- (B) A motion to terminate an injunction is made or resisted in bad faith.
- (C) Willful and malicious misappropriation exists.

Effective Date: 07-20-1994

121.22 Public meetings - exceptions.

(A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

(B) As used in this section:

(1) "Public body" means any of the following:

(a) Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution;

(b) Any committee or subcommittee of a body described in division (B)(1)(a) of this section;

(c) A court of jurisdiction of a sanitary district organized wholly for the purpose of providing a water supply for domestic, municipal, and public use when meeting for the purpose of the appointment, removal, or reappointment of a member of the board of directors of such a district pursuant to section 6115.10 of the Revised Code, if applicable, or for any other matter related to such a district other than litigation involving the district. As used in division (B)(1)(c) of this section, "court

of jurisdiction” has the same meaning as “court” in section 6115.01 of the Revised Code.

(2) “Meeting” means any prearranged discussion of the public business of the public body by a majority of its members.

(3) “Regulated individual” means either of the following:

(a) A student in a state or local public educational institution;

(b) A person who is, voluntarily or involuntarily, an inmate, patient, or resident of a state or local institution because of criminal behavior, mental illness or retardation, disease, disability, age, or other condition requiring custodial care.

(4) “Public office” has the same meaning as in section 149.011 of the Revised Code.

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.

(D) This section does not apply to any of the following:

(1) A grand jury;

(2) An audit conference conducted by the auditor of state or independent certified public accountants with officials of the public office that is the subject of the audit;

(3) The adult parole authority when its hearings are conducted at a correctional institution for the sole purpose of interviewing inmates to determine parole or pardon;

(4) The organized crime investigations commission established under section 177.01 of the Revised Code;

(5) Meetings of a child fatality review board established under section 307.621 of the Revised Code and meetings conducted pursuant to sections 5153.171 to 5153.173 of the Revised Code;

(6) The state medical board when determining whether to suspend a certificate without a prior hearing pursuant to division (G) of either section 4730.25 or 4731.22 of the Revised Code;

(7) The board of nursing when determining whether to suspend a license or certificate without a prior hearing pursuant to division (B) of section 4723.281 of the Revised Code;

(8) The state board of pharmacy when determining whether to suspend a license without a prior hearing pursuant to division (D) of section 4729.16 of the Revised Code;

(9) The state chiropractic board when determining whether to suspend a license without a hearing pursuant to section 4734.37 of the Revised Code.

(10) The executive committee of the emergency response commission when determining whether to issue an enforcement order or request that a civil action, civil penalty action, or criminal action be brought to enforce Chapter 3750. of the Revised Code.

(E) The controlling board, the development financing advisory council, the industrial technology and enterprise advisory council, the tax credit authority, or the minority development financing advisory board, when meeting to consider granting assistance pursuant to Chapter 122. or 166. of the Revised Code, in order to protect the interest of the applicant or the possible investment of public funds, by unanimous vote of all board, council, or authority members present, may close the meeting during consideration of the following information confidentially received by the authority, council, or board from the applicant:

(1) Marketing plans;

(2) Specific business strategy;

(3) Production techniques and trade secrets;

(4) Financial projections;

(5) Personal financial statements of the applicant or members of the applicant's immediate family, including, but not limited to, tax records or other similar information not open to public inspection.

The vote by the authority, council, or board to accept or reject the application, as well as all proceedings of the authority, council, or board not subject to this division, shall be open to the public and governed by this section.

(F) Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

The rule shall provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed, stamped envelopes provided by the person.

(G) Except as provided in division (J) of this section, the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

(1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing. Except as otherwise provided by law, no public body shall hold an executive session for the discipline of an elected official for conduct related to the performance of the elected official's official duties or for the elected official's removal from office. If a public body holds an executive session pursuant to division (G)(1) of this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in division (G)(1) of this section are the purposes for which the executive session is to be held, but need not include the name of any person to be considered at the meeting.

(2) To consider the purchase of property for public purposes, or for the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. No member of a public body shall use division (G)(2) of this section as a subterfuge for providing covert information to prospective buyers or sellers. A purchase or sale of public property is void if the seller or buyer of the public property has received covert information from a

member of a public body that has not been disclosed to the general public in sufficient time for other prospective buyers and sellers to prepare and submit offers.

If the minutes of the public body show that all meetings and deliberations of the public body have been conducted in compliance with this section, any instrument executed by the public body purporting to convey, lease, or otherwise dispose of any right, title, or interest in any public property shall be conclusively presumed to have been executed in compliance with this section insofar as title or other interest of any bona fide purchasers, lessees, or transferees of the property is concerned.

(3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action;

(4) Preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment;

(5) Matters required to be kept confidential by federal law or regulations or state statutes;

(6) Details relative to the security arrangements and emergency response protocols for a public body or a public office, if disclosure of the matters discussed could reasonably be expected to jeopardize the security of the public body or public office;

(7) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code, a joint township hospital operated pursuant to Chapter 513. of the Revised Code, or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, to consider trade secrets, as defined in section 1333.61 of the Revised Code.

If a public body holds an executive session to consider any of the matters listed in divisions (G)(2) to (7) of this section, the motion and vote to hold that executive session shall state which one or more of the approved matters listed in those divisions are to be considered at the executive session.

A public body specified in division (B)(1)(c) of this section shall not hold an executive session when meeting for the purposes specified in that division.

(H) A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is

invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

(I)(1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.

(2)(a) If the court of common pleas issues an injunction pursuant to division (I)(1) of this section, the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction and shall award to that party all court costs and, subject to reduction as described in division (I)(2) of this section, reasonable attorney's fees. The court, in its discretion, may reduce an award of attorney's fees to the party that sought the injunction or not award attorney's fees to that party if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed public body reasonably would believe that the public body was not violating or threatening to violate this section;

(ii) That a well-informed public body reasonably would believe that the conduct or threatened conduct that was the basis of the injunction would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(b) If the court of common pleas does not issue an injunction pursuant to division (I)(1) of this section and the court determines at that time that the bringing of the action was frivolous conduct, as defined in division (A) of section 2323.51 of the Revised Code, the court shall award to the public body all court costs and reasonable attorney's fees, as determined by the court.

(3) Irreparable harm and prejudice to the party that sought the injunction shall be conclusively and irrebuttably presumed upon proof of a violation or threatened violation of this section.

(4) A member of a public body who knowingly violates an injunction issued pursuant to division (I)(1) of this section may be removed from office by an action

brought in the court of common pleas for that purpose by the prosecuting attorney or the attorney general.

(J)(1) Pursuant to division (C) of section 5901.09 of the Revised Code, a veterans service commission shall hold an executive session for one or more of the following purposes unless an applicant requests a public hearing:

(a) Interviewing an applicant for financial assistance under sections 5901.01 to 5901.15 of the Revised Code;

(b) Discussing applications, statements, and other documents described in division (B) of section 5901.09 of the Revised Code;

(c) Reviewing matters relating to an applicant's request for financial assistance under sections 5901.01 to 5901.15 of the Revised Code.

(2) A veterans service commission shall not exclude an applicant for, recipient of, or former recipient of financial assistance under sections 5901.01 to 5901.15 of the Revised Code, and shall not exclude representatives selected by the applicant, recipient, or former recipient, from a meeting that the commission conducts as an executive session that pertains to the applicant's, recipient's, or former recipient's application for financial assistance.

(3) A veterans service commission shall vote on the grant or denial of financial assistance under sections 5901.01 to 5901.15 of the Revised Code only in an open meeting of the commission. The minutes of the meeting shall indicate the name, address, and occupation of the applicant, whether the assistance was granted or denied, the amount of the assistance if assistance is granted, and the votes for and against the granting of assistance.

Effective Date: 05-15-2002; 04-27-2005; 2007 HB194 02-12-2008

149.43 Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

- (a) Medical records;
- (b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;
- (c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;
- (d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;
- (e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;
- (f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;
- (g) Trial preparation records;
- (h) Confidential law enforcement investigatory records;
- (i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;
- (j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;
- (k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;
- (l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;
- (m) Intellectual property records;
- (n) Donor profile records;

- (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
- (p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;
- (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
- (r) Information pertaining to the recreational activities of a person under the age of eighteen;
- (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, other than the report prepared pursuant to section 307.626 of the Revised Code;
- (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;
- (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
- (v) Records the release of which is prohibited by state or federal law;
- (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;
- (x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;
- (y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information

that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

102 FERC ¶ 61,190
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 375 and 388

(Docket Nos. RM02-4-000, PL02-1-000; Order No. 630)

Critical Energy Infrastructure Information

(Issued February 21, 2003)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this final rule establishing a procedure for gaining access to critical energy infrastructure information (CEII) that would otherwise not be available under the Freedom of Information Act (FOIA). These restrictions and the final rule were necessitated by the terrorist acts committed on September 11, 2001 and the ongoing terrorism threat. The final rule adopts a definition of critical infrastructure that explicitly covers proposed facilities, and does not distinguish among projects or portions of projects. The rule also details which location information is excluded from the definition of CEII and which is included. The rule addresses some issues that are specific to state agencies, and clarifies that energy market consultants should be able to get access to the CEII they need. Finally, the rule modifies the proposed CEII process and delegates responsibility to the CEII Coordinator to process requests for CEII and to determine what information qualifies as CEII.

Docket Nos. RM02-4-000 and PL02-1-000

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The final rule will affect the way in which companies submit some information, and will add a new process in addition to the FOIA for requesters to use to request information that is not already publicly available. These new steps will help keep sensitive infrastructure information out of the public domain, decreasing the likelihood that such information could be used to plan or execute terrorist attacks.

EFFECTIVE DATE: The rule will become effective [insert date 30 days after publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Docket Nos. RM02-4-000 and PL02-1-000

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Critical Energy Infrastructure Information Docket Nos. RM02-4-000-000
PL02-1-000-000

ORDER NO. 630

FINAL RULE

(Issued February 21, 2003)

1. In this final rule, the Federal Energy Regulatory Commission (Commission) amends its regulations to address the appropriate treatment of critical energy infrastructure information (CEII) in the aftermath of the September 11, 2001 terrorist attacks on the United States of America. Under the Policy Statement issued in Docket No. PL02-1-000 on October 11, 2001 (Policy Statement), the Commission removed from easy public access certain documents that previously had been public.¹ In order to accomplish this step quickly, staff identified categories of document types that were likely to contain CEII, and those documents were removed from unrestricted public

¹See 67 FR 3129 (Jan. 23, 2002), IV FERC Stats. & Regs. ¶ 35,542.

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access. Persons seeking removed documents were directed to request the records using the Freedom of Information Act.²

2. On January 16, 2002, the Commission issued a Notice of Inquiry (NOI) in RM02-4-000 to determine what changes, if any, should be made to its regulations to restrict unfettered general public access to critical energy infrastructure information, but still permit those with a need for the information to obtain it in an efficient manner.³ On September 5, 2002, the Commission issued a Notice of Proposed Rulemaking and Revised Statement of Policy (NOPR) in Docket Nos. RM02-4-000 and PL02-1-000.⁴ The NOPR proposed procedures for submitting and requesting CEII, and proposed the creation of a new position of CEII Coordinator. The final rule adopts most of the procedures proposed in the NOPR and creates the new position.

3. The process adopted in the final rule offers a more efficient alternative to handling requests for previously public documents than does the FOIA, which the Policy Statement established as the short-term method for requesting previously public documents. The FOIA was useful in the short term where a great deal of information had been removed from public access, some of which the Commission ultimately ascertained did not actually contain CEII. As discussed in the NOPR, however, the FOIA process is

²5 U.S.C. 552.

³See 67 FR 3129, IV FERC Stats. & Regs. ¶ 35,542.

⁴See 67 FR 57994 (Sept. 13, 2002), IV FERC Stats. & Regs. ¶ 32,564.

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not well suited for handling CEII requests.⁵ The FOIA mandates disclosure of agency records unless the record falls within one of several specifically enumerated exemptions. Therefore, in order for CEII to be protected from disclosure, it must qualify for a FOIA exemption. For this reason, it is unlikely that requesters will obtain CEII through the FOIA process, although they could use the FOIA to obtain non-CEII portions of documents. In addition, under the FOIA, an agency may not distinguish among requesters based on their particular need for the information. Information given to one FOIA requester must be given to all requesters. The agency also may not restrict the recipient's use or dissemination of the information. All these factors make FOIA an unsatisfactory tool for the agency to use if it wishes to afford requesters with a specific need for information access to exempt and potentially dangerous information. Therefore, the Commission is adding § 375.313 to its regulations to authorize a Critical Energy Infrastructure Information Coordinator to process non-FOIA requests for CEII and make determinations regarding such requests.⁶

4. The NOPR revised the Policy Statement to restrict public access to documents containing detailed specifications of proposed facilities as well as existing facilities,

⁵Id. at p. 57995, ¶ 32,564 at p. 34,539.

⁶Of course, the Commission emphasizes that requesters always retain the option of seeking information under the FOIA.

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while at the same time determining that basic location information should not be treated as CEII.⁷ The final rule formalizes these policies in the regulations.

5. The Commission is issuing this rule under the authority of the Federal Power Act⁸ and the Natural Gas Act⁹ as the rule establishes a procedure for gaining access to documents collected or created pursuant to those acts that would not otherwise be available under the Freedom of Information Act, 5 U.S.C. 552. Accordingly, this order is subject to rehearing under section 313(b) of the Federal Power Act, 16 U.S.C. 8241(b), and section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), and jurisdiction to review the order lies in the United States Courts of Appeals as provided in those sections.

I. BACKGROUND

A. The Policy Statement

6. The September 11, 2001 terrorist attacks prompted the Commission to issue a policy statement on October 11, 2001, in PL02-1-000, addressing the treatment of previously public documents.¹⁰ The Commission announced there that it would no

⁷67 FR 57994 at p. 57995, FERC Stats. & Regs. ¶ 32,564 at p. 34,539.

⁸15 U.S.C. 717, *et seq.*,

⁹16 U.S.C. 791a, *et seq.*,

¹⁰See 66 FR 52917 (Oct. 18, 2001), 97 FERC ¶ 61,030. Shortly after the attacks, the Commission issued another policy statement in Docket No. PL01-6-000, in which it provided guidance to regulated companies regarding extraordinary expenditures necessary to safeguard national energy supplies. See 96 FERC ¶ 61,299 (2001). The
(continued...)

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longer make available to the public through its Internet site, the Records and Information Management System (RIMS), which has been replaced by the Federal Energy Regulatory Records Information System (FERRIS), or the Public Reference Room, documents such as oversized maps that detail the specifications of energy facilities already licensed or certificated under Part I of the Federal Power Act¹¹ and Section 7(c) of the Natural Gas Act,¹² respectively. Rather, anyone requesting such documents was directed to follow the procedures set forth in section 388.108 of the Commission's regulations (Requests for Commission records not available through the Public Reference Room (FOIA Requests)).¹³ The Policy Statement also instructed staff to report back to the Commission within 90 days on the impact of this newly announced policy on the agency's business.

B. Implementation of the Policy Statement

¹⁰(...continued)

Commission recognized there that electric, gas, and oil companies may need to adopt new procedures, update existing procedures, and install facilities to further safeguard their systems, and that these efforts might result in extraordinary expenditures. The Commission assured these companies that it would give its highest priority to processing any filing made for the recovery of such expenditures. *See, e.g., Colonial Pipeline Co.*, 100 FERC ¶ 61,035 (2002) (approving Colonial's security surcharge mechanism).

¹¹16 U.S.C. 719a, *et seq.*

¹²15 U.S.C. 717f(c).

¹³18 CFR 388.108 (2002).

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7. To implement the policy, the Commission's staff first disabled RIMS access to all oversized documents, which frequently contain detailed infrastructure information, and also removed them from the Public Reference Room.¹⁴ Staff next identified and disabled or denied access to other categories of documents dealing with licensed or exempt hydropower projects, certificated natural gas pipelines, and electric transmission lines that appeared likely to include critical energy infrastructure information. This effort, which was undertaken as cautiously and methodically as possible, affected tens of thousands of documents.

8. From the issuance of the Policy Statement until mid-January 2003, the Commission received 212 FOIA requests for documents that were not available to the public because of the Policy Statement. The Commission has responded to or otherwise resolved all of these requests. To date, only two CEII requesters have filed timely administrative appeals of the decisions to withhold documents, both of which involved requests for FERC Form No. 715. Nothing is pending in court.

¹⁴OMB Watch has misunderstood what was meant by oversized documents, stating "[c]learly file size was used as a criterion for removal of information," terming this a "blunt and clumsy approach." OMB Watch at p. 3. As explained in the Policy Statement, the Commission removed "documents, such as oversized maps." "Oversized" refers to the size of the page itself, not the length of the document. Oversized documents generally contain maps and detailed diagrams, both of which were deemed likely to contain CEII, keeping in mind that location information of existing facilities was being protected at that time.

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C. The Notice Of Inquiry

9. Three months after the Commission issued the Policy Statement, it issued the Notice of Inquiry (NOI).¹⁵ The NOI set forth the Commission's general views on how it intended to treat previously public documents, and asked specific questions on the scope and implications of maintaining the confidentiality of certain previously public documents. The NOI advised infrastructure owners that they could seek confidential treatment of filings or parts of filings that, in their opinion, contain CEII, following the existing procedures in section 388.112 of the Commission's regulations,¹⁶ and by referencing Docket No. PL02-1-000 on the first page of the filing. Approximately 50 entities responded to the NOI, with a handful of commenters filing some portion of their filing nonpublic.

D. The Notice of Proposed Rulemaking and Revised Policy Statement

10. On September 5, 2002, the Commission issued the Notice of Proposed Rulemaking and Revised Statement of Policy (NOPR) in Docket Nos. RM02-4-000 and PL02-1-000.¹⁷ The NOPR proposed to establish a CEII Coordinator with delegated authority to process requests for CEII, and proposed regulations governing submission of

¹⁵ See 67 FR 3129, IV FERC Stats. & Regs. ¶ 35,542.

¹⁶ 18 CFR 388.112.

¹⁷ See 67 FR 57994, IV FERC Stats. & Regs. ¶ 32,564.

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CEII and requests for CEII.¹⁸ It also revised the Policy Statement to extend CEII protection to information regarding proposed facilities and eliminate CEII protection for information that only reveals the location of the facility.¹⁹ The Commission received more than forty comments in response to the NOPR. A list of commenters is attached as Appendix A.

II. DISCUSSION

A. The Need for Action

11. As was the case with the NOI, most commenters agree that security considerations make it advisable for the Commission to continue to protect CEII. A few commenters, however, maintain that such protection is either unnecessary to protect the public or outweighed by the benefits of making the information available. Some contend that CEII will be of little use to terrorists,²⁰ an assertion with which some commenters specifically disagree.²¹ Some commenters believe that the NOPR did not adequately take into account the value of making information such as CEII available to the public, and

¹⁸Id. at p. 58001, ¶ 32,564 at p. 34,550.

¹⁹Id. at p. 58000, ¶ 32,564 at pp. 34,547-48.

²⁰E.g., American Library Association at p. 2; Lydia Olchoff at p. 1; Reporters Committee for Freedom of the Press and the Society of Environmental Journalists (Reporters Committee) at p. 3.

²¹E.g., GE Power Systems Energy Consulting (GE) at pp. 2-3.

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specifically the media.²² One commenter contends, for example, that the media has used such information to expose safety hazards in pipelines.²³

12. The Commission remains convinced that the responsible course is for it to protect CEII. The arguments that such protection is unnecessary are speculative and unconvincing. For instance, one commenter points to an estimate that seventy percent of infrastructure attacks come from insiders as evidence that CEII is unlikely to aid an attack,²⁴ while another states that "the possibility that terrorists will study government records and take advantage of perceived weaknesses is speculative."²⁵ The Commission is not prepared to stake the public's safety on this reasoning. According to the National Infrastructure Protection Center, the energy sector is considered one of the most attractive terrorist targets.²⁶ According to media reports, the FBI identified "multiple

²²E.g., American Library Association at p. 1; OMB Watch at p. 1, 4.

²³Reporters Committee at p. 3-4. The Commission does not, however, have jurisdiction over pipeline safety issues, which belongs to the Department of Transportation. See 49 U.S.C. Chapter 601.

²⁴American Library Association at p. 2.

²⁵Reporters Committee at p. 3.

²⁶See National Infrastructure Protection Center Advisory 02-007 (September 10, 2002) (identifying most attractive targets as transportation and energy sectors and "[f]acilities or gatherings that would be recognized worldwide as symbols of American power or security.") The National Infrastructure Protection Center's mission is to serve as the United States government's focal point for threat assessment, warning, investigation and response for threats or attacks against critical infrastructures, including
(continued...)

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casings of sites" where users routed through switches in Saudi Arabia, Indonesia, and Pakistan examined "emergency phone systems, electrical generation and transmission, water storage and distribution, nuclear power plants and gas facilities."²⁷ Where vulnerable areas exist, the Commission believes its responsibility is to reduce risks rather than to wait for proof that an attack is imminent or even likely.

13. The Commission also is unconvinced that the general public's need for information warrants the risk of disclosure of CEII. The "need to know" has never been absolute: the FOIA itself recognizes this principle by having nine exemptions, and the NOPR proposed to do nothing more than rely upon FOIA exemptions in withholding CEII.²⁸ The Commission received no convincing arguments in response to the NOPR that there are practical benefits from public availability of CEII that would outweigh possible dangers from attacks on energy infrastructure. Furthermore, this rulemaking is intended to provide an avenue for disclosure in instances where there might be some benefit. The Commission has attempted to strike the best balance possible between the benefits of information and the protection of people and property.

²⁶(...continued)
energy and water systems.

²⁷See The Washington Post, Cyber-Attacks by Al Qaeda Feared, June 27, 2002, p. A01.

²⁸67 FR 57994 at p. 57996, FERC Stats. & Rrgs. ¶ 32,564 at p. 34,541.

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B. Legal Authority to Protect CEII

14. In the NOI that initiated this rulemaking, the Commission invited comments on statutes that might affect the Commission's ability to protect CEII. The FOIA was identified as the statute that could mandate disclosure of some sensitive information. After receiving comments from many commenters, the Commission set out its view, in the NOPR, that one or more of several FOIA exemptions would most likely apply to CEII,²⁹ namely: (1) Exemption 2, which exempts "records related solely to the internal personnel rules and practices of an agency";³⁰ (2) Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential";³¹ and (3) Exemption 7, which protects from disclosure certain law enforcement information, including information the disclosure of which might jeopardize a person's life or safety.³²

15. Most commenters agree with the Commission's belief that one or more of these three exemptions would apply to CEII,³³ and the Commission adopts the analysis in the

²⁹Id. at pp. 57997-800, ¶ 32,564 at pp. 34,542-46.

³⁰5 U.S.C. 552(b)(2).

³¹5 U.S.C. 552(b)(4).

³²5 U.S.C. 552(b)(7)(F).

³³E.g., American Electric Power System at p. 1; Duke Energy Corporation (Duke) at p. 7; Edison Electric Institute (EEI) at pp. 6-7; Southern California Edison Company (continued...)

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NOPR to support its decision here.³⁴ Some, however, either express concerns about the Commission's analysis of one or more exemptions or outright disagree with that analysis.³⁵ A few commenters assert that the Commission was somehow overriding the FOIA³⁶ by creating an "extra-legal category of protected information,"³⁷ or by making CEII non-requestable under the FOIA.³⁸

16. The comments asserting that the Commission is somehow attempting to abrogate or circumvent the FOIA reflect a fundamental misunderstanding of this rulemaking. The Commission expressly acknowledged in the NOPR its continuing obligation to comply

³³(...continued)

(SCE) at p. 10; Southern Company Services, Inc. (Southern) at p. 2; Washington Legal Foundation and Public Interest Clinic, George Mason University School of Law (Washington Legal Foundation) at pp. 5-6.

³⁴For the public's convenience, the Commission's FOIA analysis is reiterated in Appendix B.

³⁵E.g., Hydropower Reform Coalition (HRC) at p. 3; Massachusetts Energy Facilities Siting Board at p. 3; National Association of Regulatory Utility Commissioners (NARUC) at pp. 3, 7-10, 12-15; OMB Watch at pp. 4-6; Reporters Committee at pp. 2, 4, 7; joint comments of the Public Utilities Commission of Ohio, the Michigan Public Service Commission and the Oklahoma Corporation Commission (States) at pp. 3, 7-10, 12-17; Whitfield Russell Associates at p. 8.

³⁶OMB Watch at pp. 4-5; Reporters Committee at pp. 2, 7.

³⁷American Library Association at p. 2.

³⁸OMB Watch at p. 4.

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with the FOIA.³⁹ This rule does not exempt any information from disclosure under that statute unless it falls within an existing exemption, abrogate in any way the right of any person to submit a request under the FOIA, or make any document or category of documents non-requestable or otherwise not subject to the FOIA. It is not the function of this rule to make any document unavailable that would otherwise be available absent this rulemaking. Instead, the purpose of this rulemaking is to establish a mechanism for making available certain categories of documents that would otherwise be unavailable.

17. The discussion of the FOIA exemptions in the NOPR reflects the Commission's view that a re-evaluation of information access policies, including analysis of the FOIA provisions, is dictated by the changed understanding of safety issues resulting from the 9/11 tragedy.⁴⁰ That re-evaluation would be needed regardless of any regulation governing access to CEII. It becomes relevant here as a part of the reasoning behind this rulemaking, but it should not be mistaken for a determination as to whether any specific piece of information is accessible under the FOIA. A FOIA requester has a right to receive an individualized determination based on the document(s) requested. The Commission has not made, and cannot properly make, generic determinations as to whether FOIA exemptions apply. Accordingly, specific arguments with respect to

³⁹ 67 FR 57994 at p. 57996, FERC Stats. & Regs. ¶ 32,564 at p. 34,541.

⁴⁰ Id. at pp. 57996-800, ¶ 32,564 at pp. 34,541-46

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Exemptions 2, 4, and 7 addressed in the NOPR,⁴¹ and raised again here,⁴² are best resolved in the context of particular FOIA requests, where submitters have the opportunity to enumerate potential competitive harm associated with release, and where the Commission can evaluate the harm of releasing that particular information. For purposes of this rulemaking, however, the Commission continues to believe that the types of information it has identified as CEII are exempt from disclosure under the FOIA.

18. As a separate matter, some commenters raise issues concerning the Commission's experience with Exemption 7 and question whether it applies outside the context of criminal investigations.⁴³ In particular, OMB Watch wonders how the Commission could have removed from public access tens of thousands of documents on the basis that they were compiled for law enforcement purposes and asks whether the Commission ever relied upon Exemption 7 prior to the 9/11 attack.⁴⁴ With respect to OMB Watch's first argument, the Commission did not remove thousands of documents from public

⁴¹Id.

⁴²E.g., NARUC at p. 12; States at p. 13; OMB Watch at p. 5; Whitfield Russell Associates at p. 8 (harm resulting from terrorist attacks would not constitute competitive harm under Exemption 4); Reporters Committee at p. 7; OMB Watch at p. 6 (information that was previously public is not protected under the FOIA).

⁴³E.g., OMB Watch at p. 7; Reporters Committee at p. 6.

⁴⁴OMB Watch at p. 7.

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access in October 2001 based on Exemption 7. The Commission removed them because they fit within certain categories of documents that were identified as likely to contain information that could be harmful in the hands of terrorists. The Commission did not do a document-by-document review of these documents to determine whether they contained information exempt from disclosure under the FOIA. In response to OMB Watch's second point, the Commission has relied from time to time on Exemption 7 prior to 9/11.⁴⁵ More to the point, it has long been recognized that Exemption 7 applies to civil as well as criminal law enforcement.⁴⁶ OMB Watch is likewise mistaken that the Commission will claim that all information it collects constitutes law enforcement information.⁴⁷ The Commission has no such intention because it recognizes that Exemption 7 does not protect all law enforcement information, but only certain limited

⁴⁵ A review of the Commission's Annual FOIA reports for FY 1998 through 2001 indicates that the Commission relied on Exemption 7 in Fiscal Years 2001 and 1998, specifically citing exemption 7(A) eight times, 7(B) two times, 7(C) three times, 7(D) two times, and 7(E) five times during those two fiscal years. The Commission also relied on Exemption 7(F) more recently in modifying its practice of making the entirety of FERC Form No. 715 available to the public. See Order on Treatment of Information Collected in Form No. 715, 100 FERC ¶ 61,141 (2002).

⁴⁶ E.g., Detroit Free Press, Inc. v. DOJ, 73 F.3d 93, 96 (6th Cir. 1996); Williams v. IRS, 479 F.2d 317, 318 (3rd Cir. 1973).

⁴⁷ See OMB Watch at p. 7.

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types, such as information the disclosure of which might interfere with enforcement proceedings or endanger the safety of an individual.⁴⁸

19. Some commenters raise administrative issues. They assert, for example, that this rulemaking will improperly remove functions from qualified "access professionals," and that the Commission has not adequately explained what qualifications the CEII Coordinator must possess.⁴⁹ These concerns are misplaced. As stated above, FOIA requests will continue to be processed according to the Commission's established FOIA procedures and the Commission's FOIA staff. The Commission's goal in appointing the CEII Coordinator will be the same as its goal in assigning staff to handle FOIA requests, or for that matter all of its staff: to ensure that employees are qualified and properly trained to handle their appointed responsibilities. Moreover, as explained below in the discussion on the use of a CEII Coordinator, the Coordinator will be free and indeed encouraged to consult with the staff who provides advice and recommendations on FOIA responses.

20. Some commenters ask whether the Commission will automatically transfer a FOIA request to the CEII Coordinator if it turns out that the requested information is

⁴⁸ 5 U.S.C. 552(b)(7).

⁴⁹ OMB Watch at p. 7; Reporters Committee at pp. 4-5.

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CEII.⁵⁰ The answer is, generally no. If a requester files a FOIA request and does not follow the procedures for seeking access to CEII, the request will be handled as a FOIA request and, if the requested information is exempt from disclosure, it will be withheld. The requester will, however, be notified that the information, although exempt from disclosure under the FOIA, may be accessible under the CEII procedures. If the requester seeks access under both the FOIA and CEII procedures, Commission staff will coordinate the response.

21. The Commission received comments questioning whether a utility must claim CEII status for information in order for it to qualify for protection under Exemption 4.⁵¹ The information either is or is not CEII. Thus, a claim that information is CEII is not necessary for the information to qualify as such. For the same reason, a claim that information is CEII will not necessarily qualify it as CEII. Accordingly, a submitter's ability to claim protection under Exemption 4 in particular is not, and cannot be, conditioned on a claim of CEII status. Information may qualify for Exemption 4 protection and not be CEII, just as information may qualify for CEII protection and not fit within Exemption 4, as long as it fits within another FOIA exemption.

22. As stated above, the Commission recognizes that it is bound by the FOIA. Where the FOIA affords certain rights to submitters of information, the Commission remains

⁵⁰NARUC at p. 24; States at p. 24.

⁵¹NARUC at p. 13; States at p. 14.

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obligated to recognize those rights, just as it remains obligated to recognize the rights of FOIA requesters. Nevertheless, if a utility fails to claim CEII status for information that would qualify as CEII, the risk that the information will be disclosed is increased because Commission staff may not become fully aware of the dangers of disclosing it. Commission staff will endeavor to identify CEII in processing requests, including information for which submitters have not claimed CEII status, but proper determinations about what information should be released under the FOIA will be easier to make where submitters identify information they believe to constitute CEII.

23. Finally, some requesters express concern whether the Commission will provide adequate information about decisions not to disclose CEII, including information that would allow requesters to challenge claims of competitive harm.⁵² Determinations of competitive harm would occur as part of the FOIA process and would be subject to existing FOIA procedures. The Commission informs a FOIA requester of the reason(s) for withholding information and the requester may appeal that determination to the Commission's General Counsel and ultimately to a United States District Court.⁵³ This rulemaking makes no changes to that procedure. Where information that is exempt from disclosure under the FOIA is found to be CEII, as noted, the Commission will so notify the requester.

⁵²NARUC at pp. 23-24; States at pp. 24-25.

⁵³18 CFR 388.108(c)(1), 388.110 (2002).

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C. Definition of CEII

24. The NOPR proposed to define CEII in section 388.113(c)(1) of the Commission's regulations⁵⁴ as:

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 U.S.C. 552; and (iv) Does not simply give the location of the critical infrastructure.⁵⁵

This definition departed from the prior policy in that it covered proposed facilities as well as existing facilities, and in that it excluded from the definition of CEII information regarding the location of the infrastructure. The majority of comments regarding the proposed CEII definition involve the meaning of "critical infrastructure," the exclusion of location information, and the inclusion of information about proposed facilities.

1. Definition of Critical Infrastructure

⁵⁴18 CFR 388.113(c)(1) (2002).

⁵⁵67 FR 57994 at p. 58000, FERC Stats. & Regs. ¶ 32,564 at p. 34,548.

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25. A crucial element in defining CEII is determining what qualifies as "critical infrastructure." The NOPR proposed to define critical infrastructure as:

systems and assets, whether physical or virtual, that are so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on the security, national economic security, national public health or safety, or any combination of those matters.⁵⁶

The NOPR proposed definition of critical infrastructure was taken directly from the USA PATRIOT Act (Act).⁵⁷ In proposing that definition, the Commission believed that all components of the energy infrastructure would qualify as critical infrastructure based on a finding in the Act that "[p]rivate business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, energy, financial services, water and transportation sectors."

26. Some commenters agree with the proposed CEII definition, with EEI noting that "[e]lectricity is an essential public service that sustains public health and welfare, including . . . the provision of power for heating and air conditioning, water supply, street and building, hospital services, food storage and processing, computers, and other electrical equipment," and as such, is vital to the nation's health, security, and

⁵⁶Id. at pp. 58000-01, ¶ 32,564 at p. 34,548.

⁵⁷Pub. L. No. 107-56.

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economy.⁵⁸ Other commenters, however, are concerned that the language could be read to extend CEII coverage only to very large or "vital" projects. For example, the Interstate Natural Gas Association of America (INGAA) requests that the Commission revise the definition of "critical infrastructure" to include "all facilities used in the production, generation, transportation, transmission, or distribution of energy."⁵⁹ Conversely, the HRC recommends that the Commission consider "only certain documents of high-risk, high priority cases to be available for CEII protections."⁶⁰ Some commenters recommend that the Commission leave it up to the infrastructure owner to determine whether its project qualifies as critical infrastructure,⁶¹ while other commenters voice concern that the definition of CEII is too broad.⁶² In this regard, Reporters Committee states that "[b]y defining CEII in a way that can have all major energy infrastructure fall under the CEII rubric, FERC maximizes the control it maintains over information."⁶³

⁵⁸EEI at p. 2.

⁵⁹INGAA at p. 3.

⁶⁰HRC at p. 5.

⁶¹E.g., MidAmerican Energy at p. 3; National Grid USA at p. 5.

⁶²E.g., HRC at p. 4; Reporters Committee at p. 8; Society of Professional Journalists at p. 2.

⁶³Reporters Committee at p. 8.

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27. No matter how broadly or narrowly the Commission defines critical infrastructure, in order to qualify for protection as CEII, the information must be useful to terrorists in planning an attack, be exempt from disclosure under the FOIA, and not merely give the location of the infrastructure. This effectively limits the scope of CEII protection. Moreover, the Commission does not want to define CEII in an ambiguous way that will invite disputes over which facilities are covered. The definition of critical infrastructure should encompass all facilities and components of facilities, not just facilities above a certain threshold. Even though a project may be small, destruction of the project could have serious consequences, particularly where it is part of a larger overall system. It is also important to the Commission that computer systems that control or are part of the energy infrastructure are covered. Therefore, the final rule defines critical infrastructure in new § 388.113(c)(2) of the Commission's regulations⁶⁴ as "existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters."

2. Information on Location of Facilities

⁶⁴See new 18 CFR 388.113(c)(2).

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warrant protection.⁶⁸ Still others contend that information above a certain level of detail should be protected,⁶⁹ for example, "location of key communication facilities, control centers, and switching facilities,"⁷⁰ and information that "identifies major transmission interconnections and other system components."⁷¹

29. The Commission has considered the commenters' arguments and suggestions especially with respect to protecting information that may otherwise be available to the public. For this purpose, a check of the Internet revealed that some of the information that had been removed after September 11 is once again available. For instance, the International Nuclear Safety Center currently has interactive maps available on its web

⁶⁸E.g., PJM Interconnection (PJM) at p. 2, SCE at p. 5. For its part, INGAA, an advocate of protecting location information, concedes "[t]o the extent that maps and/or location information are generally and readily available to the public and contain only non-detailed information of the location of energy facilities [such as state- or county-level maps]," such information could be excluded from the definition of CEIL. INGAA at p. 8.

⁶⁹E.g., GE at p. 6 (location of certain types of equipment, such as "phase-angle regulators or critical FACTS devices" should be protected); MidAmerican at p. 6; National Hydropower Association at p. 5 (protect information that provides "details of the sensitive parts of facilities"); North American Electric Reliability Council (NERC) at pp. 4-5 (protect "detailed network topology maps and the details of the interactions performed by Supervisory Control and Data Acquisition (SCADA) and Energy Management Systems (EMS)"); Northwest Natural at p. 5 ("assumes that medium to highly detailed facility location maps" will be protected); PG&E at p. 6.

⁷⁰BPA at p. 4.

⁷¹National Grid USA at p. 3

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site,⁷² and the United States Geological Survey lists a variety of maps for sale, including 7.5 minutes maps.⁷³ Although some information, such as the DOT pipeline maps have not been restored to public access, the Commission believes that there are publicly available sources that would enable a terrorist to locate most energy infrastructure. Without further guidance from the Congress or the Administration, the Commission is reluctant to withhold from public access location information that is otherwise available.

30. The Commission concludes nevertheless that there is some "location" information that does warrant protection as CEII. The Commission intends to release location information generally needed to participate in the National Environmental Policy Act (NEPA) process, while protecting information containing technical details not usually needed by most NEPA participants. Accordingly, the Commission considers the following types of gas and hydropower location information as outside the definition of CEII: (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

⁷²See http://www.insc.anl.gov/pwrmaps/map/world_map.php.

⁷³See <http://mapping.usgs.gov/digitalbackyard/topobkyd.html#5>.

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(4) general location maps. In order to alleviate commenters' concerns about making this information so easily available, the Commission instructs filers to segregate this non-CEII location information into a separate volume or appendix, label it clearly "Non-Internet Public," and submit it with instructions that it not be placed on the Internet.⁷⁴ To the extent permissible and practical, the Commission will adhere to those instructions, but the information will still be publicly available through the Public Reference Room.

31. Conversely, the Commission considers the following gas information to qualify as CEII because it provides more than just location: (1) diagrams of valve and piping details at compressor stations, meter stations, LNG facilities, and pipeline interconnections; (2) flow diagrams and other drawings or diagrams showing similar details such as volumes and operating pressures like those found in Exhibit G; (3) environmental resource reports for LNG facilities, and (4) drawings matching labels with specific buildings at the site, e.g., central gas control centers or gas control buildings.

32. Similarly, examples of hydropower location-related information that the Commission considers to be CEII include: (1) general design drawings of the principal project works (e.g., plan, elevation, profile, and section of dam and powerplant), such as those found in Exhibit F; (2) maps of projects (including location of project works with

⁷⁴Until instructed otherwise, filers may not submit non-Internet public documents through the electronic filing process. Document submitted through that process are automatically placed in public FERRIS, and are visible on the Internet.

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respect to water bodies, permanent monuments, or other structures that can be noted on the map and recognized in the field), such as those found in Exhibit G; (3) drawings showing technical details of a project, such as plans and specifications, supporting design reports, Part 12 independent consultant reports,⁷⁵ facility details, electrical transmission systems, and communication and control center information; (4) locations of critical or vulnerable components of the project; (5) inundation information; and (6) global positioning system (GPS) coordinates of any project features (precise surveyed or GPS coordinates at or above two decimal points of accuracy of equipment and structures).

33. A filing such as a license or certificate application could contain a variety of information falling into one or more of the following categories: public, non-Internet public information, nonpublic CEII, and other nonpublic privileged. In that case, the preferred method of filing would be to segregate each type of information into separate volumes or appendices, each clearly marked with the appropriate heading, and with a cover letter explaining the treatment each volume/appendix should receive as follows:

* The public volume/appendix should be marked "Public," although public is the default treatment for unmarked documents

* The non-internet public volume/appendix containing non-CEII location information should be marked "Non-Internet Public"

⁷⁵See 18 CFR Part 12, Subpart D.

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* The CEII volume/appendix should be marked "Contains Critical Energy Infrastructure Information – Do Not Release," in accordance with § 388.112(b), and

* Any other nonpublic privileged volumes/appendices should be marked "Contains Privileged Information – Do Not Release."

Filers should note that any filing containing non-Internet public, CEII or other privileged information currently may not be submitted using the electronic filing process.

34. The electric transmission grid differs from dams and pipelines in that the Commission does not have regulatory responsibilities over the siting or licensing of these facilities. Therefore, the Commission is not charged with conducting the NEPA reviews on these facilities. For that reason, there is far less need for the public as a whole to have unfettered access to location information submitted to the Commission regarding the electric grid. Some companies state that portions of FERC Form No. 715, Annual Transmission Planning and Evaluation Report, should fall outside the definition of CEII because it is location information.⁷⁶ The Commission disagrees. Certain information in Part 3 of FERC Form No. 715 is not intended primarily to identify the location of the facilities, but rather to show the interrelationship of facilities. Therefore, the Commission considers Part 3 transmission system maps and diagrams used by the utility for transmission planning to be CEII.

⁷⁶E.g., Commonwealth Associates, Inc. at p. 2; Whitfield Russell Associates at p. 8.

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3. Information Regarding Proposed Facilities

35. In the NOPR, the Commission reversed its earlier position that information relating to proposed facilities should not be treated as CEII.⁷⁷ As noted in the NOPR, "[t]he major concern initially about withholding information about proposed projects was that people might not be able to participate effectively in the National Environmental Policy Act (NEPA) process."⁷⁸ After the Policy Statement was issued in October 2001, the Commission treated information that identified location of existing, certificated or licensed facilities as CEII. It recognized that it would be nearly impossible for people to participate effectively in the NEPA process without access to specific information regarding the location of the proposed facility, the area it affects, and the resources it impacts. For that reason, the Policy Statement contemplated the release of CEII regarding proposed facilities, and then the protection of the information as CEII once a certificate or license was issued.⁷⁹ This resulted in a fairly cumbersome process and raised the concern that a patient terrorist could collect CEII-type information on proposed projects and then use that information to cause harm to the project and the people living and working in its vicinity once it was built.

⁷⁷67 FR 57994 at p. 58000, FERC Stats. & Regs. ¶ 32,564 at p. 34,548.

⁷⁸*Id.*

⁷⁹66 FR 52917 (Oct. 18, 2001), 97 FERC ¶ 61,030.

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36. In the NOPR, recognizing the inconsistency in this approach, the Commission revised the Policy Statement to restrict access to detailed technical information relating to proposed facilities, while at the same time revising the policy to cease protecting location information as CEII.⁸⁰ The majority of commenters approve of the decision to include proposed facilities,⁸¹ with only the HRC explicitly disagreeing.⁸² As explained in the NOPR, the Commission believes that as long as basic location information is not treated as CEII, protection of other sensitive information about proposed facilities will help protect the infrastructure without interfering with the NEPA process.⁸³ For example, most NEPA commenters will want to know the location of a proposed pipeline and the footprint of aboveground facilities, but few will need diagrams of valve and piping details, or flow diagrams, or need to know which building will house security and which one will house the computer operations center. Those who do have such a need may file

⁸⁰67 FR 57994 at p. 57995, FERC Stats. and Regs. ¶ 32,564 at p. 34,539.

⁸¹E.g., BEI at p. 9; Industrials (Process Gas Consumers Group, American Forest & Paper Ass'n, American Iron & Steel Institute, Georgia Industrial Group, Florida Industrial Gas Users, Industrial Gas Users of Florida, and United States Gypsum Company) at p. 4; INGAA at p. 4; National Hydropower Association at p. 5; Southern at p. 3; Washington Legal Foundation at p. 2; Williston Basin at p. 4.

⁸²HRC at p. 4.

⁸³See 67 FR 57994 at p. 58000, FERC Stats. & Regs. ¶ 32,564 at p. 34,548.

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a request for that information using the CEII request procedures in new § 388.113(d) of the Commission's regulations.⁸⁴

37. Duke Energy suggests that the Commission clarify that the definition of CEII extends to "component parts of such systems or assets or . . . formal proposals to create such systems or assets including component parts thereof,"⁸⁵ voicing concern that the requirement that the infrastructure be vital to the nation's health, security, and economy "presupposes that the 'infrastructure' in question is already in place," effectively excluding information about proposed facilities.⁸⁶ As discussed above, the Commission is changing the definition of critical infrastructure in new § 388.113(c)(2) of its regulations⁸⁷ to encompass "existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters." This revised definition makes it clear that information regarding proposed facilities may be protected as CEII.

D. Requester's Status and Need for the Information

⁸⁴See new 18 CFR 388.113(d).

⁸⁵Duke Energy at p. 12.

⁸⁶*Id.* at pp. 10-11.

⁸⁷See new 18 CFR 388.113(c)(2).

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38. The NOPR proposed a procedure that would not restrict CEII to certain types of applicants, but would take an applicant's identity and need into account.⁸⁸ A person seeking access to CEII under proposed § 388.113 would be required to submit information about his identity and need for the information.⁸⁹ The NOPR emphasized the importance of intervenors, landowners and other persons being able to participate meaningfully in Commission proceedings.⁹⁰ The Commission also expressed its belief that market participants who are not participants in proceedings would be able to access necessary information, either under proposed § 388.113 or through other means, such as the Open Access Same-time Information System (OASIS).⁹¹ The NOPR also proposed to permit owners and operators to get information about their own facility without the need to file a request under the CEII process, and to require agents of an owner/operator to obtain information from the owner/operator.⁹² The NOPR pointed out that these requirements would have no application to FOIA requests.⁹³

⁸⁸67 FR 57994 at p. 58001, FERC Stats. & Regs. ¶ 32,564 at p. 34,549.

⁸⁹*Id.* at p. 58001, ¶ 32,564 at p. 34,550.

⁹⁰*Id.* at p. 58001, ¶ 32,564 at pp. 34,549-50.

⁹¹*Id.* at p. 58001, ¶ 32,564 at p. 34,550.

⁹²*Id.* at p. 58001, ¶ 32,564 at pp. 34,549-50.

⁹³*Id.* at p. 58001, ¶ 32,564 p. 34,549.

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39. Several commenters express concern over the ability of energy market consultants and other participants to obtain data that is important to efforts to expand the energy infrastructure and develop new energy resources.⁹⁴ Among the concerns is the possibility that transmission owners might restrict access to CEII in an unfair manner so as to deprive some market participants of the ability to conduct needed research.⁹⁵ Some commenters suggest that the Commission adopt a method of pre-qualification for market participants who are not participants in Commission proceedings or include consultants and other market participants in a list of categories of CEII users who would be permitted access.⁹⁶

40. The procedures proposed in the NOPR were intended to provide access to CEII to requesters with legitimate need for the information.⁹⁷ Generally speaking, market participants seeking to develop new or expanded energy resources would present such a need. Certainly, continued development of energy infrastructure is one aspect of the nation's defense against attacks upon that infrastructure. The Commission prefers to proceed on a case-by-case basis rather than creating categories of "pre-approved" users,

⁹⁴E.g., BPA Power Administration at p. 5; Pace Global Energy Services at p. 3; Reliant Resources, Inc. (Reliant) at pp. 2-4.

⁹⁵E.g., Reliant at pp. 4-5.

⁹⁶E.g., Pace Global Energy Services at p. 3; GE at p. 4; Reliant at pp. 4-5.

⁹⁷67 FR 57994 at p. 58001, FERC Stats. & Regs. ¶ 32,564 at p. 34,550.

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because such an approach is better tailored to ensuring that inappropriate users do not gain access to CEII. The Commission understands that extensive delays in obtaining data could hinder development of energy resources, and has no intention of allowing the CEII process to result in any undue delays in the processing of facilities applications. In addition, once the CEII Coordinator has approved access to CEII on the part of a particular requester on a few occasions, subsequent requests by the same requester for similar information should, in most cases, require less time to process.

41. One matter requires clarification. As National Grid USA points out,⁹⁸ owner/operators often are corporations that can act only through agents. The reference to "agent or representative" in § 388.113(d)(2) of the Commission's regulations⁹⁹ is not intended to refer to employees or officials of an owner/operator. They would be covered by § 388.113(d)(1) of the Commission's regulations.¹⁰⁰ That subsection has been clarified accordingly.

E. Verification and Access Issues

1. CEII Coordinator

⁹⁸National Grid USA at p. 9.

⁹⁹See 18 CFR 388.113(d)(2).

¹⁰⁰See 18 CFR 388.113(d)(1).

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42. Most commenters approve of the creation of a CEII Coordinator position¹⁰¹ with some indicating that the agency was better suited to respond to requests than the industry.¹⁰² However, a few commenters believe that owners, operators, and applicants should have more of a role in granting access to CEII. For example, the National Hydropower Association requests that the Commission amend the regulations to permit owners, operators, and applicants to serve as CEII Coordinator in some circumstances,¹⁰³ and EEI advocates that submitters of information be able to object to intervenor requests for CEII.¹⁰⁴ The Commission believes that the National Hydropower Association's suggestion would impermissibly interfere with the Commission's administration of the program. EEI's suggestion, however, is consistent with the proposed CEII Coordinator process, which is adopted here. Accordingly, under § 18 CFR 388.112(d) of the Commission's regulations,¹⁰⁵ submitters are given an opportunity to comment on requests for CEII that they submitted.

¹⁰¹E.g., EEI at pp. 10-11; Electric Power Supply Association (EPSA) at p. 4; Industrials at pp. 3-4; INGAA at pp. 5 and 7; MidAmerican at pp. 3-4; National Hydropower Association at pp. 3-4; NERC at p. 3; Washington Legal Foundation at p. 2; Whitfield Russell Associates at p. 9.

¹⁰²E.g., American Electric Power at p. 1; Industrials at pp. 3-4; Reliant at p. 5.

¹⁰³National Hydropower Association at pp. 3-4.

¹⁰⁴EEI at p. 14.

¹⁰⁵18 CFR 388.112(d).

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43. At least one commenter, Reporters Committee, disagrees with the establishment of a CEII Coordinator, voicing concern that the proposed process removes access decisions from the hands of experienced access professionals and permits the agency to avoid the FOIA time limits.¹⁰⁶ As discussed above in paragraph 18, the CEII Coordinator will have access to the same professional staff who evaluate and draft recommended decisions on FOIA requests, so that expertise will be utilized. Also, the time frames set out in new § 388.113(d)(3)(iii) of the Commission's regulations¹⁰⁷ for the CEII Coordinator to process a request are the same as provided by the Commission's regulations for processing FOIA requests. To be sure, missing the CEII deadlines does not have the same legal implications as missing the FOIA deadlines.¹⁰⁸ Nevertheless, the Commission is committed to processing requests for CEII as timely as possible as if it were under the same legal obligations as imposed under the FOIA. Also, of course, if a requester is concerned about the timing for a CEII response running beyond the FOIA

¹⁰⁶Reporters Committee at p. 4.

¹⁰⁷18 CFR 388.113(d)(3)(iii).

¹⁰⁸A FOIA requester may treat an agency's failure to respond within the statutory time limit as constructive exhaustion of administrative remedies, and proceed directly to court without first filing an administrative appeal. See 5 U.S.C. § 552(a)(6)(C)(i). Normally, a requester must file an administrative appeal prior in order to exhaust his or her administrative remedies prior to filing in court. See Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364, 366 (D.C. Cir. 1985) (*per curiam*).

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statutory time limits, the requester always has the option of filing a FOIA request and seeking access under that statute.

44. Certain commenters request clarification of the authority of the Coordinator. Southern believes that the NOPR did not make it clear that the CEII Coordinator has the authority to make determinations of when information qualifies as CEII. The Commission agrees that the proposed version of § 375.313 of its regulations¹⁰⁹ did not specifically delegate this authority to the Coordinator. The final rule revises proposed 18 CFR 375.313 to add this delegation, and includes language in new § 388.113(d)(3)(ii) of the Commission's regulations¹¹⁰ to explicitly add this step into the processing of CEII requests.

45. Other commenters request that the Commission provide more concrete standards or guidance for the Coordinator. For example, National Grid USA recommends that the Commission provide "standards that will govern the CEII Coordinator's decision whether to release CEII," explaining that stated criteria may give requesters insight into which requests will be granted and reduce fruitless requests.¹¹¹ The National Hydropower Association, the NERC, PJM, and Southern also request that the Commission provide criteria for the Coordinator to use in determining whether information qualifies as CEII,

¹⁰⁹18 CFR 375.313.

¹¹⁰See new 18 CFR 388.113(d)(3)(ii).

¹¹¹National Grid USA at pp. 6-7.

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whether a requester has a need for the information, and whether to require a non-disclosure agreement (NDA) as a condition of release.¹¹² The Commission believes that the standards the Coordinator should use to determine whether information qualifies as CEII are adequately detailed in the definition in new § 388.113(c)(1) of its regulations.¹¹³ That is, does the information relate to the production, generation, transportation, transmission, or distribution of energy; could it be useful to a person in planning an attack on critical infrastructure; is it exempt from disclosure under the FOIA; and does it do more than provide location information?

46. Commenters also ask that the Commission develop guidelines for the Coordinator to use in determining whether to release information to a particular requester.¹¹⁴ The Commission does not intend to provide within the regulation itself a list of the types of requesters who would be deemed to have a need for CEII. First of all, that determination is fact specific. However, in the preamble to the NOPR and this final rule, the Commission has indicated that intervenors, market participants, energy market consultants, state agencies, landowners, environmental groups, and market participants

¹¹²National Hydropower Association at p. 4; NERC at p. 5; PJM at p. 1; Southern at pp. 4-6.

¹¹³See new 18 CFR 388.113(c)(1).

¹¹⁴E.g., PJM at p. 1; Southern at pp. 4-5.

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may be found to have a need for information in a particular situation.¹¹⁵ It will be in the requester's best interest to explain as fully as possible why he or she needs the information in question. One factor that the Coordinator should factor into a decision is whether the requester's need for the information outweighs the potential harm from release of the information. For instance, if the Commission developed a hierarchical listing of the most critical portions of the infrastructure, it would be highly unlikely to release that information to most requesters, although it might be released to the FBI or the Office of Homeland Security. The final rule has been changed to reflect this balancing in new § 388.113(d)(3)(ii) of the Commission's regulations.¹¹⁶

2. Use of PINS and Passwords

47. Some commenters are concerned that adequate security measures be taken to protect access to CEII. For instance, certain commenters favor the use of a password system to provide Internet access to CEII.¹¹⁷ GE believes it may be beneficial to maintain records on each individual's access to CEII to facilitate investigation of

¹¹⁵67 FR 57994, FERC Stats. & Regs. ¶ 32,564.

¹¹⁶See 18 CFR 388.113(d)(3)(ii).

¹¹⁷E.g., Duke at p. 17; National Hydropower Association at p. 8; GE at p. 5; SCE at p. 8.

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potential inappropriate access.¹¹⁸ Other commenters have concerns about the security issues associated with providing Internet access to CEII.¹¹⁹ For the time being, the Commission does not plan to give requesters access to Commission databases containing CEII. If and when that time comes, it is expected that identifications and passwords will be used.

3. Verification/Checks on Requesters

48. In the NOPR, the Commission proposed to require each individual requester to obtain access to information instead of granting access on an organization-by-organization basis.¹²⁰ Several commenters urge the Commission to rethink its decision not to grant requesters generic access to nonpublic information. Some note that such generic access would reduce burdens on the Commission and requesters.¹²¹ INGAA, among others, believes that access decisions should be made on a case-by-case basis,¹²² while GE recommends a hybrid approach that would allow entities with "continuous legitimate need for information" to gain generic access, while utilizing a case-by-case

¹¹⁸ See GE at p. 5.

¹¹⁹ E.g., National Hydropower Association at p. 8; GE at p. 5.

¹²⁰ 67 FR 57994 at p. 58002; FERC Stats. & Regs. ¶ 32,564 at p. 34,550.

¹²¹ E.g., Duke Energy at p. 17; EPSA at p. 4.

¹²² See INGAA at p. 7; PJM at p. 2.

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system for those with more occasional need for the information.¹²³ For the time being, the Commission is most comfortable granting access on a case-by-case basis. As mentioned in the discussion on standards to be used by the Coordinator, whether someone has a need for information can vary from circumstance to circumstance. The Commission's goal is to limit CEII access to those with a need for the information. Even though a requester may not be a terrorist, the more people who have access to information, the greater likelihood that it may find its way into the wrong hands. As also noted above, someone who requests access frequently will probably be cleared more quickly than a first-time requester, so the burden of multiple requests should not be too great.

49. In the NOPR, the Commission concluded that since the majority of requesters were expected to be entities and individuals who were well known to the Commission, it was not necessary to use the services of outsiders to verify the identity and legitimacy of requesters.¹²⁴ The Commission is reconsidering that position and is in the process of evaluating existing databases that it may use to screen requesters.¹²⁵ For that reason, the

¹²³ See GE at p. 3.

¹²⁴ 67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,550.

¹²⁵ One possibility is to use the Interagency Border Inspection Service (IBIS) database, which keeps track of information on suspect individuals, businesses, etc., and which may also be used to access the FBI's National Crime Information Center containing records on wanted persons, criminal histories, etc.

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Commission is revising proposed § 388.113(d)(3)(i) to add a requirement that the requester provide his or her date and place of birth and to request that each requester provide his or her social security number¹²⁶ in addition to the other information initially proposed in the NOPR.¹²⁷ This will help verify that the name that the individual provides is their true name, thus facilitating an accurate screening.

F. State Agency Issues

50. As indicated in the NOI and the NOPR, there are some unique issues with respect to state agency access to CEII.¹²⁸ A primary concern is the ability of state agencies, which likely will be subject to their own FOIA rules, to protect CEII received from the Commission. State Commissions¹²⁹ also raise the following additional issues:

Whether and on what basis FERC proposes that its CEII rule will preempt state open records laws and rules?

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?

¹²⁶Under the section 7(a)(1) of the Privacy Act, 5 U.S.C. 552a, an agency may not deny a right or benefit provided by law because an individual did not provide his or her social security numbers. Therefore, a requester has the option of not disclosing his or her social security number.

¹²⁷67 FR 57994 at p. 58001, FERC Stats. & Regs. ¶ 32,564 at p. 34,550.

¹²⁸67 FR 3129 at pp. 3132-33, FERC Stats. & Regs. ¶35,542 at pp. 35,830-33; 67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,551.

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Whether FERC's rule will adequately preclude utilities from invoking the FERC rule to avoid providing CEII data to State Commissions?

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)?

Whether State Commissions or their staff will be required to enter into an NDA, and if so, on what terms?¹³⁰

51. As an initial matter, the Commission emphasizes that its goal is to cooperate as fully as possible with the State Commissions, which share the Commission's objective to ensure that CEII does not get into the wrong hands. That said, the Commission grants the National Association of Regulatory Commissioners' (NARUC's) requested clarification on the Federal preemption issue. NARUC states that the Commission has no basis to preempt authority over the totality of access to information regarding gas and

¹³⁰NARUC also raises two miscellaneous issues which go beyond the scope of this rule. First, NARUC encourages the Commission to clarify how the CEII rule relates to the Commission's Standard Market Design (SMD) NOPR, "Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design," IV FERC Stats. & Regs. ¶ 32,563 (2002). Without more, and given the comprehensive nature of the SMD NOPR, the Commission is uncertain as to what NARUC's specific concerns are. The Commission believes, however, that there is nothing in this final rule that conflicts with the goals of the SMD NOPR. Second, NARUC suggests that the Commission set a benchmark for what reasonable costs of complying with the CEII rule may be passed through in companies' rates. To start with, not every one who complies with this rule will necessarily be a jurisdictional company whose rates the Commission sets. To the extent jurisdictional companies do incur costs to comply with the rule, the Commission believes that the current rules and policies for recovery of administrative costs are adequate to address the recovery of such compliance costs.

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electric utility regulation, and that much of the information at issue is not "Federal information," that is, generated by or for the Federal government, but instead is generated by non-Federal entities that have provided similar or identical information to state regulators.¹³¹ The Commission agrees.

52. The NOPR discussion on preemption related to state agency requests to FERC for CEII that the Commission had generated or collected.¹³² As NARUC correctly points out, "the NOPR itself declares that FERC's rule does not propose to alter the traditional ability of State Commissions to obtain such data directly" from the companies.¹³³ Therefore, as requested by NARUC, the Commission confirms that it does not intend that public utilities may rely on this rule to refuse to provide information directly to State Commissions.

53. In addition, State Commissions will be presumed to have a need to know information within their state involving issues within their responsibilities. They also may submit requests for information regarding entities outside of their jurisdictions with an explanation of the need. Such requests should be capable of being resolved in a timely manner. On the other hand, as discussed below, release of CEII to State Commissions and other State Agencies will normally be subject to signing an NDA. It

¹³¹NARUC at pp. 17-18.

¹³²67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,551.

¹³³NARUC at p. 18.

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does not make sense for the Commission to release the information to the State Agencies with no agreement to protect the information, at least to the extent permitted by law. The Commission has no intention of asking a state agency to ignore state law, but merely to give the Commission notice and an opportunity to take action to prevent release of the information.

G. Timing Issues

54. The NOPR proposed to provide in § 388.112(d) of the Commission's regulations¹³⁴ notice and an opportunity for a CEII submitter to comment when a request was received for its information, and to provide in § 388.112(e)¹³⁵ notification to the submitter prior to release.¹³⁶ Under the proposal, a submitter would have at least five days in which to submit its comments, and at least five-days notice prior to release of information submitted as CEII.¹³⁷ Several commenters claim that these time limits are too short, and advocate having at least 10 days to comment, and up to 30 days notice prior to release.¹³⁸ At the same time, other commenters are concerned that the time

¹³⁴18 CFR 388.112(d).

¹³⁵18 CFR 388.112(e).

¹³⁶67 FR 57994 at p. 58003, FERC Stats. & Regs. ¶ 32,564 at p. 34,552.

¹³⁷Id. at pp. 58002-03, ¶ 32,564 at p. 34,552.

¹³⁸E.g., Duke Energy at p. 5 (advocating a ten-day comment period); EEI at p. 12 (advocating at least 15 days notice prior to release); National Hydropower Association at (continued...)

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frames are too long in some circumstances, for instance, where a time for filing a protest or intervention may expire in the interim.¹³⁹ At least one, Duke Energy, raises the possibility that the Commission could extend other deadlines where someone is delayed in getting access to information.¹⁴⁰

55. The Commission has considered these arguments and examined the filings that have very short time limits, for instance responses to rate filings under Sections 205 of the Federal Power Act,¹⁴¹ or Section 4 of the Natural Gas Act,¹⁴² and does not believe anyone will be prejudiced by the time frames proposed in the NOPR. It is unlikely there will be CEII in most of these filings, and if there is, there should still be sufficient information available for parties to make the required filings in a timely manner. This same issue could arise whenever a company claims confidential treatment for a portion of its filing. To date, that has not proved to be an obstacle to meaningful, timely

¹³⁸(...continued)

pp. 7-8, 12 (advocating at least ten business days to comment and ten business days notice prior to release); NERC at p. 4 (advocating 30 days to respond to determination to release CEII to non-governmental requester); Southern at p. 10 (advocating 30 days notice prior to release).

¹³⁹See, e.g., *Industrials* at pp. 6-8; *Massachusetts Energy Facilities Siting Board* at p. 5; *Transmission Access Policy Study Group* at pp. 5-6.

¹⁴⁰Duke Energy at p. 17.

¹⁴¹16 U.S.C. 824d.

¹⁴²15 U.S.C. 717c.

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participation by other parties, and there is no reason to expect that the CEII regulation will cause a problem where none has existed previously.

56. The Commission also has examined the arguments that the proposed time limits do not give submitters adequate time to respond. First of all, the rule provides minimum times. Where circumstances permit, the Coordinator may give submitters a longer amount of time. However, the shorter minimum is needed to permit a quick turnaround where necessary and to facilitate response within the FOIA time limits. Prior to 9/11, the five-day minimums existed in § 388.112 of the Commission's regulations for other requests for nonpublic treatment.¹⁴³ For years parties have been able to respond within the time permitted. The Commission sees no reason to extend these time limits for cases involving CEII.

H. Use of Non-Disclosure Agreements (NDAs)

57. The NOPR proposed to require most CEII requesters to sign an NDA as a condition of gaining access to CEII.¹⁴⁴ The major exception was laid out in proposed 18 CFR 388.113(d)(2), which provided that owner/operators would be exempt from the

¹⁴³See 18 CFR 388.112(d) and (e).

¹⁴⁴67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at pp. 34,551-52.

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requirement to sign an NDA prior to gaining access to CEII regarding their own projects.¹⁴⁵ The reason for this is that they have at least as great an incentive to protect this information as the Commission has, and probably have access to even more damaging information in the event a rogue employee wanted to cause harm to the facility. The Commission adopts here the proposed exception for owner/operators, and also retains the requirement that agents/representatives (other than employees or officers) of owner/operators obtain CEII directly from the owner/operator, who will be in a better position to judge the agent/representative's need for the information and to impose restrictions on its use.

58. In addition, as explained in the NOPR, NDAs for Federal agency CEII requesters will differ from others in part because the Commission will remind the requester of his or her responsibilities under the Federal Records Act,¹⁴⁶ and will require that the requesting agency refer any subsequent FOIA requests for information provided by the Commission back to the Commission for a determination as to whether the information is subject to release under the FOIA.¹⁴⁷ Similarly, NDAs for State Agency requesters will specify that the information is Federal information that is "on loan" to the State Agency and that the Commission has the right to request return of the information. The Commission will

¹⁴⁵ Id.

¹⁴⁶ 44 U.S.C. § 3510(b).

¹⁴⁷ 67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,551.

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also require that the State Agency notify the Commission whenever a request for the information is received.

59. Several commenters ask the Commission to elaborate on possible penalties for violation of an NDA.¹⁴⁸ There are two that readily come to mind. First, a violation of an NDA could result in the Commission's refusing to give similar information to the violator in the future under the CEII process. Indeed, the Commission would be violating the public's trust if a requester were permitted to violate his or her obligations under an NDA with impunity. Second, the Commission could rightly bar someone from representing people before the Commission for a stated period of time under § 385.2102(a)(2) of the Commission's regulations.¹⁴⁹

I. Submission of CEII to the Commission

60. In the NOPR, the Commission proposed to make submission of CEII a subcategory of submission of documents subject to claims of privilege under § 388.112 of its regulations,¹⁵⁰ with the same number of copies and the same requirement for a written statement supporting the request for privileged treatment.¹⁵¹ As adopted here, CEII submissions under that section have to indicate that the information is CEII,

¹⁴⁸E.g., EEL at p. 15; Duke at pp. 16-17; MidAmerican at p. 3.

¹⁴⁹See 18 CFR 385.2102(a)(2).

¹⁵⁰18 CFR 388.112.

¹⁵¹67 FR 57994 at p. 58003, FERC Stats. & Regs. ¶ 32,564 at p. 34,552.

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paralleling the existing requirement for information submitted with a request for privileged treatment.¹⁵² The Commission proposed to have the submitter determine how best to segregate CEII and non-CEII, such as by creating a separate nonpublic appendix or simply redacting CEII from the public filing.¹⁵³ The Commission further cautioned that it would take disciplinary action against submitters who abuse the CEII process by claiming CEII status for extensive portions of non-CEII.¹⁵⁴ Under both the NOPR and the final rule, a claim of privilege has the same effect regardless of whether the privileged information is CEII or other nonpublic information.¹⁵⁵ Under § 388.112 of the Commission's regulations,¹⁵⁶ the portions for which privileged treatment is sought will be placed in the nonpublic file, and will not be released before the submitter has an opportunity to comment on its release, and receives notice of the impending release.

61. Some commenters dislike the practice of creating public and nonpublic documents, expressing concern over potential confusion between versions. These commenters urge the Commission to redesign its forms so that CEII and other nonpublic

¹⁵²Id.

¹⁵³Id.

¹⁵⁴Id.

¹⁵⁵See id.

¹⁵⁶See new 18 CFR 388.112.

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information are included as a separate attachment.¹⁵⁷ Commonwealth Associates, Inc. (CAI) objects to allowing submitters to designate CEII, out of fear that system owners/operators will abuse the process by making CEII available to their agents, while forcing others to wait for a decision by the CEII Coordinator by making sweeping claims of CEII status. CAI suggests that the Commission determine CEII status in the first instance. Other commenters suggest that the Commission specify penalties for violations of the CEII procedures.¹⁵⁸

62. The Commission believes, as it did in formulating the NOPR, that the process for submitting CEII will work best if it tracks as closely as possible the existing procedures for submitting other privileged information, procedures that have proven satisfactory over time. It consequently is reluctant to depart from those procedures for fear of creating confusion and encountering unforeseen problems. The suggestion that the CEII Coordinator, rather than the owner of the information, designate CEII in the first instance, rather than reduce any prejudice from delays, will more likely increase the delays. Commission staff would be required to examine every page of a submission to make the determination, as opposed to examining only those portions that are claimed to constitute CEII.

¹⁵⁷ E.g., NERC at p. 3; National Hydropower Association at pp. 11-12.

¹⁵⁸ E.g., EEI at p. 15; MidAmerican at p. 3.

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63. The concern that some submitters will make unjustified claims of CEII status is not one that the Commission takes lightly, as it indicated in the NOPR.¹⁵⁹ The Commission will take action against submitters who abuse the system. It does not intend, however, to specify the form that action may take, as it will depend on the circumstances. Admittedly, the Commission's ability to impose penalties is not extensive, but it can disqualify a person from practice before the Commission in the event of "unethical or improper professional conduct."¹⁶⁰

64. With respect to the process of separating CEII from non-CEII, the Commission agrees with the commenters preferring a separate appendix for documents containing protected information rather than two entire copies, one public and one nonpublic. Accordingly, the Commission will modify § 388.112(b) of its regulations¹⁶¹ to state a strong preference for an appendix containing protected information. The Commission will, however, leave the option of separate public and nonpublic versions for situations where the use of an appendix would render the document difficult to read. This revision will apply to non-CEII protected information as well. As stated above, the Commission believes that the procedures for CEII and non-CEII protected information should be as similar as possible to avoid confusion.

¹⁵⁹67 FR 57994 at p. 58003, FERC Stats. & Regs. ¶ 32,564 at p. 34,552.

¹⁶⁰18 CFR 385.2102(a)(2).

¹⁶¹See new 18 CFR 388.112(b).

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65. The suggestion that the Commission redesign its forms to place CEII in attachments or appendices is outside the scope of this rulemaking. As discussed below, however, the Commission does intend to re-examine its forms and reports to determine whether changes are needed to provide better protection for CEII. This issue can be addressed at that time. For now, the Commission will add a requirement to § 388.112 of its regulations¹⁶² that all submissions for which CEII status is claimed be stamped "Contains CEII – Do Not Release" on every page containing CEII rather than just on the front page. A similar provision will be added for other types of protected information as well. In addition, the Commission is revising § 388.112(b)(2) of its regulations¹⁶³ to direct those who file on electronic media¹⁶⁴ to provide a list of the names of each file containing CEII or other privileged material, and to mark the outside of the media (CD, diskette, tape) itself to indicate CEII or other privileged material. Hopefully these additional steps will prevent inadvertent disclosure of material.

J. Challenges to CEII Status

¹⁶²See new 18 CFR 388.112.

¹⁶³See 18 CFR 388.112(b)(2).

¹⁶⁴At the present time, nonpublic documents are filed on electronic media such as CDs, diskettes, and tapes. At some point in the future, the Commission will accept nonpublic and non-Internet public documents through its electronic filing process. Certain filers also use Commission-created submission software (e.g., FERC Form No. 2 software) that enables the filer to "flag" certain fields for nonpublic treatment. The Commission will be examining that software and revising it and the associated filing instructions to permit filers to flag CEII and non-Internet Public information as well.

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66. As with the submission of CEII, the NOPR proposed to handle challenges to CEII status through the existing procedures of § 388.112 of the Commission's regulations.¹⁶⁵ Under proposed § 388.112(d), the CEII Coordinator would afford the submitter notice in the event of a request for CEII, and give the submitter at least five days in which to oppose the request.¹⁶⁶ Under proposed § 388.112(e), if the CEII Coordinator denies the claim of privilege, the submitter would receive notice of the denial at least five days prior to release of the information.¹⁶⁷

67. Several commenters have concerns about the time frames proposed in § 388.112 of the Commission's regulations.¹⁶⁸ They assert that a five-day notice period is insufficient, both for the time in which a submitter must respond to a request for CEII and for the notice of a proposed release. For the former, commenters favor a ten-day notice period.¹⁶⁹ For the latter, commenters prefer anywhere from a ten to thirty-day notice period.¹⁷⁰ The Commission also received suggestions that the time run from

¹⁶⁵67 FR 57994 at pp. 58002-3, FERC Stats. & Regs. ¶ 32,564 at p. 34,552.

¹⁶⁶*Id.* at p. 58003, ¶ 32,564 at p. 34,552.

¹⁶⁷*Id.* at pp. 58002-3, ¶ 32,564 at p. 34,552.

¹⁶⁸See 18 CFR 388.112.

¹⁶⁹*E.g.*, Duke at p. 5; National Hydropower Association at pp. 7-8, 12.

¹⁷⁰*E.g.*, EEI at p. 12; National Hydropower Association at pp. 7-8; National Grid USA at p. 10; NERC at p. 4; Southern at p. 10.

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receipt of notice and that the notice be "actual" rather than constructive, such as in a Federal Register notice.¹⁷¹ Some commenters also suggest that the Commission provide for an automatic stay of a decision to release CEII in the event of a request for rehearing, arguing that the time limit for making such a request is thirty days and that the information will otherwise be released before that time runs.¹⁷²

68. The Commission continues to believe that the currently existing procedures are adequate. The Commission has not encountered a problem with submitters of privileged information subject to a FOIA request not being able to respond timely. These time frames come into play in situations involving confidential business information that is highly sensitive to submitters. If the current time frames are adequate in such situations, they should be adequate where CEII is requested. It should be noted that the Commission does send notice directly to the submitter, usually by facsimile as well as by mail and frequently alerts the submitter by telephone too, and does not rely on constructive notice.

69. Moreover, as discussed in the NOPR,¹⁷³ decisions by the CEII Coordinator, which will be made pursuant to authority delegated here in new § 375.313 of the Commission's

¹⁷¹National Hydropower Association at pp. 7-8, 12.

¹⁷²E.g., National Hydropower Association at pp. 7-8, 12; National Grid USA at p. 10.

¹⁷³67 FR 57994 at p. 58001, FERC Stats. & Regs. ¶ 32,564 at p. 34,550.

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regulations,¹⁷⁴ will be subject to requests to the Commission for rehearing.¹⁷⁵ As is true for all orders issued under delegated authority, the time limit for a request for rehearing is thirty days.¹⁷⁶ In addition, the Commission's rules specifically provide that a request for rehearing does not stay the order being challenged unless the Commission orders otherwise.¹⁷⁷ The Commission has found these procedures to be workable in various contexts over the years and believes they will continue to function well in connection with requests for CEII.

K. Other Issues

70. In response to the NOPR, several commenters suggested that the Commission review the information that it collects to determine if such collections are necessary. They reason that if the Commission does not have the information, it cannot be subject to disclosure under the FOIA. Southern is concerned about this, particularly where the information may be available through the Open Access Same-time Information System (OASIS).¹⁷⁸ The Commission agrees with these commenters' logic. As noted in the NOPR, the Commission will be examining its information collections to see where

¹⁷⁴18 CFR 375.313.

¹⁷⁵18 CFR 385.1902(a).

¹⁷⁶18 CFR 385.713(b).

¹⁷⁷18 CFR 385.713(e).

¹⁷⁸Southern at p. 11

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collections can be scaled back or eliminated without compromising fulfillment of its statutory responsibilities.¹⁷⁹ This will most likely be done in conjunction with the periodic Office of Management and Budget clearance process.

71. Commenters also seek Commission action to amend requirements that companies make information available where the Commission is protecting the same information from disclosure.¹⁸⁰ Conversely, at least one commenter, the Transmission Access Policy Study Group, requested that the Commission confirm that it is not eliminating requirements that companies make this information available.¹⁸¹ The Commission intends to eliminate the inconsistent treatment, and will be making future modifications to its regulations to effect these changes. Until those regulations are changed, the requirements remain in place unless a company successfully obtains a waiver from the requirement.

III. INFORMATION COLLECTION STATEMENT

¹⁷⁹67 FR 57994 at p. 58000, n. 41, FERC Stats. & Regs. ¶ 32,564 at p. 34,547, n. 41.

¹⁸⁰E.g., INGAA at p. 12; Puget Sound Energy, Inc. at pp. 5-6.

¹⁸¹Transmission Access Policy Study Group at p. 7.

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72. The Office of Management and Budget's (OMB's) regulations require that OMB approve certain information collection requirements imposed by agency rule.¹⁸² In the NOPR, the Commission estimated the annual public reporting burden as follows:

Data Collection	Number of Respondents	Number of Responses	Hours Per Response	Total Annual Hours
FERC-603	200	200	.25	50

Total Annual Hours for Collection (reporting + record keeping, if appropriate) = 50

hours. Information Collection Costs: The NOPR estimated the cost to comply with these requirements. It projected the average annualized cost of all respondents to be:

Annualized Capital Startup Costs: The Commission estimated that to respond to this information collection will be a one-time cost of \$12.50 per respondent. (50 hours @ \$50 hourly rate ÷ 200).

73. None of the commenters challenged the estimates provided in the NOPR. On October 1, 2002, OMB approved without change, the Commission's request for approval of the information collection required by the proposed rule, and assigned it OMB No. 1902-0197. The only information collection changes from the NOPR to the final rule are the added requirement in new § 388.113(d)(3)(i) of the Commission's regulations¹⁸³ that requesters provide their date and place of birth and the request that they provide their

¹⁸²5 CFR Part 1320 (2002).

¹⁸³See new 18 CFR 388.113(d)(3)(i).

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social security number. OMB regulations provide an exemption where a person is required to provide only facts that are necessary for identification.¹⁸⁴ The requirement that a requester provide his or her date and place of birth and the request that a requester provide his or her social security number are intended to verify the identity of the requester. For that reason, this collection need not be resubmitted to OMB for approval.

IV. ENVIRONMENTAL ANALYSIS

74. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.¹⁸⁵ Included in the exclusions are rules that are clarifying, corrective, or procedural or that do not substantively change the effect of the regulations being amended.¹⁸⁶ This rule is procedural in nature and therefore falls under this exception; consequently, no environmental consideration is necessary.

V. REGULATORY FLEXIBILITY ACT CERTIFICATION

75. The Regulatory Flexibility Act of 1980 (RFA)¹⁸⁷ generally requires a description and analysis of final rules that will have significant economic impact on a substantial

¹⁸⁴5 CFR 1320.3(h)(1).

¹⁸⁵Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

¹⁸⁶18 CFR 380.4(a)(2)(ii).

¹⁸⁷5 U.S.C. 601-612.

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number of small entities. The Commission is not required to make such analyses if a rule would not have such an effect. The Commission certifies that this rule does not have such an impact on small entities.

VI. DOCUMENT AVAILABILITY

76. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, DC 20426.

77. From FERC's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and WordPerfect format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number of this document excluding the last three digits in the docket number field.

78. User assistance is available for FERRIS and the FERC's website during normal business hours from FERC Online Support (by phone at 1-866-208-3673 (toll-free) or 202-502-6652, or by e-mail at FERCOnlineSupport@ferc.gov) or the Public Reference Room at (202) 502-8371 Press 0, TTY (202) 502-8659. E-Mail the Public Reference Room at public.referenceroom@ferc.gov.

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VII. EFFECTIVE DATE

79. These regulations are effective [insert date 30 days after publication in the **FEDERAL REGISTER**].

80. The provisions of 5 U.S.C. § 801 regarding Congressional review of final rules does not apply to this final rule, because the rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties.

List of subjects in 18 CFR Parts 375 and 388

18 CFR Part 375

Authority delegations (Government agencies), Seals and insignia, Sunshine Act.

18 CFR Part 388

Confidential business information, Freedom of information.

By the Commission,

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission amends parts 375 and 388, chapter I, title 18, Code of Federal Regulations, as follows.

PART 375--THE COMMISSION

1. The authority citation for part 375 continues to read as follows:

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Authority: 5 U.S.C. 551-557; 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791-825r, 2601-2645, 42 U.S.C. 7101-7352.

2. Add § 375.313 to subpart C to read as follows:

§ 375.313 Delegations to the Critical Energy Infrastructure Information Coordinator.

The Commission authorizes the Coordinator or the Coordinator's designee to:

- (a) Receive and review all requests for critical energy infrastructure information as defined in § 388.113(c)(1).
- (b) Make determinations as to whether particular information fits within the definition of CEII found at § 388.113(c)(1).
- (c) Make determinations as to whether a particular requester's need for and ability and willingness to protect critical energy infrastructure information warrants limited disclosure of the information to the requester.
- (d) Establish reasonable conditions on the release of critical energy infrastructure information.
- (e) Release critical energy infrastructure information to requesters who satisfy the requirements in paragraph (b) of this section and agree in writing to abide by any conditions set forth by the Coordinator pursuant to paragraph (c) of this section.

PART 388—INFORMATION AND REQUESTS

3. The authority citation for part 388 continues to read as follows:

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Authority: 5 U.S.C. 301-305, 551, 552 (as amended), 553-557; 42 U.S.C. 7101-7352.

4. Section 388.112 is revised to read as follows:

§ 388.112 Requests for privileged treatment of documents submitted to the Commission.

(a) Scope. (1) Any person submitting a document to the Commission may request privileged treatment by claiming that some or all of the information contained in a particular document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, and should be withheld from public disclosure. (2) Any person submitting documents containing critical energy infrastructure information (CEII) as defined in § 388.113 should follow the procedures specified in this section.

(b) Procedures. A person claiming that information is privileged under paragraph (a) of this section must file:

- (1) For documents submitted in hard copy,
 - (i) A written statement requesting privileged treatment for some or all of the information in a document, and the justification for nondisclosure of the information;
 - (ii) One of the following:
 - (A) In all cases where the privileged information or CEII can, as a practical matter, be segregated into a separate document or appendix:

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(1) Fourteen copies of the original document, indicating in bold print on the front page either "Privileged Information Contained in Attachment" or "Critical Energy Infrastructure Information Contained in Attachment," and

(2) One separate document or appendix, indicating in bold print on the front page either "Contains Privileged Information – Do Not Release" or "Contains Critical Energy Infrastructure Information – Do Not Release," with every page in the document or appendix marked either "Privileged Information – Do Not Release" or "Critical Energy Infrastructure Information – Do Not Release," or

(B) In cases where the privileged information or CEII cannot reasonably or coherently be separated into a separate document or appendix:

(1) The original document, indicating in bold print on the front page either "Contains Privileged Information – Do Not Release," or "Contains Critical Energy Infrastructure Information – Do Not Release" and, on every page containing privileged information or CEII, the marking "Privileged Information – Do Not Release," or "Critical Energy Infrastructure Information – Do Not Release," with the privileged information or CEII clearly identified, and

(2) Fourteen copies of the document without the information for which privileged treatment is sought, and with a statement indicating that information has been removed for privileged treatment, and

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(iii) The name, title, address telephone number, e-mail address, and facsimile number of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Commission.

(2) For documents submitted on electronic media,

(i) A written statement requesting privileged treatment for some or all of the information on the electronic media, and the justification for non-disclosure of the information;

(ii) One of the following:

(A) In all cases where the privileged information or CEII can, as a practical matter, be segregated into a separate document or appendix:

(1) One copy of the electronic media and fourteen paper copies of a filing all without the privileged information or CEII, and all marked either "Privileged Information Contained in Separate Attachment" or "Critical Energy Infrastructure Information Contained in Separate Attachment," and

(2) One copy of the electronic media and one paper copy of a separate document or appendix, in both cases marked on media itself and on the front page either "Contains Privileged Information – Do Not Release" or "Contains Critical Energy Infrastructure Information – Do Not Release," with every page in the document or appendix marked either "Privileged Information – Do Not Release" or "Critical Energy Infrastructure Information – Do Not Release," and

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(3) An index identifying each file on the media and whether it is public, contains Critical Energy Infrastructure Information, or contains other privileged information; or

(B) In cases where the privileged information or CEII cannot reasonably or coherently be separated into a separate document or appendix:

(1) One copy of a complete filing on the electronic media and a paper copy, both marked on the media itself and on the front page either "Contains Privileged Information - Do Not Release" or "Contains Critical Energy Infrastructure Information - Do Not Release," with every page containing privileged information or CEII marked either "Privileged Information - Do Not Release" or "Critical Energy Infrastructure Information - Do Not Release" and with the privileged information or CEII clearly and specifically identified, and

(2) One copy of the electronic media without the information for which privileged treatment is sought and with a statement that information has been removed for privileged treatment, together with fourteen paper copies without the information for which privileged treatment is sought,

(3) An index identifying each file on the media and whether it is public, contains Critical Energy Infrastructure Information, or contains other privileged information, and

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(iii) The name, title, address, telephone number, e-mail address, and facsimile number of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Commission.

(c) Effect of privilege claim

(1) For documents filed with the Commission.

(i) The Secretary of the Commission will place documents for which privileged treatment is sought in accordance with paragraph (b)(1)(ii) of this section in a nonpublic file, while the request for privileged treatment is pending. By placing documents in a nonpublic file, the Commission is not making a determination on any claim for privilege. The Commission retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its jurisdictional responsibilities.

(ii) The Secretary of the Commission will place the request for privileged treatment described in paragraph (b) of this section and a copy of the original document with the privileged information removed in a public file while the request for privileged treatment is pending.

(2) For documents submitted to Commission staff. The notification procedures of paragraphs (d), (e), and (f) of this section will be followed by staff before making a document public.

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

(e) Notification before release. Notice of a decision by the Commission, the Chairman of the Commission, the Director, Office of External Affairs, 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, will be given to any person claiming that information is privileged 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.

(f) Notification of suit in Federal courts. When a FOIA requester brings suit to compel disclosure of information for which a person has claimed privileged treatment, the Commission will notify the person who submitted the documents of the suit.

5. Add § 388.113 to read as follows:

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§ 388.113 Accessing critical energy infrastructure information.

(a) Scope. This section governs access to critical energy infrastructure information (CEII). The rules governing submission of CEII are contained in 18 CFR 388.112(b). The Commission reserves the right to restrict access to previously filed documents as well as Commission-generated documents containing CEII.

(b) Purpose. The procedures in this section are available at the requester's option as an alternative to the FOIA procedures in § 388.108 where the information requested is exempted from disclosure under the FOIA and contains CEII.

(c) Definitions. For purposes of this section:

(1) 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 U.S.C. 552; and

(iv) Does not simply give the location of the critical infrastructure.

(2) Critical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively

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affect security, economic security, public health or safety, or any combination of those matters.

(d) Optional procedures for requesting critical energy infrastructure information.

(1) An owner/operator of a facility, including employees and officers of the owner/operator, may obtain CEII relating to its own facility directly from Commission staff without going through the procedures outlined in paragraph (d)(3) of this section.

(2) An agent or representative of an owner/operator must obtain information from the owner/operator.

(3) If any other requester has a particular need for information designated as CEII, the requester may request the information using the following procedures:

(i) File a written request with the Commission's CEII Coordinator. The request shall contain the following: requester's name, date and place of birth, title, address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. Requesters are also requested to include their social security number for identification purposes.

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(ii) Once the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information. Where appropriate, the CEII Coordinator will forward a non-disclosure agreement (NDA) to the requester for execution. Once the requester signs any required NDA, the CEII Coordinator will make the critical energy infrastructure information available to the requester. The CEII Coordinator's decisions regarding release of CEII are subject to rehearing as provided in § 385.713 of this chapter.

(iii) The CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the Freedom of Information Act in § 388.108(c), and will provide notice to the submitter in accordance with § 388.112(d) and (e).

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APPENDIX A

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List of Commenters

Adirondack Mountain Club
American Electric Power System
American Gas Association
American Library Association
Bonneville Power Administration (BPA)
Commonwealth Associates, Inc.
City Public Service of San Antonio
Duke Energy Corporation (Duke)
Edison Electric Institute (EEI), including the EEI Alliance of Energy Suppliers, and EEI Transmission Group
Electric Power Supply Association (EPSA)
Exelon Generation Corporation on behalf of its public utility subsidiaries PECO Energy Company and Commonwealth Edison Company
Federation of American Scientists
Hydropower Reform Coalition (HRC)
The Industrials: Process Gas Consumers Group, American Forest & Paper Ass'n, American Iron & Steel Institute, Georgia Industrial Group, Florida Industrial Gas Users, Industrial Gas Users of Florida, and United States Gypsum Company
Interstate Natural Gas Association of America (INGAA)
Massachusetts Energy Facilities Siting Board
MidAmerican Energy Company (MidAmerican)
National Association of Regulatory Utility Commissioners (NARUC)
National Grid USA
National Hydropower Association
New York State Public Service Commission
North American Electric Reliability Council (NERC)
Northwest Natural Gas Company (Northwest Natural)
Oklahoma Corporation Commission
Oklahoma Gas and Electric Company
Lydia Olchoff
OMB Watch
Pace Global Energy Services
Pacific Gas & Electric Company (PG&E)
PJM Interconnection, L.L.C. (PJM)
GE Power Systems Energy Consulting (GE)
Puget Sound Energy, Inc.
Reliant Resources, Inc. (Reliant)

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Reporters Committee for Freedom of the Press and The Society of Environmental Journalists (Reporters Committee)
Southern California Edison Company (SCE)
Society of Professional Journalists
Southern Company Services, Inc., acting for itself and as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company (Southern)
Public Utilities Commission of Ohio, the Michigan Public Service Commission and the staff of the Oklahoma Corporation Commission (States)
Transmission Access Policy Study Group
Washington Legal Foundation and Public Interest Clinic, George Mason University School of Law (Washington Legal Foundation)
Williston Basin Interstate Pipeline Company (Williston Basin)
Whitfield Russell Associates

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APPENDIX B

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APPLICABILITY OF FREEDOM OF INFORMATION ACT EXEMPTIONS
TO CRITICAL ENERGY INFRASTRUCTURE INFORMATION

The Commission's actions in the NOPR and the final rule are based on its position that CEII includes only information that is exempt from disclosure under FOIA. The exemptions most likely to apply to CEII are Exemptions 2, 4, and 7. A discussion of the potential applicability of each follows.

a. Exemption 2

Exemption 2 exempts from disclosure "records related solely to the internal personnel rules and practices of an agency."¹ According to guidance from the Department of Justice (DOJ), "[a]ny agency assessment of, or statement regarding, the vulnerability of such a critical asset should be protected pursuant to Exemption 2."² DOJ has counseled agencies that "a wide range of information can be withheld under Exemption 2's 'circumvention' aspect."³ DOJ also has instructed agencies to take full advantage of the breadth of Exemption 2's protection for critical infrastructure information.⁴

¹5 U.S.C. 552(b)(2).

²DOJ 2001 FOIA Post 19, posted October 15, 2001. DOJ is the Federal agency responsible for the administration of the FOIA.

³*Id.*

⁴*Id.*

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The Commission has concluded that a portion of the CEII is exempt from disclosure under Exemption 2 of FOIA. Illustratively, the Commission is expanding its efforts to help facility owners and operators assess security risks and protect facilities from attack.⁵ Information developed or created by the Commission as part of these efforts is likely to fall within the ambit of Exemption 2. Documents describing inspections of regulated facilities likewise will fall within Exemption 2 if they assess or describe vulnerabilities of the project.

b. Exemption 4

Exemption 4 protects from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁶ The Commission has determined that much of the CEII falls within the scope of Exemption 4, on the basis that 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.

There are two primary issues regarding the application of Exemption 4 to CEII. First, whether the fact that this sort of information had been publicly available in the past undermines an argument that it is now confidential, and second, whether the Trade

⁵The Commission has jurisdiction over the safety of hydroelectric projects under sections 4(e), 10(a), and 10(c) of the Federal Power Act, 16 U.S.C. 797(e), 803(a), (c).

⁶5 U.S.C. 552(b)(4).

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Secrets Act⁷ prohibits the Commission from sharing this information on a "need-to-know" basis.

The Commission concludes that the fact that this information has been previously public does not defeat Exemption 4. Americans live in a different world today than they did prior to September 11, 2001. Americans have had to face the harsh realities of terrorism on their soil. This has forced the nation to reassess its vulnerability to terrorist threats. Government agencies as well as private companies have had to reconsider the extent to which they make information freely available to others.

Specifically, under National Parks & Conservation Assoc. v. Morton, 49 F.2d 765 (D.C. Cir. 1974) (National Parks) and Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992) (Critical Mass), the initial inquiry in Exemption 4 cases is whether the information was submitted to the government voluntarily or whether it was compelled to be submitted. For voluntary submissions, the information is entitled to protection if it "would customarily not be released to the public by the person from whom it was obtained."⁸ This test focuses on the submitter's current treatment of the information, not past treatment. Therefore, if, in the post-September 11 world, the company would not release the information to the public, the Commission should not release the information.

⁷18 U.S.C. 1905.

⁸Critical Mass, 975 F.2d at 878.

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For compelled submissions, there is a three-pronged test – the competitive harm prong, the impairment prong, and the program effectiveness prong. If any of the three tests is met, the information is exempt from mandatory disclosure under FOIA even though it may have been previously public.⁹ Under the competitive harm prong, there must be evidence of actual competition, and a likelihood of substantial competitive injury.¹⁰ This inquiry tends to be fact specific, so it is not possible to identify with certainty which categories of CEII would meet the test. However, as utilities transition from monopolies to competitive markets, it may be easier for them to demonstrate actual competition. The inquiry is whether the submitter is facing competition at the time the Commission received the request for the information, not whether there was competition when the information was first submitted to the Commission. If the competitive situation has changed, the likelihood of competitive harm would be analyzed using the current

⁹While most of the submissions to a regulatory agency like FERC may appear to be compelled, this may not necessarily be the case. DOJ has recognized that the "existence of agency authority to require submission of information does not automatically mean such a submission is 'required'; the agency authority must actually be exercised in order for a particular submission to be deemed 'required.'" DOJ Freedom of Information Act Guide & Privacy Act Overview, May 2002 ed., at 202. Courts have found submissions to be voluntary where the agency had issued a subpoena but not sought to enforce it, see *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235 (E.D. Mo. 1996), and where the agency did not have authority to enforce the information collection because the information request violated the Paperwork Reduction Act, 44 U.S.C. 3501, see *Center for Auto Safety v. NHTSA*, 244 F.3d 144 (D. C. Cir. 2001). At bottom, the question of whether the information has been submitted voluntarily or was compelled must be analyzed on a case-by-case basis.

¹⁰See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987) (CNA).

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situation, not past conditions. Where competition is found to exist, the next issue is whether release of the information is likely to result in substantial competitive injury to the submitter. Again, the likelihood of competitive injury would be examined at the time the Commission received the request for the information. Whether the information could have harmed the submitter two years earlier is irrelevant; what is relevant is whether release of the information at the time of the request would cause competitive harm to the submitter.¹¹

The test most frequently applied under the competitive harm prong is whether use of the information by competitors is likely to harm the submitter.¹² 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

¹¹The 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. See Niagara Mohawk Power Corp. v. DOE, 169 F.3d 16, 19 (D.D.C. 1999) (Niagara).

¹²See, e.g., CNA, 830 F.2d at 1152 & n.158; Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

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could cause financial harm to the submitter.¹³ 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.

For compelled submissions, the impairment prong is satisfied where disclosure may affect the reliability or quality of the information received.¹⁴ The more subjective the filing requirement, the more likely that disclosure of the information could impair the Commission's ability to get thorough and accurate information in the future.¹⁵ As noted by EEI in its comments on the NOI, regulated entities may have discretion regarding how to construct their filings.¹⁶ 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.

¹³See Nadler v. FDIC, 899 F. Supp. 158, 163 (S.D.N.Y. 1995) (Nadler), aff'd, 92 F.3d 93 (2d Cir. 1996).

¹⁴Id.

¹⁵See Niagara Mohawk, 169 F.3d at 18 (holding that impairment is unlikely to be found where "data sought appears to take the form of hard, cold numbers on energy use and production, the fudging of which may strain all but the deliberately mendacious.").

¹⁶EEI NOI comments at p. 42.

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Critical Mass recognized that in addition to the competitive harm and impairment prongs, there may be other instances where non-disclosure is warranted in order to protect other governmental interests, such as program effectiveness.¹⁷ Recently, in Public Citizen Health Research Group v. NIH,¹⁸ the district court relied on Critical Mass in determining that "impairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under" Exemption 4. The court held that the National Institute of Health's royalty information was protected under Exemption 4 because release of the information would make companies reluctant to enter into agreements with NIH, thus impairing the effectiveness of NIH's licensing program.¹⁹ The court reached a similar conclusion in Judicial Watch, Inc. v. Export-Import Bank, where release of certain financial information from foreign export credit agencies was held to be exempt from disclosure because release would make the credit agencies look for financing outside of the United States, undermining the agency's statutory purpose of fostering domestic economic growth by supporting export transactions.²⁰

¹⁷See Critical Mass, 975 F.2d 879 ("It should be evident from this review that the two interests identified in that National Parks test are not exclusive.").

¹⁸209 F. Supp. 2d 37 at 52 (D.D.C. Mar. 12, 2002) (alternative holding).

¹⁹Id. at 54.

²⁰108 F. Supp. 2d 19, 30 (D.D.C. 2000).

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Applying these recent decisions here, indiscriminate release of CEII could impair the effectiveness of the Commission's programs, which are meant to satisfy its mandate to regulate and oversee energy industries in the economic and environmental interest of the American public.²¹ Inappropriate release of CEII could make the infrastructure more vulnerable to attack, threatening those industries and resulting in potentially devastating economic and environmental consequences. 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.²² Restricted flow of information between the Commission and the companies could impair the Commission's programs that rely on such information. This is of particular concern in today's world, where the Commission is seeking additional information from licensees to assure that the infrastructure is sited and built safely and remains protected. 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, if not all of the CEII would be exempt from disclosure under the third prong of Exemption 4 as it relates to compelled submissions.

²¹See http://www.ferc.gov/About/mission/mission_intro.htm (2002).

²²See *Nadler*, 899 F. Supp. 158, 162.

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A second issue is whether the Trade Secrets Act prohibits the Commission from sharing Exemption 4 material on an as-needed basis. The Trade Secrets Act states in relevant part that:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which concerns or relates to trade secrets, processes, operations, style of work, or apparatus, or to the identify, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association; . . . to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.²³

See Chrysler Corp. v. Brown, 441 U.S. 281, 301(1979) (Chrysler). The Trade Secrets Act applies to formal agency actions as well as actions by the agency's individual employees. Courts have found that the coverage of the Trade Secrets Act and Exemption 4 are co-extensive,²⁴ meaning that the Trade Secrets Act generally prohibits release of information covered by Exemption 4.²⁵ However, the Trade Secrets Act

²³18 U.S.C. 1905.

²⁴See, e.g., Bartholdi Cable Co. v. FCC, 114 F.3d 274 (D.C. Cir. 1997); CNA, 830 F.2d at 1152.

²⁵CNA, 830 F.2d at 1151.

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permits disclosure of trade secret information where "authorized by law."²⁶ Accordingly, under the Trade Secrets Act, protected information may be released where there is statutory or regulatory authority for the agency to release it. In cases where the authorization for release is found in an agency regulation, the inquiry is whether the regulation permitting the release is authorized by law.²⁷

The Commission has statutory authority to release trade secret information. While both the Federal Power and Natural Gas Acts place restrictions on an individual employee's release of information gathered in the course of examining records of a company, they permit the Commission itself to authorize such a release. The Federal Power Act provides:

The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records and memorandum when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other

²⁶ Chrysler, 441 U.S. at 301.

²⁷ Id.

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accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.²⁸

In addition, sections 4 and 312 of the Federal Power Act authorize the Commission "[t]o make public from time to time the information secured hereunder and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use."²⁹ Section 14 of the Natural Gas Act provides similar authorization. It states:

The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized in section 312 of the Federal Power Act . . . information concerning any such matter.³⁰

Because these provisions give the Commission broad discretion to release information, such release would be authorized by law under the Federal Power and Natural Gas Acts and, therefore, permitted under the Trade Secrets Act, creating an exception to the normal situation where the Trade Secrets Act prohibits release of information covered by Exemption 4. This, in turn, would permit the Commission to withhold the information from public FOIA disclosure under Exemption 4, and still disclose the information to

²⁸ 16 U.S.C. 825(b); see also 15 U.S.C. 717g(b) (Natural Gas Act) and 18 CFR 3c.2(a).

²⁹ 16 U.S.C. 797(d), 825k.

³⁰ 15 U.S.C. 717m.

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selected individuals with appropriate restrictions on use and dissemination of that information without violating the Trade Secrets Act.

c. Exemption 7

Exemption 7 exempts from disclosure certain information compiled for law enforcement purposes.³¹ For purposes of CEIL, 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. 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. The Commission has very broad authority to enforce the provisions of the Federal Power Act and the Natural Gas Act. For instance, under the Federal Power Act, the Commission (1) monitors and investigates compliance with licenses, exemptions and preliminary permits it issues;³² (2) determines just and reasonable rates,³³ and (3) ensures compliance with the Act and regulations issued thereunder.³⁴ Similarly, with respect to the Natural Gas Act, the Commission has broad

³¹5 U.S.C. 552(b)(7).

³²16 U.S.C. 823b.

³³16 U.S.C. 824e.

³⁴16 U.S.C. 825m, 825o-1.

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authority to (1) determine whether rates and charges are just and reasonable;³⁵ and (2) enforce violations of the statute or regulations issued thereunder.³⁶ Thus, given its broad enforcement authority, much of the information the Commission collects qualifies as information collected for a law enforcement purpose. For such law enforcement information to enjoy protection under Exemption 7(F), however, the release of the information must reasonably be expected to endanger a person's life or safety.

As noted in paragraph 11 of the final rule, there have been official warnings that the energy infrastructure could be the target of terrorist attacks. Given that an attack on the energy infrastructure is a legitimate threat, the Commission concludes that release of information that could facilitate or increase the likelihood of the success of such an attack could be expected to endanger life and safety of people. The failure of a dam could cause flooding that would endanger lives, as could the explosion of a natural gas pipeline. Interruptions to gas and electric power supplies likewise could endanger lives of those reliant on power, especially in times of extreme hot or cold weather. For these reasons, information identified as CEII may qualify for protection under Exemption 7(F).

³⁵ 15 U.S.C. 717c.

³⁶ 15 U.S.C. 717s.

MINUTES

REGULAR MEETING OF THE OHIO POWER SITING BOARD

January 26, 2009

Members Present:

Alan Schriber, Chairman, Public Utilities Commission of Ohio
Lorry Wagner, Public Member
Doug O'Brien for Robert Boggs, Director, Ohio Department of Agriculture
Drew Bergman for Christopher Korleski, Director, Ohio Environmental Protection Agency
Steven Schoeny for Lee Fisher, Director, Ohio Department of Development
Cathryn Loucas for Sean Logan, Director, Ohio Department of Natural Resources
Martin Tremmel for Alvin Jackson, M.D., Director, Ohio Department of Health
Robert Schuler, State Senator

Members Absent:

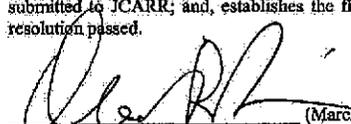
Jason Wilson, State Senator
State Representative (Vacant)
State Representative (Vacant)

Resolution 365-09 – Minutes of the Regular Board Meeting, November 24, 2008. Chairman Schriber moved to accept the minutes of the prior Board meeting. D. Bergman seconded the motion. The resolution passed.

Resolution 366-09 – Case No. 08-0281-EL-BGN, Consideration of the Application by Middletown Coke Company for a Certificate of Environmental Compatibility and Public Need for the Middletown Coke Company Cogeneration Station. Chairman Schriber moved to approve the application. S. Schoeny seconded the motion. The resolution passed.

Resolution 367-09 – Case No. 07-171-EL-BTX, Consideration of Entry on Rehearing Concerning the Application of American Transmission Systems, Incorporated, and the Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Line Supply Project. Chairman Schriber moved to deny the application for rehearing. D. Bergman seconded the motion. The resolution passed.

Resolution 368-09 – Case No. 08-1024-EL-ORD, Consideration of Entry on Rehearing Concerning the Ohio Power Siting Board's Adoption of Chapter 4906-17 of the Ohio Administrative Code and the Amendment of Certain Rules in Chapters 4906-1, 4906-5 and Rule 4906-7-17 of the Ohio Administrative Code to Implement Certification Requirements for Electric Generating Wind Facilities. Chairman Schriber moved to adopt the entry. The entry grants UNU's application for rehearing and denies Buckeye's application for rehearing; attaches revisions; orders that applicable rules be submitted to JCARR; and, establishes the five-year review date. C. Loucas seconded the motion. The resolution passed.


Alan R. Schriber, Chairman

(March 23, 2009)

MINUTES

REGULAR MEETING OF THE OHIO POWER SITING BOARD

November 24, 2008

Members Present:

Alan Schriber, Chairman, Public Utilities Commission of Ohio
Robert Boggs, Director, Ohio Department of Agriculture
Drew Bergman for Christopher Korleski, Director, Ohio Environmental Protection Agency
John Magill for Lee Fisher, Director, Ohio Department of Development
Cathryn Loucas for Sean Logan, Director, Ohio Department of Natural Resources
Martin Tremmel for Alvin Jackson, M.D., Director, Ohio Department of Health
John Hagan, State Representative

Members Absent:

Public Member (vacant)
Jennifer Garrison, State Representative
Robert Schuler, State Senator
Jason Wilson, State Senator

Resolution 362-08 -- Minutes of the Regular Board Meeting, October 28, 2008. Chairman Schriber moved to accept the minutes of the prior Board meeting. R. Boggs seconded the motion. The resolution passed.

Resolution 363-08 -- Case No. 06-1357-EL-BTX, Consideration of the Application by American Municipal Power-Ohio for a Certificate of Environmental Compatibility and Public Need for the American Municipal Power-Ohio 345 kV Transmission Line. Chairman Schriber moved to approve the application. C. Loucas seconded the motion. The resolution passed.

Resolution 364-08 -- Case No. 07-171-EL-BTX, Consideration of the Application by American Transmission Systems, Inc., and the Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Supply Project. Chairman Schriber moved to approve the application. R. Boggs seconded the motion. The resolution passed.


Alan R. Schriber, Chairman (January 26, 2009)



Ohio Power Siting Board Ohio Power Siting Board Meeting - January 26, 2009

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REVISED

OHIO POWER SITING BOARD

MEETING

January 26, 2009

3:30 PM, Room 11E

AGENDA

1. Approval of the minutes of the regular Board meeting of November 24, 2008.
2. Case No. 08-0281-EL-BGN, Consideration of the Application by Middletown Coke Company for a Certificate of Environmental Compatibility and Public Need for the Middletown Coke Company Cogeneration Station.
3. Case No. 07-171-EL-BTX, Consideration of Entry on Rehearing concerning the Application of American Transmission Systems, Incorporated, and the Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Line Supply Project.
4. Case No. 08-1024-EL-ORD, Consideration of Entry on Rehearing concerning the Ohio Power Siting Board's Adoption of Chapter 4906-17 of the Ohio Administrative Code and the Amendment of Certain Rules in Chapters 4906-1, 4906-5 and Rule 4906-7-17 of the Ohio Administrative Code to Implement Certification Requirements for Electric Generating Wind Facilities.
5. Staff Update

<http://www.opsb.ohio.gov/OPSB/agendas/agenda.cfm?id=4306>

6/25/2009

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Ohio Power Siting Board Ohio Power Siting Board Meeting - November 24, 2008

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OHIO POWER SITING BOARD

MEETING

November 24, 2008

3:30 PM, Room 11E

AGENDA

1. Approval of the minutes of the regular Board meeting of October 28, 2008.
2. Case No. 06-1357-EL-BTX, Consideration of the Application by American Municipal Power-Ohio for a Certificate of Environmental Compatibility and Public Need for the American Municipal Power-Ohio 345 kV Transmission Line.
3. Case No. 07-171-EL-BTX, Consideration of the Application by American Transmission Systems, Inc., and the Cleveland Electric Illuminating Company for a Certificate of Environmental Compatibility and Public Need for the Geauga County 138 kV Transmission Supply Project.
4. Staff Update

<http://www.opsb.ohio.gov/OPSB/agendas/agenda.cfm?id=4296>

6/25/2009