

Columbia River Inter-Tribal Fish Commission (CRITFC)
 Shoshone-Paiute Tribes of Nevada and Idaho,
 Duck Valley Reservation (S-P)
 Shoshone-Bannock (S-B)
 Great Lakes Indian Fish and Wildlife
 Commission (GLIFWC)
 Maidu-Enterprise Tribe (Maidu)
 Menominee Tribe of Wisconsin (Menominee)
 Nez Perce Tribe
 North Fork Rancheria of Mono Indians of
 California (NF Rancheria)
 Skokomish Indian Tribe (Skokomish)

Licensees

National Hydropower Association (NHA)
 Southern California Edison Company (SCE)

Non-governmental Organizations

Hydropower Reform Coalition (HRC)

Federal Agencies

Advisory Council on Historic Preservation
 (Advisory Council)
 Dept. of the Interior (Interior)

States/State Agencies

California Resources Agency, California EPA,
 State Water Resources Control Board,
 Department of Fish and Game, State of
 California Office of the Attorney General
 (California)

Other

Pacific Legacy

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 388

[Docket Nos. RM02-4-001 and PL02-1-001;
Order No. 630-A]

Critical Energy Infrastructure Information

Issued: July 23, 2003.

AGENCY: Federal Energy Regulatory
Commission, DOE.

ACTION: Final rule; order on rehearing.

SUMMARY: On February 21, 2003, the Commission issued a final rule amending its regulations to establish a procedure for gaining access to critical energy infrastructure information (CEII) that would otherwise not be available under the Freedom of Information Act (FOIA). The Commission herein is denying the petition for rehearing filed by the Transmission Access Policy Study Group (TAPS), amending the final rule to increase the numbers of copies filed, and clarifying the filing process for submitting CEII, and one provision of the regulation regarding requests for CEII.

EFFECTIVE DATE: The revisions implemented in this order on rehearing of the final rule will become effective September 5, 2003.

FOR FURTHER INFORMATION CONTACT: Carol C. Johnson, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Phone (202) 502-6457.

SUPPLEMENTARY INFORMATION:

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

I. History

1. On February 21, 2003, the Federal Energy Regulatory Commission (Commission) issued a final rule in Order No. 630 establishing procedures for the public to use to submit and request access to critical energy infrastructure information (CEII) that would otherwise not be available to them under the Freedom of Information Act, 5 U.S.C. 552 (FOIA). Order No. 630 is the most recent step the Commission has taken to protect information regarding critical energy infrastructure since the September 11, 2001 terrorist attacks on the United States. On October 11, 2001, the Commission took the initial step of issuing a policy statement in Docket No. PL02-1-000 removing from easy public access certain previously public documents.¹ On January 16, 2002, the Commission issued a notice of inquiry in Docket No. RM02-4-000 to determine what regulatory changes, if any, should be made to restrict unfettered general public access to CEII.² Later that year, the Commission issued a notice of proposed rulemaking and statement of revised policy in the same docket, proposing procedures for submitting and requesting CEII and the creation of a new position of CEII Coordinator.³ The Commission issued the final rule in Order No. 630 approximately five months later.⁴

2. On March 21, 2003, the Transmission Access Policy Study Group (TAPS) filed a timely request for rehearing of Order No. 630. The Commission granted rehearing for the limited purpose of further reconsideration on April 21, 2003. TAPS filed a motion on May 27, 2003 seeking to supplement its prior request for rehearing, and asking that the

Commission consider comments filed by TAPS and the American Public Power Association (APPA) regarding the notice of proposed rulemaking in Docket No. RM03-6-000, Amendments to Conform Regulations with Order No. 630, IV FERC Stats. & Regs. ¶ 32,569 (2003).⁵

3. As discussed in more detail below, the Commission denies TAPS's request for rehearing. Nevertheless, the Commission is revising Order No. 630 to reflect its experience in implementing the final rule. Specifically, this order revises Order No. 630 to change the CEII filing instructions, the CEII request procedures, and the instructions for requesting rehearing of the CEII Coordinator's decision.

II. Discussion

A. TAPS's Request for Rehearing

4. In its request for rehearing, TAPS claims that the CEII rule creates "a conflict between deadlines placed on intervenors in Commission proceedings * * * and the time frames for the release of CEII." TAPS Request at p. 1. TAPS cites as an example rate filings under section 205 of the Federal Power Act. According to TAPS, the Commission's CEII request process would likely take at least 20 business days to complete, thus preventing an intervenor from gaining access to relevant CEII until after the 21-calendar day limit for filing interventions and protests had passed. The Commission disagrees. Initially, a potential intervenor would typically not require access to CEII in order to file a notice of intervention or motion to intervene. As for a protest, as discussed in Order No. 630, it is unlikely that there will be CEII contained in a section 205 filing, which typically must be acted on within 60 days, or any other filing with statutory deadlines, and in the unusual case where there is such information, it is likely that there will be enough publicly available information to enable an intervenor to respond to the filing.⁶ Moreover, in the unlikely event that there is need for an intervenor to obtain access to CEII, the intervenor may request a reasonable extension of time to file a protest. Separately, as most intervenors in section 205 rate cases, the typical cases where statutory deadlines are relevant, have ongoing relationships

¹ See 66 FR 52917 (Oct. 18, 2001), 97 FERC ¶ 61,030 (Oct. 11, 2001).

² See 67 FR 3129 (Jan. 23, 2002), IV FERC Stats. & Regs. ¶ 35,542 (Jan. 16, 2002).

³ See 67 FR 57994 (Sept. 13, 2002), IV FERC Stats. & Regs. ¶ 32,564 (Sept. 5, 2002).

⁴ 68 FR 9857 (Mar. 3, 2003), III FERC Stats. & Regs. ¶ 31,140 (Feb. 21, 2003).

⁵ The Commission will consider TAPS's supplemental comments, but notes that the comments were filed after the statutory deadline for filing rehearing requests, and thus are not preserved for consideration on appeal. See, e.g., 16 U.S.C. 825f.

⁶ 68 FR at p. 9866; III FERC Stats. & Regs. ¶ 31,140 at P 55.