

Hydropower Provisions

Part 4, which governs licenses, permits, exemptions and other applications under the Federal Power Act, requires that applicants make various types of information about their projects available to the public, including items such as detailed maps and scientific studies. Specifically, under 18 CFR 4.32(a)(3), an applicant for a preliminary license, permit or exemption must provide notification to affected property owners. Under § 4.32(b)(3)–(4), an applicant must make a copy of the application and exhibits available to the public for inspection and copying at specified locations. Under §§ 4.34(i)(4)(i) and 4.34(i)(6)(iii), an applicant using alternative procedures must distribute an information package and maintain a public file of all relevant documents. Finally, under § 4.38(g), which provides for pre-filing consultation in the case of an original license, the applicant must make available for public inspection various items, including detailed maps and design information. 68 FR 18540. In addition, part 16 of the Commission's hydropower regulations, which specifies procedures for takeover and relicensing of existing projects, contains notice provisions that require applicants to make items such as drawings, diagrams and emergency action plans available for public inspection. Such provisions are found at 18 CFR 16.7(d)–(e) and 16.8(i). 68 FR 18540

9. The NOPR also proposed to revise several sections that require information possibly constituting CEII to be made available to Indian tribes and other government agencies. Such provisions are found at 18 CFR 4.32(b)(1)–(2), 4.38(b)(1), 4.38(c)(4), 4.38(d), 16.8(b)(1), 16.8(c)(4), and 16.8(d). As explained in the NOPR, the Federal Records Act, 44 U.S.C. 3510(b), does not require one federal agency to accord the same treatment to information as another federal agency where the former receives the information directly from a third party. Consequently, to ensure consistent treatment of CEII, the Commission proposed to add provisions for instances where information must be provided to other agencies and to tribes that would parallel the proposed provisions applicable to information made available to the public. The Commission noted that its proposed revisions would not prohibit a company from sharing CEII with a government agency, but would only ensure that the Commission's regulations did not require it to disclose CEII. 68 FR 18541.

10. The changes proposed by the NOPR were intended to parallel the

treatment of CEII under Order No. 630. The NOPR proposed that a company required by the affected regulations to make available information that might constitute CEII would make a determination whether the information was in fact CEII. If it was, the company would omit the CEII from the information being made available and instead include a brief statement describing the omitted information without revealing CEII, and informing the reader of his or her right to challenge the omission through submission to the CEII Coordinator under the procedures adopted in Order No. 630 and found in 18 CFR 388.112 and 388.113. The NOPR added that companies would be expected to adhere to previous determinations made by the Commission or the Coordinator with respect to specific information. 68 FR 18541.

11. The Commission issued the NOPR on April 9, 2003, and ultimately received twelve comments.²

B. Related Orders

12. The Commission on this date is issuing two other orders that have some bearing on this rulemaking. As noted, one is the order on rehearing from Order No. 630. The other is a final rule, in RM02–16, revising the Commission's hydropower licensing procedures. The hydropower revisions contain provisions requiring companies to make information available to the public that may constitute CEII. Consequently, the licensing rulemaking is adding a provision to 18 CFR part 5 that will parallel the revisions made in this Final Rule.

III. Discussion

13. Some of the comments supported the proposals in the NOPR in whole or in large part.³ Disagreements or suggestions centered on several areas.

A. Availability of Needed Information

14. Some commenters expressed concern that the NOPR, if adopted, would restrict market opportunities and interfere with other interests by keeping information away from persons with a legitimate need for it. One commenter expressed significant concerns that the NOPR would interfere with the operation of the electric market by making it difficult for market participants to obtain needed data.⁴ For

example, the Study Group was concerned that information would become unavailable from OASIS;⁵ that transmission owners would selectively withhold Form No. 715 information, resulting in discrimination;⁶ that industry councils would be unable to obtain information for studies and models, or that some companies would be unable to obtain the studies or models themselves;⁷ and that intervenors would be unable to obtain needed information in a timely fashion.⁸ The Study Group specifically contends that the Commission should enunciate and enforce a comparability standard to ensure equal access to information.⁹ It also suggests a system under which CEII owners would be required to accept OASIS passwords, identification numbers employed by regional councils, or certifications made by regional transmission organizations (RTOs) as proof that a person was a suitable recipient. Any dispute would be appealable to the CEII Coordinator.¹⁰

15. Other comments expressed similar concerns. One commenter stated that the use of the word “shall” in the proposed regulations might lead companies to believe that they were prohibited from disclosing CEII voluntarily.¹¹ The Bonneville Power Administration (BPA) noted that the Commission cannot prohibit it from disclosing information pursuant to statutory requirements such as the Freedom of Information Act (FOIA) and the National Environmental Policy Act (NEPA).¹² The Department of Interior (Interior) expressed concern that its access to information pursuant to its own statutory authorities might be hampered.¹³

16. The Commission believes that these concerns are misplaced. As the Commission stated in the NOPR, neither the revisions proposed there nor in Order No. 630 is intended to require companies to withhold CEII, or to prohibit voluntary arrangements for sharing information. These revisions are intended only to ensure that the Commission's regulations do not require the disclosure of CEII. 68 FR 18541. There is nothing in these revisions that affects one entity's ability to reach appropriate arrangements for sharing CEII and the Commission in fact encourages such arrangements. In many

⁵ *Id.* at 6.

⁶ *Id.* at 7–9.

⁷ *Id.* at 10–18, 21.

⁸ *Id.* at 18–20.

⁹ *Id.* at 21.

¹⁰ *Id.* at 22–23.

¹¹ Consumers Energy Company at pp. 2–3.

¹² BPA, at p. 2.

¹³ Interior at pp. 1–3.

² A list of commenters is appended to this order.

³ MidAmerican Energy Company at pp. 1–3; PJM Interconnection, L.L.C. at pp. 2–3; Southern California Edison at pp. 1–2.

⁴ American Public Power Association & Transmission Access Policy Study Group (Study Group) at pp. 6–20.