

(4) What changes, if any, should be made to the Rule to increase the benefits of the Rule to purchasers? How would these changes affect the costs the Rule imposes on firms subject to its requirements? How would these changes affect the benefits to purchasers?

(5) What significant burdens or costs, including costs of compliance, has the Rule imposed on firms subject to its requirements? Has the Rule provided benefits to such firms? If so, what benefits?

(6) What changes, if any, should be made to the Rule to reduce the burdens or costs imposed on firms subject to its requirements? How would these changes affect the benefits provided by the Rule?

(7) Does the Rule overlap or conflict with other federal, state, or local laws or regulations?

(8) Since the Rule was issued, what effects, if any, have changes in relevant technology, such as e-mail and the Internet, or economic conditions had on the Rule?

#### List of Subjects in 16 CFR Part 304

Hobbies, Labeling, Trade practices.

**Authority:** 15 U.S.C. 41–58.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

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## DEPARTMENT OF ENERGY

### 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

February 21, 2003.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**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.

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 April 2, 2003.

#### FOR FURTHER INFORMATION CONTACT:

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#### SUPPLEMENTARY INFORMATION:

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.<sup>1</sup> 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 access. Persons seeking removed documents were directed to request the records using the Freedom of Information Act.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup> 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 not well suited for handling CEII requests.<sup>5</sup> 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.<sup>6</sup>

<sup>3</sup> See 67 FR 3129, IV FERC Stats. & Regs. ¶ 35,542.

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

<sup>5</sup> *Id.* at p. 57995, ¶ 32,564 at p. 34,539.

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

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

<sup>2</sup> 5 U.S.C. 552.