

4. The NOPR revised the Policy Statement to restrict public access to documents containing detailed specifications of proposed facilities as well as existing facilities, while at the same time determining that basic location information should not be treated as CEII.<sup>7</sup> The final rule formalizes these policies in the regulations.

5. The Commission is issuing this rule under the authority of the Federal Power Act<sup>8</sup> and the Natural Gas Act<sup>9</sup> 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. 824(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.<sup>10</sup> The Commission announced there that it would no 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make available to the public through its Internet site, the Records and Information Management System (RIMS), which has been replaced by the Federal Energy Regulatory Records Information System (FERRIS), or the Public Reference Room, documents such as oversized maps that detail the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 Act<sup>11</sup> and section 7(c) of the Natural Gas Act,<sup>12</sup>

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)).<sup>13</sup> 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

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.<sup>14</sup> 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.

### C. The Notice of Inquiry

9. Three months after the Commission issued the Policy Statement, it issued the Notice of Inquiry (NOI).<sup>15</sup> 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 § 388.112 of the Commission's regulations,<sup>16</sup> 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.<sup>17</sup> The NOPR proposed to establish a CEII Coordinator with delegated authority to process requests for CEII, and proposed regulations governing submission of CEII and requests for CEII.<sup>18</sup> 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.<sup>19</sup> 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,<sup>20</sup> an assertion with which some commenters specifically disagree.<sup>21</sup> 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 specifically the media.<sup>22</sup>

<sup>7</sup> 67 FR 57994 at p. 57995, FERC Stats. & Regs. ¶ 32,564 at p. 34,539.

<sup>8</sup> 15 U.S.C. 717, *et seq.*

<sup>9</sup> 16 U.S.C. 791a, *et seq.*

<sup>10</sup> See 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 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).

<sup>11</sup> 16 U.S.C. 719a, *et seq.*

<sup>12</sup> 15 U.S.C. 717f(c).

<sup>13</sup> 18 CFR 388.108 (2002).

<sup>14</sup> OMB 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.

<sup>15</sup> See 67 FR 3129, IV FERC Stats. & Regs. ¶ 35,542.

<sup>16</sup> 18 CFR 388.112.

<sup>17</sup> See 67 FR 57994, IV FERC Stats. & Regs. ¶ 32,564.

<sup>18</sup> *Id.* at p. 58001, ¶ 32,564 at p. 34,550.

<sup>19</sup> *Id.* at p. 58000, ¶ 32,564 at pp. 34,547-48.

<sup>20</sup> E.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.

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

<sup>22</sup> E.g., American Library Association at p. 1; OMB Watch at p. 1, 4.