

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.<sup>79</sup> 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.

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.<sup>80</sup> The majority of commenters approve of the decision to include proposed facilities,<sup>81</sup> with only the HRC explicitly disagreeing.<sup>82</sup> 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.<sup>83</sup> 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 a request for that information using the CEII request procedures in new § 388.113(d) of the Commission's regulations.<sup>84</sup>

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,"<sup>85</sup> 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.<sup>86</sup> As discussed above, the Commission is changing the definition of critical infrastructure in new § 388.113(c)(2) of its regulations<sup>87</sup> 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*

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.<sup>88</sup> A person seeking access to CEII under proposed § 388.113 would be required to submit information about his identity and need for the information.<sup>89</sup> The NOPR emphasized the importance of intervenors, landowners and other persons being able to participate meaningfully in Commission proceedings.<sup>90</sup> 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).<sup>91</sup> 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.<sup>92</sup> The NOPR pointed out that these

requirements would have no application to FOIA requests.<sup>93</sup>

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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

40. The procedures proposed in the NOPR were intended to provide access to CEII to requesters with legitimate need for the information.<sup>97</sup> 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, 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,<sup>98</sup> 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

<sup>79</sup> 66 FR 52917 (Oct. 18, 2001), 97 FERC ¶ 61,030.

<sup>80</sup> 67 FR 57994 at p. 57995, FERC Stats. and Regs. ¶ 32,564 at p. 34,539.

<sup>81</sup> E.g., EEI 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.

<sup>82</sup> HRC at p. 4.

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

<sup>84</sup> See new 18 CFR 388.113(d).

<sup>85</sup> Duke Energy at p. 12.

<sup>86</sup> *Id.* at pp. 10–11.

<sup>87</sup> See new 18 CFR 388.113(c)(2).

<sup>88</sup> 67 FR 57994 at p. 58001, FERC Stats. & Regs. ¶ 32,564 at p. 34,549.

<sup>89</sup> *Id.* at p. 58001, ¶ 32,564 at p. 34,550.

<sup>90</sup> *Id.* at p. 58001, ¶ 32,564 at pp. 34,549–50.

<sup>91</sup> *Id.* at p. 58001, ¶ 32,564 at p. 34,550.

<sup>92</sup> *Id.* at p. 58001, ¶ 32,564 at pp. 34,549–50.

<sup>93</sup> *Id.* at p. 58001, ¶ 32,564 p. 34,549.

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

<sup>95</sup> E.g., Reliant at pp. 4–5.

<sup>96</sup> E.g., Pace Global Energy Services at p. 3; GE at p. 4; Reliant at pp. 4–5.

<sup>97</sup> 67 FR 57994 at p. 58001, FERC Stats. & Regs.

¶ 32,564 at p. 34,550.

<sup>98</sup> National Grid USA at p. 9.