

regulations<sup>99</sup> is not intended to refer to employees or officials of an owner/operator. They would be covered by § 388.113(d)(1) of the Commission's regulations.<sup>100</sup> That subsection has been clarified accordingly.

#### E. Verification and Access Issues

##### 1. CEII Coordinator

42. Most commenters approve of the creation of a CEII Coordinator position<sup>101</sup> with some indicating that the agency was better suited to respond to requests than the industry.<sup>102</sup> However, a few commenters believe that owners, operators, and applicants should have more of a role in granting access to CEII. For example, the National Hydropower Association requests that the Commission amend the regulations to permit owners, operators, and applicants to serve as CEII Coordinator in some circumstances,<sup>103</sup> and EEI advocates that submitters of information be able to object to intervenor requests for CEII.<sup>104</sup> The Commission believes that the National Hydropower Association's suggestion would impermissibly interfere with the Commission's administration of the program. EEI's suggestion, however, is consistent with the proposed CEII Coordinator process, which is adopted here. Accordingly, under § 18 CFR 388.112(d) of the Commission's regulations,<sup>105</sup> submitters are given an opportunity to comment on requests for CEII that they submitted.

43. At least one commenter, Reporters Committee, disagrees with the establishment of a CEII Coordinator, voicing concern that the proposed process removes access decisions from the hands of experienced access professionals and permits the agency to avoid the FOIA time limits.<sup>106</sup> As discussed above in paragraph 18, the CEII Coordinator will have access to the same professional staff who evaluate and draft recommended decisions on FOIA requests, so that expertise will be utilized. Also, the time frames set out in new § 388.113(d)(3)(iii) of the Commission's regulations<sup>107</sup> for the

CEII Coordinator to process a request are the same as provided by the Commission's regulations for processing FOIA requests. To be sure, missing the CEII deadlines does not have the same legal implications as missing the FOIA deadlines.<sup>108</sup> Nevertheless, the Commission is committed to processing requests for CEII as timely as possible as if it were under the same legal obligations as imposed under the FOIA. Also, of course, if a requester is concerned about the timing for a CEII response running beyond the FOIA statutory time limits, the requester always has the option of filing a FOIA request and seeking access under that statute.

44. Certain commenters request clarification of the authority of the Coordinator. Southern believes that the NOPR did not make it clear that the CEII Coordinator has the authority to make determinations of when information qualifies as CEII. The Commission agrees that the proposed version of § 375.313 of its regulations<sup>109</sup> did not specifically delegate this authority to the Coordinator. The final rule revises proposed 18 CFR 375.313 to add this delegation, and includes language in new § 388.113(d)(3)(ii) of the Commission's regulations<sup>110</sup> to explicitly add this step into the processing of CEII requests.

45. Other commenters request that the Commission provide more concrete standards or guidance for the Coordinator. For example, National Grid USA recommends that the Commission provide "standards that will govern the CEII Coordinator's decision whether to release CEII," explaining that stated criteria may give requesters insight into which requests will be granted and reduce fruitless requests.<sup>111</sup> The National Hydropower Association, the NERC, PJM, and Southern also request that the Commission provide criteria for the Coordinator to use in determining whether information qualifies as CEII, whether a requester has a need for the information, and whether to require a non-disclosure agreement (NDA) as a condition of release.<sup>112</sup> The Commission

believes that the standards the Coordinator should use to determine whether information qualifies as CEII are adequately detailed in the definition in new § 388.113(c)(1) of its regulations.<sup>113</sup> That is, does the information relate to the production, generation, transportation, transmission, or distribution of energy; could it be useful to a person in planning an attack on critical infrastructure; is it exempt from disclosure under the FOIA; and does it do more than provide location information?

46. Commenters also ask that the Commission develop guidelines for the Coordinator to use in determining whether to release information to a particular requester.<sup>114</sup> The Commission does not intend to provide within the regulation itself a list of the types of requesters who would be deemed to have a need for CEII. First of all, that determination is fact specific. However, in the preamble to the NOPR and this final rule, the Commission has indicated that intervenors, market participants, energy market consultants, state agencies, landowners, environmental groups, and market participants may be found to have a need for information in a particular situation.<sup>115</sup> It will be in the requester's best interest to explain as fully as possible why he or she needs the information in question. One factor that the Coordinator should factor into a decision is whether the requester's need for the information outweighs the potential harm from release of the information. For instance, if the Commission developed a hierarchical listing of the most critical portions of the infrastructure, it would be highly unlikely to release that information to most requesters, although it might be released to the FBI or the Office of Homeland Security. The final rule has been changed to reflect this balancing in new § 388.113(d)(3)(ii) of the Commission's regulations.<sup>116</sup>

##### 2. Use of PINS and Passwords

47. Some commenters are concerned that adequate security measures be taken to protect access to CEII. For instance, certain commenters favor the use of a password system to provide Internet access to CEII.<sup>117</sup> GE believes it may be beneficial to maintain records on each individual's access to CEII to facilitate investigation of potential inappropriate access.<sup>118</sup> Other

<sup>99</sup> See 18 CFR 388.113(d)(2).

<sup>100</sup> See 18 CFR 388.113(d)(1).

<sup>101</sup> E.g., EEI at pp. 10–11; Electric Power Supply Association (EPSA) at p. 4; Industrials at pp. 3–4; INGAA at pp. 5 and 7; MidAmerican at pp. 3–4; National Hydropower Association at pp. 3–4; NERC at p. 3; Washington Legal Foundation at p. 2; Whitfield Russell Associates at p. 9.

<sup>102</sup> E.g., American Electric Power at p. 1; Industrials at pp. 3–4; Reliant at p. 5.

<sup>103</sup> National Hydropower Association at pp. 3–4.

<sup>104</sup> EEI at p. 14.

<sup>105</sup> 18 CFR 388.112(d).

<sup>106</sup> Reporters Committee at p. 4.

<sup>107</sup> 18 CFR 388.113(d)(3)(iii).

<sup>108</sup> A FOIA requester may treat an agency's failure to respond within the statutory time limit as constructive exhaustion of administrative remedies, and proceed directly to court without first filing an administrative appeal. See 5 U.S.C. § 552(a)(6)(C)(i). Normally, a requester must file an administrative appeal prior in order to exhaust his or her administrative remedies prior to filing in court. See *Stebbins v. Nationwide Mutual Ins. Co.*, 757 F.2d 364, 366 (D.C. Cir. 1985) (*per curiam*).

<sup>109</sup> 18 CFR 375.313.

<sup>110</sup> See new 18 CFR 388.113(d)(3)(ii).

<sup>111</sup> National Grid USA at pp. 6–7.

<sup>112</sup> National Hydropower Association at p. 4; NERC at p. 5; PJM at p. 1; Southern at pp. 4–6.

<sup>113</sup> See new 18 CFR 388.113(c)(1).

<sup>114</sup> E.g., PJM at p. 1; Southern at pp. 4–5.

<sup>115</sup> 67 FR 57994, FERC Stats. & Regs. ¶ 32,564.

<sup>116</sup> See 18 CFR 388.113(d)(3)(ii).

<sup>117</sup> E.g., Duke at p. 17; National Hydropower Association at p. 8; GE at p. 5; SCE at p. 8.

<sup>118</sup> See GE at p. 5.