

commenters have concerns about the security issues associated with providing Internet access to CEII.¹¹⁹ For the time being, the Commission does not plan to give requesters access to Commission databases containing CEII. If and when that time comes, it is expected that identifications and passwords will be used.

3. Verification/Checks on Requesters

48. In the NOPR, the Commission proposed to require each individual requester to obtain access to information instead of granting access on an organization-by-organization basis.¹²⁰ Several commenters urge the Commission to rethink its decision not to grant requesters generic access to nonpublic information. Some note that such generic access would reduce burdens on the Commission and requesters.¹²¹ INGAA, among others, believes that access decisions should be made on a case-by-case basis,¹²² while GE recommends a hybrid approach that would allow entities with "continuous legitimate need for information" to gain generic access, while utilizing a case-by-case system for those with more occasional need for the information.¹²³ For the time being, the Commission is most comfortable granting access on a case-by-case basis. As mentioned in the discussion on standards to be used by the Coordinator, whether someone has a need for information can vary from circumstance to circumstance. The Commission's goal is to limit CEII access to those with a need for the information. Even though a requester may not be a terrorist, the more people who have access to information, the greater likelihood that it may find its way into the wrong hands. As also noted above, someone who requests access frequently will probably be cleared more quickly than a first-time requester, so the burden of multiple requests should not be too great.

49. In the NOPR, the Commission concluded that since the majority of requesters were expected to be entities and individuals who were well known to the Commission, it was not necessary to use the services of outsiders to verify the identity and legitimacy of requesters.¹²⁴ The Commission is reconsidering that position and is in the process of evaluating existing databases

that it may use to screen requesters.¹²⁵ For that reason, the Commission is revising proposed § 388.113(d)(3)(i) to add a requirement that the requester provide his or her date and place of birth and to request that each requester provide his or her social security number¹²⁶ in addition to the other information initially proposed in the NOPR.¹²⁷ This will help verify that the name that the individual provides is their true name, thus facilitating an accurate screening.

F. State Agency Issues

50. As indicated in the NOI and the NOPR, there are some unique issues with respect to state agency access to CEII.¹²⁸ A primary concern is the ability of state agencies, which likely will be subject to their own FOIA rules, to protect CEII received from the Commission. State Commissions¹²⁹ also raise the following additional issues:

Whether and on what basis FERC proposes that its CEII rule will preempt state open records laws and rules?

Whether State Commissions will automatically be permitted to obtain all CEII data from FERC or whether State Commission access may be limited on a "need to know" basis?

Whether FERC's rule will adequately preclude utilities from invoking the FERC rule to avoid providing CEII data to State Commissions?

Whether State Commissions will have requisite access to CEII data from utilities not within a State Commission's jurisdiction (e.g., for purposes of examining regional transmission or generation capability)?

Whether State Commissions or their staff will be required to enter into an NDA, and if so, on what terms?¹³⁰

¹²⁵ One possibility is to use the Interagency Border Inspection Service (IBIS) database, which keeps track of information on suspect individuals, businesses, etc., and which may also be used to access the FBI's National Crime Information Center containing records on wanted persons, criminal histories, etc.

¹²⁶ Under the section 7(a)(1) of the Privacy Act, 5 U.S.C. 552a, an agency may not deny a right or benefit provided by law because an individual did not provide his or her social security numbers. Therefore, a requester has the option of not disclosing his or her social security number.

¹²⁷ 67 FR 57994 at p. 58001, FERC Stats. & Regs. ¶ 32,564 at p. 34,550.

¹²⁸ 67 FR 3129 at pp. 3132–33, FERC Stats. & Regs. ¶ 35,542 at pp. 35,830–33; 67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,551.

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¹³⁰ NARUC also raises two miscellaneous issues which go beyond the scope of this rule. First, NARUC encourages the Commission to clarify how the CEII rule relates to the Commission's Standard Market Design (SMD) NOPR, "Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design," IV FERC Stats. & Regs. ¶ 32,563 (2002). Without more, and given the comprehensive nature of the SMD NOPR, the Commission is uncertain as to what NARUC's specific concerns are. The Commission

51. As an initial matter, the Commission emphasizes that its goal is to cooperate as fully as possible with the State Commissions, which share the Commission's objective to ensure that CEII does not get into the wrong hands. That said, the Commission grants the National Association of Regulatory Commissioners' (NARUC's) requested clarification on the Federal preemption issue. NARUC states that the Commission has no basis to preempt authority over the totality of access to information regarding gas and electric utility regulation, and that much of the information at issue is not "Federal information," that is, generated by or for the Federal government, but instead is generated by non-Federal entities that have provided similar or identical information to state regulators.¹³¹ The Commission agrees.

52. The NOPR discussion on preemption related to state agency requests to FERC for CEII that the Commission had generated or collected.¹³² As NARUC correctly points out, "the NOPR itself declares that FERC's rule does not propose to alter the traditional ability of State Commissions to obtain such data directly" from the companies.¹³³ Therefore, as requested by NARUC, the Commission confirms that it does not intend that public utilities may rely on this rule to refuse to provide information directly to State Commissions.

53. In addition, State Commissions will be presumed to have a need to know information within their state involving issues within their responsibilities. They also may submit requests for information regarding entities outside of their jurisdictions with an explanation of the need. Such requests should be capable of being resolved in a timely manner. On the other hand, as discussed below, release of CEII to State Commissions and other State Agencies will normally be subject to signing an NDA. It does not make sense for the Commission to release the

believes, however, that there is nothing in this final rule that conflicts with the goals of the SMD NOPR. Second, NARUC suggests that the Commission set a benchmark for what reasonable costs of complying with the CEII rule may be passed through in companies' rates. To start with, not every one who complies with this rule will necessarily be a jurisdictional company whose rates the Commission sets. To the extent jurisdictional companies do incur costs to comply with the rule, the Commission believes that the current rules and policies for recovery of administrative costs are adequate to address the recovery of such compliance costs.

¹³¹ NARUC at pp. 17–18.

¹³² 67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,551.

¹³³ NARUC at p. 18.

¹¹⁹ E.g., National Hydropower Association at p. 8; GE at p. 5.

¹²⁰ 67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,550.

¹²¹ E.g., Duke Energy at p. 17; EPSA at p. 4.

¹²² See INGAA at p. 7; PJM at p. 2.

¹²³ See GE at p. 3.

¹²⁴ 67 FR 57994 at p. 58002, FERC Stats. & Regs. ¶ 32,564 at p. 34,550.