

information to the State Agencies with no agreement to protect the information, at least to the extent permitted by law. The Commission has no intention of asking a state agency to ignore state law, but merely to give the Commission notice and an opportunity to take action to prevent release of the information.

G. Timing Issues

54. The NOPR proposed to provide in § 388.112(d) of the Commission's regulations¹³⁴ notice and an opportunity for a CEII submitter to comment when a request was received for its information, and to provide in § 388.112(e)¹³⁵ notification to the submitter prior to release.¹³⁶ Under the proposal, a submitter would have at least five days in which to submit its comments, and at least five-days notice prior to release of information submitted as CEII.¹³⁷ Several commenters claim that these time limits are too short, and advocate having at least 10 days to comment, and up to 30 days notice prior to release.¹³⁸ At the same time, other commenters are concerned that the time frames are too long in some circumstances, for instance, where a time for filing a protest or intervention may expire in the interim.¹³⁹ At least one, Duke Energy, raises the possibility that the Commission could extend other deadlines where someone is delayed in getting access to information.¹⁴⁰

55. The Commission has considered these arguments and examined the filings that have very short time limits, for instance responses to rate filings under Sections 205 of the Federal Power Act,¹⁴¹ or Section 4 of the Natural Gas Act,¹⁴² and does not believe anyone will be prejudiced by the time frames proposed in the NOPR. It is unlikely there will be CEII in most of these filings, and if there is, there should still be sufficient information available for parties to make the required filings in a timely manner. This same issue could

arise whenever a company claims confidential treatment for a portion of its filing. To date, that has not proved to be an obstacle to meaningful, timely participation by other parties, and there is no reason to expect that the CEII regulation will cause a problem where none has existed previously.

56. The Commission also has examined the arguments that the proposed time limits do not give submitters adequate time to respond. First of all, the rule provides minimum times. Where circumstances permit, the Coordinator may give submitters a longer amount of time. However, the shorter minimum is needed to permit a quick turnaround where necessary and to facilitate response within the FOIA time limits. Prior to 9/11, the five-day minimums existed in § 388.112 of the Commission's regulations for other requests for nonpublic treatment.¹⁴³ For years parties have been able to respond within the time permitted. The Commission sees no reason to extend these time limits for cases involving CEII.

H. Use of Non-Disclosure Agreements (NDAs)

57. The NOPR proposed to require most CEII requesters to sign an NDA as a condition of gaining access to CEII.¹⁴⁴ The major exception was laid out in proposed 18 CFR 388.113(d)(2), which provided that owner/operators would be exempt from the requirement to sign an NDA prior to gaining access to CEII regarding their own projects.¹⁴⁵ The reason for this is that they have at least as great an incentive to protect this information as the Commission has, and probably have access to even more damaging information in the event a rogue employee wanted to cause harm to the facility. The Commission adopts here the proposed exception for owner/operators, and also retains the requirement that agents/representatives (other than employees or officers) of owner/operators obtain CEII directly from the owner/operator, who will be in a better position to judge the agent/representative's need for the information and to impose restrictions on its use.

58. In addition, as explained in the NOPR, NDAs for Federal agency CEII requesters will differ from others in part because the Commission will remind the requester of his or her responsibilities under the Federal

Records Act,¹⁴⁶ and will require that the requesting agency refer any subsequent FOIA requests for information provided by the Commission back to the Commission for a determination as to whether the information is subject to release under the FOIA.¹⁴⁷ Similarly, NDAs for State Agency requesters will specify that the information is Federal information that is "on loan" to the State Agency and that the Commission has the right to request return of the information. The Commission will also require that the State Agency notify the Commission whenever a request for the information is received.

59. Several commenters ask the Commission to elaborate on possible penalties for violation of an NDA.¹⁴⁸ There are two that readily come to mind. First, a violation of an NDA could result in the Commission's refusing to give similar information to the violator in the future under the CEII process. Indeed, the Commission would be violating the public's trust if a requester were permitted to violate his or her obligations under an NDA with impunity. Second, the Commission could rightly bar someone from representing people before the Commission for a stated period of time under § 385.2102(a)(2) of the Commission's regulations.¹⁴⁹

I. Submission of CEII to the Commission

60. In the NOPR, the Commission proposed to make submission of CEII a subcategory of submission of documents subject to claims of privilege under § 388.112 of its regulations,¹⁵⁰ with the same number of copies and the same requirement for a written statement supporting the request for privileged treatment.¹⁵¹ As adopted here, CEII submissions under that section have to indicate that the information is CEII, paralleling the existing requirement for information submitted with a request for privileged treatment.¹⁵² The Commission proposed to have the submitter determine how best to segregate CEII and non-CEII, such as by creating a separate nonpublic appendix or simply redacting CEII from the public filing.¹⁵³ The Commission further cautioned that it would take disciplinary action against submitters

¹³⁴ 18 CFR 388.112(d).

¹³⁵ 18 CFR 388.112(e).

¹³⁶ 67 FR 57994 at p. 58003, FERC Stats & Regs. ¶ 32,564 at p. 34,552.

¹³⁷ *Id.* at pp. 58002–03, ¶ 32,564 at p. 34,552.

¹³⁸ *E.g.*, Duke Energy at p. 5 (advocating a ten-day comment period); EEI at p. 12 (advocating at least 15 days notice prior to release); National Hydropower Association at pp. 7–8, 12 (advocating at least ten business days to comment and ten business days notice prior to release); NERC at p. 4 (advocating 30 days to respond to determination to release CEII to non-governmental requester); Southern at p. 10 (advocating 30 days notice prior to release).

¹³⁹ *See, e.g.*, Industrials at pp. 6–8; Massachusetts Energy Facilities Siting Board at p. 5; Transmission Access Policy Study Group at pp. 5–6.

¹⁴⁰ Duke Energy at p. 17.

¹⁴¹ 16 U.S.C. 824d.

¹⁴² 15 U.S.C. 717c.

¹⁴³ *See* 18 CFR 388.112(d) and (e).

¹⁴⁴ 67 FR 57994 at p. 58002, FERC Stats. Regs. ¶ 32,564 at pp. 34,551–52.

¹⁴⁵ *Id.*

¹⁴⁶ 44 U.S.C. § 3510(b).

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

¹⁴⁸ *E.g.*, EEI at p. 15; Duke at pp. 16–17; MidAmerican at p. 3.

¹⁴⁹ *See* 18 CFR 385.2102(a)(2).

¹⁵⁰ 18 CFR 388.112.

¹⁵¹ 67 FR 57994 at p. 58003, FERC Stats. & Regs. ¶ 32,564 at p. 34,552.

¹⁵² *Id.*

¹⁵³ *Id.*