

birth, title, address, and telephone number; the name, address, and telephone number of the person or entity on whose behalf the information is requested; a detailed statement explaining the particular need for and intended use of the information; and a statement as to the requester's willingness to adhere to limitations on the use and disclosure of the information requested. Requesters are also requested to include their social security number for identification purposes.

(ii) Once the request is received, the CEII Coordinator will determine if the information is CEII, and, if it is, whether to release the CEII to the requester. The CEII Coordinator will balance the requester's need for the information against the sensitivity of the information. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on release of the information. Where appropriate, the CEII Coordinator will forward a non-disclosure agreement (NDA) to the requester for execution. Once the requester signs any required NDA, the CEII Coordinator will make the critical energy infrastructure information available to the requester. The CEII Coordinator's decisions regarding release of CEII are subject to rehearing as provided in § 385.713 of this chapter.

(iii) The CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the Freedom of Information Act in § 388.108(c), and will provide notice to the submitter in accordance with § 388.112(d) and (e).

Appendix A

List of Commenters

Adirondack Mountain Club
American Electric Power System
American Gas Association
American Library Association
Bonneville Power Administration (BPA)
Commonwealth Associates, Inc.
City Public Service of San Antonio
Duke Energy Corporation (Duke)
Edison Electric Institute (EEI), including the
EEI Alliance of Energy Suppliers, and EEI
Transmission Group
Electric Power Supply Association (EPSA)
Exelon Generation Corporation on behalf of
its public utility subsidiaries PECO Energy
Company and Commonwealth Edison
Company
Federation of American Scientists
Hydropower Reform Coalition (HRC)
The 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

Interstate Natural Gas Association of America
(INGAA)
Massachusetts Energy Facilities Siting Board
MidAmerican Energy Company
(MidAmerican)
National Association of Regulatory Utility
Commissioners (NARUC)
National Grid USA
National Hydropower Association
New York State Public Service Commission
North American Electric Reliability Council
(NERC)
Northwest Natural Gas Company (Northwest
Natural)
Oklahoma Corporation Commission
Oklahoma Gas and Electric Company
Lydia Olchoff
OMB Watch
Pace Global Energy Services
Pacific Gas & Electric Company (PG&E)
PJM Interconnection, L.L.C. (PJM)
GE Power Systems Energy Consulting (GE)
Puget Sound Energy, Inc.
Reliant Resources, Inc. (Reliant)
Reporters Committee for Freedom of the
Press and The Society of Environmental
Journalists (Reporters Committee)
Southern California Edison Company (SCE)
Society of Professional Journalists
Southern Company Services, Inc., acting for
itself and as agent for Alabama Power
Company, Georgia Power Company, Gulf
Power Company, Mississippi Power
Company, Savannah Electric and Power
Company, and Southern Power Company
(Southern)
Public Utilities Commission of Ohio, the
Michigan Public Service Commission and
the staff of the Oklahoma Corporation
Commission (States)
Transmission Access Policy Study Group
Washington Legal Foundation and Public
Interest Clinic, George Mason University
School of Law (Washington Legal
Foundation)
Williston Basin Interstate Pipeline Company
(Williston Basin)
Whitfield Russell Associates

Appendix B

Applicability of Freedom of Information Act Exemptions to Critical Energy Infrastructure Information

The Commission's actions in the NOPR and the final rule are based on its position that CEII includes only information that is exempt from disclosure under FOIA. The exemptions most likely to apply to CEII are Exemptions 2, 4, and 7. A discussion of the potential applicability of each follows.

a. Exemption 2

Exemption 2 exempts from disclosure "records related solely to the internal personnel rules and practices of an agency."¹ According to guidance from the Department of Justice (DOJ), "[a]ny agency assessment of, or statement regarding, the vulnerability of such a critical asset should be protected pursuant to Exemption 2."² DOJ has counseled agencies that "a wide range of

information can be withheld under Exemption 2's 'circumvention' aspect."³ DOJ also has instructed agencies to take full advantage of the breadth of Exemption 2's protection for critical infrastructure information.⁴

The Commission has concluded that a portion of the CEII is exempt from disclosure under Exemption 2 of FOIA. Illustratively, the Commission is expanding its efforts to help facility owners and operators assess security risks and protect facilities from attack.⁵ Information developed or created by the Commission as part of these efforts is likely to fall within the ambit of Exemption 2. Documents describing inspections of regulated facilities likewise will fall within Exemption 2 if they assess or describe vulnerabilities of the project.

b. Exemption 4

Exemption 4 protects from public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁶ The Commission has determined that much of the CEII falls within the scope of Exemption 4, on the basis that release of the information could cause competitive harm to submitters, impair the Commission's ability to obtain similar information in the future, or impair the effectiveness of the Commission's programs.

There are two primary issues regarding the application of Exemption 4 to CEII. First, whether the fact that this sort of information had been publicly available in the past undermines an argument that it is now confidential, and second, whether the Trade Secrets Act⁷ prohibits the Commission from sharing this information on a "need-to-know" basis.

The Commission concludes that the fact that this information has been previously public does not defeat Exemption 4. Americans live in a different world today than they did prior to September 11, 2001. Americans have had to face the harsh realities of terrorism on their soil. This has forced the nation to reassess its vulnerability to terrorist threats. Government agencies as well as private companies have had to reconsider the extent to which they make information freely available to others.

Specifically, under *National Parks & Conservation Assoc. v. Morton*, 49 F.2d 765 (DC Cir. 1974) (*National Parks*) and *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (DC Cir. 1992) (*Critical Mass*), the initial inquiry in Exemption 4 cases is whether the information was submitted to the government voluntarily or whether it was compelled to be submitted. For voluntary submissions, the information is entitled to protection if it "would customarily not be released to the public by the person from whom it was

³ *Id.*

⁴ *Id.*

⁵ The Commission has jurisdiction over the safety of hydroelectric projects under sections 4(e), 10(a), and 10(c) of the Federal Power Act, 16 U.S.C. 797(e), 803(a), (c).

⁶ 5 U.S.C. 552(b)(4).

⁷ 18 U.S.C. 1905.

¹ 5 U.S.C. 552(b)(2).

² DOJ 2001 FOIA Post 19, posted October 15, 2001. DOJ is the Federal agency responsible for the administration of the FOIA.