

obtained.”⁸ This test focuses on the submitter’s current treatment of the information, not past treatment. Therefore, if, in the post-September 11 world, the company would not release the information to the public, the Commission should not release the information.

For compelled submissions, there is a three-pronged test—the competitive harm prong, the impairment prong, and the program effectiveness prong. If any of the three tests is met, the information is exempt from mandatory disclosure under FOIA even though it may have been previously public.⁹ Under the competitive harm prong, there must be evidence of actual competition, and a likelihood of substantial competitive injury.¹⁰ This inquiry tends to be fact specific, so it is not possible to identify with certainty which categories of CEII would meet the test. However, as utilities transition from monopolies to competitive markets, it may be easier for them to demonstrate actual competition. The inquiry is whether the submitter is facing competition at the time the Commission received the request for the information, not whether there was competition when the information was first submitted to the Commission. If the competitive situation has changed, the likelihood of competitive harm would be analyzed using the current situation, not past conditions. Where competition is found to exist, the next issue is whether release of the information is likely to result in substantial competitive injury to the submitter. Again, the likelihood of competitive injury would be examined at the time the Commission received the request for the information. Whether the information could have harmed the submitter two years earlier is irrelevant; what is relevant is whether release of the information at the time of the request would cause competitive harm to the submitter.¹¹

⁸ *Critical Mass*, 975 F.2d at 878.

⁹ While most of the submissions to a regulatory agency like FERC may appear to be compelled, this may not necessarily be the case. DOJ has recognized that the “existence of agency authority to require submission of information does not automatically mean such a submission is ‘required’; the agency authority must actually be exercised in order for a particular submission to be deemed ‘required.’” DOJ Freedom of Information Act Guide & Privacy Act Overview, May 2002 ed., at 202. Courts have found submissions to be voluntary where the agency had issued a subpoena but not sought to enforce it, see *McDonnell Douglas Corp. v. EEOC*, 922 F. Supp. 235 (E.D. Mo. 1996), and where the agency did not have authority to enforce the information collection because the information request violated the Paperwork Reduction Act, 44 U.S.C. 3501, see *Center for Auto Safety v. NHTSA*, 244 F.3d 144 (D.C. Cir. 2001). At bottom, the question of whether the information has been submitted voluntarily or was compelled must be analyzed on a case-by-case basis.

¹⁰ See *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987) (*CNA*).

¹¹ The Commission’s analysis of a submitter’s competitive situation under FOIA is not the same as, and indeed is less rigid than, the analysis it must perform to establish lack of market power for charging market based rates. For FOIA purposes, the competition requirement is satisfied if the submitter faces some level of actual competition. See *Niagara Mohawk Power Corp. v. DOE*, 169 F.3d 16, 19 (D.D.C. 1999) (*Niagara*).

The test most frequently applied under the competitive harm prong is whether use of the information by competitors is likely to harm the submitter.¹² This may be fairly challenging to demonstrate in the case of CEII because the primary concern is that the information could be used to plan an attack on the infrastructure, not that it could be used to steal customers or undercut prices. On the other hand, a submitter may be able to show competitive harm where use of the information by someone other than a competitor could cause financial harm to the submitter.¹³ As relevant here, a terrorist attack on the energy infrastructure could cause financial harm to the owners and operators of the facilities because of lost opportunity costs as well as repair costs.

For compelled submissions, the impairment prong is satisfied where disclosure may affect the reliability or quality of the information received.¹⁴ The more subjective the filing requirement, the more likely that disclosure of the information could impair the Commission’s ability to get thorough and accurate information in the future.¹⁵ As noted by EEI in its comments on the NOI, regulated entities may have discretion regarding how to construct their filings.¹⁶ If companies are worried that information they submit will be subject to public disclosure, they may choose not to submit the same level of detail that they might otherwise submit. In such circumstances, and assuming the submissions would otherwise comply with the Commission’s regulations, the information may be exempt from disclosure under the impairment prong of Exemption 4.

Critical Mass recognized that in addition to the competitive harm and impairment prongs, there may be other instances where non-disclosure is warranted in order to protect other governmental interests, such as program effectiveness.¹⁷ Recently, in *Public Citizen Health Research Group v. NIH*,¹⁸ the district court relied on *Critical Mass* in determining that “impairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under” Exemption 4. The court held that the National Institutes of Health’s royalty information was protected under Exemption 4 because release of the information would make companies reluctant to enter into agreements with NIH, thus impairing the effectiveness of NIH’s licensing

program.¹⁹ The court reached a similar conclusion in *Judicial Watch, Inc. v. Export-Import Bank*, where release of certain financial information from foreign export credit agencies was held to be exempt from disclosure because release would make the credit agencies look for financing outside of the United States, undermining the agency’s statutory purpose of fostering domestic economic growth by supporting export transactions.²⁰

Applying these recent decisions here, indiscriminate release of CEII could impair the effectiveness of the Commission’s programs, which are meant to satisfy its mandate to regulate and oversee energy industries in the economic and environmental interest of the American public.²¹ Inappropriate release of CEII could make the infrastructure more vulnerable to attack, threatening those industries and resulting in potentially devastating economic and environmental consequences. Release of CEII also could make regulated entities less forthcoming in the information they provide to the Commission, especially where they have discretion as to what they submit.²² Restricted flow of information between the Commission and the companies could impair the Commission’s programs that rely on such information. This is of particular concern in today’s world, where the Commission is seeking additional information from licensees to assure that the infrastructure is sited and built safely and remains protected. Finally, release of CEII could harm the relationship between Commission staff and the regulated companies, impairing trust, and causing the parties to deal with each other in a more adversarial manner than necessary. For all of these reasons, much, if not all of the CEII would be exempt from disclosure under the third prong of Exemption 4 as it relates to compelled submissions.

A second issue is whether the Trade Secrets Act prohibits the Commission from sharing Exemption 4 material on an as-needed basis. The Trade Secrets Act states in relevant part that:

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which concerns or relates to trade secrets, processes, operations, style of work, or apparatus, or to the identify, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association; * * * to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year, or both;

¹⁹ *Id.* at 54.

²⁰ 108 F. Supp. 2d 19, 30 (D.D.C. 2000).

²¹ See http://www.ferc.gov/About/mission/mission_intro.htm (2002).

²² See *Nadler*, 899 F. Supp. 158, 162.

¹² See, e.g., *CNA*, 830 F.2d at 1152 & n.158; *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983).

¹³ See *Nadler v. FDIC*, 899 F. Supp. 158, 163 (S.D.N.Y. 1995) (*Nadler*), *aff’d*, 92 F.3d 93 (2d Cir. 1996).

¹⁴ *Id.*

¹⁵ See *Niagara Mohawk*, 169 F.3d at 18 (holding that impairment is unlikely to be found where “data sought appears to take the form of hard, cold numbers on energy use and production, the fudging of which may strain all but the deliberately mendacious.”).

¹⁶ EEI NOI comments at p. 42.

¹⁷ See *Critical Mass*, 975 F.2d 879 (“It should be evident from this review that the two interests identified in that *National Parks* test are not exclusive.”).

¹⁸ 209 F. Supp. 2d 37 at 52 (D.D.C. Mar. 12, 2002) (alternative holding).