

Proposed Energy Grid Info Regs May Not Offer Expected Security

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On June 16, the Federal Energy Regulatory Commission issued a notice of proposed rulemaking[1] proposing to amend its regulations pertaining to the designation, sharing and protection of critical energy infrastructure information. The commission's proposed revisions aim to comply with the directives in the Fixing America's Surface Transportation Act (FAST Act)[2], commonly known as the "Highway Bill," which added Section 215A to the Federal Power Act and directed the commission to revise its regulations for protecting "critical electric infrastructure information."

If approved, the proposed rule would amend the commission's regulations to make critical energy infrastructure information a subset of critical electric infrastructure information, which would be referred to collectively as "critical energy/electrical infrastructure information" and abbreviated as "CEII." The regulations would also establish a process for the designation and sharing of CEII and enable the commission to impose sanctions for any unauthorized CEII disclosures by commission personnel.

In some ways the proposed regulations are an improvement over FERC's current processes, as they would introduce more secure nondisclosure requirements as a prerequisite for CEII access and also facilitate improvements for information sharing between FERC, utilities and other parties with responsibility for protecting critical infrastructure.

However, despite the language of Section 215A that provides FERC with a significantly enhanced ability to protect CEII, the proposed regulations do not tighten the restrictions on CEII as much as permitted under the statute. In particular, the proposed regulations indicate that the existing FERC policy of voluntarily disclosing CEII to a wide variety of parties upon request will continue. The proposed regulations also lack a hard line against the improper disclosure of CEII by commission personnel.

There is, however, some room for optimism. FERC may yet decide to tighten the restrictions on handling CEII in a manner more suited to the risk posed by the information, which is — by definition — information that could be used to plan an assault on the infrastructure that is critical to the continued operation of commerce and government throughout the United States.

Background

"Critical energy infrastructure information" under FERC's current regulations includes engineering,



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vulnerability or design information that, if available to bad actors, could be used to threaten the reliability of critical infrastructure. FERC's current rules and regulations for handling this information are often maligned as ineffective. Section 61003 of the FAST Act was an attempt to address those concerns about the handling and use of CEII by directing the commission to:

- provide criteria and procedures for designating information as CEII;
- prohibit the "unauthorized" disclosure of CEII;
- develop sanctions for commission personnel who "knowingly and willfully" engage in an unauthorized CEII disclosure; and
- provide for the voluntary sharing of CEII in the event of a grid emergency.

Revised CEII Definition

The commission proposed to modify the definitions in its regulations pertaining to critical infrastructure information. The FAST Act introduced the new term "critical electric infrastructure information," which includes information regarding the bulk-power system as well as information that would otherwise fall under the commission's existing CEII definition. The commission proposed to refer to the information under the new regulations as "critical energy/electric infrastructure information," and to continue using the abbreviation CEII, which in the past referred to critical energy infrastructure information.

CEII Designation Process

Currently, the commission accepts over 7,000 critical energy infrastructure information documents each year. The FAST Act directed the commission to promulgate criteria and procedures to standardize the designation of CEII and more precisely justify the need for that designation. To do so, the NOPR would require additional justifying information from submitters of CEII, such as the requested duration for the CEII designation and an explanation for the period proposed. Submitters would also have to segregate and identify non-CEII that does not require designation. The more detailed showing required to receive a CEII designation will increase the burden on utilities submitting this sensitive information to the commission.

The NOPR would apply the segregation requirement to commission-generated CEII, which would be subjected to more scrutiny by requiring FERC's critical energy infrastructure information coordinator to determine whether information meets the definition of CEII and how long the CEII designation should last.

The FAST Act also placed a five-year limit on the designation of CEII, although the commission or the secretary of energy could redesignate it. To avoid the impracticable task of reviewing the thousands of critical energy infrastructure information documents currently stored within the commission's system, and to constantly track the age of newly designated CEII, the NOPR proposes to continue the CEII protections for existing information in the commission's files.

If existing CEII older than five years is requested, the commission will evaluate at that time whether to make the information public. This approach provides significant benefits to the industry as it avoids the possibility of mass publication of older CEII.

CEII Is Formally FOIA-Exempt

The NOPR would amend the commission's regulations to prevent the disclosure of CEII under the Freedom of Information Act, as the FAST Act exempts CEII from the FOIA. The impact of this change will be limited. Before the law was enacted, FERC successfully relied upon existing general FOIA exemptions and its own FOIA procedures to prohibit CEII disclosure, although FERC continued to disclose CEII to those who satisfied FERC's procedures for permitted disclosure. As a result, the formal exemption of CEII from FOIA will have little effect on FERC's ability to prevent disclosures that FERC does not wish to provide.

Judicial review of CEII designations is available under the FAST Act, and FERC's proposed regulations would incorporate this option. But before going to court, FERC's regulations would require an individual challenging a CEII designation to first seek an administrative appeal with the commission's general counsel.

A district court reviewing the propriety of FERC's decision to designate information as CEII is unlikely to compel the disclosure of this information given the breadth of the CEII definition. Although there are transparency benefits to disclosure, courts are likely to err on the side of caution given the risk if the information falls into the wrong hands. Thus, Section 215A is unlikely to provide meaningful additional protections against compelled commission disclosures.

Commission Controls for Handling CEII

The FAST Act requires the commission to bolster its protections to prevent the unauthorized disclosure of CEII. To that end, the commission proposed enhanced controls for commission employees and for external recipients of CEII.

To address controls for commission employees, commission staff are developing an information governance policy, including guidelines on how CEII should be handled and kept secure. The NOPR would require the commissioners, commission staff and contractors to comply with those guidelines.

The commission would also continue its current policy of voluntary sharing of CEII upon request, even though there is no obligation for it to do so. FERC could choose not to disclose CEII at all. Even though the agency is authorized to share CEII with individuals and organizations to ensure the protection of energy infrastructure, the FAST Act explicitly recognizes that the sharing of information is not required.

However, FERC has proposed only to tighten the requirements for requesting information, requiring that individuals requesting CEII demonstrate heightened need, which the commission would balance against the sensitivity of the information. Although on its face this test could reduce the disclosures of CEII by the commission, it is not clear that FERC will be any less likely to disclose CEII than it has in the past.

When FERC discloses CEII to an external individual, the NOPR does propose to strengthen the existing the nondisclosure agreement (NDA) required under the commission's regulations for recipients of such information. The proposed revisions would require NDAs to restrict the use of CEII to the purpose for which it was requested and the disclosure of CEII to individuals on a need-to-know basis. The revised NDA would also include requirements on the handling and destruction of CEII, and would make compliance with the new NDA requirements auditable by commission staff.

Sanctions for Unauthorized Disclosure

To further ensure that CEII will be adequately protected, the FAST Act requires the commission to ensure that appropriate sanctions are in place for the unauthorized, knowing and willful disclosure of CEII by commissioners and commission staff. The language proposed in the NOPR lacks specificity on how those sanctions will be determined, stating only that the commission will “take responsibility for investigating and, as necessary, imposing sanctions on its employees and agents.” The NOPR proposes that sanctions could include adverse personnel actions, including suspension or removal.

This may fall short of industry expectations given the risk posed by the disclosure of CEII. Under the proposed regulations, removal is only at the end of what is apparently a very wide spectrum of possible sanctions. Given that inappropriate disclosures could increase the risk of attack on critical infrastructure, the possibility that the commission could choose to impose minor sanctions for “knowing and willful” disclosures of CEII may not lead personnel handling CEII to take these obligations seriously.

This lack of strong sanctions carries through to the treatment of commissioners who knowingly and willfully disclose such information. The NOPR would exempt the commissioners themselves from sanctions on the grounds that they are presidential appointees and can therefore only be removed by the president. Any knowing and willful CEII disclosure by a commissioner would be referred to the U.S. Department of Energy’s inspector general, the same entity that investigated FERC’s alleged mishandling of sensitive information in the past.

The NOPR does not explain why the commission has not considered other possible sanctions for “knowing and willful” unauthorized disclosures of CEII by the commissioners themselves. Although the independence of the individual commissioners is critical to FERC’s function as an independent agency, other sanctions short of removal (such as public or private censures or referrals to Congressional oversight committees) could be available. The NOPR does not discuss those options or analyze whether or not they could be permitted under existing law.

Information Sharing

Not all of the law’s provisions seek to limit access to information. The FAST Act also encourages voluntary sharing of CEII with individuals and organizations as needed to ensure that energy infrastructure is protected.

In the NOPR, the commission noted that it already has the authority under its existing regulations to release information to carry out its jurisdictional responsibilities. The NOPR proposes to amend that language to permit the commission to release information in furtherance of other agencies’ responsibilities, and to condition such voluntary release on certain usage restrictions (i.e., the recipient must have no other legitimate need for CEII but to address critical infrastructure protection).

The NOPR suggests that the commission will endeavor to provide notice “where practicable” to the submitter of CEII when FERC will share that information voluntarily with another organization. However, the NOPR does not propose to make such notice mandatory because doing so may impair the commission’s ability to timely respond to CEII requests during a grid emergency.

If these rules are enacted, entities will need to be mindful of the ongoing status of CEII that they have submitted, or will submit, to the agency. The FAST Act stressed the importance of sharing actionable information regarding grid security in a timely manner. As a result, FERC appears to anticipate that it

may not always be able to provide notice and seek a response from an entity before disclosing its CEII.

Comment Procedures

Comments on the NOPR are due 45 days after the publication of the NOPR in the Federal Register.

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[1] Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information, Notice of Proposed Rulemaking, 155 FERC ¶ 61,278 (2016).

[2] Fixing America's Surface Transportation, Pub. L. No. 114-94, 129 Stat. 1312 (2015) (to be codified at 16 U.S.C. 824 et seq.).

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