

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Critical Energy Infrastructure  
Information

Docket Nos. RM02-4-003 and  
PL02-1-003

**COMMENTS OF THE  
TRANSMISSION ACCESS POLICY STUDY GROUP**

On March 3, 2005, the Commission issued a “Notice Soliciting Public Comment” on the effectiveness of its processes for managing Critical Energy Infrastructure Information (“CEII”). *Critical Energy Information Infrastructure*, 110 F.E.R.C. ¶ 61,245. The Transmission Access Policy Study Group (“TAPS”) appreciates the Commission’s continued monitoring of its CEII program, which must serve the legitimate needs of market participants for CEII and the national security need to keep CEII out of the hands of those who seek to harm the United States. TAPS submits these comments to express our concern with the processing time for CEII requests and the extent of CEII designations.<sup>1</sup> We also suggest some measures to address these concerns.

**I. THE DEADLINES FOR RESPONSES TO FILINGS CONTAINING  
CEII MUST ACCOUNT FOR CEII REQUEST PROCESSING  
TIME**

A year ago in response to the Commission’s prior solicitation of comments on its CEII program, TAPS urged the Commission not to conclude too much from the early,

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<sup>1</sup> TAPS has provided input on the CEII program from nearly its inception. See November 24, 2002 Comments of the Transmission Access Policy Study Group (Docket Nos. RM02-4-000 and PL02-1-000); March 21, 2003 Petition for Rehearing of the Transmission Access Policy Study Group (Docket Nos. RM02-4-000 and PL02-1-000); May 16, 2003 Comments of the American Public Power Association and Transmission Access Policy Study Group (Docket No. RM03-6-000); May 27, 2003 Motion of Transmission Access Policy Study Group to Supplement and For Reconsideration (Docket Nos. RM02-4-000 and PL02-1-000); March 15, 2004 Comment of the American Public Power Association and Transmission Access Policy Study Group (Docket Nos. RM02-4-002, PL02-1-002 and RM03-6-001).

relatively unproblematic experience with the program.<sup>2</sup> At the time, the Commission had not adopted the Interim Screens of its Market-Based Rate (“MBR”) program, which require the submission of a simultaneous transmission import capability study. However, in the past 6 months, the Commission has received numerous MBR compliance filings, most of which included simultaneous transmission import capability studies. In many instances the filing utilities have designated as CEII the entirety of these studies, making them unavailable from the Commission absent an approved CEII request. At the same time, the Commission has typically afforded intervenors only 21 days from the compliance filing to submit motions to intervene and protests.

The Commission should synchronize the time available to respond to MBR filings with the need to obtain CEII. Even if a CEII request were processed in the shortest time possible,<sup>3</sup> insufficient time would likely remain to make meaningful use of the document containing CEII. Further, a review of CEII orders issued since October 1, 2004 indicate that processing times are typically more than 30 days.<sup>4</sup> Given the need for intervenors to analyze and depend upon information designated as CEII, including simultaneous transmission import capability studies, they must have *timely* access to it. A more than

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<sup>2</sup> March 15, 2004 Comment of the American Public Power Association and Transmission Access Policy Study Group (Docket Nos. RM02-4-002, PL02-1-002 and RM03-6-001).

<sup>3</sup> The CEII regulations require notification to the submitting party at the time a request is made and again, if the request is going to be granted. 18 C.F.R. §§ 388.112(d), 388.112(e). Both notifications provide the submitting party *at least 5* calendar days notice. *Id.* Even assuming the Commission and the requester are able to take required actions quickly (*e.g.*, locating the CEII, reviewing it, turning around an appropriate non-disclosure agreement), the notice provisions can cause processing times to easily consume more than half of the typical 21 days allowed to respond to Section 205 filings.

<sup>4</sup> Instances where processing time was less than 30 days appear exceptional. Several one-day turnarounds (and, in one case, a same-day turnaround) were tied to a conference call in which the requesters sought to participate involving Pinnacle West’s market-based rate application. *See* Docket Nos. CE05-96 through -103 and -106. The second set of requests, Docket Nos. CE05-140, -168 and -173, sought access to Form 715 data submitted by Michigan Electric Transmission Company and were apparently expedited with some assistance from the CEII staff.

30-day turnaround on CEII requests when a 21-day clock from applicant's filing is ticking is clearly not acceptable.<sup>5</sup>

To address this problem, TAPS urges that the Commission examine in the next 30 days the amount of time required to process CEII requests, especially those needed to analyze filings made with the Commission.<sup>6</sup> It should publicly report its findings and identify recurring problems that either the Commission or requesters should address. The Commission can then propose solutions, solicit comments, or both. Further, if the Commission's review reveals steps CEII requesters can take to expedite their requests, the Commission should identify those steps.

In addition, the Commission should enlarge the time provided to respond to filings containing CEII to allow intervenors the opportunity to obtain CEII clearance and to receive and examine the CEII. This need is especially great in the MBR context where entire simultaneous transmission import capability studies are protected from public disclosure. The enlargement should reflect the processing time that the review urged above reveals is required for CEII requests, assuming the request is made within a few days of the Commission's notice of filing, and should leave room for the requester to analyze the CEII once it is made available.<sup>7</sup> In the meantime and at minimum, the

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<sup>5</sup> Of course, having the full 21 days to analyze and respond to a filing assumes that the intervenor receives notice on the day the public utility makes its filing. However, more often notice does not occur until the Commission issues a "Notice of Filing" some days later, meaning, as a practical matter, less than 21 days to analyze and respond to the filing.

<sup>6</sup> The CEII request form's requirement that the requester provide a "Statement explaining need and intended use of the information" would presumably allow the Commission to determine cases where requesters needed the information to analyze a filing.

<sup>7</sup> Unless the CEII processing time is reduced significantly from that reflected in requests acted upon since October 1, 2004, an intervention/protest period of 40 to 45 days would appear to be necessary to enable CEII to be requested, analyzed and used.

Commission should make it a stated policy to respond favorably to intervenor motions for additional time to prepare interventions and protests where it is necessary to obtain and analyze CEII.<sup>8</sup>

## **II. THE COMMISSION SHOULD EXAMINE CEII DESIGNATION PRACTICES**

The March 3<sup>rd</sup> Solicitation (at P 12) specifically asks: “Is the CEII designation being misused or claimed for information that does not meet the definition?” TAPS is not aware of specific misuse of the CEII designation. We are concerned that CEII claims are overbroad, especially in the MBR context where entire simultaneous transmission import capability studies and underlying workpapers are designated as CEII. It seems highly unlikely that every element of such studies qualifies as CEII. However, if the studies are so designated, intervenors encounter significant roadblocks in their ability to assess the transmission aspects of MBR filings.

To address the apparent over-designation of CEII, the Commission should audit a representative sample of filings with CEII designations. Based upon its findings, which should be made public, the Commission can provide further guidance about the kinds of information that are properly designated as CEII.

The Commission should also enforce the current regulation requiring CEII claims to include a “written statement requesting . . . CEII . . . for some or all information in a document, and the justification for special treatment of the information . . . .” 18 C.F.R. § 388.112(b)(1). The Commission should make clear that requesters must identify the specific pieces of information considered CEII, provide a justification, and withhold from

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<sup>8</sup> Particularly in the context of MBR compliance filings, the Commission will not be constrained by Section 205(d)'s 60-day notice requirement. 16 U.S.C. § 824d(d).

public disclosure only the actual CEII, not necessarily the entire document in which it is contained. A more complete description and targeted designation would have several benefits. It would allow intervenors to assess the basis for CEII designations and bring to the Commission's attention designations that appear overly broad. Such an independent check would be valuable given that the Commission itself does not examine CEII designations until a CEII request is received. *See* Solicitation P 9. Further, more narrow, targeted CEII designations could eliminate the need for some CEII requests, if intervenors have access to the non-CEII portions of a document and can assess whether their review of a filing is hindered by not having access to the CEII itself.

Respectfully submitted,

*/s/ Mark S. Hegedus*

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