UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information	Docket No. RM16-15-000

COMMENTS OF TRANSMISSION ACCESS POLICY STUDY GROUP

The Transmission Access Policy Study Group ("TAPS") respectfully submits these comments on the Commission's June 16, 2016 Notice of Proposed Rulemaking[1] that proposes to amend the Commission's regulations to implement provisions of section 61003 of the Fixing America's Surface Transportation Act[2] that pertain to the designation, protection, and sharing of critical electric infrastructure information, and to otherwise amend the Commission's regulations that pertain to critical energy infrastructure information.

As discussed below, while TAPS supports the NOPR's objective of implementing the FAST Act, the Final Rule should reflect a number of important modifications to ensure that the Act's purposes are achieved. These include: fixing a circularity in the NOPR's proposed definition of critical energy infrastructure information; clarifying and providing additional detail regarding the Commission's proposed treatment of

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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, 81 Fed. Reg. 43,557 (proposed June 16, 2016), FERC Stats. & Regs. ¶ 32,715 (2016) ("NOPR").

[2] Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 61003, 129 Stat. 1312, 1773 (2015) (to be codified at FPA § 215A, 16 U.S.C. § 824*o*-1) ("FAST Act").

information from non-public databases; adding the FAST Act's exemption of CEII[3] from state and other public disclosure laws to the Commission's regulations and non-disclosure agreements; making clear that it interprets that exemption as applying to all governmental entities subject to public disclosure laws, including municipal joint action agencies; and clarifying or improving the Commission's requirements for submitting and accessing CEII.

I. INTERESTS OF TAPS

TAPS is an association of transmission-dependent utilities ("TDUs") in more than 35 states, promoting open and non-discriminatory transmission access.[4] As transmission-dependent utilities, TAPS members have long recognized the importance of grid reliability and security. As TDUs, TAPS members are users of the Bulk-Power System, highly reliant on the reliability of facilities owned and operated by others for the transmission service required to meet TAPS members' loads. TAPS members often need to obtain CEII regarding their host transmission providers' systems, to allow them to participate in rate cases, for planning purposes, or otherwise. Many TAPS members also provide CEII to NERC or the Commission. All TAPS members have a strong interest in limiting the dissemination of CEII, whether about their own facilities or others', beyond those with a need for the information.

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[3] Throughout these comments, we use the term "CEII" to refer to "Critical Energy/Electric Infrastructure Information," as defined by the proposed regulations, consistent with the NOPR's practice. NOPR, P 13. Where we specifically discuss either critical energy infrastructure information or critical electric infrastructure information, we spell out the appropriate term.

[4] Duncan Kincheloe, Missouri Public Utility Alliance, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

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II. COMMENTS

A. The Commission should not include FOIA exemption as a criterion in its definition of critical energy infrastructure information.

The FAST Act exempts critical electric infrastructure information (which it defines[5] to expressly include critical energy infrastructure information as defined in Commission regulations) from disclosure under the Freedom of Information Act.[6] FPA § 215A(d)(1)(A). The NOPR proposes,[7] appropriately, to add that exemption to the Commission's regulations. However, it does so in a needlessly confusing and circular manner, which may have the unintended consequence of *excluding* critical energy infrastructure information from the definition of CEII and thereby defeating Congress' explicit intent of protecting such information from FOIA disclosure.

The Commission's existing critical energy infrastructure information regulations define critical energy infrastructure information as "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure" that

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[5] FPA § 215A(a)(3).

[6] Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

[7] NOPR, proposed 18 C.F.R. § 388.113(c)(1).

"[r]elates details about the production, generation, transportation, transmission, or distribution of energy;" "[c]ould be useful to a person in planning an attack on critical infrastructure;" "*[i]s exempt from mandatory disclosure under [FOIA]*;" and "[d]oes not simply give the general location of the critical infrastructure." 18 C.F.R. § 388.113(c)(1) (emphasis added). The NOPR proposes to retain that definition, with the added specification that to qualify as critical energy infrastructure information, information must be exempt from mandatory disclosure under FOIA "pursuant to section 215A(d)(1)(A) of the Federal Power Act."[8]

Because the FAST Act makes all CEII statutorily exempt from FOIA disclosure, there is no need to include, as a pre-requisite to qualification as critical energy infrastructure information, the requirement that such information be exempt from mandatory disclosure under FOIA pursuant to section 215A(d)(1)(A) of the Federal Power Act. Indeed, by making exemption from FOIA disclosure pursuant to section 215A a precondition for information to qualify as critical *energy* infrastructure information, the proposed rule could make it impossible for any information that does not meet the statutory definition of critical *electric* information (gas infrastructure, for example) to qualify as CEII, contrary to Congress' intent that "information that qualifies as critical energy infrastructure information under the Commission's regulations"[9] be included in critical electric infrastructure information.

To avoid unintentionally undermining Congress' intent, the Final Rule should delete from its definition of critical energy infrastructure information the requirement that

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[8] NOPR, proposed 18 C.F.R. § 388.113(c)(2).

[9] FPA § 215A(a)(3).

such information be exempt from disclosure under FOIA. Information that meets the other three prongs of the definition should surely be considered critical energy infrastructure information and treated as CEII as the FAST Act directs, including treating such information as exempt from disclosure under FOIA.

B. The Commission should revise its regulations to account for information obtained by the Commission from private databases, and should assure stakeholders that the Commission will treat NERC databases as non-public.

The proposed rule includes procedures for entities filing CEII at the Commission,[10] and for Commission staff to protect internally-generated CEII.[11] CEII can also, however, come into the Commission's possession without being either submitted to the Commission or Commission-generated, such as when the Commission accesses the non-public NERC Generating Availability Data System ("GADS"), Transmission Availability Data System ("TADS"), and protection system misoperations databases.[12]

The NOPR states (P 17 n.13) that:

> Information downloaded by Commission staff from private databases that are accessed pursuant to Commission order or regulation will be maintained as non-public information consistent with the Commission's internal controls. *See, e.g., Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, 155 FERC ¶ 61,275 (2016).

TAPS supports the NOPR's proposal to treat information retrieved from private databases as non-public. The Final Rule should add that requirement to the

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[10] NOPR, proposed 18 C.F.R. § 388.113(d)(1).

[11] NOPR, proposed 18 C.F.R. § 388.113(d)(2), (3).

[12] *Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, Order No. 824, 81 Fed. Reg. 44,998 (July 12, 2016), FERC Stats. & Regs. ¶ 31,383 (2016).

Commission's CEII and privileged information regulations, including 18 C.F.R. §§ 388.112(b) and 388.113(d), which, as proposed by the NOPR, do not address non-public information that is neither submitted to nor generated by FERC. The regulations must recognize that such information will not be stamped as CEII or privileged in accordance with the Commission's regulations governing submission of non-public information, because the information is contained in databases, and is not being *submitted to* the Commission, but rather *accessed by* the Commission.

Despite the statement that the Commission will maintain information from private databases as non-public, the conclusion of NOPR footnote 13 creates doubts that the Commission will in fact protect information retrieved from NERC, particularly the GADS, TADS, and misoperations databases to be made available under Order No. 824, from public disclosure. Specifically, the footnote goes on to state (NOPR, P 17 n.13):

> If the Commission receives a request for access to downloaded information, the Commission will evaluate whether the information meets the definition of CEII or is proprietary information or otherwise privileged or non-public and will provide the owner of the database or information (as appropriate) with an opportunity to comment on the request consistent with proposed section 388.113(d)(1)(vi) or sections 388.112(d) and (e).

While that footnote may be consistent with the Commission's existing regulations and practice, the Final Rule should provide assurances that the Commission will continue to treat these NERC databases as non-public CEII and/or privileged information, consistent with the understanding of the registered entities that submit that data to NERC. The Commission's stated interest in reviewing this data to carry out its statutory functions, as expressed in Order No. 824, should not become a vehicle for wider dissemination of these important and sensitive databases, in whole or part.

The Final Rule should also revise proposed 18 C.F.R. § 388.112(d) and (e), and proposed 18 C.F.R. § 388.113(d)(1)(vi) to provide that if the Commission is considering the release of non-public database information, either in response to a request or *sua sponte*, it will notify both the entity that manages the database or other information source, and the entity or entities whose data would be released, and give them the opportunity to demonstrate that the information is properly treated as CEII or privileged. In particular, with respect to the NERC databases, both NERC and the entities who have submitted information to NERC for inclusion in the databases should be notified and given the opportunity to comment.

C. The Commission should include in its CEII regulations and non-disclosure agreements the FAST Act's exemption of CEII from public disclosure laws, interpreted to ensure the Act's purpose is achieved.

The FAST Act exempts CEII from disclosure under FOIA, and from any other federal, state, or tribal law, or any law of any political subdivision, that requires public disclosure of information or records. FPA § 215A(d)(1). The NOPR explicitly acknowledges the FOIA exemption, but does not mention the exemption from state, tribal, and political subdivisions' public disclosure laws (collectively referred to as "Sunshine Laws"), or propose to make the exemption part of the Commission's regulations, or incorporate the exemption into the Commission's standard non-disclosure agreements ("NDAs") that individuals sign in order to receive CEII. The Commission should add the Sunshine Law exemption both to the NDAs and to its regulations, and should make clear that it interprets the exemption in a manner that fully achieves the FAST Act's purpose.

1. The Commission should incorporate the FAST Act's exemption of CEII from Sunshine Laws into its regulations and clarify that the exemption applies to governmental entities subject to Sunshine Laws, including municipal joint action agencies.

The FAST Act's exemption of CEII from Sunshine Laws states, in full:

> Critical Electric Infrastructure Information . . . shall not be made available by any Federal, State, political subdivision or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records.

FPA § 215A(d)(1). This important provision is clearly intended to ensure that CEII does not become public due to the requirements of state, local, or tribal public records laws. The Final Rule should amend the Commission's regulations and interpret this provision so that it achieves its important purpose.

The FAST Act's exemption of CEII from disclosure under Sunshine Laws must be included in the Commission's regulations. In order to carry out the FAST Act's intent, it is vital that entities looking into the rules governing CEII be made aware of the exemption. The exemption's validity is of course unaffected by its omission from the Commission's regulations, but inclusion will significantly reduce the risk that the Act will be violated due to lack of awareness.

In addition, the Commission should make clear that for purposes of this provision "political subdivisions" includes any governmental entity; any agency, authority, or instrumentality of such entities; and any corporation which is wholly owned, directly or indirectly, by one or more such entities. The term "political subdivision" is not defined in the FAST Act or the Commission's current or proposed CEII regulations. Further, we understand that some governmental entities that are subject to public records laws may not be "political subdivisions" as defined by the laws of their states. For example, while

every municipal joint action agency is an "agency, authority, or instrumentality" of "a State or any political subdivision of a state" under section 201(f) of the Federal Power Act and subject to its states' public records laws, some may not be considered "political subdivisions" for state law purposes. But Congress clearly did not intend for such entities to be required to make public, pursuant to Sunshine Laws, CEII protected from disclosure by the FAST Act's preemption of Sunshine Laws. The Commission should therefore explicitly construe this provision to avoid creating a wide loophole in Congress' exemption of CEII from Sunshine Laws.

To avoid the potential for disclosures of CEII not intended by Congress, the Final Rule should construe the FAST Act to exempt CEII from disclosure under all state, local, and tribal public records laws by any governmental entity, any agency, authority, or instrumentality of such entities, and any corporation which is wholly owned, directly or indirectly, by one or more such entities subject to those public records laws. In other words, the Final Rule should make clear that the Commission interprets the FAST Act to preempt all Sunshine Laws that would otherwise require the disclosure of CEII.

2. The Commission should add the FAST Act's exemption of CEII from Sunshine Laws to its standard CEII NDAs.

The FAST Act's Sunshine Law exemption must be included in the Commission's CEII NDAs so that it is clear that CEII provided under those NDAs is not subject to release under either FOIA or Sunshine Laws, by those subject to such disclosure requirements. While we recognize that omission of a reference to the FAST Act's preemption of Sunshine Laws would not affect the FAST Act's non-disclosure requirement, failure to mention the exemption in the NDAs would undermine the FAST Act's intent by creating the potential for inadvertent disclosure in violation of the Act.

Including a clear reference in the NDAs that CEII recipients sign helps ensure that this Congressional directive will not be defeated by lack of awareness.

In addition to revising all of the standard NDAs, the Commission should eliminate the State Agency Employee NDA[13] altogether. This NDA was created specifically to provide a work-around to address applicable Sunshine Law/FOIA concerns in the absence of a clear preemption, which the FAST Act has now added to the Federal Power Act.[14] Prior to the FAST Act's express preemption of Sunshine Laws requiring disclosure, this language was an attempt to impose a contractual nondisclosure requirement for critical energy infrastructure information received by a State agency. Now that the FAST Act expressly preempts Sunshine Laws, we are not aware of a need for a separate NDA for state agency employees,[15] particularly if the General NDA references the Sunshine Law exemption. Thus, once the Fast Act's Sunshine Act language is included in the General NDAs (as requested above) the State Agency NDA can and should be eliminated.

The need for elimination of the now-unnecessary State NDA is reinforced by its requirements that place some governmental employees between a rock and a hard place—violating the terms of the NDA or violating the requirements of applicable public records retention requirements. The Commission's current State Agency Employee NDA

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[13] State Agency Employee NDA, https://www.ferc.gov/legal/ceii-foia/ceii/state-agen-nda.pdf.

[14] *See Critical Energy Infrastructure Information*, Order No. 630, 68 Fed. Reg. 9,857, 9,865 (Mar. 3, 2003), FERC Stats. & Regs. ¶ 31,140, PP 50-53 (2003).

[15] It is unclear from the NDAs and Order No. 630 whether the State Agency Employee NDA is intended to apply to employees of local governments as well. If the Commission retains the State Agency Employee NDA, it should clarify that local and tribal government entities and municipal joint action agencies may use the General NDA (which, as noted above, must include the Sunshine Law exemption, like all of the Commission's NDAs).

attempts to address Sunshine Laws by providing that "[a]ny information provided under this agreement is on loan to the State agency, and must be returned to the Federal Energy Regulatory Commission upon request. This information is not the property of the State and is not subject to State Freedom of Information/Public Records acts or similar statutes." *Id*. § 4. However, many entities that are subject to Sunshine Laws have associated records retention requirements that apply regardless of whether particular records are expressly exempt from disclosure.[16] The FAST Act preempts the disclosure requirements in Sunshine Laws by providing that CEII "shall not be made available," but it does not expressly preempt state records retention requirements.[17] Accordingly, the current language in the State Agency Employee NDA requiring the agency to return CEII to FERC immediately upon request may not comport with state public records *retention* requirements that continue to apply. Thus, not only is the Commission's existing State Agency Employee NDA unnecessary to confer Sunshine Law protection given the FAST Act, but its provisions could expose public entities to potential violations of public record retention requirements.

The Commission can best achieve the FAST Act's purposes by adding to all NDAs the express obligation of those subject to Sunshine Laws not to disclose CEII, and eliminate the State Agency Employee NDA. If, however, the Commission does not do away with the separate State Agency Employee NDA altogether, it should, in addition to

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[16] *See, e.g.*, Fla. Stat. § 119.021(2) (requiring the Florida Department of State to adopt rules establishing retention and a disposal process for public records and requiring agencies to comply with such rules); Fla. Stat. § 257.36(6) (mandating public records may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division of Library and Information Services of the Department of State); Fla. Admin. Code Ann. R. 1B-24.003 (establishing public records retention schedules).

[17] FPA § 215A(d)(1)(B).

recognizing in all NDAs the express preemption of the obligation to disclose under Sunshine Laws, either remove the language that could require an entity to violate state records retention requirements, or modify the requirement to return documents to make it apply only "to the extent permitted by applicable law."

D. The Commission should revise its regulations regarding the imposition of additional conditions on voluntary sharing of CEII.

The FAST Act requires that the Commission facilitate the voluntary sharing of CEII among "Federal, State, political subdivision, and tribal authorities"; NERC; regional entities; "information sharing and analysis centers established pursuant to Presidential Decision Directive 63"; "owners, operators, and users of critical electric infrastructure in the United States"; and "other entities determined appropriate by the Commission."[18] The NOPR proposes that when the Commission itself voluntarily shares information pursuant to this provision, it "may impose additional restrictions on how the CEII the Commission voluntarily shares may be used and maintained." NOPR, P 41.

The proposed rule contemplates that Office Directors will, after consultation with the CEII Coordinator, determine whether to voluntarily share CEII, and that additional conditions may be imposed.[19] The delegations of authority to the Commission's Office Directors, however, do not authorize the Office Directors to release CEII, or to establish conditions on its release.[20] In contrast, the delegation of authority to the CEII Coordinator[21] includes the authority to:

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[18] FPA § 215A(d)(2)(D).

[19] NOPR, proposed 18 C.F.R. § 388.113(f).

[20] 18 C.F.R. §§ 375.303, 304, 307, 308, 311, 315.

[21] 18 C.F.R. § 375.313(d), (e).

> (d) Establish reasonable conditions on the release of critical energy infrastructure information [and]
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> (e) Release critical energy infrastructure information to requesters who satisfy the requirements in paragraph (b) of this section and agree in writing to abide by any conditions set forth by the Coordinator pursuant to paragraph (c) of this section.

Similar language should be added to the delegations of authority to the Office Directors to enable the proposed rule to function as intended. Doing so will also make clear that any conditions imposed by the Office Directors must be reasonable. This is particularly important in the context of voluntary releases of CEII, which the NOPR states would likely be in cases "when the Commission believes that the recipients need the information to protect critical infrastructure," NOPR, P 41, because such conditions should not interfere with the recipients' ability to protect the critical infrastructure at issue.

E. The Commission should clarify that the reasonableness of conditions imposed on access to CEII is subject to judicial review in the same manner as refusals to release CEII.

Federal Power Act section 215A(d)(11) provides for federal district court review of Commission decisions "concerning the designation of critical electric infrastructure information under this subsection." The NOPR proposes to require that entities appeal Commission decisions concerning CEII designations to the Commission's General Counsel (but would not require that they seek rehearing) before using the judicial review provided for in the FAST Act. NOPR, P 28. This treatment of CEII designations is

consistent with the Commission's existing practice with respect to refusals to release CEII.[22]

Neither the NOPR nor the FAST Act itself provides for judicial review of the reasonableness of conditions that the Commission imposes on the release of properly-designated CEII to a requester. Since conditions on the release of CEII (including additional conditions on the voluntary release of CEII, as proposed by the NOPR (P 41)) are a type of refusal to release CEII, however, we request that the Commission clarify in the Final Rule that the imposition of such conditions is subject to the existing appeal and judicial review provisions governing refusals to release CEII, since a condition is essentially a refusal to release the CEII unless the requester meets the condition.

F. The Commission should clarify that compliance with its existing CEII filing requirements meets the FAST Act's requirement to "segregate" CEII from non-CEII.

The NOPR, like the FAST Act, would require entities submitting CEII to "segregate" CEII from non-CEII as much as possible, "to facilitate disclosure of information that is not designated as critical electric infrastructure information."[23] The Final Rule should clarify that submitting a redacted public version of a filing, consistent with the Commission's existing rules, satisfies the requirement to "segregate" CEII.

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[22] 18 C.F.R. § 388.113(d)(4)(iv); NOPR, P 28 n.19 (determinations on CEII requests are "subject to review by an applicable district court").

[23] FPA § 215A(d)(8).

CONCLUSION

For the reasons set forth above, TAPS respectfully requests that the Commission issue a Final Rule incorporating the changes described herein.

Respectfully submitted,

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