

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY**

Critical Electric Infrastructure Information;)
New Administrative Procedures) RIN 1901-AB44

**COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION,
THE LARGE PUBLIC POWER COUNCIL, AND
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking issued by the United States Department of Energy (“DOE” or “the Department”) in the above-referenced proceeding,¹ the American Public Power Association (“APPA”), the Large Public Power Council (“LPPC”), and the National Rural Electric Cooperative Association (“NRECA”) (collectively, “Joint Trade Associations”) hereby provide comments on the Proposed Rule.²

I. INTRODUCTION AND EXECUTIVE SUMMARY

Joint Trade Associations applaud DOE’s proposal to establish regulations implementing its critical electric infrastructure information (“CEII”) designation authority under section 215A(d) of the Federal Power Act (“FPA”).³ By providing greater clarity and certainty concerning the procedures for the designation, handling, and sharing of CEII, appropriately structured regulations should minimize the possibility that CEII will be disclosed in a manner that poses a risk to critical electric infrastructure. At the same time, allowing “tightly-

¹ *Critical Electric Infrastructure Information; New Administrative Procedures*, 83 Fed. Reg. 54,268 (Oct. 29, 2018) (“NOPR” or “Proposed Rule”).

² There appears to be a problem with the proposed subsection numbering of the proposed regulations in the NOPR. The preamble and the text of the proposed regulations include numerous references and cross-references to subsection 1004.13(g), but, as numbered in the proposed regulations, this subsection is designated 1004.13(f). Further, the numbering skips from subsection (f) to subsection (h). There is no subsection (g). The citations and references in these comments are to the subsection numbers as they appear in the proposed regulations in the *Federal Register*.

³ 16 U.S.C. § 824o-1(d).

controlled”⁴ voluntary sharing of CEII among Federal and non-Federal entities is likely to promote overall grid security by providing entities that have a need-to-know CEII with an avenue to obtain it, subject to appropriate restrictions. Joint Trade Associations believe that the CEII regulations proposed in the NOPR generally provide a workable framework to govern the designation, handling, and voluntary sharing of CEII. These comments, however, suggest a number of changes, clarifications, and enhancements to the Proposed Rule to ensure adequate protection for CEII.

Section 215A, which was added to the FPA by the Fixing America’s Surface Transportation Act (“FAST Act”), provides for certain information to be designated as CEII by the Secretary of Energy (“Secretary”) and/or the Federal Energy Regulatory Commission (“FERC”).⁵ FERC revised its regulations to implement section 215A in its Order No. 833, issued in late 2016,⁶ although, as explained in the Proposed Rule, the designation procedures in Order No. 833 were limited to FERC.⁷ The Department states that it “has sought to harmonize its procedures with the FERC procedures as much as possible,” with some small variations.⁸ Joint Trade Associations support this general approach, including DOE’s proposal “to engage in more proactive designations” than FERC may have the ability to perform.⁹

Aspects of the Proposed Rule that Joint Trade Associations specifically endorse include:

⁴ NOPR at p. 54,270.

⁵ See 16 U.S.C. § 824o-1(d)(3).

⁶ *Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information; Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, Order No. 833, 81 Fed. Reg. 93,732 (Dec. 21, 2016) (“Order No. 833”), *order on clarification and reh’g*, Order No. 833-A, 83 Fed. Reg. 24,656 (May 30, 2018).

⁷ NOPR at p. 54,269.

⁸ *Id.*

⁹ *Id.*

- The proposal to “pre-designate” certain information as CEII to ensure prompt and clear protection from disclosure;
- The proposal to evaluate each CEII designation request rather than making a designation determination only in response to a request for information submitted as CEII;
- The proposal to return or destroy voluntarily-submitted information for which CEII designation is denied;
- The proposal to incorporate the statutory public disclosure law exemption for CEII into the regulatory text;
- The proposal that any release of CEII not generated by DOE would, except in certain circumstances, be preceded by at least ten business days’ notice to the submitter and a phone conference between the submitter and the CEII Coordinator to discuss any concerns with such potential release;
- The proposed reconsideration process, including the proposal that a request for reconsideration of a denial of CEII designation triggers a stay of the underlying decision; and
- The proposal to return or destroy information for which a CEII designation has expired or been removed.

Although Joint Trade Associations support many features of the NOPR, Joint Trade Associations recommend that the Department revise and clarify certain aspects of the Proposed Rule in issuing any final regulations in this proceeding. Joint Trade Associations’ specific recommendations include the following:

- The Department should automatically pre-designate *all* information for which a CEII designation is requested, pending a review of the request.
- The Department should confirm that “pre-designation” would constitute a formal CEII “designation” within the meaning of FPA section 215A such that pre-designated material would be treated as CEII at the time it is pre-designated.
- Absent pre-designation of all information for which a CEII designation is requested, the Department should specify that a public power utility receiving a public disclosure act request for information that is the subject of a pending CEII designation request would have the opportunity to promptly consult with the DOE CEII Coordinator and receive an expedited determination as to whether the submitted information is CEII under DOE’s regulations.
- Absent pre-designation of all information for which a CEII designation is requested, the Department should make clear that material maintained “in DOE’s files as non-public” during the pendency of a request for CEII designation will be treated and handled in all

respects as if it were CEII, including storage of electronic data in a secure electronic environment.

- The Department should provide that, like FERC, it will continue to treat CEII as non-public after a designation has lapsed due to the passage of time unless and until there is a request for such information, at which time the original submitter of the information should be given notice and an opportunity to request that DOE re-designate the information as CEII.
- The Department should clarify that inadvertent disclosure of CEII by a submitting entity generally would not be a basis for reconsidering/removing a CEII designation.
- The Department should provide the opportunity for stakeholders to participate in the development of further guidance and procedures that will apply in DOE's management of CEII.
- The Department should decline to share CEII not generated by DOE over the objection of the submitting entity in cases where the CEII was voluntarily provided by the submitting entity.
- DOE should provide additional details concerning the criteria and vetting procedures that DOE will apply in responding to requests for release of CEII.

Joint Trade Associations discuss these proposed clarifications and changes to the NOPR in greater detail below.

II. INTEREST OF JOINT TRADE ASSOCIATIONS

APPA is the national service organization representing the interests of the Nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities are located in every state except Hawaii. They collectively serve over 49 million people and account for 15% of all sales of electric energy (kilowatt-hours) to ultimate customers. Public power utilities are load-serving entities, with the primary goal of providing the communities they serve with safe, reliable electric service at the lowest reasonable cost. This orientation aligns the interests of the utilities with the long-term interests of the residents and businesses in their communities. APPA is part of the Electricity Subsector Coordinating Council and engages regularly in efforts that include information sharing with DOE as a Sector Specific Agency.

LPPC is an association of the 26 largest state-owned and municipal utilities in the nation

and represents the larger, asset-owning members of the public power sector.¹⁰ LPPC members are also members of APPA and own approximately 90% of the transmission assets owned by non-federal public power entities.

NRECA is the national service organization for the nation's member-owned, not-for-profit electric cooperatives. More than 900 rural electric cooperatives are responsible for keeping the lights on for more than 42 million people across 47 states. Because of their critical role in providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve. Cooperatives serve 56% of the Nation's land area, 88% of all counties, and 12% of the Nation's electric customers, while accounting for approximately 11% of all electric energy sold in the United States.

Joint Trade Associations have an interest in the Proposed Rule, as their electric utility members may at times be required to submit, or may voluntarily submit, information to DOE that may be designated as CEII, including Form OE-417. Joint Trade Associations' members may also have a need to receive CEII, and, thus have an interest in rules that allow for needed sharing of CEII, subject to appropriate restrictions.

¹⁰ LPPC's members are: Austin Energy, Chelan County Public Utility District No. 1, Clark Public Utilities, Colorado Springs Utilities, CPS Energy (San Antonio), Electricities of North Carolina, Grand River Dam Authority, Grant County Public Utility District, IID Energy (Imperial Irrigation District), JEA (Jacksonville, FL), Long Island Power Authority, Los Angeles Department of Water and Power, Lower Colorado River Authority, MEAG Power, Nebraska Public Power District, New York Power Authority, Omaha Public Power District, Orlando Utilities Commission, Platte River Power Authority, Puerto Rico Electric Power Authority, Sacramento Municipal Utility District, Salt River Project, Santee Cooper, Seattle City Light, Snohomish County Public Utility District No. 1, and Tacoma Public Utilities.

III. COMMENTS

A. DOE Should Pre-Designate All Information for Which a CEII Designation is Requested

In order to meet the definition of CEII under the FAST Act, information must be “designated” as CEII by the Secretary or FERC.¹¹ The Department proposes to designate certain categories of information as CEII automatically, including information that meets the FAST Act definition of “Defense Critical Infrastructure Information” and information on electric incidents and emergencies reported to DOE through Form OE-417.¹² This information would be “pre-designated” as CEII by the DOE CEII Coordinator, although “final CEII designation authority would reside with the [relevant] DOE Office exercising its delegated CEII designation authority.”¹³ It is Joint Trade Associations’ interpretation that such “pre-designation” would constitute a formal CEII “designation” within the meaning of FPA section 215A, and the Department should so confirm. Joint Trade Associations support the proposal to “pre-designate” certain information as CEII, and Joint Trade Associations urge DOE to extend this approach to all information for which a CEII designation is requested.

Defense Critical Infrastructure Information, Form OE-417 submissions, and Federal spectrum information is likely to reflect CEII, and it is appropriate to immediately extend a blanket of protection over these submissions. Further, reserving final designation authority for these materials to the appropriate DOE Office would provide an additional layer of review that

¹¹ 16 U.S.C. § 824o-1(a)(3) (“The term ‘critical electric infrastructure information’ means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the [FERC] or other Federal agency, other than classified national security information, *that is designated as critical electric infrastructure information by the Commission or the Secretary pursuant to subsection (d)*” (emphasis added)).

¹² NOPR at p. 54,271; *see also id* at pp. 54,275-76 (proposed subsection 1004.13(f)(3)(i)). DOE also proposes to pre-designate Federal spectrum information managed by the National Telecommunications and Information Administration. *See id.*

¹³ *Id.* at p. 54,270.

would help ensure that the pre-designation approach for these materials does not result in information being maintained as CEII that does not meet the statutory definition.¹⁴

Aside from pre-designated materials, the NOPR proposes that information for which CEII treatment is requested will be maintained in DOE's files as "non-public" unless and until DOE completes its determination that the information is not entitled to CEII treatment.¹⁵ Joint Trade Associations urge DOE to reconsider this approach and instead apply the pre-designation classification to all information for which a CEII designation is requested. The Department is already proposing a "pre-designation" process for certain categories of information, and there are valid reasons to extend this approach to all information for which a CEII designation is requested.

Pre-designation of all CEII requests could be readily accommodated under the Department's proposed framework because DOE indicates that it intends to make a specific decision on *all* CEII designation requests – an approach that Joint Trade Associations support.¹⁶ This distinguishes the NOPR from the approach used by FERC, which generally will make a formal CEII determination and designation only when there is a specific request for information that has been submitted as CEII.¹⁷ FERC concluded it would be "overly burdensome" to make a ruling on each CEII request when it is filed, given the sheer volume of CEII submissions that FERC receives every year.¹⁸ The NOPR explains, however, that "the Department anticipates

¹⁴ DOE should clarify whether information pre-designated as CEII would be subject to further specific evaluation under proposed subsection 1004.13(f)(5)(i) to "confirm" the designation, or whether a pre-designation would remain in place unless and until DOE has reason to review the designation under proposed subsection 1004.13(f)(5)(ii).

¹⁵ NOPR at p. 54,276 (proposed subsection 1004.13(f)(3)(ii)).

¹⁶ *See, e.g., id.* (explaining that "DOE will endeavor to make a determination as soon as practicable.").

¹⁷ *See* FERC Order No. 833 at PP 38 and 48, 81 Fed. Reg. at pp. 93,736-37. As with the Department's proposed pre-designation process, FERC does automatically consider certain information CEII, such as the FERC Form 715 - Annual Transmission Planning and Evaluation Report.

¹⁸ *See id.*

receiving a smaller volume of CEII materials, due to DOE’s non-regulatory role, which gives DOE the flexibility to engage in more proactive designations.”¹⁹ Thus, even applying automatic pre-designation, an individualized designation determination would still be made on all information for which CEII treatment is requested, which would protect against over-designation of material that does not qualify as CEII. And because DOE proposes nearly identical procedures to address *denial* of a CEII designation request and *removal* of a CEII designation, the regulations could retain the same basic framework even if denial of CEII treatment were to be treated instead as the removal of a CEII pre-designation.

Using an automatic designation approach for all CEII requests would provide clarity as to *when* a CEII “designation” formally occurs, which is relevant for a number of purposes under the FAST Act.²⁰ Under FPA section 215A(d)(9), for example, information may not be designated as CEII for longer than five years unless specifically re-designated.²¹ Designating material as CEII upon the date of submission (subject to further Department review) would allow submitters and/or DOE to more easily track the applicable five-year designation period and initiate the process for re-designation, if appropriate.²² Further, the FAST Act contemplates that DOE personnel may be subject to sanctions for knowingly and willingly engaging in unauthorized disclosure of CEII.²³ Using pre-designation to specify the point at which information is deemed

¹⁹ NOPR at p. 54,269; *see also id.* (explaining that DOE’s proposed procedures “anticipate designation before a FOIA request is received”).

²⁰ As noted, the proposed regulations state that the Department would generally try to make a designation determination “as soon as practicable.” *Id.* at p. 54,276 (proposed subsection 1004.13(f)(3)(ii)).

²¹ 16 U.S.C. § 824o-1(d)(9).

²² Although not explicit in its regulations, FERC apparently considers the five-year designation period to run from submission of information for which a CEII designation is requested even though, as noted above, FERC generally does not formally designate information as CEII unless the information is requested.

²³ 16 U.S.C. § 824o-1(d)(2)(C). In promulgating regulations to implement FPA section 215A(d)(2)(C), FERC deferred to the Department “as to what sanctions would be appropriate for DOE officers and employees.” FERC Order No. 833 at P 107, 81 Fed. Reg. at p. 93,743.

to be designated CEII would provide DOE personnel and other parties with clearer notice of the information that, if improperly disclosed, could result in sanctions.

Pre-designating all information for which CEII treatment is requested would also help ensure appropriate protection from disclosure under Federal, state, and tribal public disclosure laws as contemplated by the FAST Act and the Department's proposed regulations.²⁴ The FAST Act's exemption for CEII under state public disclosure laws is important to protecting CEII of public power utilities, which are often subject to such state laws. During the time between when a request for CEII designation is made and when DOE grants the CEII designation, the applicability of the state public disclosure law exemption might potentially be called into question because the proposed regulations state that the pendency of a designation request does not mean that DOE has made a determination regarding CEII designation.²⁵ Pre-designating all proposed information for which CEII information is requested would eliminate this ambiguity and provide the other benefits described above.

B. The Department Should Confirm that Non-Public Information Will Be Treated The Same As CEII While a Designation Request is Pending

Absent pre-designation of all CEII submissions, it would be imperative to implement the NOPR's proposal to maintain information as non-public while a CEII designation request is pending.²⁶ Joint Trade Associations are concerned, however, that the "non-public" status referenced in the NOPR is insufficiently described in either the Department's existing or proposed regulations. Joint Trade Associations recommend that the Department specify in its final regulations that material maintained "in DOE's files as non-public"²⁷ during the pendency

²⁴ See 16 U.S.C. § 824o-1(d)(1)(B); NOPR at p. 54,276 (proposed subsection 1004.13(f)(6)(ii)(B)).

²⁵ NOPR at p. 54,276 (proposed subsection 1004.13(f)(3)(ii)).

²⁶ See *id.*

²⁷ *Id.*

of a request for CEII designation will be treated and handled in all respects as if it were CEII, as appears to be the Department's intent.²⁸ The regulations should make clear, in particular, that treatment of electronic information as non-public will include "stor[age] in a secure electronic environment" with appropriate labeling, as the NOPR proposes for CEII.²⁹

C. Implementation of the FAST Act Exemption from Public Disclosure Laws

As noted above, the FAST Act's provision exempting CEII from state public disclosure laws is important to protecting CEII of public power utilities, which are often subject to these laws. Even though the statutory exemption from state public disclosure laws would apply independent of DOE's regulations, Joint Trade Associations support the NOPR's proposal to specifically incorporate the exemption into the regulatory text.³⁰ Joint Trade Associations suggest, moreover, that DOE include specific reference to the public disclosure law exemption in the non-disclosure agreements ("NDA") and Acknowledgement/Agreement that would be required to receive CEII under proposed subsection 1004.13(j).³¹ Including specific reference to the public disclosure law exemption for CEII in the Department's regulations and NDA would help ensure awareness of this important limitation among stakeholders. FERC agreed with APPA, Transmission Access Policy Study Group ("TAPS"), and others that its CEII regulations and NDA should explicitly incorporate the FPA section 215A(d)(1)(B) exemption from public disclosure laws,³² and the Department should do likewise.

²⁸ *See id.* (indicating that maintaining information in DOE's files as non-public would constitute "interim treatment of the information as CEII").

²⁹ *Id.* at p. 54,276 (proposed subsection 1004.13(f)(6)(i)).

³⁰ *See id.* (proposed subsection 1004.13(f)(6)(ii)(B)).

³¹ *Id.* at p. 54,277 (proposed subsection 1004.13(j)(3)).

³² FERC Order No. 833 at PP 22, 27, 81 Fed. Reg. at pp. 93,734-5.

Further, if the Department does not adopt pre-designation for all materials as discussed in section III.A above, DOE should specify that a public power utility that receives a state public records request for information that has been submitted to DOE with a request for CEII designation will have the opportunity to consult with the DOE CEII Coordinator and receive an expedited determination as to whether the submitted information is CEII under DOE's regulations.³³

D. The Department Should Modify the NOPR's Treatment of Information for Which CEII Protection Has Expired to Provide Greater Protection for Sensitive Information and Reduce Regulatory Burdens

Under the FAST Act, designated information can cease to be treated as CEII when a designation expires due to the passage of time or when a CEII designation is removed by the Secretary (or the Secretary's delegee).³⁴ While the Proposed Rule provides for notice and an opportunity to comment when DOE proposes to *remove* a CEII designation,³⁵ the regulations indicate that this process would not apply to the *expiration* of a designation. Instead, the proposed regulations indicate that a CEII designation will simply lapse unless the submitter affirmatively applies for re-designation no earlier than one year prior to the date of expiration.³⁶

Joint Trade Associations are concerned that the need for CEII submitters to track designation durations and dates of expiration for potentially numerous CEII submissions over multiple years could be a record-keeping challenge and a potential trap for the unwary that could

³³ FERC declined to adopt a special expedited designation process for this situation, concluding that it was sufficient that "State and local entities may consult with the CEII Coordinator as to whether information that is subject to a State, local, or other type of records request is CEII under the Commission's regulations." FERC Order No. 833 at P 49, 81 Fed. Reg. at p. 93,737. Joint Trade Associations urge DOE to endorse a more robust process in its regulations, particularly given the Department's observation that it has greater flexibility than FERC "to engage in more proactive designations." NOPR at p. 54,269.

³⁴ 16 U.S.C. §§ 824o-1(d)(9) and 824o-1(d)(10). A CEII designation could also be removed through judicial review.

³⁵ See NOPR at p. 54,276 (proposed subsection 1004.13(h)(2)).

³⁶ See *id.* (proposed subsection 1004.13(h)(1)(ii) ("[a] submitter may re-apply for CEII designation no earlier than one year prior to the date of expiration of the prior designation or re-designation")).

put CEII designations at risk of inadvertent expiration. Unlike under FERC’s regulations, however, the Proposed Rule does not provide that DOE will treat information as *non-public* after a CEII designation has lapsed.³⁷

To address this concern, the Department should revise the proposed regulations to specify that, like FERC, DOE will continue to treat CEII as non-public even after a designation has lapsed due to the passage of time. This “non-public” treatment should be functionally identical to the handling of CEII, as discussed in section III.B above. Further, Joint Trade Associations recommend that DOE revise the proposed regulations to provide that submitters of CEII for which a designation has lapsed would receive notice of any requests for such information (by either a Federal or non-Federal entity) and an opportunity to assert that DOE should re-designate the information as CEII. Section 215A(d)(9) of the FPA gives the Secretary authority to re-designate information as CEII to extend protection beyond five years, and the statute does not require that the re-designation occur before the expiration of the prior CEII designation. This approach is administratively simpler for the Department and submitters alike, and it would protect against inappropriate release of sensitive information while still providing a straightforward process for release of information that need no longer be maintained as CEII.³⁸

On a somewhat related point, the proposed regulations state that if a CEII submitter publicly discloses its information that has been designated as CEII, “then the Department

³⁷ See 18 C.F.R. § 388.113(e)(3) (2018) (“The Commission will treat CEII or documents marked as CEII as non-public after the designation has lapsed until the CEII Coordinator determines to un-designate the information”); see also FERC Order No. 833 at P 71, 81 Fed. Reg. at pp. 93,740.

³⁸ Joint Trade Associations emphasize that submitters should still have the option of requesting a CEII re-designation prior to expiration of an earlier designation, but non-action by the submitter should not put the CEII at risk of disclosure. The Department should also maintain the proposed option for submitters to request the return or destruction of CEII for which a designation has expired. See NOPR at p. 54,276 (proposed subsection 1004.13(h)(3)).

reserves the right to remove its CEII designation.”³⁹ The Department should clarify that the disclosure by the submitter that might prompt such removal of the CEII designation must be intentional, and that inadvertent disclosure by the submitter would not be a basis for reconsidering the CEII designation.

E. The Department Should Provide the Opportunity for Stakeholders to Participate in the Development of the CEII Guidelines and NDA

The proposed regulations would task the CEII Coordinator with “establish[ing] guidance for the treatment, handling, and storage of all CEII materials in the Department in accordance with [proposed subsection 1004.13(f)(6)], including those related to CEII international sharing protocols.”⁴⁰ In addition, the CEII Coordinator would have authority to “[e]stablish reasonable conditions for considering requests for release of CEII-designated material.”⁴¹

Joint Trade Associations recognize that it would be difficult to develop detailed and prescriptive regulations governing all aspects of DOE’s management of CEII, and providing the CEII Coordinator and other officials with authority to develop guidance and procedures on these matters should be workable.⁴² Joint Trade Associations recommend, however, that the Department provide the opportunity for stakeholders – including public power utilities, electric cooperatives, and their representatives – to participate in the development of the further guidance and procedures that will apply in DOE’s management of CEII. Stakeholders should have a role in developing guidelines for matters such as labeling requirements for voluntarily-shared information to mirror industry norms (standards) for internal protection of sensitive

³⁹ *Id.* at p. 54,278 (proposed subsection 1004.13(l)(1)).

⁴⁰ *Id.* at p. 54,275 (proposed subsection 1004.13(e)(1)(viii)).

⁴¹ *Id.* (proposed subsection 1004.13(e)(1)(iv)).

⁴² As discussed below, the Department should include certain additional details in the regulations concerning sharing of CEII.

information.⁴³ Stakeholders should also be able to comment on the criteria to be applied in considering requests for release of CEII, the vetting process that DOE will use for CEII requesters, and the terms and conditions of NDAs beyond the minimum requirements specified in the proposed regulations.⁴⁴

Joint Trade Associations appreciate DOE's solicitation of stakeholder views and its efforts to address their concerns thus far.⁴⁵ Joint Trade Associations urge the Department to continue this cooperation by providing the opportunity for additional input regarding any further guidance and procedures that DOE develops with respect to the treatment, handling, storage, and sharing of CEII.

F. The Department Should Revise and Clarify Certain Aspects of the Proposed Rule's CEII Sharing Provisions

Regulations promulgated under FPA section 215A(d)(2)(D) are to "facilitate *voluntary* sharing of critical electric infrastructure information with, between, and by" various electric industry stakeholders.⁴⁶ The NOPR, while proposing relatively robust processes for coordinating with submitters prior to release of CEII, would give DOE the final say on whether to share a submitter's CEII over the objection of the submitter.⁴⁷

⁴³ For example, the North American Electric Reliability Corporation ("NERC") has developed, with industry input, guidance for protecting sensitive information. The NERC guideline is available at: [https://www.nerc.com/comm/CIPC/Protecting%20Sensitive%20Information%20Guideline%20Task1/Protecting%20Sensitive%20Information%20Guideline%20\(PSIGTF\).pdf](https://www.nerc.com/comm/CIPC/Protecting%20Sensitive%20Information%20Guideline%20Task1/Protecting%20Sensitive%20Information%20Guideline%20(PSIGTF).pdf).

⁴⁴ NOPR at p. 54,277 (proposed subsection 1004.13(j)(2)).

⁴⁵ See *id.* at p. 54,269 & fn.1 (noting DOE's efforts to solicit stakeholder views and its intention to address stakeholder concerns).

⁴⁶ 16 U.S.C. § 824o-1(d)(2)(D) (emphasis added).

⁴⁷ See NOPR at p. 54,277 (proposed subsection 1004.13(j)(5) ("DOE would make the final determination as to whether to share CEII not generated by DOE")). The proposed regulations would also allow DOE to share CEII without prior notice to the submitter in certain circumstances. *Id.*

Joint Trade Associations recommend that DOE reconsider its proposal to allow sharing of CEII that was not generated by DOE over the objection of the submitting entity in cases where information was *voluntarily* provided to DOE by the submitter.⁴⁸ Such disclosure would amount to a form of *involuntary* sharing at odds with the FAST Act’s directive to “facilitate voluntary sharing” of CEII. Sharing of voluntarily-provided CEII over the objection of the submitter would also contravene FPA section 215A(d)(6), which provides that nothing in section 215A “shall require a person or entity in possession of critical electric infrastructure information to share such information with Federal, State, political subdivision, or tribal authorities, or any other person or entity.”⁴⁹ Release of voluntarily-provided critical electric infrastructure information without the consent of the submitter could diminish stakeholder trust and generally discourage the sharing of sensitive information with DOE – an outcome that would frustrate, rather than facilitate, voluntary sharing of CEII. Thus, the Department should revise the proposed regulations to specify that CEII that was *voluntarily* provided by a submitter will not be shared by DOE over the submitter’s objection.

Joint Trade Associations also recommend that the Department revise the proposed regulations to provide additional details concerning the criteria and vetting procedures that DOE will apply in responding to requests for release of CEII. The discussion at the February 14-15, 2018 DOE meeting referenced in the NOPR highlighted stakeholders’ concern that access to CEII is not always restricted to necessary recipients and that agency processes for evaluating releases of CEII lack transparency.⁵⁰ Joint Trade Associations appreciate DOE’s proposal that

⁴⁸ *Cf.* NOPR at p. 54,276 (proposed subsection 1004.13(f)(5)(iii) (distinguishing between voluntarily-provided information and information a submitter is required to provide)).

⁴⁹ 16 U.S.C. § 824o-1(d)(6).

⁵⁰ *See* NOPR at p. 54,269 n.1; *see also* Critical Electric Infrastructure Information Workshop Summary of Conclusions at 1 (noting that “[i]nformation owners expressed concerns over the ability to guarantee CEII will only be accessed by appropriate parties with a ‘need to know’”. Specific areas for improvement could include increasing

any release of CEII not generated by DOE would, except in certain circumstances, be preceded by at least ten business days' notice to the submitter and a phone conference between the submitter and the CEII Coordinator.⁵¹ Such notice and opportunity to comment would benefit, however, from a commonly-understood framework for evaluating and vetting CEII requests. DOE should elaborate, for example, on its suggestion that sharing of CEII by DOE may only occur "as necessary to carry out its specific jurisdictional duties pursuant to section 215A of the FPA and as the lead Sector-Specific Agency for cybersecurity for the energy sector under section 61003(c)(2)(A) of the FAST Act, and the Sector-Specific Agency for Energy (Critical Infrastructure) under Presidential Policy Directive 21."⁵² Further, DOE should specify that any entity requesting CEII will be required to make a particularized showing of how its receipt of CEII will accomplish the stated need for the information.

It would also be beneficial for DOE to provide additional details regarding how it proposes to implement FPA section 215A(d)(2)(D)(vi), which calls for regulations to facilitate voluntary sharing of CEII among "other entities determined appropriate by [FERC]."⁵³ This "catch-all" provision could greatly expand the universe of potential CEII recipients. Joint Trade Associations and their members, for example, have expressed concerns with FERC's practice of providing CEII to consultants or researchers for commercial or academic purposes,⁵⁴ and Joint Trade Associations urge DOE to restrict sharing of CEII to recipients who have a clear "need to

industry participation in validating request for CEII, and ensuring those who are entrusted to receive CEII, even if covered by an NDA, do not disclose information to other stakeholders.").

⁵¹ NOPR at p. 54,277 (proposed subsection 1004.13(j)(5)).

⁵² *Id.* at p. 54,271.

⁵³ 16 U.S.C. § 824o-1(d)(2)(D)(vi).

⁵⁴ See, e.g., *Critical Energy Infrastructure Information*, FERC Order No. 662, 70 Fed. Reg. 37,031 at P 17 (June 28, 2015) (noting that CEII in FERC Form 715 "is often requested by consultants and academics using the data to create models in order to advise clients and potential clients.").

know” the information, particularly in situations where DOE proposes to share CEII over the objection of the submitter.

The Department should also provide additional details regarding its proposal that CEII may be shared without an NDA with entities that “participate in an Electric Reliability Organization or Regional Entity information sharing program that ensures the protection of CEII.”⁵⁵ In particular, DOE should elaborate on the criteria it will apply in determining whether an information sharing program adequately “ensures the protection of CEII,” particularly since the NOPR proposes that an NDA would not be required for such information sharing.⁵⁶

⁵⁵ NOPR at p. 54,277 (proposed subsection 1004.13(j)(3)).

⁵⁶ In the case of the current ERO, Joint Trade Associations’ members provide information to NERC and the Electricity Information Sharing and Analysis Center (“E-ISAC”). A code of conduct controls how information is shared between NERC and NERC’s E-ISAC. It would be of concern to the members of Joint Trade Associations, however, if DOE’s proposal to facilitate voluntary sharing of CEII with participants in an ERO or Regional Entity information sharing program were to extend to sharing of CEII with ERO segments other than the E-ISAC.

IV. CONCLUSION

Joint Trade Associations appreciate the opportunity to provide these comments on the Proposed Rule, and we respectfully request that the Department consider these comments in developing any final regulations in this proceeding.

Respectfully submitted,

/s/ John E. McCaffrey

John E. McCaffrey
Regulatory Counsel
Jack Cashin
Director of Policy Analysis &
Reliability Standards
AMERICAN PUBLIC POWER
ASSOCIATION
2451 Crystal Drive, Suite 1000
Arlington, VA 22202
(202) 467-2900

American Public Power Association

/s/ Barry Lawson

Barry Lawson
Senior Director, Regulatory Affairs
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203
(703) 907-5781

*National Rural Electric Cooperative
Association*

/s/ Jonathan D. Schneider

Jonathan D. Schneider
Jonathan P. Trotta
STINSON LEONARD STREET LLP
1775 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
(202) 728-3034

Large Public Power Council

Dated: December 28, 2018