UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

The National Rural Electric Cooperative Association ("NRECA") respectfully submits these Comments in response to the Notice of Proposed Rulemaking ("NOPR") issued on June 16, 2016 by the Federal Energy Regulatory Commission ("FERC" or "Commission") in Docket No. RM16-15-000.[1]

In the NOPR, the Commission proposes to amend its existing regulations in order to implement the provisions of the Fixing America's Surface Transportation Act[2] ("FAST Act") pertaining to the "designation, protection and sharing of Critical Electric Infrastructure Information."[3] In addition, the NOPR proposes to amend existing Commission regulations pertaining to Critical Energy Infrastructure Information. While the NOPR generally does a fine job of implementing the relevant provisions of the FAST Act, NRECA submits these Comments with the hope that they will assist the Commission in its formulation of the Final Rule.

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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] Pub. L. No. 114-94, 129 Stat. 1312 (2015) (to be codified at 16 U.S.C.§§ 824 *et seq*.).

[3] NOPR at P. 1.

In particular, there are four areas of concern that the Commission should address in its Final Rule:

- In keeping with the FAST Act's purpose of enhancing security and electric reliability, the Commission's Final Rule should avoid implementing definitions of "Critical Electric Infrastructure" and "Critical Electric Infrastructure Information" in a manner that would create confusion with existing understandings of those terms or would result in the disclosure of sensitive information about electric facilities that are not Bulk Power System ("BPS") assets, but that were previously viewed as "Critical Energy Infrastructure".

- While the NOPR text outlines a reasonable procedure for implementing Section 215A(d)(9) of the Federal Power Act ("FPA"), which specifies a five-year time limit for a designation of Critical Energy/Electric Infrastructure Information unless specifically redesignated by the Commission, the Commission's regulatory text does not appear to match that procedure and leaves many gaps. To avoid inadvertent un-designation and unauthorized disclosure of Critical Energy/Electric Infrastructure Information, the regulatory text should make clear that the submitter of Critical Energy/Electric Infrastructure Information will receive prior notice of all potential un-designations and disclosures, will have an opportunity to comment, and will able to appeal any Commission decision before the designation lapses and before the Critical Energy/Electric Infrastructure Information is disclosed to or shared with third parties.

- Although Section 215A(d)(2)(D) of the FPA is intended to facilitate "voluntary sharing" among government agencies, the Electric Reliability Organization ("ERO"), and the industry, the Commission should avoid exercising unilateral discretion to share Critical Energy/Electric Infrastructure Information. Instead, to protect security and to mitigate disincentives for the industry to share sensitive information with the Commission, the Commission should provide in the Final Rule that it will not disclose (whether in the name of "voluntary sharing" or otherwise) any Critical Energy/Electric Infrastructure Information without affording the submitter notice and an opportunity to comment and to appeal the decision to disclose/share the information.

- While NRECA respects the concerns raised in the NOPR concerning the Commission's ability to impose sanctions on Commissioners and on the Department of Energy ("DOE") for failure to abide regulations governing Critical Energy/Electric Infrastructure Information, the plain language of Section 215A(d)(2)(C) of the FPA mandates that the Commission "ensure there are appropriate sanctions in place." To ensure that there are appropriate sanctions, the Commission should provide formally in its regulations that it "shall" refer any allegations of misconduct by the Commissioners or by DOE officials to the DOE Inspector General. The regulations should also provide an avenue for members of the public to make such referrals, as well, subject to appropriate whistleblower protections.

I. STATEMENT OF INTEREST

NRECA is the national service organization for America's Electric Cooperatives. The nation's member-owned, not-for-profit electric cooperatives constitute a unique sector of the electric utility industry with a unique set of challenges. NRECA represents the interests of the nation's more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Electric cooperatives are driven by their purpose to power communities and empower their members to improve their quality of life. Affordable electricity is the lifeblood of the American economy, and for 75 years electric cooperatives have been proud to keep the lights on. 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.

America's Electric Cooperatives bring power to 75 percent of the nation's landscape and 12 percent of the nation's electric customers, while accounting for approximately 11 percent of all electric energy sold in the United States. NRECA's member cooperatives include 65 generation and transmission ("G&T") cooperatives and 840 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. The G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives, those cooperatives that provide power directly to the end-of-the-line consumer-owners. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

NRECA shares the Commission's commitment to reliability and security of electric generation, transmission and distribution transmission. In submitting these Comments in response to the Commission's NOPR implementing the FAST Act, NRECA reiterates its long-held belief that the Commission should be measured in its rulemaking process and should balance the need for the electric industry to access certain industry information with the Commission's commitment to protect sensitive information against unauthorized disclosure.

II. BACKGROUND

On December 4, 2015, the President signed the FAST Act into law. This bill was the vehicle for numerous, significant changes to the FPA.[4] Specifically, Division F of Title LV of the FAST Act includes a variety of provisions aimed at enhancing energy security.[5]

Section 61003 of Division F of the FAST Act, establishes a new section of the FPA, Section 215A. Inside the newly-created Section 215A, Section 215A(b) provides for DOE's ability to address grid security emergencies, Section 215A(c) relates to the designation of "Critical Defense Facilities", and Section 215A(e) governs the issuance of security clearances to optimize communication regarding "threats to the security of the critical electric infrastructure."

Most relevant to this present proceeding, however, is Section 215A(d) which provides for the protection and sharing of Critical Electric Infrastructure Information. Section 215A(d)(2) directs the Commission to promulgate regulations to address four critical goals:

[4] 16 U.S.C. §§ 791, *et seq*.

[5] In addition to Section 61003, discussed in more detail herein, the FAST Act contains the following provisions relating to energy security: Section 61001 relating to emergency preparedness for energy supply disruptions; Section 61002 relating to resolving inconsistencies between environmental and grid reliability mandates; Section 61004 relating to strategic transformer reserve; and Section 61005 relating to DOE's report on energy security evaluation.

- To establish criteria and procedures for designation of Critical Electric Infrastructure Information;

- To prohibit unauthorized disclosure of Critical Electric Infrastructure Information;

- To ensure appropriate sanctions for Commissioners, Commission employees and agents, or employees and agents of the DOE who knowingly and willfully disclose Critical Electric Infrastructure Information in an unauthorized manner; and

- To facilitate voluntary sharing of Critical Electric Infrastructure Information among government agencies, the ERO, and the industry.

Although there is no purpose statement for Section 61003, or more generally for Division F of Title LV of the FAST Act, nor is there substantial legislative history concerning this provision,[6] it is clear from the structure and language of these portions of the FAST Act that Congress intended to enhance and maintain security and reliability in the electric sector. In addition, while there is one provision relating to voluntary sharing of Critical Electric Infrastructure Information within a circumscribed sphere of entities who "need to know," the bulk of Section 215A relates to protecting Critical Electric Infrastructure Information from unauthorized disclosure and the preservation of electric system security and reliability.

III. COMMENTS

Generally speaking, the NOPR implements the relevant portions of the FAST Act well. To that end, NRECA supports the proposal to reorganize former regulations in 18 C.F.R. §§ 388.112-113 into a single regulation devoted exclusively to the handling of Critical Electric

[6] *But see* Conference Report to the Fixing America's Surface Transportation Act Fact Sheet, (December 1, 2015), https://energycommerce.house.gov/news-center/fact-sheets/conference-report-fixing-america-s-surface-transportation-act (last visited August 19, 2016)(noting that the FAST Act, in part, "Ensures America's Energy Security" and " Ensures that our energy infrastructure, including the electric grid, is more resilient to 21st century risks such as physical attacks, cyber attacks, and extreme weather").

Infrastructure Information and Critical Energy Infrastructure Information.[7] NRECA also supports the Commission's specification of minimum requirements for Non-Disclosure Agreements ("NDA") that would help guard against unnecessary and unwanted disclosures of submitted information.[8]

Nevertheless, there is some ambiguity in how the Commission proposes to implement the new statutory term "Critical Electric Infrastructure Information" and there are gaps in the proposed regulations that would be inconsistent with the terms and intent of the statute unless the Commission makes needed clarifications. These Comments will address four areas of concern.

A. Definition of "Critical Electric Infrastructure"

In the NOPR, the Commission proposes to adopt the statutory definition of "Critical Electric Infrastructure" and "Critical Electric Infrastructure Information,"[9] and proposes to revise the term "CEII" so that it refers to both Critical Electric Infrastructure Information" and Critical Energy Infrastructure Information.[10] The Commission, however, fails to address ambiguities that result from adopting the new statutory terms alongside the existing terms in the manner that the Commission proposes.

For example, the Commission recognizes that the new statutory term "Critical Electric Infrastructure" is limited to BPS assets.[11] The Commission also recognizes that the preexisting term "Critical Energy Infrastructure" encompasses assets that go beyond the BPS and Critical Electric Infrastructure.[12] However, in recognizing that Critical Energy Infrastructure applies to

[7] NOPR at ¶ 20.

[8] Proposed 18 C.F.R. § 388.113(h)(2).

[9] NOPR at ¶ 12.

[10] NOPR at ¶ 13.

[11] NOPR at ¶ 11; *see* FPA § 215A(a)(3); Proposed 18 C.F.R. § 388.113(c).

[12] NOPR at ¶ 11.

"other energy infrastructure," specifically "gas pipeline, LNG, oil and hydroelectric infrastructure," the Commission neglects to mention that there is other electric infrastructure that was previously classified as Critical Energy Infrastructure, but that does not qualify as part of the BPS or as Critical Electric Infrastructure.[13] Instead, the Commission notes that Critical Energy Infrastructure Information has always included information about "production, generation, transportation, transmission, or distribution of energy."[14] NRECA urges the Commission to make clear that it continues to view electric generation, non-BES transmission and distribution facilities as Critical Energy Infrastructure even if they are not typically BPS facilities and would not qualify as Critical Electric Infrastructure.

There is nothing in the FAST Act that would suggest that the scope of protected information in the electric sector should be narrower than it was prior to the adoption of the FAST Act. Similarly, there is nothing to suggest that the adoption of the term Critical Electric Infrastructure was intended to restrict or limit protections of information in the electric sector. In fact, Section 215A(d)(10) of the FPA explicitly references the need to protect the security and reliability of "distribution facilities."[15] The Commission in the NOPR[16] and in proposed 18 C.F.R. § 338.113(e)(2), proposes to extend this protection beyond "Bulk-Power System and distribution facilities" to "other forms of energy infrastructure." In the Final Rule, the

[13] For example, under NERC's definition of Bulk Electric System ("BES"), only large generators interconnected at 100kV or above are included in the BES, and all distribution is explicitly excluded. *See North American Electric Reliability Corp., Order Approving Revised Definition*, 146 FERC ¶ 61,199 (2014). The statutory definition of BPS also excludes distribution facilities and only encompasses the "electric energy from generation facilities needed to maintain transmission system reliability." 16 U.S.C. § 824o(a)(1).

[14] 18 C.F.R. § 388.113(c)(1).

[15] FPA Section 215A(d)(10) provides that the Commission can remove the Critical Electric Infrastructure Information designation from a document if the Commission or the Secretary of the DOE "determines that disclosure of such information could no longer be used to impair the security or reliability of the bulk-power system *or distribution facilities*." (Emphasis added.) This reference to distribution facilities makes clear that Congress was concerned about the protection of electric distribution assets as well as BPS assets. The Commission proposes to address Section 215A(d)(10) in its regulations, proposed 18 C.F.R. § 338.113(e)(2), which similarly covers "distribution facilities and other forms of energy infrastructure."

[16] NOPR at ¶ 27.

Commission should clarify that these "other forms of energy infrastructure" include electric infrastructure that may not qualify as Critical Electric Infrastructure but continues to qualify as Critical Energy Infrastructure.

As noted above, the FAST Act was intended to enhance security and reliability in the electric sector by protecting sensitive information. To suggest that the new term circumscribes the scope of electric assets for which information protections would apply could lead to disclosure of electric sector information that was previously considered to be Critical Energy Information and would increase risks to security and reliability in a manner that is antithetical to the FAST Act. In the Final Rule, the Commission should clarify that this is not the Commission's intent and that the broad scope of the terms Critical Energy Infrastructure and Critical Energy Infrastructure Information continues to protect electric generation, non-BES transmission and distribution facilities that would otherwise not be protected under the new terms Critical Electric Infrastructure and Critical Electric Infrastructure Information.

B. Five-year Limit for CEII[17] Designations

In the NOPR, the Commission notes that Section 215A(d)(9) of the FPA provides that the CEII designation may not last for longer than five years, unless re-designated by the Commission or the DOE.[18] The Commission notes, however, that given that there are more than 200,000 documents in the Commission's eLibrary System with a CEII designation, the Commission will not move designated information to its public files immediately after the five-year mark, but will make the determination whether to un-designate or re-designate the information on a case-by-

[17] Notwithstanding NRECA's concerns, as noted in Part III.A. of these Comments, regarding the Commission's proposed narrow applicability of the term "CEII," the term "CEII" is used throughout the remainder of these Comments to refer to both Critical Electric Infrastructure Information and Critical Energy Infrastructure Information.

[18] NOPR at ¶¶ 23-24.

case basis when an entity requests the information, when staff determines the need to remove the designation, or when a submitter requests that the designation be removed.[19] The Commission further states that, even "past the expiration of the CEII designation," it will only release information previously designated as CEII to an entity that has executed an NDA, thereby affording the Commission an opportunity to determine whether a redesignation is required.[20] The Commission also makes clear that it will not remove the CEII designation until it finds that the information "no longer could impair the security or reliability of not only the [BPS] and distribution facilities but other forms of energy infrastructure" and only after it affords the submitter notice and an opportunity to comment.[21] Finally, proposed 18 C.F.R. § 388.113(e)(4) contemplates the right of the submitter to pursue an administrative appeal to the Commission's General Counsel in the event that the CEII Coordinator decides to remove the CEII designation over the submitter's objection.

NRECA supports FERC's proposal to avoid making unilateral, automatic, or wholesale un-designations and public disclosures of existing CEII. The FAST Act recognizes the Commission's discretion to extend the designation beyond the five-year cut off. As noted above, the FAST Act was intended to protect against disclosure of sensitive information, not to facilitate inadvertent or unvetted disclosure. Nevertheless, there are issues with the regulatory text that implements this discussion in the NOPR. These Comments will address these issues in turn.

i. Regulatory Text Barring Automatic Disclosure

One of the most significant concerns with the proposed regulations is that there is no provision in proposed 18 C.F.R. § 388.113(e) that codifies the Commission's commitment to

[19] NOPR at ¶ 24.

[20] NOPR at ¶ 26.

[21] NOPR at ¶ 27.

maintain information designated as CEII in its non-public files even after the expiration of the five-year period, until an entity requests the information, the staff determines that the designation should be removed, or the submitter request that the designation be removed. As the Final Rule will have the "force and effect of law,"[22] the Commission should include express language in the regulations articulating its commitment in the NOPR text to preserving CEII in its non-public files until one of the above conditions is met. Clear language to this effect will avoid any ambiguity that might arise as a result of the language (or lack thereof) in the proposed regulations.

ii. Regulatory Text Requiring CEII Recipients To Sign Non-disclosure Agreements

In addition there is no provision in proposed 18 C.F.R. § 388.113(e) that codifies the Commission's commitment to require a requester of CEII to sign a Non-Disclosure Agreement ("NDA") after the five-year period has expired. While proposed 18 C.F.R. § 388.113(f)(3) provides that all entities receiving CEII must execute either an NDA or an acknowledgement agreement, it does not address the situation when a document was designated as CEII more than five years before the disclosure and whether the receiving entities must sign an NDA in that situation. To avoid an ambiguity in the regulations, the Commission should codify in the regulations the requirement for an NDA when an entity receives CEII after the designation expires.

iii. Ambiguity Concerning the Notice of Removal Decision

Next, proposed 18 C.F.R. § 388.113(e)(3) is imprecise, unworkable and internally inconsistent. The first sentence states: "If such a designation **is removed**, the submitter will receive notice and an opportunity to comment." (Emphasis added.) This implies that the

[22] *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979).

designation could be removed prior to the submitter receiving notice and an opportunity to comment. The third sentence states that the "[n]otice of a removal decision will be given to any person claiming that the information is CEII no less than five calendar days before disclosure." The Commission should revise this regulation to make clear that the notice and opportunity to comment and the opportunity to seek judicial review should be provided **before** any removal or disclosure decisions with ample opportunity to object to both the removal of the CEII designation and the disclosure of the submitter's information.

To hold otherwise would make futile any notice and opportunity to comment since that procedure could not prevent a removal that the Commission has already decided or that has already occurred. It would also belie the validity of the removal decision. Any decision to remove the designation that is made prior to receiving comment from a submitter is likely to be unsupported by substantial evidence.

iv. Lack of Specificity in the Administrative Appeal Process

Proposed 18 C.F.R. § 388.113(e)(4) provides that a submitter must seek pursue an administrative appeal with the Commission's General Counsel prior to seeking judicial review in district court pursuant to Section 215A (d)(11) of the FPA. Although NRECA does not object to this appellate review step in principal, the Commission has failed to articulate the legal basis for this requirement, and more fundamentally, the Commission fails to provide any procedures for this administrative appeal.

This provision should specify the timeframe in which this appeal can be pursued and provide a timeframe for when a decision on the appeal should be rendered. It should also make clear that no designation removal or CEII disclosure can take place prior to completion of that administrative appeal or during the pendency of any subsequent judicial review. Although the

Commission asserts in the NOPR that an administrative appeal procedure would be "appropriate" to ensure consistency of decision making,[23] the Commission fails to cite to any provision in the FAST Act or any other statutory authority to require such an administrative appeal.

Finally, although the Commission proposes to amend 18 C.F.R. § 375.313 to reflect changes in the delegations of authority to the CEII Coordinator to effectuate the FAST Act, the Commission has not provided delegations of authority to the General Counsel to hear and decide an administrative appeal under proposed 18 C.F.R. § 388.113(e)(4) or to "staff" to determine the need for removal of a CEII designation as the Commission proposed in the NOPR.[24] NRECA suggests that the Commission revise its proposed amendments to 18 C.F.R. § 375.313 to include these delegations to Commission "staff" and the General Counsel.

C. Voluntary Sharing

Instead of encouraging the energy sector to voluntarily share its CEII with the Commission, the NOPR creates a significant disincentive to do so. Proposed regulation 18 C.F.R. § 388.113(f)(5)[25] provides that a submitter of CEII will get five days' notice, but it does not provide for an opportunity for comment as proposed in 18 C.F.R. § 388.113(e)(3) or for an administrative appeal as provided in 18 C.F.R. § 388.113(e)(4). The Commission should make clear that, whatever CEII it discloses under the auspices of "voluntary sharing," those disclosures must be subject to the same notice, opportunity for comment and appeal rights that are afforded

[23] NOPR at ¶ 28.

[24] NOPR at ¶ 24.

[25] Proposed section 388.113(f)(5) permits the sharing of CEII with law enforcement without notice to the submitter of the CEII. While NRECA understands and appreciates the need to share CEII with law enforcement expeditiously, sometimes without opportunity to provide advance notice, the Commission should revise 18 C.F.R. § 388.113(e)(5) to provide a requirement that notice of a disclosure of CEII be given to the submitter as soon as possible, even if such notice occurs after the disclosure has been made.

whenever FERC discloses information previously designated as CEII. To hold otherwise would create a significant disincentive to voluntary sharing of CEII by regulated entities, and this disincentive would be inconsistent with the true intent of Section 215A(d)(2)(D) of the FPA.

In the NOPR, the Commission asserts that Section 215A(d)(2)(D) gives the Commission "authority to share CEII with individuals and organizations that the Commission has determined need the information to ensure that energy infrastructure is protected."[26] NRECA respectfully submits that the Commission reads Section 215A(d)(2)(D) too narrowly. What the Commission does not acknowledge or discuss is the fact that the statutory intent is to facilitate voluntary sharing by and among a wide variety of entities, most notably "owners, operators and users of critical electric infrastructure," from whom most CEII will originate. The NOPR is too narrowly focused on the Commission's unilateral ability to disclose sensitive information. This position diverges from the text and intent of the FAST Act.

Section 215A(d)(2)(D) makes clear that the "voluntary sharing" that the Commission must "facilitate" must be "with, between and by" the many listed entities. If Congress had intended the FAST Act to simply encourage the Commission to make unilateral decisions to share information, Congress would have simply provided for voluntary sharing "by" the Commission.

Given that Section 215A(d)(2)(C) stipulates that the Commission should provide for sanctions for itself, its employees and agents, and the DOE for unauthorized disclosure, the reference to voluntary sharing could not possibly be construed to be limited to the Commission's *unilateral* authority to disclose sensitive information. Instead, "voluntary sharing" must be read in the broader context of ensuring that entities with CEII have no disincentives to share their

[26] NOPR at ¶ 37.

CEII with the Commission and with other parties who have a legitimate need to obtain that information. This is illustrated by the liability limitation spelled out in Section 215A(f)(3) of the FPA, which provides that sharing or receipt of information pursuant Section 215A(d) shall not be subject to any causes of action in any Federal or State court.

This encouragement of voluntary sharing through the elimination of disincentives is also consistent with other efforts to encourage voluntary sharing of cyber security information by eliminating concerns about redisclosure of CEII by the recipient of CEII. For example, the Cybersecurity Information Sharing Act of 2015[27] ("CISA") provides that: "A cyber threat indicator or defensive measure shared with the Federal Government under this title shall be … *deemed voluntarily shared information and exempt from disclosure* under section 552 of title 5, United States Code, and any State, tribal or local provision of law requiring disclosure of information or records."[28] In addition, Executive Order 13691 encourages the formation of voluntary information sharing and analysis organizations, but recognizes that "Such information sharing must be conducted in a manner that *protects the privacy and civil liberties of individuals, that preserves business confidentiality, that safeguards the information being shared*, and that protects the ability of the Government to detect, investigate, prevent, and respond to cyber threats to the public health and safety, national security, and economic security of the United States"[29]

The NOPR appears to turn the notion of voluntary sharing on its head. By preserving for itself the unfettered discretion to release CEII, whether generated by the Commission or

[27] Pub. L. No. 114-113, Div. N, Title I, § 101, 129 Stat. 2936 which was part of the Cybersecurity Act of 2015, Pub.L. No. 114-113, Div. N, § 1(a), 129 Stat. 2935 which was part of the Consolidated Appropriations Act of 2016, 114 Pub.L. No. 113, 129 Stat. 2242.

[28] CISA §105(d)(3)(A)(emphasis added).

[29] Exec. Order No. 13691, 80 Fed. Reg. 9349 (February 20, 2015)(emphasis added).

submitted to the Commission, and whether or not the Commission has received a request for the CEII, the Commission would in fact discourage voluntary sharing of CEII by the industry as contemplated under Section 215A(d)(2)(D). Instead, to encourage the voluntary submission of CEII by the industry, the Commission should make clear that any disclosure of CEII in its files, including disclosures by the Commission in the name of "voluntary sharing" must be subject to the notice, opportunity to comment, and administrative and judicial appeal rights procedures that are afforded to submitters of CEII. The Commission should not allow itself to end run these procedures in the name of "voluntary sharing."

D. Sanctioning Authority

Finally, the Commission should issue a clearer statement of the Commission's authority to sanction persons that disclose CEII in violation of the regulations. NRECA appreciates the concerns laid out in the NOPR about the Commission's ability to sanction itself or individual Commissioners [30]and about its ability to police the DOE.[31] However, these simple statements in the NOPR text do not discharge the Commission's responsibilities expressly stated in Section 215A(d)(2)(C) of the FPA, which requires that the Commission promulgate regulations that "ensure there are appropriate sanctions in place."[32]

In present form, the NOPR text does not "ensure" that appropriate sanctions are in place. It merely states that the Commission "can" refer any misconduct to the DOE Inspector General ("IG"). Nor does the Commission fulfill its charge by "anticipat[ing]" that DOE will take responsibility for its own officials with respect to unauthorized disclosures.

[30] NOPR at ¶ 36.

[31] NOPR at n. 24.

[32] FAST Act, § 215A(d)(2)(C).

Instead, the Final Rule should be revised to make clear that the Commission "shall" refer any misconduct to the DOE IG. The Final Rule should also provide a mechanism for the public to make a referral to the DOE IG if they are aware of any misconduct. In addition, the referring entity should receive appropriate whistleblower protections similar to those afforded to federal employees, contractors and grantees under the Inspector General Act of 1978[33] as amended, and the Whistleblower Protection Act of 1989.[34] While these steps would not solve any jurisdictional barrier to the Commission's sanctions authority, it would enable the Commission to better fulfill its mandate by facilitating the reporting of any misconduct to DOE's IG.

In clarifying its authority to sanction its own officers, employees and agents for misconduct and to refer misconduct of Commissioners or the DOE to DOE's IG, the Commission should reaffirm its existing authority to assess civil penalties on other requesters of CEII that misuse or inappropriately disclose CEII. The Commission's current form of NDA provides that "[v]iolation of this non-disclosure agreement may result in criminal or civil sanctions against the recipient."[35] Such a breach of a recipient's duty to protect CEII from unauthorized disclosure would also be a violation of a Commission rule under Part II of the FPA, which would be subject to a civil penalty of up to $1,000,000 each day that such violation continues.[36] In codifying its authority to ensure appropriate sanctions against the Commission and officers, employees or agents of the Commission or the DOE pursuant to FPA Section

[33] Pub. L. 95-452 (1978).

[34] Pub.L. 101-12 (1989), as amended; *see also* DOE's Whistleblower Information page, http://energy.gov/ig/services/whistleblower-information (last visited August 19, 2016).

[35] *Critical Energy Infrastructure Information General Non-disclosure Agreement*, Section 17, http://www.ferc.gov/legal/ceii-foia/ceii/gen-nda.pdf (last visited August 19, 2016).

[36] *See* 16 U.S.C §852o-1.

215A(d)(2)(C), the Commission should reaffirm its authority to impose sanctions against any recipient that misuses or improperly discloses CEII.[37]

IV. CONCLUSION

NRECA supports common sense implementation of the FAST Act, specifically Section 215A of the FPA. As is laid out in more detail above, the Commission's Final Rule should clarify any confusion as to the definition of "critical energy infrastructure"; guard against un-designation and disclosure of sensitive and proprietary information submitted to the Commission; provide submitters with adequate notice of, opportunity for comment on and opportunity for appeal of Commission determinations prior to the release of CEII; encourage voluntary sharing; and better-define the Commission's process for imposing sanctions.

[37] Proposed regulation 18 C.F.R. § 388.112(i) provides for sanctions against the Commission or officers, agents or employees of the Commission or DOE, but it is silent with respect to sanctions against non-governmental recipients.

WHEREFORE, NRECA respectfully requests that the Commission consider these Comments in promulgating its Final Rule in this proceeding.

Respectfully submitted,

By:

NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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Dated: August 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 19th day of August, 2016.

By: /s/
Joel deJesus