

125 FERC ¶ 61,223
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Critical Energy Infrastructure Information Docket No. RM06-23-001

ORDER ON REHEARING

(November 25, 2008)

1. This order addresses the request for rehearing filed by Edison Electric Institute (EEI) of the Commission's October 30, 2007 Order in this proceeding (Order No. 702),¹ a Final Rule that amended the Commission's regulations for gaining access to critical energy infrastructure information (CEII). The Final Rule modified non-disclosure agreements, revised the Commission's process to allow the CEII Coordinator to respond to CEII requests by letter, made the CEII appeal process consistent with the Freedom of Information Act (FOIA) appeal process, provided landowners access to alignment sheets for the routes across or in the vicinity of their properties, included a fee provision, limited the portions of forms and reports the Commission defines as containing CEII, eliminated as a category of documents the Non-Internet Public (NIP) designation, and provided that the Commission will seek a requester's date and place of birth on a case-by-case basis

¹ Critical Energy Infrastructure Information, Order No. 702, FERC Stats. & Regs. ¶ 31,258 (2007), 72 Fed. Reg. 63980 (November 14, 2007).

rather than require that information with every request for CEII. This order denies EEI's request for rehearing for the reasons set forth below.

Background

2. Shortly after the attacks on September 11, 2001, the Commission began its efforts with respect to CEII.² As a preliminary step, the Commission removed from its public files and Internet page documents such as oversized maps that were likely to contain detailed specifications of facilities, and directed the public to use the FOIA request process to obtain such information.³ The Commission established its CEII rules in Order Nos. 630 and 630-A.⁴

3. On September 21, 2006, the Commission issued a Notice of Proposed Rulemaking (NOPR) inviting comments on the following issues: (1) annual certification for repeat requesters; (2) execution of non-disclosure agreements by authorized representatives of organizations on behalf of all of the organizations' employees; (3) charging fees; (4) issuing letter responses to CEII requests;

² See Statement of Policy on Treatment of Previously Public Documents, 66 Fed. Reg. 52,917 (Oct. 18, 2001), 97 FERC ¶ 61,030 (2001).

³ The FOIA process is specified in 5 U.S.C. § 552 (2000 & Supp. IV 2004) and the Commission's regulations at 18 C.F.R. § 388.108.

⁴ Critical Energy Infrastructure Information, Order No. 630, 68 Fed. Reg. 9,857 (Mar. 3, 2003), FERC Stats. & Regs. ¶ 31,140 (2003); order on reh'g, Order No. 630-A, 68 Fed. Reg. 46,456 (Aug. 6, 2003), FERC Stats. & Regs. ¶ 31,147 (2003).

(5) making the CEII appeal process consistent with the process set forth for FOIA appeals; (6) providing alignment sheets to landowners for the routes across or in the vicinity of their properties; (7) limiting the portions of forms and reports the Commission now defines as containing CEII; and (8) eliminating the NIP designation. The Commission received thirteen responses to the NOPR. After considering comments on the NOPR, the Commission issued Order No. 702, the October 30, 2007 Order, which made changes to the Commission's CEII process.

Requests for Rehearing

4. On November 29, 2007, EEI submitted a request for rehearing and clarification of Order No. 702 raising two issues in its request for rehearing and clarification. Specifically, EEI requests that the Commission: (1) clarify and enlarge response timeframes for submitters of CEII as set forth in 18 C.F.R. §§ 388.112(d) and (e); and (2) provide submitters of CEII an opportunity for administrative review or appeal before the release of CEII.⁵

⁵ EEI raises an ancillary concern requesting that the Commission stay release of CEII pending appeal of a decision to release. As explained below, infra note 6, Commission regulation already provides an objecting submitter a five calendar day hold period to seek judicial relief after a determination has been made to release. See 18 C.F.R. § 388.112(e). As further explained below, infra paragraphs 7-9, these procedures adequately ensure submitters' rights in protecting their documents from an inappropriate release.

Discussion

5. EEI requests that current timeframes allowed for under 18 C.F.R. §§ 388.112(d) and (e) be increased from the current five calendar day minimum to a minimum of ten working days.⁶

6. Order No. 702 does not amend the time periods set forth in sections 388.112(d) and (e). EEI's request for rehearing and clarification of Order No. 702 is, therefore, an inappropriate vehicle for now challenging and/or revising the current periods or procedures set forth in sections 388.112(d) and (e). Concerns regarding the time periods encompassed by these notice provisions were previously raised by EEI in a request for rehearing of Order No. 683⁷ and these concerns were found to be unpersuasive.⁸

⁶ 18 C.F.R. § 388.112(d) provides for notification to be given to a submitter when a request is made for CEII and allows the submitter an opportunity to comment on a proposed release of the CEII. Section 388.112(e) provides for notification to be given to a submitter prior to release of the CEII and affords the submitter a five day period prior to release to seek injunctive relief in the appropriate United States District Court similar to that sought in a reverse FOIA action.

⁷ Critical Energy Infrastructure Information, Order No. 683, 71 Fed. Reg. 58,273 (October 3, 2006), FERC Stats. & Regs. ¶ 31,228 (2006).

⁸ See, e.g., Critical Energy Infrastructure Information, *order on reh'g*, Order No. 683-A, 72 Fed. Reg. 18,572 (April 13, 2007), 119 FERC ¶ 61,029 (2007) (Order No. 683-A). In Orders Nos. 683 and 683-A, the Commission explained that the notice of request required by section 388.112(d) and the five day notice of release required by section 388.112(e) may be provided at the same time and in the same document. The Commission further explained that a joint issuance of the two notices improves processing time by allowing requested

(continued...)

7. EEI also requests that objecting submitters should have the same opportunity as requesters to appeal to FERC's General Counsel a determination of the CEII Coordinator under procedures comparable to those set out at 18 C.F.R. § 388.110, or alternatively to seek rehearing before the Commission.

8. Previously, under CEII regulations prior to adoption of Order No. 702, any frustrated party, requester or submitter, could seek rehearing by the Commission of a CEII Coordinator's determination as provided by Rule 713.⁹ While Order No. 702 no longer provides for rehearing pursuant to Rule 713, it allows the same administrative appeal rights that are available under FOIA.¹⁰

9. This process allows CEII (and FOIA) requesters to appeal adverse administrative determinations to the General Counsel pursuant to section 388.110, while objecting CEII (and FOIA) submitters must proceed directly to the United States District Court if they wish to prevent disclosure of a particular document. Order No. 702 consistently and appropriately treats CEII submitters on par with FOIA submitters. These procedures, in the FOIA context, are well established and have been found to afford submitters sufficient due process. See Lykes Brothers

information to be released at the earliest point. Moreover, it does not disadvantage a submitter because an additional five day notice is provided if, prior to release, the submitter files timely comments opposing release.

⁹ 18 C.F.R. § 385.713; see also former 18 C.F.R. § 388.113(d)(3)(ii) (2007).

¹⁰ See 5 U.S.C. § 552 and 18 C.F.R. § 388.110.

Steamship Co. v. Pena, 1993 Dist. LEXIS 20279 (D.D.C. 1993) (holding that central policy of FOIA is to promote greater public access to information held by the government and it is consistent with this policy to require more stringent agency review of decisions to withhold than decisions to disclose documents).

EEI's argument to allow for administrative appeals of determinations to disclose CEII is unpersuasive both as a matter of law and practice.

The Commission orders:

EEI's request for rehearing and clarification is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.