

**UNITED STATES OF AMERICA**  
**Before the**  
**FEDERAL ENERGY REGULATORY COMMISSION**

**Critical Energy Infrastructure     )**  
**Information                             )**

**Docket No. RM03-6-000**

**COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION**

On April 9, 2003, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a Notice of Proposed Rulemaking (“NOPR”) that would revise its regulations regarding how companies disseminate critical energy infrastructure information (“CEII”). Essentially, FERC has certain regulations that require companies to distribute CEII directly to the public in contravention of the Commission’s recent regulations allowing CEII to be withheld and protected from distribution to those without a demonstrable need. The National Hydropower Association (“NHA” or “Association”) submits these comments in support of FERC’s decision to revise these regulations to afford equivalent protection to CEII under control of companies as is currently afforded to similar information under the control of the Commission. NHA believes that the proposed procedures as outlined in the NOPR, with some modifications, would close a gap that exists in the current regulations and would provide an important level of protection of our nation’s hydropower projects.

**I. Introduction**

NHA is the national trade association committed exclusively to representing the interests of the hydroelectric power industry. Our members represent 61 percent of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall in North America. NHA’s membership consists of more than 140 organizations including:

public utilities, investor owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants and attorneys.

The hydropower industry recognizes the importance of public safety and takes its responsibilities to ensure safety very seriously. As such, NHA has been actively engaged in the Commission's work on CEII issues. NHA met with FERC officials following the Commission's release of its Policy Statement on October 11, 2001, in Order No. 630, Docket No. PL02-1 [97 FERC ¶ 61,030; 66 FR 52917 (October 18, 2001)] under which it removed certain information from easy public access that the Commission considered critical and sensitive in view of the terrorist attacks of September 11, 2001. NHA identified to FERC additional types of documents containing critical and sensitive data, the release of which could pose security risks.

NHA also submitted comments on this issue in response to both the FERC's "Notice of Inquiry and Guidance for Filings in the Interim" on January 16, 2002, in Docket No. RM02-4, [IV FERC Stats. & Regs. ¶ 35,542; 67 FR 3129 (January 23, 2002)], and its Notice of Proposed Rulemaking on September 5, 2002, in Docket Nos. RM02-4 and PL02-1 [IV FERC Stats. & Regs. ¶ 32,564; 67 FR 57,994 (September 13, 2002)].

NHA applauds the Commission for its extensive and thoughtful work in this area. The Commission is on the forefront of addressing security issues. The Association appreciates this opportunity to comment further on the protection of CEII, and to address specifically, the protection of CEII under the control of individual companies.

## II. Comments

### **A. NHA supports the proposed process outlined in the NOPR for protecting CEII that companies are required to disseminate to the public directly, with some minor modifications.**

NHA agrees with the Commission that the protection of CEII must be consistent, whether it is located at FERC or in the files of an individual company. To ensure this, the Commission proposes to revise its regulations by allowing companies subject to public disclosure requirements, to omit CEII from the information made available to the public. Instead, a company would include a statement briefly describing the information, without revealing CEII, and would refer the reader to the procedures for challenging CEII claims and for requesting CEII. Any challenges and requests would take place under the procedures adopted in Order No. 630 (as promulgated in 18 CFR §§ 388.112 and 388.113).

NHA generally supports the proposed process in the NOPR. The Association believes that FERC has proposed a common-sense solution that closes a gap in the current regulations. However, NHA is concerned that the process as outlined in the NOPR will not work for all instances in which CEII information is requested from a company. As such, the Association proposes a modified version of this process that it believes, if used in addition to the NOPR's proposed process, will cover the majority, if not all, of the situations that may arise.

The NOPR's proposed process does not address those situations where a company has CEII that FERC has not otherwise reviewed, or on which FERC has not made a prior CEII determination (e.g., hydroelectric project "library" information (18 CFR §16.7(d)), or information developed as part of a current licensing process already underway.) In

these and other situations, the Commission must address how it is to make a determination on the CEII status of the information and whether it should be withheld.

NHA proposes the following process for these situations:

1. The company receives a request for public dissemination of information that includes CEII.
2. The company considers the request and makes a decision whether to release CEII or not.
3. The company decides to withhold CEII and follows the process outlined in the NOPR and redacts the information, provides an explanation, and refers the reader to the FERC regulations at 18 CFR § 388.113.
4. The requester may pursue release of the CEII from FERC.
5. If the requested CEII information is not available at FERC, or if a question exists on whether or not the information is CEII, FERC will request that the company send the information to the FERC CEII Coordinator for review.
6. The company will send the requested information to the CEII Coordinator.
7. The CEII Coordinator makes its decision on both the status of the information (i.e., whether the information is CEII) and if the particular requester should receive the information. The CEII Coordinator then informs the company and the requester of the Commission's decision.

In the instances detailed above, it is necessary for the company to make a preliminary decision on what it considers to be CEII and on whether to release the information to the particular requester. Just as FERC may deny a request to release CEII, a company needs to be able to deny requests as well, but do so using FERC guidelines as a basis for its decision and with the knowledge that requesters may go to FERC with their request if denied by the company. NHA believes these minor modifications to the NOPR process adequately address the situations described above.

## **B. Additional Questions/Issues to be Addressed**

NHA requests that FERC consider the following issues and provide a response in the regulations or where appropriate:

1. NHA requests that FERC issue additional guidance to companies on the types of information they may protect, and on the bases for which they may withhold CEII.
2. NHA suggests that the rule contain a provision that a company always retains the right to withhold CEII information from any particular requester, even if the company releases the information to other entities (i.e., release of CEII is not a waiver of the protection afforded by the regulations).

NHA is concerned that a requester may argue that a company who releases certain CEII can no longer claim that the information is protected. However, a company may decide to release CEII to one requester with whom the company is well acquainted and for whom the company is certain of the need for the information, but the company may also withhold the same CEII from a different, unfamiliar requester, or from a requester unable to demonstrate a clear need for the information. NHA believes the earlier decision to release should have no bearing on the latter decision to withhold, as the process clearly intends that these decisions are based on individual circumstances.

3. NHA believes transition issues will arise following the adoption of the final rule.

Companies already in the middle of a licensing process should be allowed to protect CEII prospectively, even if they have already publicly released the same information in the past as part of their licensing process or compliance plans. NHA is aware of member companies that posted information on the

Internet, some or all of which may now be considered CEII. As the Commission began development of its CEII policies and rules, many companies pulled the information from their websites. The final rule should clearly state that companies can protect CEII information on a forward looking basis, even if the subject information was previously made publicly available.

4. NHA suggests FERC include a global provision in the regulations stating that all of the Commission's regulations are subject to the CEII rules.

NHA is concerned that FERC may not have captured every instance in the regulations in which companies are required to publicly release information. Therefore, NHA believes a catch-all provision is needed and appropriate.<sup>1</sup> In addition, the CEII NOPR cites regulation sections that are not properly cross-referenced with the FERC hydro licensing rulemaking in Docket No. RM02-16-000. These two rules should be coordinated closely to ensure proper cross-referencing, depending on which final rule is issued first. For example, under proposed 18 CFR § 5.4 in the hydro licensing rulemaking proceeding, which deals with the Pre-Application Document (PAD), materials including potential CEII must be made available to the public. Any final rule in this proceeding, if issued before the final rule in Docket No. RM02-16-000, should acknowledge this issue.

### **III. Conclusion**

The National Hydropower Association once again commends FERC for its continuing efforts to ensure the safety of the nation's energy infrastructure.

The safety of the nation's hydropower infrastructure is one of NHA's top

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<sup>1</sup> NHA is not aware of any other regulations that would require the disclosure of CEII.

priorities. NHA applauds the Commission's efforts to follow-up its earlier CEII rulemaking with this proposed rulemaking and close a gap that would have potentially compromised protection of CEII for the hydropower industry. Again, the Association appreciates the opportunity to comment on this proposal critical to our nation's security.

Respectfully submitted,

NATIONAL HYDROPOWER ASSOCIATION

A handwritten signature in cursive script that reads "Linda Church Ciocci". The signature is written in black ink on a white background.

By \_\_\_\_\_

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