

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Critical Energy Infrastructure
Information

Docket Nos. RM02-4-000 and
PL02-1-000

**COMMENTS OF THE
TRANSMISSION ACCESS POLICY STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) appreciates the opportunity to comment on the Commission’s notice of proposed rulemaking and revised statement of policy regarding critical energy infrastructure information (“CEII”), issued on September 5, 2002.¹ TAPS supports the Commission’s goal of ensuring that its public information resources not be avenues for the release of CEII that could increase the vulnerability of the nation’s energy infrastructure. TAPS submits these comments to urge that FERC’s legitimate interest in protecting CEII does not operate to deny to market participants information critical to the assessment of market conditions.

Specifically, the Commission should clarify or affirm that:

- Market price and bid data, and the like, do not come within the definition of critical energy infrastructure information, as defined in the proposed 18 C.F.R. § 388.113(c)(1).
- Parties that request information that falls within the scope of the CEII rule and that need the information to assess market conditions in response to a Commission notice or deadline will have their requests expedited and, if necessary, deadlines to which they are responding extended to ensure that they will have sufficient time to analyze the information once released.

¹ Critical Energy Infrastructure Information, 67 Fed. Reg. 57,994 (Sept. 13, 2002) (to be codified at 18 C.F.R. Parts 375 and 388).

- Form 715 (and similar) filing rules will continue to obligate transmitting utilities to provide, upon request by legitimate entities, information that the Commission has now removed from public access from Commission sources.

I. INTEREST OF TAPS

TAPS is an informal association of transmission-dependent utilities (“TDU”) in more than 30 states, promoting open and non-discriminatory transmission access.² As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members are vitally interested in issues of industry structure and have strongly supported the Commission’s initiative to form truly independent, regional transmission organizations. We recognize the critical importance of cost-effective and reliable access to existing and planned resources, as well as to robust competitive markets, to our ability to continue to provide reliable service to our customers at a reasonable, predictable cost.

II. COMMUNICATIONS

Communications regarding the matters addressed in these comments should be directed to the following:

² TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power, Inc. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

Robert C. McDiarmid
Cynthia S. Bogorad
William S. Huang
Mark S. Hegedus
SPIEGEL & MCDIARMID
1350 New York Avenue, NW
Washington, DC 20005
Tel: (202) 879-4000
Fax: (202) 393-2866³

Roy Thilly, CEO
WISCONSIN PUBLIC POWER INC.
1425 Corporate Center Drive
Sun Prairie, Wisconsin 53590
Tel: (608) 837-2653
Fax: (608) 837-0274

III. COMMENTS

A. *CEII Protection Should Not Interfere with Market Transparency*

The Commission should not permit legitimate security concerns to cloud the transparency of market operations and the decisions of RTOs and market monitors with respect to market rule revision, enforcement, and recommendations for changes in market structure. While the security concerns are genuine, it is important that the Commission take care that its response does not destroy the competitive market regimes the Commission is pursuing on other fronts. The release of market data, such as LMPs and bid-offer data, cannot reasonably be deemed to raise concerns regarding the security of critical energy infrastructure.

TAPS does not understand the proposed rule's definition of "critical infrastructure information" to encompass market data. The proposed rule states that: "Critical infrastructure means systems and assets, whether physical or virtual, that are so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on the security, national economic security, national public health or safety, or any combination of those matters." Proposed 18 C.F.R. § 388.113(c)(2).

³ E-mail addresses: robert.mcdiarmid@spiegelmc.com; cynthia.bogorad@spiegelmc.com; william.huang@spiegelmc.com; mark.hegedus@spiegelmc.com.

Market data relate to the output of generation and transmission facilities and do not reveal information about how to incapacitate or destroy systems and assets that are covered by the proposed rule. As such, it is hard to see how the data “[c]ould be useful to a person in planning an attack on critical infrastructure” (proposed 18 C.F.R. § 388.113(c)(1)(ii)). To the extent market data may indirectly provide information regarding transmission constraints and transmission facilities that may be important to reliability, any potential security issues raised by disclosing these data are far outweighed by the direct need of market participants for access to the information.⁴ Thus, legitimate CEII concerns should not be grounds for withholding needed market information.

B. Market Participants Must Have Timely Access to Information Necessary to Analyze Markets

Information necessary to analyze the competitiveness of markets is becoming increasingly important in Commission proceedings. The Commission’s approaches to analyzing mergers and acquisitions under Section 203 of the Federal Power Act, 16 U.S.C. § 824b, and rates filed or requested, including pursuant to market-based rate authority, under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e, focus on the assessment of market structures and behavior to determine the existence, extent and exercise of market power. TAPS is concerned about the availability of information, such as transmission constraint information, that is vital to analyze markets.

⁴ For example, it would be self-evident to any observer that EHV transmission lines or substations would be targets of opportunity for any entity interested in damaging the nation’s economy. The details of power flow do not ordinarily add much information of value to a terrorist, although they are key economic details for participants in a market-oriented electric regime.

For example, as the Commission recognizes, geographic markets cannot be properly defined without assessing transmission capability and constraints.⁵ However, intervenors may be unable to carry the burden the Commission says they have in proceedings such as merger reviews, if certain transmission information is not available in a timely fashion.

Unsupported, general claims of harm are insufficient grounds to warrant further investigation of an otherwise comprehensive analysis developed by the applicants. Intervenors may also file an alternative competitive analysis, *accompanied by appropriate data*, to support their arguments. The Commission realizes that the need for more rigor in intervention showings could require additional efforts by potential intervenors. We will therefore routinely allow 60 days from filing for intervenors and others to comment on a merger filing.

Order No. 592 at 30,119 (emphasis added).

TAPS is concerned that needed information will not be available. The Commission may be correct where it states in the CEII NOPR that “market participants will be able to get access to the information they need without the Commission making the information available to the general public.” Preamble ¶ 38. In instances where such information is not otherwise available and market participants must obtain it from the Commission, the CEII NOPR proposes that a CEII Coordinator determine the need for the information within 20-30 business days. Preamble ¶ 37. However, the passing of 20-30 business days—*i.e.*, four to six weeks—will seriously jeopardize market participants’ ability to respond to a merger or rate filing. Even for the subset of merger filings that the

⁵ See, e.g., *Wisvest-Connecticut, LLC and NRG Connecticut Power Assets, LLC*, 96 F.E.R.C. ¶ 61,101 (2001); *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,044, at 30,132 (1996).

Commission determines requires a full sixty-day notice and comment period, almost three-fourths of the available time could be lost waiting for the decision of the CEII Coordinator. Nor is there any assurance that the information will be provided to the intervenor in usable form within that time-frame. In the case of rate filings, the Commission generally provides only 21 days for interested parties to intervene and protest, and under the proposed CEII rules the intervention period would likely run before the CEII Coordinator even issued a decision on a request for needed information.

In view of the foregoing, the Commission should establish an expedited process for entertaining requests for information needed to prepare a response to filings such as merger applications under Section 203 or rate filings under Sections 205 or 206. Where the CEII Coordinator cannot decide the request and release the information on an expedited basis, *e.g.*, a week from receipt of request, the Commission should extend the filing deadline for which the information is sought to account for the passage of time associated with the request for the CEII information. It may be possible to tailor this approach to specific circumstances. For example, a pro-active applicant under Sections 203, 205, or 206 might be able to short-cut the process by making needed information available directly to potential intervenors, without requiring FERC's public information office to act as a middleman. On the other hand, if critical energy infrastructure information restrictions operate to preclude industry consultants from maintaining the up-to-date baseline models needed to analyze filings, intervenors should be given additional time to complete their analyses and file protests and comments. Without such a process, the Commission's actions regarding CEII could adversely affect

the ability of market participants to serve as intervenors and protestors in Commission proceedings.

C. Information Should Continue to be Made Available to Legitimate Entities by Submitters

TAPS understands the CEII NOPR and policy as aimed at limiting the availability from public, Commission sources, information that is critical to the security of the nation's energy infrastructure and that could be used by entities or persons seeking to cause harm to the national security (economic or otherwise). However, TAPS does not read the NOPR to relieve submitters of any obligations to provide information directly to legitimate entities, such as TAPS members, in response to a specific requests. In ¶ 45 of the NOPR, the Commission states (emphasis added):

[T]here is nothing to prevent someone from attempting to obtain CEII directly from the submitter, but the submitter would be under no obligation to agree to provide the information directly to the requester *unless there is an independent obligation to do so.*

Even if the information requested would not be publicly released by the Commission because of the operation of the CEII rule, the Commission should affirm that submitters, where obligated, will have to supply such information to specific requesters.

For example, the Commission's instructions for Form No. 715 require that the information in the Form be made available upon request:

The Commission requires each transmitting utility, or its designated agent, to submit and make available expeditiously to the public, upon request (in hard copy and in electronic form, except for item 2, below) an annual report that includes:

1. power flow base cases for its transmission system, or if the transmitting utility belongs to a regional or subregional transmission planning or reliability

organization, power flow base cases for that region or subregion;

2. system maps and one-line diagrams;
3. a description of their reliability criteria and transmission planning assessment practices; and
4. an evaluation under the reliability criteria of the current and future performance of their transmission system.

FERC: Form No. 715 Instructions, Part II.A.⁶ By appealing to the Commission's policy that the Commission will not itself make such information generally available to the public, a submitter should not be permitted to withhold information, such as power flow cases, from specific requesters. Submitters will know the identify of those requesting the information, and if there are questions about a requester's use of the information, the submitter will be in a position to ascertain whether the requester would seek to use the information to undermine national security.

⁶ Available at www.ferc.gov/electric/f715/f715inst.htm (last viewed on November 13, 2002).

The Commission needs to distinguish between potential terrorists and legitimate entities. TAPS believes that information essential for market participants, if the Commission's market-oriented approaches to regulation are to work, can be made available directly to them without necessarily making the Commission a conduit for CEII that is easily obtained by organizations seeking to inflict harm to the United States, its citizens, and its residents.

Respectfully submitted,

/s/

Robert C. McDiarmid
Cynthia S. Bogorad
William S. Huang
Mark S. Hegedus

Attorneys for the Transmission
Access Policy Study Group

Law Offices of:
Spiegel & McDiarmid
1350 New York Avenue, NW
Suite 1100
Washington, DC 20005-4798
(202) 879-4000

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