

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Regulations Implementing FAST Act)
Section 61003 – Critical Electric)
Infrastructure Security and Amending)
Critical Energy Infrastructure)
Information)

Docket No. RM16-15-000

**COMMENTS OF THE
NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING**

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August 19, 2016

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The North American Electric Reliability Corporation (“NERC”) hereby provides comments on the Federal Energy Regulatory Commission (“Commission”) Notice of Proposed Rulemaking (“NOPR”) to revise the Commission’s Critical Energy/Electric Infrastructure Information (collectively, “CEII”) regulations.¹ The NOPR proposes to enhance protections for CEII and implement the Fixing America’s Surface Transportation Act (“FAST Act”), which created section 215A of the Federal Power Act (“FPA”).² Consistent with the FAST Act and section 215A of the FPA, the Commission proposes to expand the scope of its CEII regulations to encompass Critical Electric Infrastructure Information, as that phrase is defined in section 215A, and address the designation, unauthorized disclosure, and voluntary sharing of CEII. NERC supports the NOPR, proposes enhanced security protections for disclosure of CEII consistent with the NOPR, and seeks clarification of Commission statements regarding information downloaded from NERC databases pursuant to Order No. 824 or other directive.³

¹ *Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information*, 155 FERC ¶ 61,278 (2016) (“NOPR”). CEII refers to Critical Energy Infrastructure Information and Critical Electric Infrastructure Information, except where appropriate to address any distinction. Throughout these comments, capitalized terms not otherwise defined herein have the meaning ascribed in sections 215 and 215A of the FPA.

² *See* Fixing America’s Surface Transportation, Pub. L. No. 114-94, 129 Stat. 1312 (2015) (to be codified at 16 U.S.C. § 824 et seq.) (“FAST Act”). *Id.*, § 61,003 (hereafter referred to as “section 215A of the FPA”).

³ *Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, Order No. 824, 155 FERC ¶ 61,275, *clarified*, 156 FERC ¶ 61,017 (2016) (clarifying that the compliance date of

I. COMMUNICATIONS

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II. EXECUTIVE SUMMARY

The Commission's CEII regulations are "designed to limit the distribution of sensitive infrastructure information to those individuals with a need to know in order to avoid having sensitive information fall into the hands of those who may use it to attack the nation's infrastructure."⁵ The FAST Act provided the Commission with additional authority to protect such sensitive information.⁶ As a result, the Commission's NOPR proposes, "adopting regulations to implement [the Commission's] recently-expanded authority to protect against the disclosure of 'critical electric infrastructure information.'"⁷

Order No. 824 will be based on a final rule on this NOPR and that the Commission will publish the compliance date in the Federal Register).

⁴ Persons to be included on the Commission's service list are identified by an asterisk. NERC respectfully requests a waiver of Rule 203 of the Commission's regulations, 18 C.F.R. § 385.203, to allow the inclusion of more than two persons on the service list in this proceeding.

⁵ NOPR, P 9.

⁶ *See, e.g., id.*, PP 7 and 10.

⁷ Order No. 824, P 46.

NERC supports the Commission’s actions to protect CEII and critical infrastructure from malicious actors. Cyber and physical threats to the Bulk-Power System (“BPS”) facing North America underscore the need to protect sensitive infrastructure information. Expanding the scope of CEII regulations to encompass Critical Electric Infrastructure Information⁸ would materially improve security of the BPS by ensuring that sensitive information related to the Bulk Electric System (“BES”) is protected as CEII. This is a fundamental aspect of the Commission’s implementation of the FAST Act, as incapacitation or destruction of critical BES assets would negatively affect operation of the electric grid, and thereby security and/or public health or safety. *See infra*, Section III.A. Further, the NOPR proposes regulation memorializing the Commission’s historic practice of withholding proprietary, personal, or non-public information inextricably intertwined with CEII from disclosure. That clarification would protect sensitive information tied to CEII that could give malicious actors insight into vulnerabilities on the grid. *See infra*, Section III.B. The Commission’s proposal to facilitate how the Commission will voluntarily share information with governmental entities, NERC, Regional Entities, and Information Sharing and Analysis Centers (“ISACs”) should also help buttress ongoing security coordination within the energy sector. *See infra*, Section III.C.

In addition, the NOPR proposes regulation to help address risks associated with unauthorized disclosure. CEII regulations permit certain enumerated entities and “legitimate requester[s] who [do] not pose a security risk,” as demonstrated in a Statement of Need to request access to CEII.⁹ The NOPR proposes additional criteria for the Statement of Need, an

⁸ Section 215(a)(3) of the FPA (defining Critical Electric Infrastructure Information as “information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency, other than classified national security information... Such term includes information that qualifies as critical energy infrastructure information under the Commission’s regulations.”).

⁹ Current 18 C.F.R. § 388.113(d)(4)(v).

attestation requirement, and that persons requesting CEII enter into a non-disclosure agreement (“NDA”) including certain minimal conditions prior to disclosure. NERC supports these revisions as they (1) help better define what constitutes a legitimate requester who does not pose a security risk and has demonstrated valid need for access to CEII, and (2) implement legal protections to help prevent disclosure of CEII. Nevertheless, as discussed below, additional vetting criteria are necessary to mitigate the risk of disclosures that could endanger security and/or public health or safety. Therefore, NERC proposes further revisions to the Commission’s regulations to provide:

1. Additional criteria for determining when a requester of CEII has a legitimate need for the CEII and does not pose a security risk;
2. Further protections under the NDAs;
3. Longer notice and review periods in response to requests for access;
4. Coordination between the Commission’s CEII Coordinator and Offices of Electric Reliability (“OER”) and Energy Infrastructure Security (“OEIS”), as these Offices have significant subject matter expertise related to the BES; and
5. Additional procedures for appeals of Commission determinations regarding CEII.

These proposals are consistent with the NOPR and would provide the Commission with a robust framework to meaningfully review requests for access to CEII, based upon a complete record.

Without these revisions, there is undue risk of inadvertently disclosing CEII to malicious actors.

See infra, Section III.D.

Finally, NERC appreciates the Commission’s clarification that it will maintain data downloaded from NERC databases under Order No. 824 or other Commission order or regulation as non-public information. NERC requests confirmation of its understanding that the Commission would treat such data as privileged information and designated CEII. This designation is warranted as non-public information downloaded under Order No. 824 from

NERC’s Transmission Availability Data System (“TADS”), Generating Availability Data System (“GADS”), and protection system misoperations databases relate to sensitive BES assets within the scope of privileged information under Commission regulation and Critical Electric Infrastructure as defined under the FAST Act and section 215A of the FPA. *See infra*, Section III. E. NERC requests that the Commission issue a final rule consistent with the NOPR, as enhanced by NERC’s additional proposals and clarifications, as just and reasonable methods of protecting sensitive information from improper disclosure.

III. COMMENTS

The NOPR, with NERC’s proposed revisions to CEII regulations, should help safeguard CEII and the nation’s Critical Electric Infrastructure. As discussed below, NERC requests that the Commission issue a final rule in this proceeding, consistent with the NOPR, as supplemented by the regulatory enhancements and clarifications that NERC proposes in these comments.

A. NERC Supports Expanding CEII Regulations to Encompass Critical Electric Infrastructure Information.

As reflected in the NOPR, CEII regulations currently apply to Critical Energy Infrastructure Information, which is defined as:

specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) Relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack...; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act [“FOIA”]...; and (iv) Does not simply give the general location....¹⁰

The NOPR proposes to augment CEII regulations by incorporating the FAST Act and section 215A of the FPA’s new statutory terms Critical Electric Infrastructure and Critical Electric Infrastructure Information. Critical Electric Infrastructure Information is “information related to

¹⁰ Current 18 C.F.R. § 388.113(c)(1) and proposed 18 C.F.R. § 388.113(c)(2)).

critical electric infrastructure”¹¹ which is defined as, “a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.”¹² Therefore, pursuant to the FAST Act, the NOPR would apply the Commission’s CEII regulations to not only specific engineering, vulnerability, or detailed design information, but any information related to Critical Electric Infrastructure.¹³

NERC supports the Commission’s proposed implementation of the FAST Act. This expansion of the Commission’s CEII regulations would materially improve security by ensuring that sensitive information related to the BES is protected CEII. As the Electric Reliability Organization (“ERO”) designated under section 215 of the FPA to establish and enforce Reliability Standards and assess reliability and adequacy of the BPS in North America, NERC collects significant amounts of sensitive information related to the BES.¹⁴ Stakeholders provide some of this information under mandatory data obligations and provide some information on a voluntary basis.¹⁵ This data is protected Confidential Information under section 1500 of the NERC Rules of Procedure (“ROP”), consistent with the Commission’s statements that the ERO should “adopt confidentiality Rules to prevent the unintended disclosure of such information.”¹⁶

¹¹ Section 215A(a)(3) of the FPA. *See also* proposed 18 C.F.R. § 388.113(c)(1).

¹² Section 215A(a)(3) of the FPA. *See also* proposed 18 C.F.R. § 388.113(c)(3).

¹³ *See* NOPR, PP 9-15 (describing the proposal).

¹⁴ The Commission certified NERC as the electric reliability organization (“ERO”) in accordance with Section 215 of the FPA on July 20, 2006. *N. Am. Elec. Reliability Corp.*, 116 FERC ¶ 61,062 (2006). Section 215 of the FPA was enacted by Energy Policy Act of 2005 (“EPAct 2005”); *and* sections 215(a) and (g) of the FPA.

¹⁵ These comments focus on mandatorily provided information per Order No. 824’s limitation to data provided on a mandatory basis.

¹⁶ *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204, P 115, *order on reh’g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

At times, NERC provides the Commission with access to NERC-held information related to BES assets. In addition, Order No. 824 requires NERC to provide Commission staff access to TADS, GADS, and protection system misoperations data.¹⁷ There have been concerns that this would chill stakeholder data sharing and place sensitive information at risk of disclosure under FOIA, undermining efforts to maintain reliability and secure the grid. Expanding the scope of CEII to protect sensitive information related to the BES would help mitigate those concerns and improve national security.

B. NERC Supports Clarifying Regulation Memorializing the Commission’s Practice Regarding Information Inextricably Intertwined with CEII.

The NOPR proposes regulation to “clarify that the Commission’s CEII regulations should not be construed to require the release of proprietary information, personal information, cultural resource information and other comparable data protected by statute or regulation, or any privileged or otherwise non-public information....”¹⁸ The NOPR states that this clarifying regulation is consistent with the Commission’s historic practice of withholding proprietary or other protected information inextricably intertwined with CEII from disclosure.¹⁹

NERC supports the Commission’s proposed clarification that CEII regulations apply to proprietary, personally identifiable, non-public, or privileged information intertwined with CEII. Excluding information inextricably intertwined with CEII from disclosure would operate as a just and reasonable mechanism to protect Critical Electric Infrastructure, consistent with existing Commission practice. As discussed in Section III.A above, NERC regularly collects significant amounts of CEII. CEII often contains proprietary, personally identifiable, non-public, or privileged information. The name or location of an asset or its owner combined with CEII or

¹⁷ See, e.g., Order No. 824 (compliance date pending).

¹⁸ NOPR, P 52 (proposing to add new 18 C.F.R. § 388.113(g)(5)(ix)).

¹⁹ *Id.*

information in the public record (such as Commission-filed interconnection agreements), could lead an actor with malicious intentions to gain detailed design information exposing a potential vulnerability on the BPS. In Order No. 672, the Commission acknowledged, “even publicly identifying which entity has a system vulnerable to a ‘cyber attack’ could jeopardize system security, allowing persons seeking to do harm to focus on a particular entity in the Bulk-Power System.”²⁰ The same holds true for information that the Commission identified in Order No. 824 in the TADS, GADS, and protection system misoperations databases. The Commission’s proposed clarification would protect this hybrid form of information from improper disclosure.

C. NERC Supports the Proposal to Facilitate Voluntary Information Sharing with NERC, Regional Entities, and Information Sharing and Analysis Centers.

Pursuant to the FAST Act, the NOPR proposes regulation that would facilitate the voluntary sharing of CEII between and by governmental entities, NERC, Regional Entities, ISACs, owners, operators, and users of Critical Electric Infrastructure, and other entities determined appropriate by the Commission.²¹ The Commission states that it would require an Office Director or his designee to consult with the CEII Coordinator before deciding whether to voluntarily share CEII. The NOPR states that the CEII Coordinator will determine whether information is designated CEII and whether appropriate protective measures are in place to secure sharing with the intended recipient. Further, the Commission commits that, (1) “the CEII will be shared subject to an appropriate NDA or Acknowledgement and Agreement[,]” (2) states that the Commission “may impose additional restrictions on how the CEII...may be used and

²⁰ Order No. 672, P 538.

²¹ *See, e.g.*, NOPR, PP 1-2, 37-42 (proposing 18 C.F.R. § 388.113(f)); *and* section 215A(d)(2) of the FPA.

maintained[.]” and (3) adds that the Commission will provide notice of disclosure to the submitter, where practical.²²

Subject to NERC’s additional proposals to buttress security procedures for sharing CEII (discussed in Section III.D below), NERC supports these revisions facilitating voluntary information sharing. NERC’s proposals to enhance security procedures for sharing CEII include, for example, coordination between the CEII Coordinator, OER, and OEIS prior to any disclosure. Through the course of NERC’s statutory activities, NERC has repeatedly seen the manner in which careful coordination between governmental entities and designated non-governmental entities with stringent security controls can help protect the electric grid. Much of NERC’s experience in this arena arises from its work as the Electricity ISAC (“E-ISAC”).

Specifically, NERC supports the Commission’s proposal to share CEII with NERC, Regional Entities, ISACs, and other limited entities determined appropriate when necessary to protect energy infrastructure. In light of the E-ISAC’s role coordinating with governmental entities and other ISACs to address threats to the system, the Commission should, under the appropriate circumstances, also share CEII with the E-ISAC when the Commission voluntarily shares CEII with a governmental entity.²³ This would support the continuing relationship and focus that these organizations have regarding security of the BPS. The E-ISAC maintains situational awareness, incident management, coordination, and communication capabilities within the electricity sector. In collaboration with the Department of Energy and the Electricity

²² NOPR, PP 37-42. The CEII Coordinator is the Director of the Office of External Affairs. *See* NOPR, n. 15.

²³ The E-ISAC was established in 1998, pursuant to implementation of Presidential Decision Directive 63. *See, e.g.*, E-ISAC Webpage, available at <http://www.nerc.com/pa/ci/esisac/Pages/default.aspx>; and *Policy on the Role of the Electricity Sector – Information Sharing and Analysis Center (ES-ISACT) vis-à-vis NERC’s compliance Monitoring and Enforcement Program*, available at [http://www.nerc.com/files/Updated%20ES-ISAC%20Firewall%20Approval%20\(13%20Mar%202013\).pdf](http://www.nerc.com/files/Updated%20ES-ISAC%20Firewall%20Approval%20(13%20Mar%202013).pdf) (describing the essence of the E-ISAC’s work as information sharing).

Subsector Coordinating Council, the E-ISAC serves as a primary security communications channel. For example, among its diverse activities to support reliable operation of the grid, the E-ISAC: (i) identifies, prioritizes, and coordinates the protection of critical infrastructure; (ii) facilitates information sharing on threats and protective measures, (iii) provides rapid response through its communication capabilities; (iv) receives incident data from private and public entities; (v) assists the Department of Energy, Commission, and Department of Homeland Security in analyzing event data; (vi) works with other ISACs to share information and provide assistance during actual or potential events; and (vii) develops and maintains awareness of private and governmental infrastructure interdependences.

Thus, NERC understands the role voluntary information sharing can play in securing North American energy infrastructure. NERC supports the Commission's proposal to share CEII with NERC, Regional Entities, ISACs, and other limited entities determined appropriate when necessary to protect energy infrastructure. This information sharing would ensure continued alignment between the Commission, E-ISAC, and governmental entities protecting North American energy infrastructure and continued rapid response to any incident or threat to the grid.

D. NERC Supports Clarifying Regulation Regarding Requests for CEII and Proposes Further Enhancements Consistent with the NOPR to Avoid Undue Risk to Critical Electric Infrastructure.

Recognizing the Commission's duty to protect CEII,²⁴ the NOPR proposes controls regarding management of CEII. The NOPR states that Commission-developed policies and guidelines, for example, will address how Commission personnel should handle, mark, and secure sensitive information.²⁵ The NOPR also proposes sanctions for unauthorized disclosure

²⁴ NOPR, P 29.

²⁵ NOPR, P 30. The NOPR does not state whether these policies and guidelines will be posted publicly.

of CEII by Commission personnel.²⁶ In addition, the Commission proposes further regulations pertaining to requests for access to CEII and authorized disclosure of CEII.

These are important modifications. Regulations currently permit the Commission's CEII Coordinator to disclose CEII to legitimate requesters who do not pose a security risk and provide a Statement of Need.²⁷ The NOPR proposes three sets of revisions to enhance Commission procedures for managing such requests for access to CEII. First, the NOPR proposes standards for what must be included within a Statement of Need supporting a request for CEII. The Commission proposes that requesters must demonstrate:

(1) the extent to which a particular function is dependent upon access...; (2) why the function cannot be achieved or performed without access...; (3) whether other information is available to the requester that could facilitate the same objective; (4) how long the information will be needed; (5) whether or not the information is needed to participate in a specific proceeding...; and (6) whether the information is needed expeditiously.... A conclusory statement will not satisfy this requirement.²⁸

Second, the NOPR proposes minimum requirements for NDAs executed as a condition to receipt of CEII.²⁹ Third, the NOPR proposes that requests for CEII include a signed attestation of accuracy.³⁰

²⁶ NOPR, P 36 (noting that the Commission may not sanction Commissioners, although it can refer misconduct to the DOE Inspector General).

²⁷ The Commission has previously disclosed CEII. *See Scott Deffenderfer, et. al.*, 120 FERC ¶ 62,020, PP 8 and 11 (2007) (the request had sought a copy of NERC's Multiregional Modeling Working Group power flow models, as well as transmission maps and system or substation diagrams that showed electrical connectivity). *See also Michael J. Schubiger*, 120 FERC ¶ 62,131 (2007); *Sunil Talati*, 120 FERC ¶ 62,113 (2007); *Edward J. Park*, 120 FERC ¶ 62,061 (2007); and *Hala Ballouz*, 119 FERC ¶ 62,204 (2007). *See also Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,158 (2014); *order on clarification, reh'g, and compliance filings*, 153 FERC ¶ 60,016 (2015) (recently rejecting the Midcontinent Independent System Operator, Inc.'s request for privileged treatment for certain customer-specific information, for failure to satisfy FOIA Exemption 4 for commercially sensitive information).

²⁸ NOPR, P 33.

²⁹ NOPR, P 32. NDAs for different types of entities are available at <http://www.ferc.gov/legal/ceii-foia/ceii.asp>. Federal Agencies receive an "Agency Acknowledgment and Agreement" available at <http://www.ferc.gov/legal/ceii-foia/ceii/fed-agen-acknow-agree.pdf> in lieu of an NDA.

³⁰ NOPR, P 34

NERC supports these proposed measures. Nevertheless, additional procedures remain necessary “to avoid having sensitive information fall into the hands of those who may use it to attack the nation’s infrastructure.”³¹ Due to the national security interest of protecting CEII and the limited period for Commission review of requests for access, it is essential that requests fully support the requesting entity’s asserted need for CEII and address risk of unauthorized disclosure. Therefore, NERC proposes refinements to the Commission’s regulations, which are consistent with the NOPR and described in detail below. Without NERC’s proposed regulatory enhancements to ensure a complete and carefully evaluated record, there is undue risk that disclosure of CEII might endanger Critical Electric Infrastructure.

NERC proposes that the Commission further improve security in five areas under the Commission’s CEII regulations:

1. Evidentiary criteria for determinations as to whether a requester of CEII does not pose a security risk;
2. Additional protections under the NDAs;
3. Extended notice, comment, and review periods to ensure that the provider of the CEII has a meaningful opportunity to review a request for disclosure of CEII;
4. Coordination between the CEII Coordinator and two Commission Offices, OER and OEIS, regarding CEII related to the BES; and
5. Appeals of Commission decisions to disclose CEII.

NERC addresses each of these five areas immediately below.

1. Evidentiary Criteria for Legitimate Requesters Who Do Not Pose a Security Risk.

To augment the NOPR, NERC proposes that the Commission revise its CEII regulations to include evidentiary criteria that the Commission must consider to determine whether a requester of CEII is a legitimate requester and does not pose a security risk. Criteria such as

³¹ NOPR, P 9.

those suggested below could leverage standards utilized by other agencies and apply on a transparent and non-discriminatory basis to ensure that the CEII Coordinator and other Commission staff members have a complete record on which to analyze requests for access to CEII.³² A complete, detailed, request for CEII is particularly important in light of the limited time that the Commission has to review a request. *See infra*, Section III.D(3). The Commission needs all information related to the scope of a request, asserted need for access, and risk of disclosure upon initial receipt of a request for access. Without a complete record, the CEII Coordinator might inadvertently disclose CEII to an entity with malicious intent or incapable of securing CEII from improper disclosure to unauthorized parties. Such disclosure would create material undue risk of irreparable harm to security and/or public health or safety.

Similar to the Commission's enhancements for what constitutes a sufficiently supported Statement of Need, NERC asks that the Commission provide greater specificity on how CEII requesters should demonstrate that they are legitimate requesters who do not pose a security risk.³³ To address several areas of sensitivity, these criteria should require evidence supporting the Statement of Need, demonstrating that the requester is not a suspicious person, and assuring the Commission of the requester's capability to maintain CEII secure from unauthorized disclosure. For example, evidence on employment history and that the function referenced in the Statement of Need as the basis for access to CEII is a valid, going concern, would help the Commission verify that it can rely on the Statement of Need. In addition, requiring that requesters confirm they are not under investigation and have not been convicted of criminal

³² See, e.g., Department of Homeland Security Suitability Criteria; U.S. Government Accountability Office, *FDIC Implemented Controls over Financial Systems, but Further Improvements Are Needed*, available at <http://www.gao.gov/assets/680/678084.pdf> (June 2016); and U.S. Government Accountability Office, *Cybersecurity*, available at http://www.gao.gov/key_issues/cybersecurity/issue_summary (last visited Aug. 11, 2016) (suggesting revisions to Federal agency security controls regarding critical information).

³³ NERC anticipates that these criteria could be added to proposed 18 C.F.R. § 388.113(g)(5).

violations would help prevent disclosure of CEII to suspicious persons. The Commission could also perform a background check, confirm that the requester is not on the terrorist watchlist, and/or verify relevant security clearances as further means of preventing inadvertent disclosure to a malicious actor. Finally, requiring the requester to demonstrate capability of maintaining CEII secure from unauthorized disclosure would enable the Commission to determine whether it can reasonably rely on the requester's performance under the NDA.

The Commission should incorporate criteria into its CEII regulations to enable it to verify whether the requester and any business or other individual associated with the request constitutes a legitimate requester who does not pose a security risk. Criteria such as those described immediately above would work in tandem with the NOPR's proposed enhancements to the Statement of Need and the attestation requirement to develop a complete record in support of a request for CEII. This in turn would help prevent CEII from falling into the hands of those who might seek to attack Critical Electric Infrastructure.

2. Additional Protections under NDAs.

NERC supports the minimum NDA requirements proposed in the NOPR. NERC proposes that the Commission refine these provisions to address the irreparable harm to national security likely to arise if malicious actors obtain CEII. For example, NERC proposes that the Commission clarify its proposed document destruction requirement to reflect specific deadlines. The Commission could require the destruction or return of CEII upon the earlier of Commission request, five years, or expiration of the period of time that access is claimed necessary in the Statement of Need. In addition, NERC proposes that NDAs add a right to specific performance or equitable remedy, as the Commission and entities that submitted CEII to the Commission (submitting entities) must be able to act immediately to try to prevent irreparable harm to national security if they become aware of unauthorized disclosure. Similarly, interested parties

with knowledge regarding the CEII should receive copies of executed NDAs, to ensure they are aware of all conditions associated with disclosure and are ready to react promptly if they learn of unauthorized disclosure. Additional NDA requirements to address irreparable harm will augment the effectiveness of the NDA as a tool to control limited release of CEII and prevent unauthorized disclosure.

3. Extended Notice, Comment, and Review Periods for Requests for Access.

CEII regulations provide a limited period for review by original submitting entities and Commission evaluation of requests for access to CEII. Submitting entities may receive no more than five calendar days to submit comments on requests for access to CEII and the Commission is limited to 20 working days to complete its review of a request (unless that period is tolled once due to a request for information or extended for cause under FOIA).³⁴ However, the submitting entity is often in the best position to understand and inform the Commission as to why the Commission should withhold data from disclosure. The Commission should provide additional time for submitting entities to provide such comments. In light of the national security interests at issue upon a request for CEII and the fact that malicious actors may misuse CEII to target potential vulnerabilities on the electric grid, the CEII regulations should ensure meaningful opportunity to evaluate requests for access and take action to prevent irreparable harm that might ensue from disclosure.

Therefore, to balance disclosure with national security interests, NERC proposes extending the period for notice and comment on requests for access to CEII.³⁵ Ten working days

³⁴ Existing 18 C.F.R. §§ 388.112(d), 388.113(d)(vi) and 388.108(c)(1); *see also* proposed 18 C.F.R. §§ 388.113(d), (e)(3), (f)(5), and (g)(5)(vi).

³⁵ The Commission could shorten these periods to address emergencies or other instances where expedited review is appropriate, pursuant to its existing authority. 18 C.F.R. § 388.108(d) (stating, “(1) A requester may seek expedited processing on the basis of a compelling need. Expedited processing will be granted if the requester demonstrates that: (i) Failure to obtain the records on an expedited basis can reasonably be expected to pose an

that run concurrently with the Commission’s period of review, for example, would provide greater opportunity for submitting entity analysis of a request for CEII, while maintaining sufficient opportunity for the Commission to review comments. To maximize the Commission’s opportunity to review comments, the Commission should also require entities requesting CEII to provide submitting entities a copy of the request and Statement of Need when providing the same to the Commission. To ensure adequate Commission opportunity to review requests for CEII, the Commission could also revise its regulations to state that the Commission will toll its period of review once upon a request for further information.³⁶ Finally, the Commission could extend its notice prior to limited release of CEII to permit sufficient opportunity for submitting entities to appeal the determination regarding disclosure. A 45-day notice period would mirror requesting entity rights to appeal determinations denying disclosure.³⁷ As discussed in Section III.D(5) below, NERC proposes mutual, non-discriminatory, rights to appeal CEII determinations. Enhanced notice of CEII requests and disclosure will help ensure that the Commission has an adequate record on which to determine whether to disclose CEII and help avoid irreparable harm to critical infrastructure:

4. Coordination between the CEII Coordinator and the Commission’s Offices of Electric Reliability and Energy Infrastructure Security.

The NOPR proposes that the CEII Coordinator determine whether a requesting entity may receive limited CEII. To ensure that the CEII Coordinator evaluates all material risks of disclosing CEII related to the BES, NERC proposes that the CEII Coordinator consult with the Directors of other Commission Offices that regularly exercise significant expertise in managing

imminent threat to the life or physical safety of an individual, or (ii) In the case of a requester primarily engaged in the dissemination of information, there is an urgency to inform the public concerning Federal Government activity. (2) A request for expedited processing under this section must be supported with detailed credible documentation....”).

³⁶ 5 U.S.C. § 552(a)(6)(B)(ii).

³⁷ 18 C.F.R. § 388.110.

sensitive information regarding the BES, prior to any authorization for disclosure. This consultation between Commission Offices with substantial interest in CEII and important subject matter expertise could serve as good cause for the Commission to extend its period to review requests for CEII.³⁸

In particular, the Commission's OER is responsible for helping to protect and improve reliability and security of the BPS. The Commission's OEIS is similarly responsible for identifying, communicating, and seeking comprehensive solutions to potential risks to the BPS. These Offices have unique insight into particular risks to the grid and/or CEII associated with sensitive assets on the BES. Therefore, prior to any decision to disclose CEII, the CEII Coordinator should leverage the extensive experience that these two Offices have managing such sensitive information and the risks that might arise if entities with malicious intent or that are incapable of adequately safeguarding CEII receive CEII related to the BES.

5. Procedures Regarding Appeals.

The Commission's existing regulations include relatively detailed procedures that requesting entities may use to appeal a Commission determination denying access to CEII.³⁹ The NOPR proposes new regulation requiring administrative appeal of any decision regarding CEII designation to the Commission's General Counsel before an entity may request judicial review in district court.⁴⁰ The NOPR, however, provides few details regarding that appeals process. There is also no current or proposed regulation providing submitting entities procedures to appeal determinations authorizing disclosure of CEII.

³⁸ 18 C.F.R. §§ 388.108(c)(4) and 388.110(b); *and* 5 U.S.C. § 552(a)(6)(B)(iii). It may also be appropriate to coordinate with other governmental entities, such as the Nuclear Regulatory Commission.

³⁹ 18 C.F.R. § 388.110.

⁴⁰ Proposed 18 C.F.R. § 388.113(c)(4).

NERC proposes that the Commission issue non-discriminatory regulation clarifying the procedures applicable to appeal of CEII designation and procedures to appeal a determination authorizing disclosure. The existence of clear procedures regarding requesting entity appeals of determinations denying disclosure of CEII, contrasted with the lack of procedures regarding appeals of determinations authorizing disclosure, creates undue uncertainty and risk in light of the national security interests presented by CEII. The Commission's regulations should provide requesting entities and submitting entities mutual rights to appeal CEII determinations given the negative impacts on security and/or public health or safety if CEII falls into the wrong hands. The Commission could model procedures for submitting entity appeals on existing rules for requesting entity appeals. Procedures to appeal an authorization to disclose CEII are necessary to provide submitting entities and the Commission with adequate opportunity to avoid disclosure that might inadvertently place Critical Electric Infrastructure at risk. Moreover, in light of the risks to security that arise from disclosure of CEII to malicious actors or entities incapable of protecting CEII, NERC proposes that any authorized disclosure of CEII subject to appeal be held in abeyance until conclusion of the appeal.

NERC's proposed regulations, together with the proposals included in the NOPR, would provide a robust framework for Commission consideration of requests for access to CEII and help ensure that the Commission only discloses CEII to legitimate requesters, with demonstrable need for access to CEII, who do not pose a security risk. As a result, the Commission should incorporate NERC's proposals into the Commission's CEII regulations as just and reasonable methods of protecting CEII, consistent with the intent of the FAST Act.

E. NERC Agrees that Data Downloaded from NERC Databases Should Be Maintained Non-Public and Requests Additional Clarification Regarding Designation as Privileged Information and CEII.

The NOPR states that information downloaded from private databases per order or regulation (such as Order No. 824, requiring access to certain NERC databases) will be maintained non-public.⁴¹ Specifically, the Commission clarifies that such downloaded data:

will be maintained as non-public information.... If the Commission receives a request for access..., the Commission will evaluate whether the information meets the definition of CEII or is proprietary information or otherwise privileged or non-public and will provide the owner of the database or information (as appropriate) with an opportunity to comment....⁴²

NERC agrees that data downloaded from its databases pursuant to Order No. 824 should be maintained non-public. In addition, NERC seeks clarification that the Commission intends to designate data from NERC's TADS, GADS, and protection system misoperations databases as privileged information and CEII. As recognized in Order No. 824, this information has historically been accorded confidential treatment consistent with the relevant data requests issued under section 1600 of the NERC ROP.⁴³ In addition, the data in these databases consists of non-public, proprietary, information subject to exemption from disclosure under FOIA, as discussed below. NERC seeks confirmation that the Commission intends to designate all downloaded information "Privileged and CEII" and subject to further examination upon a request for access

⁴¹ Order No. 824, PP 46-49.

⁴² NOPR, n. 13.

⁴³ Order No. 824, PP 9, 11, and 14. *See, e.g., TADS Phase I final report*, Section 2.4.7 (Sept. 26, 2007), available at http://www.nerc.com/docs/pc/tadstf/TADS_PC_Revised_Final_Report_09_26_07.pdf; and *TADS Phase II final report*, Appendix 3, p. 11 (Sept. 11, 2008), available at http://www.nerc.com/pa/RAPA/tads/TransmissionAvailabilityDataSystemRF/TADS_Phase_II_Final_Report_091108.pdf (noting that most of TADS individual outage data is CEII). *Generating Availability Data System: Mandatory Reporting of Conventional Generation Performance Data*, Appendix V, p. 41 (July 2011), available at http://www.nerc.com/pa/RAPA/gads/MandatoryGADS/Revised_Final_Draft_GADSTF_Recommendation_Report.pdf. *Request for Data or Information: Protection System Misoperation Data Collection*, p. 15 (Aug. 14, 2014), available at http://www.nerc.com/pa/RAPA/ProtectionSystemMisoperations/PRC-004-3%20Section%201600%20Data%20Request_20140729.pdf.

to this particular data. This would ensure clarity regarding the mechanics applicable to any request for such data and preserve security and/or public health or safety in light of the sensitivity of this information related to reliability of the BES.

Information in these databases should be designated privileged under Commission regulation. TADS, GADS, and protection system misoperations data reflect trade secrets, commercial, or financial information that is confidential and falls within the FOIA exemption for trade secrets and commercial data.⁴⁴ As summarized in Order No. 824, entities submit data to NERC through these databases to provide non-public information regarding operation of their facilities. TADS includes specific information on transmission outages, such as information on BES AC circuits, transmission transformers, event type, and cause codes (including fire, vandalism, and failed equipment). NERC uses this information to analyze outage frequency, duration, causes, and risks.⁴⁵ GADS, includes detailed design, event, and performance information related to generation outages and plant performance. NERC uses GADS data to analyze reliability of generation and examine trends in the BPS.⁴⁶ Protection system misoperations information includes details regarding protection systems or components that misoperated or were removed from service. NERC uses this information to assess performance and analyze trends that may negatively affect reliability.⁴⁷ This confidential, commercial information, regarding the details of transmission, generation, and protection system performance is privileged information within the scope of the Commission's regulations.⁴⁸

⁴⁴ 5 U.S.C. § 552(b)(4).

⁴⁵ Order No. 824, PP 7-8.

⁴⁶ *Id.*, PP 10-11.

⁴⁷ *Id.*, PP 13-14.

⁴⁸ Current and proposed 18 C.F.R. § 388.112.

Much of the information in these databases is also Critical Electric Infrastructure Information, within the scope of the FAST Act, section 215A of the FPA, and the Commission’s proposed regulations. As stated in Order No. 824, the data in these databases “could provide insight into chronic or recurring system deficiencies.”⁴⁹ TADS, includes significant amounts of information regarding operational outages that cannot be deferred and are necessary to respond to unplanned events to prevent an emergency (presenting a risk to human life, damage to equipment, or damage to property) or to maintain the system within operating limits.⁵⁰ TADS also includes certain information on planned outages, such as outages requested by highway departments or the Coast Guard.⁵¹ As illustrated by the threats to the grid presented by the 2015 Ukrainian and 2013 Californian attacks on transmission facilities, malicious actors might use transmission outage information to identify potential targets.⁵² Due to the gravity of transmission outages, NERC Reliability Standard TOP-001-3 assigns a “Medium” violation risk factor (“VRF”) to Requirement R9 of the standard, requiring balancing authorities and transmission operators to notify reliability coordinators and known impacted entities of certain planned and unplanned outages. The NERC VRF guide applies “Medium” VRFs to requirements that could directly affect capability of the BES if violated.⁵³ Transmission reliability and outages, analyzed using TADS data, are also a key focus of NERC’s annual State of Reliability (“SOR”) report.⁵⁴ NERC’s Severity Risk Index considers forced transmission outages for voltages 200 kV(+) as a significant factor to help measure daily performance of the

⁴⁹ Order No. 824, P 41.

⁵⁰ See *supra* n. 43, *TADS Phase II final report*, p. 3.

⁵¹ *Id.*, p. 9.

⁵² Order No. 672, P 538.

⁵³ *VRF Guide*, p. 1, available at http://www.nerc.com/files/violation_risk_factors.pdf.

⁵⁴ See *State of Reliability 2016*, pp. v-vi, 1, 9, and Appendix B (May 2016), available at http://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/2016_SOR_Report_Final_v1.pdf (“2016 SOR”).

BPS, further underscoring the sensitivity of transmission outage data.⁵⁵ As TADS data relates to assets that would negatively affect security and/or public health or safety, if incapacitated or destroyed, individual TADS data (particularly for elements 200 kV(+) or regarding sustained outages) should be designated CEII.

GADS includes data regarding forced generation outages. This information can be an important indicator of BPS performance and resiliency.⁵⁶ Generators help serve load and provide essential reliability services, such as voltage support and reactive power that help to prevent voltage collapse on the BPS. The changing resource mix may also be increasing sensitivity of the BPS to generation characteristics on the grid.⁵⁷ GADS data regarding generation that would negatively affect reliability if incapacitated or destroyed should be designated CEII.

Protection system misoperations data is also of material concern to security and/or public health or safety. As the Commission stated in Order No. 824, “[p]rotection system misoperations have exacerbated the severity of most cascading power outages, having played a significant role in the August 14, 2003 Northeast blackout....”⁵⁸ In 2015, the Commission directed that NERC assign a “High” VRF for requirements under NERC’s protection system Reliability Standard, due to the importance of these facilities and NERC’s designation of “protection system misoperations as one of the top priority reliability risks.”⁵⁹ NERC’s section 1600 data request for protection system misoperations information similarly underscores the

⁵⁵ *Id.*, p. 9.

⁵⁶ *Id.*, pp. 1 and 3.

⁵⁷ *Id.*, p. 5.

⁵⁸ Order No. 824, P 14.

⁵⁹ *N. Am. Elec. Reliability Corp.*, 151 FERC ¶ 61,129, P 20 (2015).

risks to reliability presented by these events.⁶⁰ NERC’s 2016 SOR demonstrates continued effort to reduce protection system misoperations, stating, “misoperations continue to be one of the largest contributors to transmission outage severity and should remain an area of focus.”⁶¹ The Commission and NERC’s long-standing emphasis on the risk to reliability presented by protection system misoperations demonstrates that individual protection system misoperations report data should be designated CEII. It would be an unacceptable risk to security if malicious actors obtained information on protection system vulnerabilities on the grid.

Each database impacted by Order No. 824 includes non-public data comprised of privileged information and CEII. As a result, NERC agrees with the Commission’s statement that such data should be maintained non-public and requests clarification that the Commission intends to designate data downloaded from these databases as “Privileged and CEII.” NERC also requests clarification of the Commission’s statement regarding notices of request for access to data downloaded from NERC’s databases. Both NERC (as the owner of the accessed database) and the original submitting entity (as the owner of the original data) are “submitting entities” for purposes of information downloaded by Commission staff. To ensure due process and avoid undue risks to CEII, both NERC and the original submitting entity should receive notice of requests for access to data downloaded from NERC databases.

⁶⁰ See *supra* n. 43, *Request for Data or Information: Protection System Misoperation Data Collection*.

⁶¹ 2016 SOR, p. 1.

IV. CONCLUSION

Wherefore, for the reasons stated above, the Commission should issue a final rule in this proceeding implementing the proposals in the NOPR, as augmented by NERC's proposed regulatory enhancements and clarifications, as just and reasonable means of protecting critical infrastructure and complying with the FAST Act and section 215A of the FPA.

Respectfully submitted,

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Date: August 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service lists compiled by the Secretary in Docket No. RM16-15-000.

Dated at Washington, DC this 19th day of August, 2016.

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