

A horizontal banner image divided into several vertical panels. From left to right, the panels show: a pair of scales of justice, a stack of books, a computer keyboard, and a gavel. Overlaid on this image is the text "JONES DAY COMMENTARY" in white, bold, sans-serif font. "JONES DAY" is in a smaller font size above "COMMENTARY".

## JONES DAY COMMENTARY

### ENERGY

# FERC REVISES ITS RULES ON CRITICAL ENERGY INFRASTRUCTURE INFORMATION EFFECTIVE NOVEMBER 2006

The Federal Energy Regulatory Commission (“FERC”) issued a Final Rule<sup>1</sup> and a Notice of Proposed Rulemaking<sup>2</sup> on September 21, 2006, to modify its regulations governing Critical Energy Infrastructure Information (“CEII”).

CEII is information on proposed or existing energy infrastructure that is restricted from mandatory public disclosure under the Freedom of Information Act (“FOIA”)<sup>3</sup> because it contains detailed information that could be useful in planning an attack on energy infrastructure, such as electric transmission lines, natural gas pipelines, and liquefied natural gas (“LNG”) import terminals.<sup>4</sup> FERC first implemented regulations restricting public access to CEII shortly after the terrorist attacks on September 11, 2001. Since that time, the regulations have undergone a number of changes, including amendments in February 2003 to define CEII to include information on proposed facilities, in addition to licensed or certificated facilities, and to

exclude information that simply provides the location of the infrastructure.

### FINAL RULE – ORDER NO. 683

With Order No. 683 (or the Final Rule), FERC clarified the definition of CEII to exclude information that FERC never intended to include. FERC also made procedural changes to simplify the procedures for obtaining access to CEII without increasing vulnerability of the energy infrastructure. Order No. 683 becomes effective on November 2, 2006.

**The Final Rule Clarifies the CEII Definition to Focus on Specific Engineering, Vulnerability, or Detailed Design Information.** In an effort to curtail what FERC views as an overutilization of the CEII designation, Order No. 683 attempts to clarify the level of detail necessary to qualify information on the location or design of infrastructure as CEII. The clarification is made by

adding the following language, noted in italics, to the definition of CEII, 18 C.F.R. § 388.113(c)(1):

*Critical energy infrastructure* information means *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 on critical infrastructure;
- (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and
- (iv) Does not simply give the general location of the critical infrastructure.<sup>5</sup>

Order No. 683 also clarifies that “narratives such as the descriptions of facilities and processes are generally not CEII unless they describe specific engineering and design details of critical infrastructure.”<sup>6</sup>

**Non-Disclosure Agreement Requirement Added.** The Final Rule implements two procedural changes related to processing CEII requests. To minimize delay in processing CEII requests, requesters now must submit an executed non-disclosure agreement (“NDA”) with their signed CEII requests. FERC has posted standardized NDA agreements on its *How-to File a Critical Energy Infrastructure Information (CEII) Request* web site.<sup>7</sup> That web site contains separate agreements for general requesters, the media, and federal agencies. Under Order No. 683, FERC will not accept a CEII request unless it contains an executed NDA.<sup>8</sup> FERC added the executed NDA requirement because its experience in processing CEII requests showed that the vast majority of CEII submitters supported release of the information with a properly executed NDA.<sup>9</sup> The requirement improves FERC’s efficiency in processing CEII requests.

**Notices of CEII Request Combined.** The second procedural change affects the Notice and Opportunity to Comment<sup>10</sup> and Notice Prior to Release<sup>11</sup> issued by FERC to the CEII submitter in response to a CEII request. In the past, FERC issued these notices separately. Under Order No. 683, however, FERC will provide these notices in the same document.<sup>12</sup> The notice procedure change will not affect the submitter’s opportunity to oppose release of the CEII information. Submitters may still provide comments to FERC upon notice of release.<sup>13</sup> “In

the event a submitter provides comments opposing release, the information would not be released until the submitter receives a revised notice of release.”<sup>14</sup>

**CEII Designation Must Be Justified.** The Final Rule also emphasizes that to prevent misuse of the CEII designation, submitters are required to segregate public information from CEII and “file as CEII only information which truly warrants being kept from ready public access.”<sup>15</sup> “The CEII process was not intended as a mechanism for companies to withhold from public access information that does not pose a risk of attack on the energy infrastructure.”<sup>16</sup> Under FERC’s current rules, submitters are required to provide a written statement to justify legally their CEII designation.<sup>17</sup> Failure to justify a CEII designation might lead to a rejection of an entire filing.<sup>18</sup>

## NOTICE OF PROPOSED RULEMAKING

Along with the Final Rule, FERC also issued a Notice of Proposed Rulemaking (“NOPR”) to streamline further the handling of CEII requests and to provide guidance on the materials that constitute CEII in a variety of reports and forms commonly submitted to FERC. With the CEII NOPR, FERC seeks comments on: (1) the proposed CEII regulation revisions, (2) the proposed guidelines designating certain portions of common submissions as CEII, and (3) the proposed elimination of the Non-Internet Public (“NIP”) designation.<sup>19</sup> Comments on the proposed revisions are due November 2, 2006. Reply comments are due November 17, 2006.

**Annual Certification for Repeat Requesters of CEII.** In conjunction with the new requirement that each CEII request contain an executed NDA, FERC proposes revising 18 C.F.R. § 388.113 to allow annual certification for repeat requesters. The annual certification would permit FERC to make a determination on whether a requester poses a security risk for the first request made by the requester during the calendar year. For subsequent requests, the requester would not be required to resubmit his detailed information or to file additional NDAs.<sup>20</sup> With subsequent requests, the requester will still be required to provide detailed information on why he needs the information and to attest that the information provided with his initial request has not changed.<sup>21</sup>

The CEII NOPR recognizes an implied need for intervenors in a proceeding and affected landowners of proposed facilities to access CEII. FERC notes that those individuals “may require access to information in order to participate meaningfully in the proceeding.”<sup>22</sup>

The CEII NOPR’s conclusion regarding intervenors’ needs for access to CEII echoes an interesting trend that is emerging in LNG proceedings. In at least two recent proceedings, FERC has required LNG developers with pending NGA § 3 applications to disclose the contents of NEPA Resource Report 13 to requesting intervenors pursuant to the terms of a bilaterally negotiated NDA.<sup>23</sup> Resource Report 13 is widely recognized as containing privileged information normally protected from mandatory disclosure by FOIA Exemption 4.<sup>24</sup> Despite this widely held belief, FERC required disclosure of Resource Report 13, subject to protection by an NDA, because the intervening parties deserved access to the filed information.<sup>25</sup> In one case, FERC ordered disclosure of Resource Report 13, despite the earlier decision of its FOIA officer to withhold disclosure on the grounds that FOIA Exemption 4 protected the information from mandatory disclosure.<sup>26</sup> In these cases, FERC required the parties to enter a bilaterally negotiated NDA to govern the terms of disclosure. While the production was to be made pursuant to an NDA, thereby limiting use of the information, disclosure of Resource Report 13 would give intervenors (including potential competitors) access to privileged information.

**Authorized Representative May Execute NDA.** Proposed revisions to 18 C.F.R. § 388.113 would allow an authorized representative of an organization to execute an NDA on behalf of that organization’s employees. Under the proposed rule, FERC would verify the organization requesting the CEII. The requesting organization then would be responsible for verifying its own CEII users.<sup>27</sup> In essence, this revision allows a company to submit one CEII request through its authorized representative and then share the CEII internally with its employees without requiring each employee to submit separately a CEII request and executed NDA. If unauthorized disclosure occurs by a member or employee of an organization, “[FERC] will hold the authorized representative and the entity accountable and take all action available to [FERC] to deal with the violation.”<sup>28</sup> Authorized representatives submitting repeat requests are eligible for annual certification.

**FOIA Fees Applicable to CEII Requests.** FERC proposes modifying the current CEII regulations to follow the fee schedule used for FOIA requests.<sup>29</sup>

**CEII Determinations No Longer Subject to Rehearing.** FERC proposes changing the procedure used for issuing CEII determinations to conform to the procedures used for the release of other non-public information specified in 18 C.F.R. § 388.107. Currently, the CEII Coordinator, or her designee, makes a CEII determination by delegated order. The delegated order is then subject to rehearing and review by FERC and subsequent appeal to an appellate court of proper jurisdiction.<sup>30</sup>

FERC proposes revising the rule to require the CEII Coordinator, or her designee, to issue a notice of determination by letter to grant or deny the CEII request.<sup>31</sup> In a process similar to FERC’s procedure for appealing FOIA determinations of requests for the release of non-public information, a dissatisfied requester would file an administrative appeal of the CEII determination letter to FERC’s General Counsel.<sup>32</sup> The General Counsel’s determination is subject to *de novo* review in a U.S. district court.<sup>33</sup> Likewise, a dissatisfied submitter may seek injunctive relief in a reverse FOIA-type action to prevent disclosure of CEII in response to a request.<sup>34</sup>

**Landowners May Request Alignment Sheets From FERC Staff.** The proposed rule would grant landowners whose land is affected by proposed facilities the right to obtain alignment sheets without submitting an NDA.<sup>35</sup> Under the rule, FERC would provide the NDA exemption so that landowners may discuss facility routes on or near their property with others even though the alignment sheets contain CEII. The CEII NOPR encourages landowners to first request the information from the applicant before filing a CEII request with FERC.<sup>36</sup>

**Elimination of Non-Internet Public Designation.** Because of the confusion arising from the use of the NIP designation for submitters attempting to classify information properly, FERC has proposed a prospective elimination of the NIP designation. Noting that most NIP-designated information is still available on the internet through other sources, FERC has concluded that “there is little to be gained by protecting information that can be gleaned from a visual inspection of the facility, or that is otherwise easily attainable from other

sources, such as the United States Geological Survey or commercial mapping firms.”<sup>37</sup> As a result, submitters should designate as public any maps showing basic location information for pipelines or other facilities.<sup>38</sup>

**CEII Guidelines for Commonly Submitted Information.** The proposed rule sets forth detailed classification guidelines for information in commonly submitted reports and forms, including Resource Report 13 (which relates to LNG facility design and operational information),<sup>39</sup> natural gas pipeline flow diagrams,<sup>40</sup> FERC Form 715 (Annual Transmission Planning and Evaluation Report),<sup>41</sup> and documents pertaining to FERC’s Division of Dam Safety and Inspections and Division of Hydropower Licensing.<sup>42</sup> For each, the CEII NOPR provides specific examples of public, CEII, and privileged information. The guidelines repeatedly emphasize that information designated as public, CEII, and privileged should be segregated, clearly labeled, and filed as separate volumes.

## IMPORTANT CONCLUSIONS

Companies should be careful not to overdesignate information under the CEII and privileged designations. Overusing either designation will undermine a company’s ability to protect truly sensitive information. Overdesignation also increases the company’s justification burden. Overdesignation as CEII or failure to justify adequately each designation could, in the extreme, cause FERC to reject a filing in its entirety.

CEII is not the proper designation to use for keeping confidential information out of the public domain. The vast majority of people requesting CEII obtain access to it. If a company wishes to keep its proprietary information out of the hands of

competitors, the company should file the information as privileged under FOIA Exemption 4, which covers competitively sensitive information, or any other relevant FOIA designation. As highlighted by the CEII NOPR and the Resource Report 13 cases, however, it is important to recognize that designation of materials as privileged will not necessarily prevent competitors from ultimately gaining access to those materials, although an NDA would be required. Thus, the lesson to take away from FERC’s evolving CEII and privileged-information policies is that a company providing sensitive information to FERC in support of a request for a FERC authorization must always recognize that any information provided to FERC may make its way into the hands of others, even if the company does its best to restrict the information’s dissemination using the CEII and privileged-information designations.

## LAWYER CONTACTS

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## NOTES

1. Critical Energy Infrastructure Information, Order No. 683, 71 Fed. Reg. 58,273 (Oct. 3, 2006) (“Order 683” or “Final Rule”).
2. Critical Energy Infrastructure Information, Notice of Proposed Rulemaking, 71 Fed. Reg. 58,325 (Oct. 3, 2006) (“CEII NOPR”).
3. 5 U.S.C. § 552.
4. 18 C.F.R. § 388.113(c)(1).
5. Order 683, 71 Fed. Reg. at 58,276.
6. *Id.*
7. The FERC’s *How-to File a Critical Energy Infrastructure Information (CEII) Request* web site is found at <http://www.ferc.gov/help/how-to/file-ceii.asp>.
8. Order 683, 71 Fed. Reg. at 58,274.
9. *Id.* at 58,275.
10. *See* 18 C.F.R. § 388.112(d) (2006).
11. *See* 18 C.F.R. § 388.112(e) (2006).
12. Order 683, 71 Fed. Reg. at 58,275.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *See* 18 C.F.R. § 388.112(b)(1).
18. Order 683, 71 Fed. Reg. at 58,275 (“The Commission retains its concern for filing abuses and will take action against applicants or parties who knowingly misfile information as CEII, including rejection of an application where information is mislabeled as CEII or where a legal justification is not provided.”).
19. *See, generally*, Critical Energy Infrastructure Information, Notice of Proposed Rulemaking, 71 Fed. Reg. 58,325 (Oct. 3, 2006).
20. *Id.* at 58,326.
21. *Id.*
22. *Id.*
23. *Broadwater Energy LLC and Broadwater*, 116 FERC ¶ 61,032 (2006), and *Bradwood Landing LLC*, 116 FERC ¶ 61,125 (2006).
24. *See, generally*, *David Collins*, 116 FERC ¶ 62,168 at P 8 (2006); *David Deen*, 114 FERC ¶ 62,167 at P 7 (2006); *Brian Brown*, 115 FERC ¶ 62,190 (2006); *C. Lincoln Jewett*, 115 FERC ¶ 62,333 (2006); *Mark Brady*, 107 FERC ¶ 61,107 at 6 (2004); *Mark Brady*, Docket No. CE04-63-000, “Order Granting Request for Critical Energy Infrastructure Information” (Mar. 16, 2004) (unreported); CEII NOPR at P 58,328. FERC’s regulations for Commission records that are exempt from public disclosure govern the disclosure and protection of privileged information. *See* 18 C.F.R. § 388.107-112. FERC’s definition of “records exempt from public disclosure” includes information properly classified as “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” *Id.* at § 388.107(d). The trade secrets and financial/commercial information exemption is commonly referred to as FOIA Exemption 4.
25. *Broadwater Energy LLC and Broadwater*, 116 FERC ¶ 61,032 (2006), and *Bradwood Landing LLC*, 116 FERC ¶ 61,125 (2006).
26. *See Broadwater Energy LLC and Broadwater Pipeline LLC*, 116 FERC ¶ 61,032 at P 3 (2006).
27. CEII NOPR, 71 Fed. Reg. at 58,328.
28. *Id.*
29. *Id.* *See also* 18 C.F.R. § 388.109(b) (2006) (fees for FOIA requests).
30. *See* 18 C.F.R. § 385.713 (2006).
31. CEII NOPR, 71 Fed. Reg. at 58,327.
32. *Id.*
33. *Id.* *See also* 18 C.F.R. §§ 388.108(c)(1), 388.110 (2006).
34. CEII NOPR, 71 Fed. Reg. at 58,327. In a “reverse” FOIA action, the submitting party seeks injunctive relief to prevent the agency in possession of its information from disclosing the information in response to a FOIA request. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987).
35. CEII NOPR, 71 Fed. Reg. at 58,327.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 58,327-28.
40. *Id.* at 58,328.
41. *Id.* at 58,328-29.
42. *Id.* at 58,328.

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