

UNITED STATES OF AMERICA
before the
FEDERAL ENERGY REGULATORY COMMISSION

North American Electric Reliability Corporation	Docket No. RR06-1-012
Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT	Docket No. RR07-1-002
Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization	Docket No. RR07-2-002
Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc.	Docket No. RR07-3-002
Delegation Agreement Between the North American Electric Reliability Corporation and Reliability <i>First</i> Corporation	Docket No. RR07-4-002
Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation	Docket No. RR07-5-002
Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc.	Docket No. RR07-6-002
Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council	Docket No. RR07-7-002
Delegation Agreement Between the North American Electric Reliability Corporation and Florida Reliability Coordinating Council.	Docket No. RR07-8-002
North American Electric Reliability Corporation and Western Electricity Coordinating Council	Docket No. RR08-2-000

**NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION'S
REQUEST FOR REHEARING OF MARCH 21, 2008 ORDER**

April 21, 2008

I. INTRODUCTION

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.713, the North American Electric Reliability Corporation ("NERC") requests rehearing with respect to one directive in the Commission's March 21, 2008 Order in the above-captioned dockets.¹ That directive is in Paragraph 75 and directs NERC, in its Hearing Procedures and at §1501.3 of its Rules of Procedure, to adopt the definition of the term "Critical Energy Infrastructure Information" ("CEII") used in NERC's delegation agreement with ReliabilityFirst Corporation ("ReliabilityFirst"), which "reflects the Commission's most recent amendment of this term in Order No. 683."² The definition of CEII used by ReliabilityFirst³ and adopted by the Commission at 18 C.F.R. §388.113(c)(1)⁴ has several components, one of which is that the information "is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552." However, NERC is not subject to the Freedom of Information Act ("FOIA") and does not normally engage in determining if documents and other information in its possession are subject to or exempt from mandatory disclosure under FOIA. Further, while a requirement that CEII must be exempt from mandatory disclosure under FOIA is appropriate in the context of the Commission regulations in which this definition is found, it is not substantively useful in

¹*North American Electric Reliability Corporation, et al., Order Addressing Revised Delegation Agreements*, 122 FERC ¶ 61,245 (March 21, 2008) ("March 21 Order").

²March 21 Order at P 75. Order No. 683 is *Critical Energy Infrastructure Information*, FERC Stats. & Regs. ¶ 31,228 (2006).

³ReliabilityFirst's definition of CEII actually appears in P 1.1.5 of its Hearing Procedures, which are part of Exhibit D to its amended and restated delegation agreement with NERC.

⁴Footnote 44 of the March 21 Order cites 18 C.F.R. §388.112(c)(1). There is no definition of CEII at §388.112(c)(1). NERC believes the Commission intended to cite 18 C.F.R. §388.113(c)(1), which contains a definition of CEII.

identifying what information should be treated as CEII in the NERC context.⁵ Therefore, NERC requests that the Commission grant rehearing of the March 21 Order and modify the directive in P 75 to specify that NERC must adopt the definition of CEII used by ReliabilityFirst and adopted in 18 C.F.R. §388.113(c)(1), but *excluding* the component of that definition that the information “is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552.”

II. STATEMENT OF ISSUE FOR REQUEST FOR REHEARING

Pursuant to 18 C.F.R. §385.713, NERC seeks rehearing on the following issue:

Issue: In P 75 of the March 21 Order, the Commission directs NERC to adopt, in its Hearing Procedures and §1501.3 of its Rules of Procedure, a definition of “Critical Energy Infrastructure Information” that includes a requirement that to be CEII, information must be “exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552.” NERC should not be required to include this requirement in its definition of CEII. *First*, NERC is not subject to FOIA, and in the normal course of its activities does not have to make determinations as to whether information in its possession that it obtains from sources such as Registered Entities and Regional Entities, or that it seeks to obtain from such entities, is subject to or exempt from disclosure under FOIA. Thus, inclusion of this term in NERC’s definition of CEII will add an unusual and unnecessary step to NERC’s determinations of whether particular information is CEII and should be protected as such. *Second*, while the term “is exempt from mandatory disclosure under the Freedom of Information Act” was appropriately included in the Commission’s definition of CEII at 18 C.F.R. §388.113(c)(1) given the purpose of the Commission’s regulations at §388.112 and 388.113, it is not meaningful in the context of the NERC Hearing Procedures and Rules of Procedure. *Third*, while the term “is exempt from mandatory disclosure under the Freedom of Information Act” is, again, meaningful in the context of 18 C.F.R. §388.112 and 388.113, it does not provide any additional substantive content to the determination of whether particular information is information about critical energy infrastructure that should be given confidential treatment; the other components of the definition do that. Accordingly, the Commission should grant rehearing and revise the directive in P 75 to allow NERC to exclude the term “is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552” from the definition of CEII NERC is required to adopt.

⁵ The preceding two sentences are also applicable to the Regional Entities, which are subject to §1500 of the NERC Rules of Procedure and have for the most part adopted the NERC Compliance Monitoring and Enforcement Program (“CMEP”) and Hearing Procedures.

III. ARGUMENT

In P 75 of the March 21 Order, the Commission directed NERC “to adopt, in the NERC hearing procedures and at section 1501.3 of the NERC Rules of Procedure, the RFC [Reliability*First*] Delegation Agreement’s proposed revision to the term “Critical Energy Infrastructure Information” (a revision which reflects the Commission’s most recent amendment of this term in Order No. 683).” The definition of CEII in the Reliability*First* Delegation Agreement, which is also the definition in the Commission’s regulations at 18 C.F.R. §388.113(c)(1), is:

“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.

NERC submits that inclusion, in the definition of CEII to be adopted in the NERC Hearing Procedures and §1500 of its Rules of Procedure, of a requirement that in order to be CEII, information must be “exempt from mandatory disclosure under the Freedom of Information Act”, is inappropriate and unnecessary. The Commission should grant rehearing to revise the directive in P 75 so as to authorize NERC to omit the term “is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552” from the definition of CEII in NERC’s Hearing Procedures and Rules of Procedure.

As background, Section 1500 of the NERC Rules of Procedure sets forth procedures NERC and Regional Entities will follow to identify and protect “confidential information” that comes into their possession from owners, operators and users of the bulk power system and other entities. The definition of “confidential information” in §1501.1 includes “critical energy

infrastructure information,” which in turn is defined in §1501.3.⁶ Additionally, provisions of the NERC CMEP incorporate the definition of CEII from §1501.3 of the Rules of Procedure – specifically CMEP §3.1.6 (stating that CEII will be redacted from any public reports of compliance audits), §9.3.1 (stating that information generated or received pursuant to compliance program activities that is CEII shall be treated in a confidential manner in accordance with §1500 of the NERC Rules of Procedure) and §9.3.3 (stating that the Compliance Enforcement Authority (*i.e.*, NERC or a Regional Entity) will keep confidential all CEII in accordance with §1500 of the NERC Rules of Procedure and that CEII will be redacted and not released publicly). The NERC Hearing Procedures specify that CEII will be considered entitled to protection by a protective order issued in the hearing process (*see* P 1.5.10), and that the Hearing Officer’s initial decision and the Hearing Body’s final decision are to specify whether any information in the proceeding was deemed to be CEII (*see* PP 1.7.4 and 1.7.8).⁷

NERC submits that the provision “is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552”, should not be included in the definition of CEII in

⁶In its Order issued January 18, 2007, in Docket No. RR06-1-003, the Commission approved NERC’s definitions of the categories of confidential information in §1501 of its Rules of Procedure, with the exception of “confidential business and market information”, which is unrelated to the definition of CEII. *North American Electric Reliability Corp., Order on Compliance Filing*, 118 FERC ¶61,030 (2007) (“January 2007 Compliance Order”) at P 178.

⁷Under the NERC CMEP as approved by the Commission, “Information or data generated or received pursuant to Compliance Program activities, including a hearing process, shall be treated in a confidential manner pursuant to the provisions of Section 1500 of the NERC Rules of Procedure” (CMEP §9.3.1); and all proceedings conducted pursuant to the NERC Hearing Procedures and any written testimony, exhibits, other evidence, transcripts, comments, briefs, rulings and other issuances shall be non-public and held in confidence except as NERC (in accordance with authorization granted by the Commission to release information about a non-public proceeding) or the Commission authorizes or directs public disclosure. *See* NERC Hearing Procedures P 1.5.10(a); March 21 Order at P 86; 18 C.F.R. §39.7(b)(4). Additionally, the Commission has directed NERC and the Regional Entities to maintain information they report to the Commission as confidential until the Commission authorizes public disclosure. January 2007 Compliance Order at P 183.

the NERC Hearing Procedures and Rules of Procedure, for three reasons.

First, as the Electric Reliability Organization (“ERO”) certified by the Commission, NERC is not subject to FOIA. The Regional Entities, which are subject to the NERC Rules of Procedure and have for the most part adopted the NERC CMEP and Hearing Procedures, are also not subject to FOIA.⁸ While a reference to whether information is exempt from disclosure under FOIA is appropriate in the regulations of the Commission, which is subject to FOIA, it is not necessary in a definition of CEII used for determining whether information coming into NERC’s possession (or coming into possession of a Regional Entity), whether in the course of compliance activities or other NERC and Regional Entity statutory activities, shall be treated as CEII. NERC does not base this point solely on a technical legal distinction. Rather, because NERC and the Regional Entities are not subject to FOIA, NERC and the Regional Entities (unlike the Commission) do not in the normal course of their activities have to make determinations as to whether information that comes into their possession is subject to, or exempt from, disclosure under FOIA. It would be a diversion of the resources of NERC and the Regional Entities if they were required to become familiar with the large body of law on what information is subject to and exempt from disclosure under FOIA and to apply that law in determining whether or not information in their possession is CEII and must be treated accordingly.

⁸The requirements of 5 U.S.C. 552 are applicable to an “agency.” “Agency” is defined in 5 U.S.C. 551 as (with some enumerated exclusions) “each authority of the Government of the United States, whether or not it is within or subject to review by another agency”. NERC and the Regional Entities are not “authorities of the Government of the United States.” Section 1211(b) of the Energy Policy Act of 2005 states that the ERO certified by the Commission pursuant to §215(c) of the Federal Power Act (“FPA”), and any Regional Entity delegated enforcement authority pursuant to §215(e)(4) of the FPA, “are not departments, agencies or instrumentalities of the Federal Government.” The Commission has agreed with NERC that “there is no requirement in either section 215 of the FPA or the Commission’s regulations that the ERO or a Regional Entity make information available to the general public.” January 2007 Compliance Order at P 177.

Second, while the provision “is exempt from mandatory disclosure under the Freedom of Information Act” was appropriately included in the Commission’s regulations at 18 C.F.R. §388.112 and 388.113, given the purpose of those regulations, it is not a meaningful requirement in the context of the NERC Hearing Procedures and Rules of Procedure. The title of §388.112 is “Requests for special treatment of documents submitted to the Commission”, and its “Scope” as set forth in §388.112(a) is:

- (1) Any person submitting a document to the Commission may request privileged treatment by claiming that some or all of the information in a particular document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552, and should be withheld from public disclosure.
- (2) Any person submitting documents containing critical energy infrastructure information (CEII) as defined in §388.113 should follow the procedures specified in this section.

Thus, determining whether a document is exempt from mandatory disclosure under FOIA is a necessary step in determining whether it falls within the scope of the procedures set forth in §388.112. Further, the purpose of §388.113, entitled “Accessing critical energy infrastructure information” (in the Commission’s possession), is stated in §388.113(b) as follows:

- (b) *Purpose.* The procedures in this section are available at the requester’s option as an alternative to the FOIA procedures in §388.108 where the information requested is exempted from disclosure under the FOIA and contains CEII.

Thus, as a threshold matter, information does not even fall within the scope of the procedures provided in §388.113 unless the information is exempt from mandatory disclosure under FOIA. In contrast, for the purposes of NERC’s (and Regional Entities’) identification and treatment of information as CEII in connection with the CMEP, Hearing Procedures, and other statutory activities under the NERC Rules of Procedures, there is no need to determine if the information would be exempt from disclosure under FOIA if in the hands of an “agency” of the federal government such as the Commission.

Third, while the term “is exempt from mandatory disclosure under the Freedom of Information Act” is, again, meaningful in the context of 18 C.F.R. §388.112 and 388.113, it does not provide any additional substantive content to the determination of whether particular information is information about critical energy infrastructure that should be given confidential treatment. Rather; the other components of the definition do that. Those other components are:

- That the information is specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure;
- That the information relates details about the production, generation, transportation, transmission, or distribution of energy;
- That the information could be useful to a person planning an attack on critical infrastructure; and
- That the information does not simply give the general location of the critical infrastructure.

Further, and perhaps most importantly, to be CEII, the information must be about “critical infrastructure”, which is a term for which the Commission and NERC already use the same definition:

Critical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.

See 18 C.F.R. §388.113(c)(2); NERC Rules of Procedure §1501.4; NERC Hearing Procedures P 1.1.5. Even with the provision “is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552” removed from the NERC definition of CEII, as requested herein, NERC and the Regional Entities will still be able to apply the substantive requirements listed above, which are identical to those in the Commission’s definitions of CEII and critical infrastructure, to determine what documents and other information should be afforded the confidential treatment necessary and appropriate to information about critical energy

infrastructure.⁹

IV. CONCLUSION

For the reasons set forth herein, NERC respectfully requests that the Commission grant rehearing of the March 21 Order for the purpose of revising P 75 of the March 21 Order to direct NERC to adopt the definition of CEII in the Commission’s regulations at 18 C.F.R. §388.113(c)(1), but with the provision “is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552” removed from the definition.

Respectfully submitted,

/s/ David N. Cook
Rick Sergel
President and Chief Executive Officer
David N. Cook*
Vice President and General Counsel
North American Electric Reliability
Corporation
116-390 Village Boulevard
Princeton, NJ 08540-5721
(609) 452-8060
(609) 452-9550 – facsimile
david.cook@nerc.net

*Persons to be included on the
Commission’s official service list.

/s/ Owen E. MacBride
Owen E. MacBride*
Debra Ann Palmer
Schiff Hardin LLP
1666 K Street, N.W., Suite 300
Washington, DC 20036-4390
(202) 778-6400
(202) 778-6460 – facsimile
omacbride@schiffhardin.com
dpalmer@schiffhardin.com

Rebecca J. Michael, Assistant General Counsel
North American Electric Reliability Corporation
1120 G Street, N.W., Suite 990
Washington, D.C. 2005-3801
(202) 393-3998
(202) 393-3995 – facsimile
Rebecca.michael@nerc.net

⁹In Order No. 683, the Commission modified its previous definition of CEII by adding the words “specific engineering, vulnerability, or detailed design” at the beginning of 18 C.F.R. §388.113(c)(1), and adding the words “detail about” at the beginning of §388.113(c)(1)(i). Order No. 683 at P 6. These revisions will be incorporated in the definition of CEII that NERC will adopt in response to P 75 of the March 21 Order.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties listed on the official service list compiled by the Secretary in this proceeding.

Dated at Chicago, Illinois this 21st day of April, 2008.

/s/ Owen E. MacBride
Owen E. MacBride

*Attorney for North American Electric
Reliability Corporation*