

163 FERC ¶ 61,125  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 375 and 388

[Docket No. RM16-15-001; Order No. 833-A]

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

(Issued May 17, 2018)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Clarification and Rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) in this order on clarification and rehearing grants in part Edison Electric Institute's request for clarification or, in the alternative, rehearing of Order No. 833, and denies rehearing of that order, which amends the Commission's regulations to implement provisions of the Fixing America's Surface Transportation Act pertaining to the designation, protection, and sharing of Critical Energy/Electric Infrastructure Information.

EFFECTIVE DATE: This rule will become effective [**INSERT DATE 60 days after publication in the FEDERAL REGISTER**].

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SUPPLEMENTARY INFORMATION

163 FERC ¶ 61,125  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;  
Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

Regulations Implementing FAST Act Section 61003 – Docket No. RM16-15-001  
Critical Electric Infrastructure Security and Amending  
Critical Energy Infrastructure Information

ORDER NO. 833-A

ORDER ON CLARIFICATION AND REHEARING

(Issued May 17, 2018)

1. In Order No. 833, the Commission amended its regulations to implement provisions of the Fixing America's Surface Transportation Act (FAST Act)<sup>1</sup> related to Critical Electric Infrastructure Information.<sup>2</sup> In addition, Order No. 833 revised the Commission's Critical Energy Infrastructure Information regulations.<sup>3</sup> Edison Electric Institute (EEI) requested clarification or, in the alternative, rehearing of Order No. 833. For the reasons discussed below, we grant EEI's request for clarification in part and deny rehearing.

**I. Order No. 833**

2. On December 4, 2015, the FAST Act was signed into law. The FAST Act, *inter alia*, added section 215A to the Federal Power Act (FPA) to improve the security and resilience of energy infrastructure in the face of emergencies. The FAST Act directed the

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<sup>1</sup> Fixing America's Surface Transportation Act, Pub. L. No. 114-94, section 61,003, 129 Stat. 1312, 1773-1779 (2015) (codified at 16 U.S.C. 824o-1).

<sup>2</sup> *Regulations Implementing FAST Act Section 61003 — Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information, Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, Order No. 833, 157 FERC ¶ 61,123 (2016).

<sup>3</sup> *Id.*

Commission to issue regulations that provide: (1) the criteria and procedures for designating information as Critical Electric Infrastructure Information; (2) a specific prohibition on unauthorized disclosure of Critical Electric Infrastructure Information; (3) sanctions for the knowing and willful unauthorized disclosure of Critical Electric Infrastructure Information by Commission and Department of Energy (DOE) employees; and (4) a process for voluntary sharing of Critical Electric Infrastructure Information.<sup>4</sup>

3. On June 16, 2016, the Commission issued a Notice of Proposed Rulemaking (NOPR) to amend its regulations to implement the provisions of the FAST Act pertaining to the designation, protection, and sharing of Critical Electric Infrastructure Information and to revise the existing Critical Energy Infrastructure Information regulations.<sup>5</sup> The NOPR proposed that the amended procedures be referred to as the Critical Energy/Electric Infrastructure Information (CEII) Procedures.<sup>6</sup> In response to the NOPR, nineteen entities filed comments and two entities filed reply comments.

4. On November 17, 2016, the Commission issued Order No. 833, which amended the Commission's regulations at 18 C.F.R. §§ 375.309, 375.313, 388.112 and 388.113 to implement the FAST Act provisions that pertain to the designation, protection and sharing of Critical Electric Infrastructure Information. Order No. 833 also revised the existing Critical Energy Infrastructure Information regulations. The Commission determined that the amended regulations comply with the requirements of the FAST Act and better ensure the secure treatment of CEII.<sup>7</sup>

## II. Discussion

5. EEI asserts that the Commission either erred or should reconsider five aspects of Order No. 833.<sup>8</sup> As discussed below, we grant EEI's request for clarification in part and deny EEI's request for rehearing.

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<sup>4</sup> See generally FAST Act, Pub. L. No. 114-94, section 61,003, 129 Stat. 1312, 1776.

<sup>5</sup> *Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information*, 155 FERC ¶ 61,278 (2016) (NOPR).

<sup>6</sup> *Id.*

<sup>7</sup> See generally Order No. 833, 157 FERC ¶ 61,123.

<sup>8</sup> EEI Request at 6-7.

**A. Requests for Access to CEII**

**Order No. 833**

6. The FAST Act required the Commission, taking into account standards of the Electric Reliability Organization, to facilitate voluntary sharing of Critical Electric Infrastructure Information. The statute directed the Commission to facilitate voluntary sharing with, between, and by Federal, State, political subdivision, and tribal authorities; the Electric Reliability Organization; regional entities; information sharing and analysis centers established pursuant to Presidential Decision Directive 63; owners, operators, and users of critical electric infrastructure in the United States; and other entities determined appropriate by the Commission.<sup>9</sup>

7. In Order No. 833, the Commission established procedures in its regulations for providing CEII to third parties. Specifically, in section 388.113(f), the Commission established a process for the Commission to voluntarily share CEII when there is a need to ensure energy infrastructure is protected. Separately, in section 388.113(g), the Commission revised its long-standing procedures for members of the public to request access to CEII by requiring a statement demonstrating a valid and legitimate need for the information.<sup>10</sup> Both processes contain procedures to notify submitters of the CEII of the Commission's prospective sharing of its CEII as well as a requirement that prospective CEII recipients execute Non-Disclosure Agreements (NDA).

8. The Commission also stated that the procedures do not impose a sharing requirement on entities; instead, the provisions allow the Commission to exercise discretion to share CEII that has already been submitted to, or generated by, the Commission.<sup>11</sup> Further, the Commission determined that even if the Commission's voluntary sharing of information were viewed as the same as a third-party sharing it, the Commission must balance its obligation to disclose information as necessary to carry out

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<sup>9</sup> FAST Act, Pub. L. No. 114-94, section 61,003, 129 Stat. 1312, 1776.

<sup>10</sup> The CEII request procedures found in section 388.113(g) were first established under the Commission's Critical Energy Infrastructure Information regulations in 2003. *See Critical Energy Infrastructure Information*, Order No. 630, FERC Stats. & Regs. ¶ 31,140, *order on reh'g*, Order No. 630-A, FERC Stats. & Regs. ¶ 31,147 (2003).

<sup>11</sup> Order No. 833, 157 FERC ¶ 61,123 at P 125.

the Commission's jurisdictional responsibilities against an entity's preference not to have information disclosed.<sup>12</sup>

### **Request**

9. EEI states that the Commission should reconsider its determination that CEII can be shared over the objections of submitters.<sup>13</sup> EEI asserts that section 215A(d)(2)(D) of the FPA directs the Commission only to facilitate voluntary sharing "by and between" entities. EEI contends that the Commission's ability to share information over a submitter's objection, as provided in 18 C.F.R. § 388.113(g)(5)(iii), amounts to involuntary sharing not intended by the FAST Act and in violation of FPA section 215A(d)(6).<sup>14</sup> EEI asserts that, by using section 215A(d)(2)(D) to authorize the Commission to provide CEII over the submitter's objection, the Commission is using the FAST Act to "share" CEII in an involuntary manner. EEI states that its interpretation is consistent with Congress' decision to make CEII exempt from mandatory disclosure under the Freedom of Information Act (FOIA).<sup>15</sup>

### **Commission Determination**

10. We deny clarification and rehearing of this issue. We disagree with EEI's contention that the FAST Act only directs the voluntary sharing of CEII "by and between" entities or that the Commission's release of information over a submitter's objections constitutes "involuntary" sharing of such information. EEI misconstrues FPA section 215A(d)(2)(D) to argue that the statute's directives regarding voluntary sharing do not include voluntary sharing of CEII *by the Commission*. Such a reading is inconsistent with the FAST Act in two respects.

11. First, FPA section 215A(d)(2)(D)(i) provides that the Commission's regulations should "facilitate voluntary sharing of critical electric infrastructure information with, between, and by— (i) Federal, State, political subdivision, and tribal authorities ..." It would be incongruous to read the FAST Act's reference to "voluntary sharing ... by ... Federal ... authorities" not to include voluntary sharing by the Commission of CEII in its possession. Second, the FAST Act did not direct the Commission to curtail or eliminate

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<sup>12</sup> *Id.* P 126.

<sup>13</sup> EEI Request at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *See* 5 U.S.C. 552 *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

the established, pre-existing process for providing members of the public with access to CEII, which is provided in 18 C.F.R. § 388.113(g)(5)(iii).

12. Even before the FAST Act, the Commission's regulations included a process whereby the Commission's CEII Coordinator had the discretion to share, in certain circumstances, CEII that was submitted to, or generated by, the Commission.<sup>16</sup> Under both the prior regulations and the revised regulations at 18 C.F.R. § 388.113(d)(1)(vi), a submitter is, as EEI acknowledges, provided an opportunity to comment on the potential disclosure of its CEII.<sup>17</sup> Prior to any determination to release CEII to a requester, pursuant to 18 C.F.R. § 388.113(g)(5)(iii), the CEII Coordinator will take into consideration any objections and "will balance the requester's need for the information against the sensitivity of the information." Other than characterizing a determination by the CEII Coordinator to ultimately release CEII over an objection as "involuntary sharing," EEI does not propose any change to the Commission's long-standing approach nor does EEI demonstrate that the FAST Act is intended to restrict the Commission from sharing CEII, under an NDA, with third parties that have a valid and legitimate need for the material.<sup>18</sup>

13. In addition, our reading of the FAST Act is consistent with EEI's statement that "[u]nder the plain meaning of the FAST Act statute, the term 'voluntary' means the Commission should implement an information sharing process that allows owners to

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<sup>16</sup> Order No. 833, 157 FERC ¶ 61,123 at P 125.

<sup>17</sup> EEI's argument pertains to the CEII request process found in 18 C.F.R. 388.113(g)(5) of the Commission's regulations. To the extent that EEI's argument indirectly relates to the separate voluntary sharing provisions found in section 388.113(f), its argument does not persuade us to grant rehearing on that section for the same reasons as those provided above. For example, under section 388.113(f), except in exigent circumstances, submitters are provided notice prior to release of CEII and may submit comments. In the event of an exigency like a national security issue, the Commission will provide notice of the disclosure to the submitter of CEII as soon as practicable.

<sup>18</sup> EEI's interpretation suggests that the determination as to whether it is appropriate for the Commission to share CEII should be entirely in the hands of the submitter. Such an approach is inconsistent with the FAST Act as it could limit the Commission's ability to share CEII. In any event, pursuant to 388.113(d)(1)(iv), a submitter is provided notice of release of CEII under 18 C.F.R. § 388.113(g)(5)(iii), and a submitter who disagrees with the determination providing notice of the release of its CEII has the ability to seek injunctive relief in district court.

share information intentionally and freely.”<sup>19</sup> The new voluntary sharing provisions, at 18 C.F.R § 388.113(f) of the Commission’s CEII regulations, only govern the process by which the Commission will voluntarily share CEII that has been submitted to the Commission or generated by staff.<sup>20</sup> Before the FAST Act and under the revised regulations, entities remain free to share the CEII that they submitted to the Commission with others.

14. Finally, we disagree with EEI’s assertion that its interpretation of the FAST Act’s “voluntary sharing” provisions is consistent with Congress’ creation of a FOIA exemption for CEII.<sup>21</sup> The Commission’s FOIA program and the voluntary sharing contemplated under the FAST Act serve different purposes, with the former serving to support government transparency<sup>22</sup> and the latter governing how certain sensitive information is identified, secured, and shared to support the security and resilience of critical energy infrastructure. We do not agree that the new FOIA exemption protecting against mandatory public disclosure of CEII in response to a FOIA request suggests that Congress also intended to prohibit *any* sharing of that CEII without the submitter’s consent. Rather, the regulations adopted in Order No. 833 struck an appropriate balance between the FAST Act’s provisions protecting CEII from public disclosure with the provisions providing that CEII may be voluntarily shared with certain third parties. Thus, while the FOIA exemption prevents the disclosure of CEII in response to a FOIA request, we disagree with EEI’s assertion that the exemption was intended to preclude the Commission from exercising its discretion to share CEII pursuant to the established procedures in 18 C.F.R. § 388.113(g)(5)(iii).

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<sup>19</sup> EEI Request at 7.

<sup>20</sup> As to sharing of CEII by CEII recipients, under our NDAs, CEII recipients may only share CEII with other individuals covered by our NDA for the same information.

<sup>21</sup> EEI Request at 7-8.

<sup>22</sup> *See, e.g., NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (“The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”).

**B. Criteria for Responding to CEII requests****Order No. 833**

15. In Order No. 833, the Commission concluded that the FAST Act does not require changes to the Commission's existing process for accessing CEII.<sup>23</sup> The Commission also decided to maintain its balancing approach when determining whether to provide CEII to individuals who demonstrated a need for access to CEII under an executed NDA.<sup>24</sup> The Commission noted that a request for access to CEII is case specific to the unique facts and circumstances of each request and, therefore, declined to provide additional guidance and criteria about how it will respond to individual CEII requests under 18 C.F.R. § 388.113(g)(5).<sup>25</sup>

**Request**

16. EEI asserts that the Commission erred by declining to provide or clarify the criteria that the Commission will use to determine whether a member of the public is eligible to obtain CEII from the Commission.<sup>26</sup> EEI claims that such clarification will provide clear guidance to Commission staff about when a member of the public may receive CEII and afford a better understanding to submitters about the "benefits or risks involved in providing CEII to the Commission."<sup>27</sup> EEI also contends that "criteria stating that the Commission will consider public safety benefits before releasing CEII to the public may provide CEII submitters with greater reasons to voluntarily provide CEII to the Commission."<sup>28</sup>

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<sup>23</sup> Order No. 833, 157 FERC ¶ 61,123 at P 144.

<sup>24</sup> *Id.* P 143.

<sup>25</sup> The Commission, however, outlined the information that an individual seeking access to CEII under 18 C.F.R. § 388.113(g)(5) must include in an accompanying statement of need. *See id.*

<sup>26</sup> EEI Request at 6 (averring that nothing in section 388.113(g)(5)(iii) identifies any criteria that the Commission will use before disclosing CEII to a requester).

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.*

### Commission Determination

17. We grant clarification and deny rehearing of this issue. We continue to believe that the Commission has provided sufficient detail on the circumstances in which the Commission will share CEII.<sup>29</sup> The CEII regulations enable “individuals with a valid or legitimate need to access certain sensitive energy infrastructure information” that would otherwise be exempt under FOIA.<sup>30</sup>

18. Since instituting the CEII process in 2003, the Commission has acquired significant experience in processing CEII requests. In particular, the Commission routinely processes CEII requests from, among others, consultants, academics, landowners, and public interest groups. In implementing the provisions of the FAST Act, the Commission is utilizing its vast experience in addressing the various interests of CEII requestors and submitters as well.

19. Furthermore, we disagree with EEI’s assertion that the Commission failed to provide any criteria that the CEII Coordinator will use to determine whether a member of the public is eligible to access CEII. As explained in Order No. 833, the Commission has utilized a “balancing approach effectively in response to Critical Energy Infrastructure Information requests for almost fifteen years. The balancing approach has provided to individuals with a demonstrated need access to information subject to a NDA.”<sup>31</sup> Consistent with long-standing practice, section 388.113(g)(5)(iii) states that the “CEII Coordinator will balance the requester’s need for the information against the sensitivity of the information.”

20. Contrary to EEI’s assertion, in the NOPR and in Order No. 833, we provided clarification regarding the criteria for obtaining CEII by outlining information that a CEII requester must include in its statement of need.<sup>32</sup> We also stated that a conclusory statement of need by a CEII requester will not suffice.<sup>33</sup> Moreover, we note that a request for access to CEII is case specific to the unique facts and circumstances of each request.

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<sup>29</sup> See, e.g., 18 C.F.R § 388.113(f) (2017) (providing the procedures for voluntary sharing), § 388.113(g) (providing procedures for accessing CEII).

<sup>30</sup> Order No. 833, 157 FERC ¶ 61,123 at P 3.

<sup>31</sup> *Id.* P 143.

<sup>32</sup> 18 C.F.R. § 388.113(g)(5)(i)(b).

<sup>33</sup> *Id.*

21. In its filing, EEI provides one suggestion (i.e., “public safety benefits”) concerning how the Commission can enhance the criteria to determine whether a member of the public is eligible to obtain CEII from the Commission.<sup>34</sup> We clarify that public safety benefits are one criterion that the CEII Coordinator should consider, as part of the balancing approach described above, in determining whether to share CEII in a particular instance. Overall, we believe that our approach provides sufficient detail on the circumstances in which the Commission will share CEII, while also providing the CEII Coordinator with enough specificity and flexibility to respond to each individual request for CEII.

**C. Non-Disclosure Agreement**

**Order No. 833**

22. Order No. 833 included revisions to strengthen the CEII handling requirements for both Commission staff and external recipients. As part of those revisions, the Commission established minimum requirements for the NDAs that recipients of CEII must execute before receiving access to CEII. The Commission explained that the minimum requirements for an NDA are not exhaustive and do not preclude other requirements.<sup>35</sup> Further, the Commission stated that additional provisions may be added to the NDA and submitters may request additional provisions.<sup>36</sup> In response to NOPR comments, the Commission amended section 388.113(h)(2) to add a provision to require CEII recipients to promptly report all unauthorized disclosures of CEII to the Commission.<sup>37</sup>

**Request**

23. EEI states that the Commission should consider “modernizing the Commission’s CEII NDA even further to mitigate against the risk of a CEII recipient involuntarily sharing CEII with a hostile actor.”<sup>38</sup> EEI identifies one example of how the Commission may change the CEII NDA. While acknowledging the “incident response clause” in section 388.113(h)(2), EEI suggests that the clause could be changed to require the

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<sup>34</sup> EEI Request at 9.

<sup>35</sup> Order No. 833, 157 FERC ¶ 61,123 at P 92.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* P 93.

<sup>38</sup> EEI Request at 10-11.

reporting of unauthorized disclosures that actually occurred or “those reasonably suspected to have occurred.”<sup>39</sup>

### **Commission Determination**

24. We grant clarification and deny rehearing on this issue. Order No. 833 explained that section 388.113(h)(2) only includes “‘minimum’ requirements for a NDA and is not intended to be exhaustive or preclude additional provisions, as needed.”<sup>40</sup> As the Commission stated in Order No. 833, under certain circumstances the Commission may add additional provisions to the NDA and submitters may request that additional provisions be added to the NDA.<sup>41</sup> While we decline to make any changes to the minimum requirements for the NDA, the Commission reiterates that the CEII Coordinator may consider adding additional provisions to the NDA on a case by case basis. However, to the extent EEI seeks a specific change to the NDA or requests that the Commission take further comment on revisions to the NDA at this time, we deny those requests. EEI has not demonstrated that the NDA revisions that we have adopted, or the fact that we will entertain further changes to the NDA as appropriate, are unreasonable or arbitrary.

#### **D. Designation of Commission-Generated Information**

##### **Order No. 833**

25. In Order No. 833, the Commission determined that for Commission-generated information, the CEII Coordinator, after consultation with the appropriate Office Director, will determine whether the information is CEII.<sup>42</sup> The Commission concluded that stakeholder participation in CEII designations of Commission-generated information is unnecessary because the Commission has the expertise and experience to make such determinations.<sup>43</sup> The Commission also noted that in certain instances it would be inappropriate for stakeholders to be privy to Commission-generated information that potentially qualified as CEII.<sup>44</sup> Finally, the Commission stated that an entity is not

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<sup>39</sup> *Id.* at 10.

<sup>40</sup> Order No. 833, 157 FERC ¶ 61,123 at P 92.

<sup>41</sup> *Id.* P 92.

<sup>42</sup> *Id.* P 59.

<sup>43</sup> *Id.* P 60.

<sup>44</sup> *Id.*

precluded from raising concerns with the CEII Coordinator when an entity believes that Commission-generated information contains CEII about its facility.<sup>45</sup>

### **Request**

26. EEI requests that the Commission clarify the existing procedures or provide the anticipated procedure for stakeholder “notification of, and opportunity to comment on, potential disclosure or sharing of Commission-generated information.”<sup>46</sup> EEI asserts that the Commission erred by failing to provide a process for an entity to comment on the possible disclosure or sharing of Commission-generated CEII.<sup>47</sup> EEI contends that the Commission may incorporate a submitter’s CEII in a Commission-generated CEII document that is released to a CEII requester without providing the submitter any opportunity to comment.

27. EEI also contends that the Commission could create a document that combines information that alone did not constitute CEII and was not submitted to the Commission as such, but that combined with other information could constitute CEII.<sup>48</sup> EEI states that in that instance, the submitter would not have had an opportunity to mark the information as CEII.<sup>49</sup> EEI maintains that, in these situations, it would be inconsistent for the Commission not to provide notice and an opportunity to comment.<sup>50</sup>

### **Commission Determination**

28. We grant clarification and deny rehearing on this issue. The FAST Act implicitly recognizes that the Commission has the expertise and experience to determine whether any information, including Commission-generated information, is properly designated as CEII by vesting the Commission with the authority to designate information as CEII. The FAST Act does not require, and EEI identifies no provision in the FAST Act requiring, the Commission to provide notice and opportunity for public comment about the prospective release or sharing of Commission-generated CEII. Furthermore, the Commission is not persuaded that we should establish a requirement for stakeholder input

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<sup>45</sup> *Id.* P 61.

<sup>46</sup> EEI Request at 6.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 13.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 13-14.

when the Commission combines information not filed as CEII with other information and potentially creates CEII.

29. To the contrary, inherent differences between Commission-generated CEII and CEII from submitters, as well as practical considerations, warrant different procedures. As EEI acknowledges, there are circumstances in which it would be inappropriate for an outside entity to comment on the content of a non-public, Commission-generated CEII document. Nonetheless, EEI asks the Commission to develop a “consistent process” for stakeholder participation. We disagree and believe that crafting a broad notification requirement for each Commission-generated document that discusses CEII in some respect would be impractical and, as we noted in Order No. 833, often inappropriate.<sup>51</sup>

30. Therefore, EEI’s arguments do not persuade us that a formal, mandatory stakeholder process is needed to comment on the release or sharing of Commission-generated CEII. We, however, clarify that nothing in the FAST Act or the Commission’s CEII regulations prevents the CEII Coordinator from exercising discretion in an individual situation to solicit comments from a submitter of CEII or other information when evaluating whether to release a Commission-generated CEII document. We note that even if the Commission determines to release Commission-generated CEII, such a release would be pursuant to an NDA and the Commission’s protections against further unwarranted or prohibited disclosure.

#### **E. DOE’s Criteria and Procedures for What Constitutes CEII**

##### **Order No. 833**

31. In Order No. 833, the Commission declined to revise the CEII regulations to identify specific designation criteria and CEII procedures for DOE.<sup>52</sup> The Commission stated that the FAST Act does not compel DOE to make changes to its regulations and

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<sup>51</sup> Order No. 833, 157 FERC ¶ 61,123 at P 61. For example, Commission-generated documents may include other forms of non-public information such as pre-decisional, internal deliberations covered by the Deliberative Process Privilege. 5 U.S.C. § 552(b)(5)(2017) (protecting from disclosure “intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.”); see *Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); see also *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973) (recognizing that “[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny”).

<sup>52</sup> Order No. 833, 157 FERC ¶ 61,123 at P 39.

noted that nothing within the Commission's regulations limits DOE's ability to designate CEII in accordance with the FAST Act.<sup>53</sup>

### **Request**

32. EEI asserts that the Commission erred in declining to provide or clarify the applicability of any procedure or process for stakeholders regarding DOE designations of its information as CEII.<sup>54</sup> Specifically, EEI requests that the Commission confirm that DOE determinations regarding CEII will be conducted pursuant to the Commission's CEII regulations.<sup>55</sup> EEI further requests that if that is not the case, the Commission should clarify that position, so EEI can seek further clarification from DOE as to the applicable procedures and criteria DOE intends to use for such determinations.<sup>56</sup>

### **Commission Determination**

33. We deny rehearing on this issue. In Order No. 833, the Commission declined to revise our regulations to identify specific designation criteria and CEII procedures that would be required for DOE.<sup>57</sup> EEI's argument here does not persuade us to change that determination. Specifically, section 215A(d)(3) of the FAST Act provides that information "may be designated" by the Commission and DOE pursuant to the criteria and procedures that the Commission establishes.<sup>58</sup> As explained in Order No. 833, nothing within the FAST Act compels DOE to make changes to its regulations, and nothing in the Commission's regulations limits DOE's ability to designate information in accordance with the FAST Act.<sup>59</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> EEI Request at 7.

<sup>55</sup> *Id.* at 16.

<sup>56</sup> *Id.*

<sup>57</sup> Order No. 833, 157 FERC ¶ 61,123 at P 39.

<sup>58</sup> FAST Act, Pub. L. No. 114-94, section 61,003, 129 Stat. 1312, 1776.

<sup>59</sup> Order No. 833, 157 FERC ¶ 61,123 at P 39 (citing NOPR, 155 FERC ¶ 61,278 at P 16 n.12).

The Commission orders:

EEI's request for clarification is hereby granted in part and EEI's request for rehearing is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.