



also a NERC-registered entity subject to the mandatory NERC reliability standards for generation and transmission owners and operators as well as other NERC-registered functions. As the owner and operator of significant generation and transmission, therefore, SCS has frequent occasion to generate, collect, use, and transmit Critical Energy Infrastructure Information (“CEII”). Additionally, securing and protecting our nation’s critical infrastructure are top priorities for SCS and the electric power industry as a whole.

Southern therefore responds to the questions submitted below:

**(1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;**

In Order No. 630, the Commission laid out the legal authority for the protection of CEII under exemptions contained in the Freedom of Information Act (FOIA).<sup>2</sup> FERC stated that one or more of several FOIA exemptions would mostly apply to CEII, namely exemptions 2, 4 and 7.<sup>3</sup> Since then, several decisions have explored the extent of the various FOIA exemptions in other situations. For example, the recent Milner v. Dept. of Navy case held that Exemption 2 does not cover records relating to critical infrastructure such as munitions storage at a Washington naval base, but suggested that Exemption 7 is available for such information.<sup>4</sup> Further, subsequent cases, such as the PEER case, have confirmed that FOIA exemptions, such

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<sup>2</sup> Final Rule, *Critical Energy Infrastructure Information*, 102 FERC ¶ 61,190, (2003) (“Order 630”).

<sup>3</sup> Id. at P 14.

<sup>4</sup> See *Milner v. Dept. of Navy*, 131 S.Ct. 1259 (2011); see also *Public Employees for Environmental Responsibility (“PEER”) vs. U.S. Section, Int’l Boundary and Water Commission*, 740 f.3d 195, 200 (2014) (describing impact of *Milner* case).

as Exemption 7, continue to apply to CEII and homeland security information, as the Commission found in issuing its CEII rules.<sup>5</sup>

As the Commission recognized in Order 630, its CEII regulations are intended to “restrict unfettered general public access to critical energy infrastructure information, but still permit those with a need for the information to obtain it in an efficient manner.”<sup>6</sup> In this regard, SCS emphasizes the importance of maintaining the security and confidentiality of CEII, as public access to such information could potentially threaten the reliability of the bulk electric system. SCS supports Acting Chairman LaFleur’s statement, in her response to the publication of recent media articles regarding physical security at energy facilities, that the release of sensitive information about the grid “undermines the careful work done by professionals who dedicate their careers to providing the American people with a reliable and secure grid.”<sup>7</sup> Moreover, as Acting Chairman LaFleur further explained, “[w]hile there may be value in a general discussion of the steps we take to keep the grid safe, the publication of sensitive material about the grid crosses the line from transparency to irresponsibility, and gives those who would do us harm a roadmap to achieve malicious designs. The American people deserve better.”<sup>8</sup>

SCS agrees with Acting Chairman LaFleur’s statements, as well as her call for a more clearly defined exemption under FOIA for critical energy infrastructure information. Until such an exemption is legislatively created, one additional step the Commission should consider to protect CEII and other sensitive information would be to only collect such information when absolutely necessary. Instead, when appropriate, the Commission may consider using

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<sup>5</sup> *PEER v. U.S. Section*, 740 F.3d 195 (D.C. Cir. 2014) (recognizing FOIA exemption 7 as applicable to emergency action plans related to law enforcement and emergency personnel responses to dam failures and as well as inundation maps of areas that would be affected if dams were to break).

<sup>6</sup> Order 630, at P 2 (internal citations omitted).

<sup>7</sup> Statement by Acting Chairman Cheryl A. LaFleur on Publication of Wall Street Journal Article About Grid Security (March 12, 2013), available at <http://www.ferc.gov/media/statements-speeches/lafleur/2014/03-12-14.asp#.U0KCU6KxS8E>.

<sup>8</sup> *Id.*

alternatives such as on-site reviews, webinars, and other technological solutions that allow the Commission to view such information without having to possess the information in its records. Such conservative steps may mitigate the chances that CEII and other sensitive information could end up in the wrong hands or be released to the public, thereby endangering the reliability of the electric grid.

**(2) The accuracy of the agency’s estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used;**

As explained in response to question (1) above, the more steps that the Commission can take to minimize inappropriate public access to CEII and other sensitive information, the less likely it is that such information can be used to harm the electric reliability of the grid, thereby imposing additional costs on generation and transmission owners and operators, and thus the ratepayer.

**(3) Ways to enhance the quality, utility and clarity of the information collection; and**

Again, by adopting conservative steps to protect CEII from inappropriate public disclosure, or by continuing to advocate for a clearly defined exemption from CEII under FOIA, the Commission can more clearly and effectively protect such sensitive information from falling into the wrong hands, thus ensuring the highest quality and utility of the information collected.

**(4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology;**

By leveraging emerging technologies in ways that allow the Commission to view sensitive CEII and other information – without necessarily collecting or possessing it – the Commission should be able to fulfill its compliance and enforcement responsibilities while

avoiding the risk of public disclosure of sensitive information under FOIA requests in ways that could harm or create risk to the reliability of the electric grid.

SCS appreciates the opportunity to provide comments on the Commission's notice of Information Collection and Request for Comments, and it looks forward to continuing to work with the Commission and other owners and operators to ensure there are sufficient mechanisms in place to provide for the safety and security of the North American bulk power system through the protection of CEII and other sensitive information.

Respectfully submitted,

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