December 28, 2018

U.S. Department Energy, Office of Electricity
Mailstop OE-20
Room 8E-030
1000 Independence Avenue SW
Washington, DC 20585.

Submitted directly to *Regulations.gov*

Re: Docket #OE–1901–AB44

Notice of proposed rulemaking to implement DOE's critical electric infrastructure information (CEII) designation authority under the Federal Power Act. Vol. 83, Federal Register, No. 209, October 29, 2018. Proposed Rules. Department of Energy: 10 CFR Part 1004.

Assistant Secretary Walker:

Earthjustice, the Union of Concerned Scientists, and Public Citizen submit these comments in opposition to the Department of Energy's (Department or DOE) proposed rulemaking to implement critical infrastructure information (CEII) designation authority under the Federal Power Act (FPA).

Specifically, we oppose the Departments proposed rulemaking because:

1. The Department has no legal authority to establish criteria and procedures for CEII designation;
2. The Department's proposed rule improperly conflicts with federal law, including the Fixing America's Surface Transportation (FAST) Act, the Freedom of Information Act (FOIA), and the Federal Records Act;
3. The Department's proposed rulemaking is fatally flawed because it does not comply with the Administrative Procedure Act (APA); and
4. The Department's proposed CEII procedures would inappropriately broaden the Department's authority to restrict access to information critical for informed debate on issues important to the public and raise serious concerns over due process and the ability of the public to ensure accountability in the Department's decision-making.

I. The Department has no legal authority to establish criteria and procedures for CEII designation.

The Department "proposes to establish its own designation procedures" for CEII, but there is no lawful basis for it to do so.[1] The FAST Act establishes a clear division of labor between the Federal Energy Regulatory Commission (Commission or FERC) and the Department, as shown in the text it added in Section 215A(d) of the FPA:

> **(2) Designation and sharing of critical electric infrastructure information**
> Not later than one year after December 4, 2015, the ***Commission***, after consultation with the Secretary, shall promulgate such regulations as necessary to—
>
> **(A)** establish criteria and procedures to designate information as critical electric infrastructure information;
> [. . .]
>
> **(3) Authority to designate**
> Information may be designated by the Commission or the Secretary as critical electric infrastructure information ***pursuant to the criteria and procedures established by the Commission*** under paragraph (2)(A).

16 U.S.C. § 824o-1(d) (emphasis added). Thus, while both the Commission and the Department have authority to *designate* CEII, the power to *establish criteria and procedures* for doing so is the Commission's alone.

In contrast to this unambiguous statutory text, the Department cites no legal authority in support of the proposition that it may establish CEII designation procedures. While the Department is correct that the Commission's current CEII designation procedures do not extend to designations by the Department, this regulatory gap cannot justify arrogating to the Department a role Congress expressly reserved for the Commission. The Department's promulgation of the proposed rule would be *ultra vires*.

II. The Department's proposed rule improperly conflicts with federal law, including the FAST Act, FOIA, and the Federal Records Act.

Even assuming the FAST Act provides the Department authority to establish criteria and procedures for the designation of CEII, the proposed rule improperly conflicts with federal law, including the FAST Act, FOIA, and the Federal Records Act.

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[1] "Critical Electric Infrastructure information, New Administrative Procedures," 83 Fed. Reg. 54,268, 54,269/1 (Oct. 29, 2018).

a. "Pre-designation" and interim treatment of information as CEII would short-circuit the CEII designation process and judicial review provided under the FAST Act.

In its proposed rulemaking, the Department proposes a new process by which certain information submitted by industry or other stakeholders, including information marked as "Defense Critical Electric Infrastructure Information" and information reported to the Department through Form OE-417 would immediately be "pre-designated" as CEII, thereby hindering Freedom of Information Act (FOIA) requests for this information and generally prohibiting access to this information by the public.[2] The Department also proposes to treat information as CEII, and thus restrict it from public disclosure, on an "interim" basis whenever the entity submitting the information so requests.[3]

Information that is pre-designated or provided interim treatment would be handled like CEII indefinitely; the Department commits only to "endeavor to make a determination as soon as practicable" regarding its actual status as CEII.[4] A determination is triggered only when either (A) the information is subject to FOIA request or (B) a request for reconsideration of the designation is made.[5] However, to file a request for reconsideration a person must first receive a "decision" denying a request to release CEII or change the CEII designation.[6] Because pre-designation and interim treatment are not deemed a "determination," it appears that under the proposed rules one cannot file a request for reconsideration until the Department actually issues a CEII determination with respect to that information.[7] Further, the Department proposes that a request for reconsideration is a necessary step before seeking judicial review under section 215A(d)(11) of the FPA.[8]

Consequently, it appears that the Department's new rules would allow information that is "pre-designated" or subject to interim treatment as CEII to be withheld indefinitely without opportunity for judicial review (unless and until a FOIA request is filed, processed by the Department, and ultimately results in a denial of the request based on a determination the information is CEII).

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2 While we understand, according to footnote 6 (83 Fed. Reg. 54,268, 54,269/1 (Oct. 29, 2018)) that data in Form OE-417, schedule 1 data will not be considered CEII as a matter of course, it is worth noting the significant value to the public of access to that data and our assertion that limitation on public access to that data would be inappropriate.

3 *Id*. at 54,276/1 (Proposed § 1004.13 (f)(3)(ii)).

4 *Id*. (Proposed § 1004.13 (f)(3)(ii)). The proposed rule does not appear to impose even this open-ended commitment to issue a determination "as soon as practicable" with respect to information that is pre-designated.

5 *Id*. at 54,276/2 (Proposed § 1004.13 (f)(5)(ii)(A) & (B)).

6 *Id*. at 54,277/1 (Proposed § 1004.13 (i)(1)(ii)).

7 *Id*. at 54,276/1 (Proposed § 1004.13 (f)(3)(ii)).

8 *Id*. at 54,277/1 (Proposed § 1004.13 (i)(1)(v)).

The Department's proposed rules are inconsistent with the FAST Act. The FAST Act provides for particular treatment of information that "is designated" as CEII.[9] Information that is properly designated as CEII is exempt from public disclosure that may otherwise be legally required pursuant to FOIA or state public disclosure laws. By expanding that treatment to information that is *not* designated as CEII (i.e., information that is predesignated or receives interim treatment based on the submitter' s request), the Department's proposed rules exceed the statutory mandate. The proposed rule would functionally shift the role of designating CEII from the Department to industry stakeholders, as the assertions of entities submitting the information provides the basis for treatment as CEII indefinitely. The FAST Act requires the Commission or Secretary to segregate out information that is not expected to lead to disclosure of CEII in order, "wherever feasible, to facilitate disclosure of information that is not designated as [CEII]".[10] Overly broad restriction of public access to information that could not be expected to lead to disclosure of CEII is plainly inconsistent with the FAST Act.

Additionally, pre-designation and interim treatment of information as CEII would impermissibly interfere with judicial oversight of CEII designations. Section 215A(d)(11) of the FPA authorizes judicial review of CEII designations, evincing clear legislative intent to afford protections against arbitrary CEII designations and ensure public access where appropriate. Because neither pre-designation nor interim CEII status appears to trigger an opportunity for a person to request reconsideration of that treatment, which would be a prerequisite to judicial review, DOE's proposed rules effectively and inappropriately nullify this section of law.[11]

b. <u>The Department's proposed rules are inconsistent with FOIA.</u>

i. The proposal would violate the deadlines established by FOIA

Upon receiving a request for records under FOIA, an agency must determine whether to comply with such request within twenty working days,[12] upon which an agency must "promptly" make available any records that it determines to release.[13] Although properly designated CEII is exempt from disclosure under FOIA,[14] the proposal would unlawfully impede the release of records that do not merit CEII designation.

The proposal envisions two types of FOIA requests for information claimed as CEII: (i) a request for information that has been claimed as CEII but for which the Department has not made a CEII

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9 16 U.S.C. 824o-1 (a)(3).

10 16 U.S.C. 824o-1 (d)(8).

11 It is not sufficient that a person may ultimately trigger issuance of a CEII determination by submitting a FOIA request for the materials. As discussed herein, the Department has made no provision in the proposed rules to ensure that a FOIA request involving information that is pre-designated or subject to interim treatment is resolved in a timely manner, consistent with FOIA's statutory timeframe. Because of the long lag time to process FOIA requests, the pre-designation or interim treatment of information as CEII could evade review for years as a time.

12 5 U.S.C. § 552 (a)(6)(A)(i); *see also* 10 C.F.R. § 1004.5 (d).

13 5 U.S.C. § 552 (a)(6)(C)(i).

14 *See* 16 U.S.C. § 824o-1 (d)(1)(A); 5 U.S.C. § 552 (b)(3).

designation, and (ii) a request for information already designated as CEII. Under the first type, the proposal provides that "DOE will render a decision on designation before responding to the requester or releasing such information."[15] Under the second type, the proposal provides for mandatory review of a CEII designation when the affected information is requested under FOIA.[16] By failing to impose time limits for the Department to "render a decision on" or review a CEII designation, the proposal sets a course for recurring, indefinite violations of FOIA, even with respect to information for which a requested CEII designation is meritless.

The Department must set time limits for this process that facilitate compliance with the Department's statutory obligations. Under the proposal, a submitter whose CEII claim is rejected is granted twenty business days to submit a statement in support of its request that the Department review its decision.[17] This period is equivalent to the Department's entire window for determining whether to comply with the FOIA request, even though it excludes steps that would be essential to that determination—namely, searching for the requested records, making an initial assessment of the CEII claim, and reviewing the submitter's statement in support of that claim. The proposal is blatantly not designed for compliance with the Department's FOIA obligations.

A similar problem arises if the FOIA request triggers a review of information previously designated as CEII. Under the proposal, the Department must provide a submitter at least ten business days to comment on a decision to remove a CEII designation.[18] Moreover, the Department must notify the submitter at least twenty business days prior to disclosure of the affected information.[19] Again, this timeframe is utterly incompatible with the mandates of FOIA: the notice period to submitters would fully exhaust the Department's time for responding to the FOIA request, and that does not account for the time the Department spends reviewing the CEII designation or the submitter's comments on a decision to remove the designation.

The proposal is not saved by the "unusual circumstances" provision of FOIA, which allows for a modest extension of the Department's deadline in certain limited scenarios.[20] A request for information unjustifiably claimed as CEII—or for which a CEII designation is no longer appropriate—would not necessarily satisfy any of the conditions required to show unusual circumstances. In any event, unusual circumstances afford the Department only ten additional business days to make a FOIA determination.[21] The proposal's provisions governing review of CEII designations (including pre-designations) and requests for CEII designation do not establish any deadline for completing this review. They would therefore be unlawful, even if unusual circumstances could be properly invoked.

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15 83 Fed. Reg. at 54,276/1 (Proposed § 1004.13 (f)(3)(iii)).
16 *Id.* at 54,276/2 (Proposed § 1004.13 (f)(5)(ii)(A)).
17 *Id.* 54,277/1 (Proposed § 1004.13 (i)(1)(i)).
18 *Id.* at 54,276/3 (Proposed § 1004.13 (h)(2)).
19 *Id.*
20 *See* 5 U.S.C. § 552 (a)(6)(B)(iii); 10 C.F.R. § 1004.5 (d)(3).
21 10 C.F.R. § 1004.5 (d)(3).

By comparison, the analogous FERC regulations establish a more time-limited approach. For instance, prior to removing a CEII designation, FERC provides submitters of the information at least five business days to submit comments.[22, 23] FERC also gives itself a twenty-business-day deadline for making a determination on administrative appeals of CEII designation decisions, which is aligned with the administrative appeal provisions of FOIA.[24] In fact, the Commission's CEII regulations repeatedly reference and draw upon its FOIA regulations. *See, e.g.*, 18 C.F.R. § 388.113(g)(5)(vii) ("The CEII Coordinator will attempt to respond to the requester under this section according to the timing required for responses under the FOIA."); *id.* § 388.113(j)(4) (explicitly incorporating FOIA regulations regarding the time for acting on administrative appeals). FERC thereby acknowledges the overlap between CEII and FOIA—most importantly, that the release of records under FOIA should not be delayed by baseless claims of CEII or by CEII designations that have become obsolete. This proposal, in contrast, displays virtually no awareness of the Department's FOIA obligations and would all but ensure that those obligations are flouted.

ii. The proposal would violate the disclosure requirements of FOIA.

The proposal risks further violations of FOIA by offering to return or destroy information voluntarily submitted to the Department upon a determination that a CEII designation is not warranted.[25] The proposal suggests that records could be requested under FOIA, triggering a determination that a CEII designation is unwarranted, and then the records could be returned or destroyed prior to the resolution of the FOIA request.[26] That would be patently unlawful. As the Department's own Records Management Handbook explains,

> Records affected by a FOIA request must not be destroyed. If records subject to FOIA are destroyed, it is considered an unlawful and/or accidental destruction (36 CFR 1230.3) and the Department must promptly report it to [the National Archives and Records Administration]. Destroying records under a FOIA request can result

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22 18 C.F.R. § 388.113 (e)(4).

23 It is also worth noting that DOE's regulations with respect to other types of information, such as private business information, provide the submitter with only 7 calendar days notice that an exemption claim is being denied. 10 CFR 1004.11.

24 *Id.* § 388.113 (j)(3); 5 U.S.C. § 552 (a)(6)(A)(ii).

25 *See* 83 Fed. Reg. at 54,276/2 (Proposed § 1004.13 (f)(5)(iii)) (covering "information for which CEII designation was requested but not granted"). For clarity, we note that the proposal at times misidentifies § 1004.13 (**f**)(5)(iii) as § 1004.13 (**g**)(5)(iii), *see id.* at 54,276/1 (Proposed § 1004.13 (f)(3)(ii)), although the proposed regulations as written contain no subsection 1004.13 (g).

26 *See id.* at 54,276/1 (Proposed § 1004.13 (f)(3)(iii)).

> in severe consequences both for the DOE and the individual. Consequences include, but are not limited to, fine, imprisonment, and negative media attention.[27]

Under FOIA, any records (or portions thereof) in the Department's possession upon the receipt of a FOIA request for which a CEII designation is then denied or removed must be released to the requestor, subject to other FOIA exemptions. The Department's proposal clearly violates this requirement.

iii. The proposal would flout FOIA's presumption of disclosure.

The Department's proposed approach to previously designated information not only endangers FOIA's "basic policy" of disclosure but also indicates the Department's intent not to administer FOIA in an objective, even-handed manner. Specifically, when the Department receives a FOIA request for information for which a CEII designation has been removed or expired, but which has not been destroyed or returned, the proposal would require the Department to "work with the submitter to review whether the information is subject to other FOIA exemptions."[28] This one-sided policy stacks the deck against the requestor. Rather than fulfill its duty to assess the applicability of FOIA exemptions in an objective, neutral manner, the Department would be aligned with the submitter in an effort to prevent disclosure.

To be clear, this policy would apply to information that is *not* designated as CEII at the time of the FOIA request. There is no lawful justification for the Department to enshrine a bias against disclosure of such information. The Supreme Court "repeatedly has stressed the fundamental principle of public access to Government documents that animates the FOIA"[29] and has emphasized that FOIA's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[30] "The basic purpose of FOIA is to ensure an informed citizenry."[31] A Presidential Memorandum instructs all agencies to "adopt a presumption in favor of disclosure."[32] In contrast, the Department's proposal would reverse that presumption in certain circumstances, allowing disclosure only after every effort to withhold information has failed.

c. <u>The Department's proposal violates the Federal Records Act.</u>

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27 *See* U.S. Dep't of Energy, Office of Chief Info. Officer, Records Management Handbook § 5.3.1.3 (2016), *available at* https://www.energy.gov/sites/prod/files/2016/12/f34/Records%20Management%20Handbook_0.pdf.

28 83 Fed. Reg. at 54,276/3 (Proposed § 1004.13 (h)(3)).

29 *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989).

30 *Id.* at 152 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

31 *Id.* at 152 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

32 *See* Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

Federal agencies are prohibited from destroying records of the United States Government except pursuant to the Federal Records Act.[33] Congress has directed the National Archivist to promulgate regulations establishing procedures for the disposal of agency records pursuant to statutory requirements.[34]

The Department's proposal provides no demonstration that its provisions for destruction of information claimed as CEII, or for which CEII designation has expired or been removed, comply with these statutory and regulatory requirements. As described above, if an entity voluntarily provides information claimed as CEII, and the CEII designation is denied, the proposal would have the Department, "at the request of the submitter . . . return or destroy" the information.[35] The proposal would institute a similar procedure for information for which a CEII designation has expired or been removed, regardless of whether the information was voluntarily submitted.[36]

The proposal does not show how such return or destruction of information would comport with the mandates of the Federal Records Act. The proposal could impact an enormous variety of records. Indeed, any information voluntarily provided to the Department could be labeled CEII, however unjustifiably, for the purpose of ensuring that such information is returned or destroyed when a CEII designation is denied, regardless of the information's content or how the Department utilized it. Without a clearer explanation of the types of information to which these provisions of the proposal apply—and consideration of the relevant record retention schedules—the Department's proposal violates the Federal Records Act and its implementing regulations.

III. The Department's proposed rulemaking is fatally flawed because it does not comply with the Administrative Procedure Act (APA).

The Department's proposed rulemaking does not comply with the requirements of the APA because the Department's proffered rationale for key elements of the new rules is inadequate, inconsistent, or arbitrary. Further, the Department's failure to explain inconsistencies with the Commission's controlling interpretation of the FAST Act and the need for substantial modifications to existing Commission practice does not constitute the reasoned decision-making the APA requires. The Department's proposed rulemaking is also procedurally flawed, and therefore in violation of the APA, because it hides from public view key justifications for the proposed rules, thereby failing to meet the APA's requirements to provide a meaningful opportunity for comment.

a. The Department's proffered rationale for key elements of the new rules is inadequate, inconsistent, or arbitrary and fails to explain inconsistencies with the Commission's controlling interpretation of the FAST Act and the need for substantial modifications to existing Commission practice.

33 *See* 44 U.S.C. § 3314.

34 *See id.* § 3302.

35 83 Fed. Reg. at 54,276/2 (Proposed § 1004.13 (f)(5)(iii)).

36 *Id.* at 54,276/3 (Proposed § 1004.13 (h)(3)).

Even assuming that, contrary to the plain language of the FAST Act, the Department has authority to issue its own criteria and procedures for the designation of CEII, the Department cannot simply ignore the Commission's existing interpretation of and substantial practice implementing the FAST Act's requirements. Yet that is precisely what the Department does in its proposed rulemaking: downplay or simply ignore the differences between the Department's proposed reading of the FAST Act and the Commission's.

While the Department asserts that it has sought to "harmonize" the rules with Commission procedures and that variations are "small," the substantial broadening of the scope of information that would be restricted from the public, new requirements for return or destruction of information rather than disclosure, and the substantial bias toward non-disclosure of information under the Department's new rules does not bear this characterization out.[37]

As the implementing agency granted explicit authority to determine the criteria and procedures for designation of CEII, the Commission's reading of these provisions is controlling. At minimum, the Department must not adopt an interpretation of these provisions of the FAST Act that conflicts with the Commission's. To the extent it adopts criteria and procedures that are different from but not conflicting with Commission requirements, it must reasonably explain its rationale for those departures. The Department has failed to do so in the proposed rulemaking in clear violation of the APA.

i. The Department fails to adequately justify its proposal to pre-designate information as CEII contrary to the Commission's established procedures.

The Department offers no explanation why particular categories of information should be subject to a blanket presumption of CEII under its proposed pre-designation. It appears highly improbable, for example, that *all* information related to "Defense Critical Electric Infrastructure" (i.e., any energy infrastructure that serves a facility that is critical to the defense and vulnerable to disruption of an exterior energy supply[38]) "could be useful to a person in planning an attack on critical infrastructure" such that it warrants designation as CEII.[39] As explained above in Part I of these comments, this sweeping restriction on public access to information that would not lead to disclosure of CEII violates the FAST Act and the Department's failure to provide reasonable justification for this element of the proposal also violates the APA.[40]

Further, the Department's proposal for pre-designation of CEII is contrary to the Commission's established procedures. In identifying information that would be pre-designated as CEII, the

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37 83 Fed. Reg. at 54,269/1.

38 16 U.S.C. 824o-1 (c)(1)&(2).

39 18 CFR 388.113 (c)(2).

40 *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (Agency action is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency.").

Department is creating a presumption that certain types of information are CEII before a final determination is made. Yet the Commission rejected requests for just such a "blanket presumption" in its issuance of Order 833, the Commission's promulgation of CEII rules pursuant to the FAST Act.[41] In response to arguments that certain categories of information warranted such a presumption because it would be hard to explain how the information met the FAST Act definition of CEII *ex ante*, the Commission concluded that "[t]he Trade Associations' proposal is unduly broad and inconsistent with the FAST Act because it could lead to all infrastructure information, whether critical or not, being treated as CEII."[42] Failure to explain these inconsistencies with the Commission's controlling interpretation of the FAST Act and the need for substantial modifications to existing Commission practice further violates the APA.[43]

ii. The Department fails to adequately explain its need to provide indefinite, interim treatment of information as CEII.

The Department also fails to explain its need to provide indefinite, interim treatment of information as CEII based solely on the assertion of the information provider, which conflicts with the Commission's established CEII designation procedures. Unlike the Commission, the Department does not require that the submitter of information provide a clear justification for its treatment as CEII.[44] Instead, a bare assertion of the provider appears to suffice under the proposed rules.

The sole explanation the Department offers cannot reasonably justify indefinite, interim treatment or explain its departures from the Commission's CEII criteria and procedures. The Department claims that it "anticipates receiving a smaller volume of CEII materials, due to DOE's non-regulatory role, which gives DOE the flexibility to engage in more proactive designations."[45] The smaller volume of material to be processed by DOE would warrants less, not greater, reliance on blanket presumptions of non-disclosure. The Department should have a greater capacity to handle the small volume and evaluate the requests for CEII treatment without resorting to pre-designation or interim treatment. The Department has failed to adequately explain how its broad presumption of non-disclosure is reasonable under the FAST Act or consistent with Commission procedures.

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41 Order 833, 157 FERC ¶ 61,123 at PP 32, 36 (Nov. 17, 2016) (codified at 18 CFR Parts 375 and 388).

42 *Id*. at P 36.

43 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)(When an agency changes policy, it often must "provide a more detailed justification than what would suffice for a new policy created on a blank slate.")

44 18 CFR 388.113 (c)(2). (d)(1)(i) ("The justification must provide how the information, or any portion of the information, qualifies as CEII, as the terms are defined in paragraphs (c)(1) and (2) of this section. The submission must also include a clear statement of the date the information was submitted to the Commission, how long the CEII designation should apply to the information and support for the period proposed. Failure to provide the justification or other required information could result in denial of the designation and release of the information to the public.")

45 83 Fed. Reg. at 54,269/1.

iii. The Department fails to provide adequate justification for its proposed limits on the extent to which CEII may be shared.

The Department's proposed rules make very limited provision for potential sharing of CEII, and in its explanation of the proposal the Department provides no indication of the circumstances under which it may (if at all) approve sharing of CEII. The Department limits sharing to only those entities that are explicitly named under section 215A(d)(2)(D) of the FPA[46], and further characterizes such sharing as "tightly-controlled."[47]

In contrast, in Order 833 the Commission recognized that there a number of circumstances in which access to CEII is warranted or required. The Commission recognized that it must "balance the need to protect critical information with the potential need of parties participating in Commission proceedings to access CEII" and accordingly provided means for parties to access that information.[48] Indeed, the Commission has long recognized "that it was important to have a process for individuals with a valid or legitimate need to access certain sensitive energy infrastructure information."[49] The entities who could access such data covered a broad array of interests.[50] From time to time, the Commission has recognized entire categories of information that should not be restricted due to the value of that information for research.[51]

In promulgating its CEII regulations pursuant to the FAST Act, the Commission rejected requests to further constrain the sharing of CEII information, and instead established a process by which a requester could demonstrate a legitimate need.[52] Specifically, the Commission requires a requester to demonstrate : (1) the extent to which a particular function is dependent upon access to the information; (2) why the function cannot be achieved or performed without access to the information; (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 (with that proceeding identified); and (6) whether the information is needed expeditiously.[53] The Commission clearly reads the FAST Act to enable sharing of CEII to those demonstrating a legitimate need.

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46 *Id*. at 54,277/2 (Proposed § 1004.13(j)(2).

47 *Id*. at 54,270/3.

48 Order 833, 157 FERC ¶ 61,123 at P 26.

49 *Id*. at P 21.

50 *Id*. at note 153 (including public utilities, gas pipelines, hydro developers, academics, landowners, public interest groups, researchers, renewable energy organizations, and consultants).

51 *Id*. at n. 232 (citing *Reliability Standard for Transmission System Planned Performance for Geomagnetic Disturbance Events*, 156 FERC ¶ 61,215, at PP 93-95 (2016))

52 *Id* at PP 81, 98 (rejecting proposal for "CEII requester to demonstrate that there is a 'reliability or social benefit' to the request").

53 *Id*. at P81.

Moreover, the Commission has never read the FAST Act to limit sharing of CEII simply because Congress specifically directed the Commission to "facilitate voluntary sharing of [CEII]" with certain entities, such as state, local, and tribal authorities.[54] Rather, the Commission construed the FAST Act to require the Commission to share CEII with those listed entities *without a request* "when there is a need to ensure that energy infrastructure is protected."[55]

The Department provides no explanation why the Commission's provisions for sharing, based on a legitimate need and subject to appropriate non-disclosure requirements, are no longer reasonable or why more limited sharing is warranted for CEII provided to the Department. The Department appears to confuse the FAST Act's directive to the Commission to facilitate sharing with certain entities with a restriction to share CEII with *only* those entities. The Department has not adequately justified its significantly more limited approach to sharing CEII.

iv. The Department fails to explain why the return and/or destruction of information not designated as CEII is warranted.

The Department inexplicably adds provision for the return or destruction of information to a submitter in the event that the information is later determined not to be CEII (e.g., where it received interim treatment as CEII but was subsequently determined not to be CEII) [56]; a CEII determination is reversed[57]; or a CEII determination is not renewed upon expiration of the status.[58] In its implementation of the FAST Act, the Commission has never considered the destruction or return of CEII submitted to it necessary to ensure the protection and voluntary sharing of CEII. The Department has made no effort in its proposed rulemaking to explain why such extreme measures are warranted.[59]

b. <u>The proposed rulemaking is procedurally flawed because it hides from public view key justifications for the proposed rules, thereby failing to meet the APA's requirements to provide a meaningful opportunity comment.</u>

The Department explains that its proposed rules are intended "to address stakeholder concerns about the protection of critical infrastructure information from public release" and "address concerns about the format required and time allotted for communications with DOE regarding its CEII designation actions."[60] The Department further states that its proposed rules "reflect informal input from industry representatives, who are the submitters of CEII, regarding enhancements the DOE could make when adapting CEII procedures."[61] The Department cites to

54 *See id*. at PP 108-109.

55 *Id*.

56 83 Fed. Reg. at 54,271/2; *see also id.* at 54,276/2 (Proposed §1004.13(f)(5)(iii)).

57 *Id*. at 54,276/3 (Proposed §1004.13(h)(3)).

58 *Id*.

59 Nor has it explained, as addressed above, how such return or destruction is consistent with other federal laws such as FOIA and the Federal Records Act.

60 83 Fed. Reg. at 54,269/2.

61 *Id*. at 54,269/1.

a February 2018 meeting among certain stakeholders and DOE's Office of Electricity, and a memorandum that purports to summarize the meeting.[62]

Although the concerns raised by industry stakeholders during the February meeting are identified as key justifications for the proposal, the Department fails to share with the public the substance of those concerns and how its proposal may address them. The Department provides no further explanation in the federal register notice, nor is the cited memorandum available for review.[63]

The public cannot meaningfully comment on an agency's action if key facts or rationale in support of the decision are not made available for consideration and comment.[64] The Department's failure to disclose information that, by its own account, provides a key motivation and basis for the proposal prevents commenters from developing evidence in the record to support objections to the proposal, and insulates the Department's regulations from being tested by contrary views. Because of these procedural flaws, the Department's notice and comment in this rulemaking violate the APA.[65]

IV. The Department's proposed CEII procedures would inappropriately broaden the Department's authority to restrict access to information critical for informed debate on issues important to the public, raising serious due process concerns and impacting the ability of the public to ensure accountability in the Department's decision-making.

As described above, the Department's proposal would violate federal law on multiple grounds. More generally, however, we oppose the Department's proposed rules because they would raise serious concerns over due process and set a dangerous precedent that cuts at the heart of government transparency and accountability.

The proposed rules notably do not provide any means for parties to Department proceedings to obtain timely access to information that is designated as CEII or preliminarily treated as CEII, and which therefore cannot be accessed by the public. Denying access to information that forms the basis of Department decision-making to parties affected by those decisions is inconsistent with due process. In contrast, Commission CEII rules provide for timely access to parties without compromising the objective of protecting critical energy infrastructure, and the Department must do the same.

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62 *Id*. at 54,269/2.

63 The Department claims the memo is posted to the Office of Electricity website, but as of the filing of these comments, it was not found through browsing the site or by a google search of the website.

64 *United States Telecom Assn. v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

65 *United States Telecom Assn. v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (an agency must "provide sufficient factual detail and rationale for the proposal to permit interested parties to comment meaningfully" on proposed rulemaking).

The proposal would effectively allow CEII designation of almost any piece of information submitted to the Department and labeled "Critical Energy Infrastructure Information" by the submitter. Further, the Department provides no meaningful timeline or process for making a final, substantive determination of whether information actually qualifies as CEII. In essence, the Department's proposal would allow virtually any information submitted to be barred from public access for an indefinite amount of time, amounting to a breathtaking and inappropriate broadening of the Department's authority under Section 215A of the FPA and significantly hampering parties' ability to meaningfully participate in DOE proceedings.

The Department's rationale for its proposal – to protect information from FOIA requests before it has been properly reviewed for potential CEII designation – does not warrant such broad authority. The processes and procedures already established by FOIA, as well as the CEII procedures adopted by the Commission, allow for review of information before it is released to the public and authorize the relevant agencies to exclude information that is exempt from disclosure, including CEII, in responding to FOIA requests. The current proposal does little to add meaningful protections of legitimate CEII while potentially granting broad authority to the Department to withhold information from the public that would allow for proper transparency and accountability in the Department decision-making.

Further, the Department's attempt to minimize the perceived impacts of this proposal because the Department "anticipates receiving a smaller volume of CEII materials [than the Commission] due to DOE's non-regulatory role, which gives DOE the flexibility to engage in more proactive designations" does nothing to alleviate these concerns. Given the significant role that the Department plays in maintaining an affordable, reliable, and resilient electricity supply, the rationale that the Commission receives more information and should therefore have more robust review and designation procedures rings hollow. Further, this rationale appears counter-factual. If the Department receives a smaller volume of CEII materials, this should make it *more* feasible to make timely, individualized determinations on the substance of the information submitted.

In sum, the Department's proposal strikes at the heart of free and fair governance by inappropriately hamstringing the ability of the public and interested stakeholders to participate in the decision-making process and hold its government accountable on issues of significant public interest and importance, and that could have significant impacts on the cost, reliability, and security of the nation's electricity supply. On its face, the proposal appears to be little more than an attempt to hide the Department's decision-making process from public scrutiny and obfuscate judicial challenges to the Department's authority. As such, we find the proposal offensive to the basic principles of good governance and public participation.

For the reasons set forth above, we strongly oppose the Department's proposed rulemaking.

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