

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

<b>Availability of Certain North American Electric Reliability Corporation Databases to the Commission</b>	) ) ) ) ) ) )	<b>Docket No. RM15-25-000</b>
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**REQUEST FOR CLARIFICATION  
OF THE EDISON ELECTRIC INSTITUTE, THE AMERICAN PUBLIC POWER  
ASSOCIATION, THE ELECTRIC POWER SUPPLY ASSOCIATION, THE  
ELECTRICITY CONSUMERS RESOURCE COUNCIL, AND THE LARGE  
PUBLIC POWER COUNCIL**

The Edison Electric Institute (“EEI”), the American Public Power Association (“APPA”), the Electric Power Supply Association (“EPSA”), the Electricity Consumers Resource Council (ELCON), and the Large Public Power Council (LPPC), the “Trade Associations,” respectfully submit this Request for Clarification in response to Order No. 824<sup>1</sup> issued by the Federal Energy Regulatory Commission (“FERC or the Commission”), which amends the Commission’s regulations to require the North American Electric Reliability Corporation (“NERC”) to provide the Commission and Commission Staff with access on a non-public and ongoing basis to certain databases compiled and maintained by NERC. Specifically, the Commission should clarify that when the Commission or Commission staff accesses the information in the NERC databases, this information will be deemed as submitted to the Commission and marked as privileged material or CEII in order to be afforded confidentiality protection.

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<sup>1</sup> *Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, Order No. 824, 155 FERC ¶ 61,275 (2016) (“Order No. 824”).

## BACKGROUND

In Order No. 824, the Commission adopted a final rule providing the Commission and FERC staff access to information contained in three NERC databases: (1) Generating Availability Data System (“GADS”); (2) Transmission Availability Data System (“TADS”); and (3) protection system misoperation databases (collectively referred to as “NERC databases”). FERC intends to use the information to assist itself in determining the need for new or modified NERC reliability standards and understanding NERC’s periodic reliability and adequacy assessments.<sup>2</sup> The three NERC databases consist of information submitted electronically by our members and other entities that generate and transmit electric energy and are subject to NERC reliability standards. The databases identify generator and transmission outages and protection system misoperations, and provide detail as to the nature, location, duration, and cause of the incidents.<sup>3</sup>

The Commission recognized that the information contained in these databases may be sensitive and qualify as CEII. To address these concerns, the Commission deferred the effectiveness of Order No. 824 until the Commission adopts regulations to implement its new authority under FPA section 215A, which stipulates the requirements for the Commission to develop additional guidelines that address its “authority to safeguard sensitive information.”<sup>4</sup> The Commission subsequently clarified that Order No. 824 is effective upon its publication in the *Federal Register* (published on July 12, 2016), but that the compliance date of the final rule is “based on the issuance of the final

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<sup>2</sup> Order No. 824 at P 1.

<sup>3</sup> *Id.* at PP 6-13.

<sup>4</sup> *Id.* at PP 46-47.

rule in Docket No. RM16-15-000.”<sup>5</sup> Concurrent with the issuance of Order No. 824, the Commission issued a Notice of Proposed Rulemaking in that docket to amend its CEII regulations (“CEII NOPR”).<sup>6</sup>

### REQUEST FOR CLARIFICATION

The Trade Associations respectfully request that the Commission clarify Order No. 824 by explaining how it will treat and protect information accessed from NERC databases. The information contained within the NERC databases is collected under NERC data reporting requirements, associated information protection requirements, and non-disclosure agreements,<sup>7</sup> which are important safeguards that industry has long-relied upon when submitting these requested data to NERC. The Commission should therefore clarify that when the Commission or Commission Staff accesses the NERC databases, the information accessed will be deemed to be privileged material and/or CEII.

In Order No. 824, the Commission correctly acknowledged that industry is very concerned about maintaining the confidentiality of data included in the TADS, GADS, and protection system operations databases. Order No. 824 states that the Commission “recognizes that information contained in the TADS, GADs, and protection system

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<sup>5</sup> *Availability of Certain North American Electric Reliability Corporation Databases to the Commission*, Order Clarifying Effective Date and Compliance Date, 154 FERC 61,017 (2016).

<sup>6</sup> *See Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information*, Notice of Proposed Rulemaking, 155 FERC ¶ 61,278 (June 16, 2016) (“CEII NOPR”).

<sup>7</sup> E.g., North American Electric Reliability Corp., *Generating Availability Data System: Mandatory Reporting of Conventional Generation Performance Data* (Jul. 2011), [http://www.nerc.com/pa/RAPA/gads/MandatoryGADS/Revised\\_Final\\_Draft\\_GADSTF\\_Recommendation\\_Report.pdf](http://www.nerc.com/pa/RAPA/gads/MandatoryGADS/Revised_Final_Draft_GADSTF_Recommendation_Report.pdf); North American Electric Reliability Corp., *Transmission Availability Data System (TADS): Data Reporting Instruction Manual* (Oct. 1, 2016), [http://www.nerc.com/pa/RAPA/tads/Key\\_TADS\\_Documents/2016\\_TADS\\_DRI\\_Manual.pdf](http://www.nerc.com/pa/RAPA/tads/Key_TADS_Documents/2016_TADS_DRI_Manual.pdf); and North American Electric Reliability Corp., *Request for Data or Information: Protection System Misoperation Data Collection* (Aug. 14, 2014), [http://www.nerc.com/pa/RAPA/ProtectionSystemMisoperations/PRC-004-3%20Section%201600%20Data%20Request\\_20140729.pdf](http://www.nerc.com/pa/RAPA/ProtectionSystemMisoperations/PRC-004-3%20Section%201600%20Data%20Request_20140729.pdf)

misoperations databases may be sensitive, and that such information may qualify as CEII under the Commission’s regulations.”<sup>8</sup> The Commission deferred the compliance date for the Final Rule until the Commission issues a final rule adopting regulations to implement its authority under the FAST Act in its CEII NOPR proceeding.<sup>9</sup> However, the proposed regulations in the CEII NOPR do not address how the Commission will safeguard the information in the NERC databases from public disclosure when the Commission or Commission staff accesses the NERC databases.<sup>10</sup>

In the CEII NOPR, proposed section 388.112(b) requires the person filing a document they want to be treated as privileged to “designate the document as privileged” and specifies document marking requirements for the document to receive the “privilege claim” safeguards found in section 388.112(c).<sup>11</sup> For CEII, proposed section 388.113(d)(1)(iv) specifies that “although unmarked information may be eligible for CEII treatment, the Commission intends to treat information as CEII only if it is properly designated as CEII pursuant to Commission regulations.” The CEII marking procedure is a submission requirement for CEII information. Section 388.113(d)(2) contains the Commission procedure for designating Commission-generated information as CEII.<sup>12</sup>

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<sup>8</sup> Order No. 824 at P 46.

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

<sup>10</sup> The Trade Associations note that in the pending CEII NOPR at P 17 (fn. 13), the Commission commented that information downloaded from private databases accessed under Commission order or regulation would be maintained as non-public information. It further says that upon a request for access to such downloaded information it will evaluate whether the information meets the definition of CEII, is proprietary or otherwise privileged or non-public under 388.113 (d)(1)(iv) or 388.112(d) and (e). Although this is an appropriate acknowledgement, the difficulty with the NOPR on this point is that the proposed regulations do not specify that information in the databases is presumed to have been appropriately designated as protected, thereby triggering the evaluation procedure. Clarification is needed in the instant docket, and will be sought in the CEII NOPR, in order to ensure that this gap is filled.

<sup>11</sup> CEII proposed rule at 18 CFR 388.112

<sup>12</sup> *Id.* at 18 CFR 388.113.

Thus, when the Commission or Commission staff accesses the NERC databases, the information accessed is neither Commission-generated nor information submitted to the Commission and therefore is not addressed by the modifications to 18 CFR §§ 388.112-113.

To safeguard this information from public disclosure, the Trade Associations request clarification that when the Commission or Commission staff accesses the information in the NERC databases, this information will be treated as information that has been submitted to the Commission and marked as privileged material or CEIL.

### **CONCLUSION**

**WHEREFORE**, for the foregoing reasons, the Trade Associations request that the Commission ensure that any future action ordered as a result of this proceeding is consistent as discussed above.

Respectfully submitted,

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Dated: July 29, 2016

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 29<sup>th</sup> day of July.

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