

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY**

Critical Electric Infrastructure Information;)
New Administrative Procedures) RIN 1901-AB44

COMMENTS OF THE EDISON ELECTRIC INSTITUTE

I. INTRODUCTION

The Edison Electric Institute (“EEI”), on behalf of our member companies, respectfully submits these comments in response to the Notice of Proposed Rulemaking (“NOPR”) issued by the Department of Energy (“the Department” or “DOE”) and published at 83 Fed. Reg. 54268 on October 29, 2018 under Regulation Identifier Number (“RIN”) 1901-AB44.

EEI is the association that represents all U.S. investor-owned electric companies. Our members provide electricity for about 220 million Americans, and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States. In addition to our U.S. members, EEI has more than 65 international electric companies as International Members, and hundreds of industry suppliers and related organizations as Associate Members. EEI’s members include Generator Owners and Operators, Transmission Owners and Operators, Load-Serving Entities, and other entities that may submit—on a voluntary or mandatory basis—critical electric infrastructure information (“CEII”) to or request CEII from the Department. Accordingly, EEI members are directly affected by the NOPR.

As discussed herein, EEI generally supports the Department’s proposed rule to implement DOE’s CEII designation authority under the Federal Power Act. It is clear that much

care and thought went into the preparation of the proposed rule, and the tone set demonstrates the Department’s commitment to promoting public/private sector information sharing. EEI supports this commitment because public and private sector entities must partner to protect the nation’s critical electric infrastructure and public/private information sharing is a crucial element to achieving that goal. EEI thanks the Department for its efforts and provides these comments to help the Department clarify and enhance its proposed procedures.

II. COMMENTS

In the NOPR, the Department proposes new administrative procedures to implement DOE’s CEII designation authority under the Fixing America’s Surface Transportation Act (“FAST Act”).¹ The FAST Act authorized both the Secretary of Energy (“the Secretary”) and the Federal Energy Regulatory Commission (“the Commission” or “FERC”) to independently designate CEII.² In 2016, the Commission established criteria for FERC to designate CEII, but declined to identify specific designation criteria and procedures for DOE.³ In this proceeding, the Department proposes to establish administrative procedures “to ensure that stakeholders and the public understand how the Department would designate, protect, and share CEII under the Federal Power Act.”⁴

EEI supports the Department’s efforts to establish how it will designate, protect, and share CEII, including the harmonization of the DOE CEII procedures with the FERC procedures and tailoring the procedures to DOE’s role as the Sector Specific Agency (“SSA”) to the Energy

¹ Critical Electric Infrastructure Information; New Administrative Procedures, Notice of Proposed Rulemaking, 10 CFR Part 1004 (2018) (“NOPR”).

² 16 U.S.C. § 824o-1(d)(2)(D) (2017).

³ Federal Energy Regulatory Commission, *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 at P 39 (2016) (“FERC Order No. 833”).

⁴ NOPR at 54269.

Sector. As the SSA, the Department plays an important role in partnering with the Energy Sector—who owns over 80 percent of the country's energy infrastructure—and other Federal entities to protect national security.

The NOPR, with its emphasis on protecting sensitive private sector information, demonstrates that the Department seeks to develop information sharing frameworks that will encourage, rather than discourage, private sector entities to share such information with the government. Sharing information and increasing cooperative efforts between the public and private sectors is critical to protecting critical electric infrastructure and national security. Due to the importance of partnering with the Energy Sector to share information, EEI recommends that the Department consider further enhancements of its proposed CEII procedures.

As described in greater detail below, EEI recommends that the Department specify how it will evaluate information submitted as CEII, including the criteria used by the DOE Offices to designate CEII. EEI encourages the Department to clarify the marking requirements for machine-to-machine electronic information and information pre-designated as CEII; the delegation and coordination process to ensure that the designation, protection, and sharing of CEII is consistent and understood by stakeholders; the notification procedures for unauthorized CEII disclosures and CEII designation changes; and how the Department will determine which CEII requests are legitimate. EEI encourages the Department to seek methods in its procedures to reduce the burden on CEII submitters and revise the procedure section numbering. EEI recommends revisions to further align its sharing procedures for Federal and non-Federal entities and asks that the Department consider providing remedies for CEII submitters when a DOE CEII Non-Disclosure Agreement (“NDA”) is breached. Finally, EEI encourages the Department to seek stakeholder input on the NDA that includes the minimum requirements identified in the

proposed procedures and on the international sharing protocols once they are developed by DOE.

A. EEI encourages the Department to consider specifying the CEII designation criteria and associated timelines.

EEI first asks the Department to consider identifying the criteria it will use to determine whether submitted information will be designated as CEII. The proposed procedures in §1004.13(f)(i) require the “DOE CEII Coordinator, or a Coordinator’s designee, [to] execute the Department’s evaluation as to whether the submitted information or portions of the information meets the definition of CEII, as described at section (c)(2) of this Part, with the appropriate DOE Office with delegated CEII designation authority.” Although §1004.13(f) is titled “Criteria and procedures for designating CEII,” the section is focused on the procedures that CEII submitters must follow for CEII designation rather than the criteria and procedures the Department will use to designate CEII. Although the Department notes in the NOPR that FERC’s rulemaking established criteria for designating CEII that is applicable to DOE, the Commission declined “to identify specific designation criteria and CEII procedures for DOE” in Order No. 833.⁵

Accordingly, it is unclear in the proposed procedures how the Department will evaluate information submitted as CEII and what criteria will be used by DOE personnel when performing the Department’s evaluation. Clarifying CEII designation criteria and procedures is particularly important in the Department’s proposed procedures due to the proposed delegation of the designation authority to potentially each DOE Office.⁶ Given that multiple DOE Offices may be asked to evaluate the same or similar data and information, the designation criteria and procedures must be clear to enable each DOE Office to consistently designate CEII and for potential CEII submitters to understand what information the Department will likely designate as

⁵ FERC Order No. 833, 157 FERC ¶ 61,123 at P39.

⁶ NOPR §1004.13(d).

CEII. For this reason, EEI recommends that the Department add additional details to the proposed procedures to clarify the evaluation and/or criteria that will be used by the Department to designate CEII. Providing this clarification will help EEI members determine whether the information they submit to the Department would be protected from disclosure. This clarification will also encourage information sharing with the Department because it will help submitters understand what information will or will not be protected if submitted to the Department.

In clarifying the CEII designation criteria, EEI recommends that the Department consider information on other systems or assets that may negatively affect national security, economic security, and/or public health; information that may enable the misuse of an asset or system that may negatively affect national security, economic security, and/or public health; and information on systems or assets that has previously been made public. Further, the Department should consider how the release of the data or information interplays with existing publicly available information. In addition, EEI recommends that the Department consider clarifying the timelines for CEII evaluation and the return or destruction of information not designated as CEII as well as the interim treatment of the information.

- 1. Information related to other systems or assets that may negatively affect national security, economic security, and/or public health.**

In the proposed procedures, the CEII definition is limited to “information related to critical electric infrastructure” or Defense Critical Electric Infrastructure. The definition for Critical Electric Infrastructure is limited to a system or asset of the bulk-power system that its incapacity or destruction “would negatively affect national security, economic security, public

health or safety, or any combination.”⁷ The definition of Bulk-Power System specifically excludes “facilities used in the local distribution of electric energy”⁸ but the Defense Critical Electric Infrastructure (“DCEI”) definition does not exclude such distribution facilities.⁹ The Department is likely to receive information related to distribution systems due to DOE’s role as the SSA to the Energy Sector, which includes generation, transmission, and distribution systems and assets. Furthermore, FERC concluded that “it is clear that Congress did not intend for the new Critical Electric Infrastructure Information designation to apply only to the bulk-power system.”¹⁰ The Commission relied on the statutory language in § 215A(d)(10) that FERC or the Secretary of Energy should remove CEII designation if they determine that “the unauthorized disclosure of such information could no longer be used to impair the security or reliability of the bulk-power system or distribution facilities.”¹¹ Thus, Congress intended CEII protection to extend to distribution facilities. Also, the Commission concluded that “[s]uch information, even if it concerns non-electric infrastructure, could be used to impair the security or reliability of the bulk-power system, for example by severing gas pipeline connections to electric generation facilities.”¹²

Accordingly, EEI recommends that the Department consider evaluating information related to systems or assets that if destroyed or incapacitated may negatively affect national security, economic security, and/or public health or safety in making its CEII designations.

Finally, EEI recommends that the Department ensure that its designation criteria and

⁷ *Id.* §1004.13(c)(2).

⁸ *Id.* §1004.13(c)(1).

⁹ *Id.* §1004.13(c)(5).

¹⁰ FERC Order No. 833 at P 19.

¹¹ 16 U.S.C. § 824o-1(d)(10) (2017), FERC Order No. 833 at P 19.

¹² FERC Order No. 833 at P 19.

procedures consider information in a robust, holistic manner. For example, asset locations and mapping can often be found on publicly available websites because it was not previously considered sensitive enough to protect from disclosure or was posted pursuant to regulatory mandate.¹³ Making new details such as system vulnerabilities or real-time flow and constraint data could provide additional information for a saboteur to plan actions to negatively affect critical electric infrastructure. In other words, a hostile actor could use the mapping information described above and combine it with new information such as system vulnerabilities to learn more about operational weaknesses of critical electric infrastructure to determine how to disrupt its operation. For this reason, the criteria or procedures the Department uses should not consider data or information in isolation because a narrowly focused evaluation could obscure the true impact of the release of the information. EEI recommends that the Department consider the value and context that the information could add to existing publicly available data in its designation criteria and procedures.

2. Information that may enable the misuse of an asset or system that may negatively affect national security, economic security, and/or public health.

EEI appreciates the inclusion of the incapacitation or destruction of assets in the Department's procedures; however, the misuse of an asset or system may also negatively affect national security, public health, and/or public safety while not necessarily incapacitating or destroying a critical electric infrastructure system or asset. For example, if an adversary were able to manipulate system protection settings (e.g., protective relays) or change the information

¹³ In instances involving mandatory disclosure, some EEI members are requesting state-level regulatory permission to implement confidentiality measures for certain information to protect public safety and grid security. *E.g., Joint Petition of Pacific Gas & Electric Company (U 39 E), San Diego Gas & Electric Company (U 902 E), and Southern California Edison Company (U 338 E) For Modification of D.10-12-048 and Resolution E-4414 to Protect the Physical Security and Cybersecurity of Electric Distribution and Transmission Facilities, Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program, R.08-08-009 (fld. Dec. 10, 2018).*

seen by system operators, then such actions could result in overloads, loss of load, destruction of equipment, etc. To address this concern, EEI recommends that the Department consider evaluating whether information should be protected to prevent misuse of electric infrastructure assets or systems. For example, the Department could add the word “misuse” to the Critical Electric Infrastructure definition in §1004.13(c)(2) or clarify that incapacitation of a system or asset includes misuse, as misuse of a system or asset may incapacitate that system or asset if it is no longer capable of operating as expected.

3. Information that has previously been made public by the Department.

EEI notes that the Department has previously made certain information publicly available prior to proposing these procedures and prior to submitters having the opportunity to request confidentiality of such data and information. To ensure that this does not bias an information submitter’s ability to request confidentiality of such information going forward, EEI recommends that the Department review and evaluate the existing system or asset information it has made public before it established these CEII procedures to determine whether it should now be redesignated as CEII going forward and be removed proactively from the public domain. Additionally, the Department should evaluate whether newly submitted information, although similar to the information previously made public, should be protected as CEII going forward.

4. Timelines for CEII evaluation and return or destruction of information not designated as CEII as well as the interim treatment of the information.

In the proposed procedures, it is unclear if there is an estimated timeline or deadline within which submitters can expect a determination decision or the return of voluntarily submitted data. In particular, the timeline for the return of information not designated as CEII is important for submitters to understand because this information could be subject to public

disclosure between the time the Department makes its CEII determination and the time that it returns the information to the submitter. Also, for mandatory data that is submitted, if a submitter requests reconsideration of a DOE decision not to designate information as CEII or seeks judicial review, it is unclear how this information will be treated until these requests and reviews are completed. The proposed procedures clarify that information will be kept non-public until the Department “completes its determination” but does not address whether completion expands to requests for reconsideration and judicial review.¹⁴

To address these concerns, EEI recommends that the Department add additional details to the proposed procedures to clarify: 1) the anticipated timeline for such evaluation, 2) the anticipated timeline for the return of information, where necessary, and 3) the interim treatment of information. Relative to the interim treatment of information, EEI recommends that information be treated as non-public until the timelines associated with reconsideration, judicial review, and requests for the return or destruction of such information have lapsed.

B. EEI encourages the Department to clarify the marking requirements for submitting pre-designated and machine-to-machine information as CEII.

The proposed procedures require the CEII Coordinator to review CEII submissions for information about DCEI on incidents and emergencies reported through the Department’s Form OE-417, and Federal spectrum information managed by the National Telecommunications and Information Administration (“NTIA”) that is pre-designated as CEII.¹⁵ EEI supports these immediate pre-designations of information as CEII; however, it is unclear whether the proposed procedures require submitters of this pre-designated information to follow the submission process outlined in §1004.13(f)(1)(i)-(iv). For example, the schedule 2 information on the Form

¹⁴ NOPR §1004.13(f)(3)(ii).

¹⁵ *Id.* §1004.13(f)(3)(i)

OE-417 is marked, as follows:

Information on Schedule 2 will not be disclosed to the public to the extent that it satisfies the criteria for exemption under the Freedom of Information Act, e.g., exemptions for confidential commercial information and trade secrets or certain information that could endanger the physical safety of an individual, or information designated as Critical Energy Infrastructure Information.¹⁶

It is unclear whether this schedule 2 marking is sufficient or whether the submitter needs to follow the procedures outlined in proposed §1004.13(f)(1)(i)-(iv) to ensure that the information is considered by the Department as CEII. Accordingly, EEI suggests that further clarification within the procedures or in the provision of additional guidance on how to submit such pre-designated information as CEII would be helpful.

Also, §1004.13(f)(6)(i) of the proposed rule mentions that electronic information that cannot be physically labeled as CEII will be stored in a secure electronic environment.¹⁷ Secure storage of this information is important as there are several DOE power administrations that regularly receive machine-to-machine, electronic information from electric companies. However, the marking procedures do not address information that cannot be physically labelled such as machine-to-machine information that may be shared with the Department. In addition, this electronic information may contain a mix of CEII and non-CEII information; however, without the ability to mark it, the information cannot be separated as the marking procedures require in §1004.13(f)(6)(iii). EEI recommends that the Department add a procedure to §1004.13(f)(6) to address such information as DOE currently receives and will likely continue to receive machine-to-machine, electronic information that should be protected from public disclosure.

¹⁶ Available at <https://www.oe.netl.doe.gov/OE417/Form/Home.aspx#>

¹⁷ NOPR §1004.13(f)(6)(i)

C. EEI encourages the Department to consider methods to clarify its delegation and coordination processes as the Department implements its procedures to ensure the designation, protection, and sharing of CEII are consistent and understood by stakeholders.

The proposed procedures enable the Secretary to delegate his or her CEII designation authority to any DOE Office¹⁸ and the CEII Coordinator to delegate his or her CEII Coordinator authority to an appropriate official from the DOE Office of Electricity or the Bonneville Power Administration, Energy Information Administration, Southeastern Power Administration, Southwestern Power Administration, or Western Area Power Administration (“the DOE Administrations”).¹⁹ The CEII Coordinator functions include coordinating and overseeing DOE’s implementation of its CEII-designation program and assisting the DOE Offices with CEII designation, protection, storage, and sharing.²⁰

EEI supports coordination among DOE Office designees to ensure that the FAST Act authorities are consistently implemented within DOE. However, given the potential for many delegations of designation and coordinator authority, a robust internal process to ensure that CEII is appropriately and consistently designated, protected, and shared throughout the Department will be important. For example, information on a jointly-owned, critical electric infrastructure facility may be submitted from multiple parties to different DOE Offices, and, therefore it will be important for DOE’s processes to identify and treat this information consistently.

Additionally, the proposed procedures require the CEII Coordinator or the Coordinator’s designee to notify CEII submitters of a non-Federal entity request for CEII²¹ and to convene a conference call with the affected DOE Office(s) and CEII submitter(s) to discuss concerns with

¹⁸ *Id.* §1004.13(d).

¹⁹ *Id.* §1004.13(c)(4).

²⁰ *Id.*

²¹ *Id.* §1004.13(e)(1)(vi).

sharing the CEII in this situation.²² EEI supports these proposed procedures; however, it is unclear when the submitter will be notified of a CEII request, whether the §1004.13(e)(1)(vii) conference call will be scheduled within five days of the request or within five days of when the submitter is notified of the request, and if the submitter will receive the §1004.13(k) request before the conference call is convened. To meaningfully participate in a discussion with the Department on whether the CEII should be shared, the submitter will need sufficient notice to participate in a call as well as sufficient time to review the request. EEI recommends that the Department provide additional guidance to CEII submitters on what to expect from the CEII Coordinator or his/her designee when convening a conference call to discuss a non-Federal entity request for CEII release.

Finally, the proposed procedures encourage the CEII Coordinator to meet with FERC at least semi-annually to coordinate “to ensure that both agencies are applying CEII designation criteria consistently and to share best practices.”²³ The procedures also support annual coordination with other Federal agencies.²⁴ EEI supports the Department’s proposed coordination with other Federal agencies and recommends that, in addition to coordination with FERC, coordination with the Department of Homeland Security (“DHS”) under its Protected Critical Infrastructure Information (“PCII”) and other information protection authorities and the Nuclear Regulatory Commission (“NRC”) are critical. Currently, the mechanisms for companies to share information on critical electric infrastructure with Federal entities and for Federal entities to protect this information vary by agency. FERC and DOE have similar, but different CEII procedures and DHS and NRC have their own procedures. Inter-agency discussions on

²² *Id.* §1004.13(e)(1)(vii).

²³ NOPR §1004.13(e)(3).

²⁴ *Id.* §1004.13(e)(4).

identifying best practices to encourage voluntary information sharing and the protection of this information by Federal entities will be key to protecting the nation's critical electric infrastructure.

D. EEI encourages the Department to consider clarifying its notification procedures for inadvertent, knowing, and willful unauthorized releases of CEII by Federal and non-Federal entities and CEII designation changes.

The proposed procedures address public disclosure by the CEII submitter and disciplinary actions for knowing and willful unauthorized CEII disclosures by DOE employees and contractors.²⁵ However, the procedures are silent on inadvertent disclosures, including disclosures caused by a data breach, and notification of any unauthorized CEII disclosures (i.e., inadvertent, knowing, or willful). Inadvertent disclosures are more likely than a knowing or willful disclosure. Historically, when unauthorized disclosures of CEII and other confidential information have occurred in the Energy Sector, these unauthorized disclosures have occurred as a result of an inadvertent disclosure by agency personnel rather than by a knowing and deliberate disclosure. Nonetheless, agency rules have not historically addressed notification or other actions to be taken during such circumstances. For example, FERC's CEII rules do not specifically address such notifications or practices to prevent inadvertent disclosures.

Further, it is unclear if an inadvertent disclosure will trigger the Department to remove the CEII designation under §1004.13(h)(2). In other words, if information designated as CEII is inadvertently disclosed to the public, then, it is unclear whether the Department will remove its CEII designation. For these reasons, EEI recommends that the Department enhance its proposed procedures to clarify what actions will be taken in response to an unauthorized disclosure.

In addition, if the Department renews or removes a CEII designation, the Department

²⁵ *Id.* §1004.13(l).

should consider notifying not only the submitter, but also all third parties the Department has shared the CEII with (i.e., Federal and non-Federal entities) so they can take the necessary actions to continue to protect the information appropriately.

To address these concerns, EEI recommends that the Department consider confidential methods to notify CEII submitters of unauthorized CEII disclosures by the Department and the third parties (i.e., Federal entities and non-Federal entities) the Department shares the CEII with and clarify whether inadvertent, unauthorized disclosures will trigger the removal of a CEII designation. Notification is important to submitters so they are aware of what information has been released and can mitigate any potential security risks created by the disclosure. Also, the Department should consider adding a process to notify third parties of CEII designation changes (i.e., renewals or removals).

E. EEI encourages the Department to clarify how it will verify the legitimacy of the CEII request.

The proposed procedures for requesting CEII discuss that upon receiving a CEII request, the CEII Coordinator will “contact the DOE Office or Federal agency that created or maintains the CEII.”²⁶ Contacting another Federal agency suggests that a requester can make a CEII request through DOE for CEII created by other agencies. For example, if FERC created a document that contains CEII, then a requester can contact DOE to request this information. EEI recommends that the Department replace “Federal agency” with text that describes the DOE Administrations or clarify what the Department intends by this phrase.

The proposed §1004.13(k)(4) also describes that, upon receipt of a CEII Request, the CEII Coordinator, in consultation with the DOE Office, “shall determine if the need for CEII and the protection afforded to the CEII should result in sharing CEII for the limited purpose made in

²⁶ *Id.* §1004.13(k)(4).

the request.”²⁷ However, the procedures do not address whether the Department will evaluate whether the DOE request or requester are legitimate. EEI recommends that the Department consider clarifying that it will review the legitimacy of received requests and their associated requestors in making its sharing determination.²⁸ It will be helpful for the public and CEII submitters to understand that the requests and requesters will be evaluated for legitimacy. For example, the Department should determine whether the requester and his/her organization are not only who they represent they are but also carefully evaluate the risk of sharing information with the requester. A possible scenario is that a nation state could support a legitimate consulting firm with legitimate clients; however, the firm’s tie to the nation state may increase the risk that the CEII shared could also be used for other undisclosed purposes. In addition, guidance to the public and potential CEII submitters as to examples of legitimate requests may be helpful to understand how the Department will share CEII.

F. EEI encourages the Department to seek methods to promote private sector information sharing by minimizing administrative hurdles for CEII submitters to share sensitive information.

As proposed by the Department, within a year of the CEII designation period expiration, a submitter can re-apply for CEII designation.²⁹ This proposed procedure will require that both DOE and the submitter track the expiration date of all CEII submitted to the Department to appropriately protect and release this information. Duplicative tracking could quickly become

²⁷ *Id.* §1004.13(k)(4).

²⁸ For example, the Department could conduct background checks of requesters similar to DHS’s critical infrastructure information handling. Procedures for Handling Critical Infrastructure Information, 6 C.F.R. § 29.7(b)). Also, the Treasury Department publishes a Specially Designated Nationals and Blocked Persons list of individuals and companies that U.S. persons are generally prohibited from dealing with because they are a threat to national security, foreign policy, or economy of the United States. Specially Designated Nationals And Blocked Persons List (SDN) Human Readable Lists, <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

²⁹ NOPR §1004.13(h)(1)(ii).

onerous and overwhelming for submitters who may also have to track information they have shared with other Federal entities.

Like the Department, EEI supports the need for public/private sector information sharing. Accordingly, EEI suggests that the Department clarify that it will continue to protect CEII until the submitter is notified of a request for CEII sharing or removal of the designation, which can happen at any time. To reduce the tracking and re-applying burden on CEII submitters and encourage voluntary sharing of such information with the Department, EEI recommends that the Department notify the CEII submitter and automatically initiate the re-designation process before the CEII designation period expires. The FAST Act enables the Secretary to re-designate CEII as appropriate³⁰ and an automatic re-designation review by the Department will help to alleviate the obstacles for submitters—generally owners and operators of critical electric infrastructure—of tracking and re-applying for CEII designation and facilitate information sharing with DOE. Automatic initiation of the re-designation process will also reduce the administrative burden on the Department.

For CEII voluntarily shared with the Department, the proposed rule enables a submitter to request DOE to return or destroy information that the Secretary or the DOE CEII Coordinator has not designated as CEII,³¹ removed the CEII designation from,³² or if the designation has expired.³³ To reduce administrative burdens, EEI recommends that, for voluntarily submitted information, the Department consider making the default action associated with these actions (i.e., non-designation, removal or expiration of the CEII designation) to return or destroy the

³⁰ 16 U.S.C. § 824o-1(d)(9).

³¹ NOPR § 1004.13(f)(5)(iii).

³² *Id.* § 1004.13(h)(2).

³³ *Id.* § 1004.13(h)(3).

information rather than notifying the submitter and requiring the submitter to request the return or destruction of the information. In most circumstances, where a submitter voluntarily shared information with the Department as CEII, it can be assumed that the submitter will want to continue to protect this information.

Removal of the CEII designation represents a material change in the agreement to protect the information the submitter provided to the Department and introduces disclosure risk that the submitter cannot control. Therefore, it is more reasonable to put the burden on the Department to either continue to protect this information as CEII, return it to the submitter, or destroy it, rather than require the submitter to request its return or destruction. This is especially important due to the unique role the Department plays as the SSA for the Energy Sector and as a partner with the industry to enhance national security.

EEI supports the §1004.13(i) reconsideration of designation procedure that has been proposed because it provides a more efficient and immediate alternative than seeking judicial review. EEI commends the Department for allowing a reconsideration review to occur within the Department for any determination made by the DOE CEII Coordinator or his/her designee.³⁴ Such a process will provide both DOE and submitters with a much more efficient, effective data protection process. Regarding information that is submitted to the Department via mandate, EEI also supports the Department allowing at least ten days for submitters to comment in writing prior to the removal of CEII designations for this information, because depending on the type of information and associated facts and circumstances, more than ten days may be needed to respond.

³⁴ 16 U.S.C. § 824o-1(d)(11).

G. EEI recommends reviewing and revising the procedure section numbers before finalizing the rule.

Currently there is no section “(g)” despite numerous references to this section.³⁵ EEI recommends that the Department review and edit the numbering of all sections and references as appropriate before finalizing the rule.

H. EEI encourages the Department to consider improvements to its procedures for sharing CEII, including clarifying or aligning its procedures for sharing with Federal and non-Federal entities and addressing audit rights and changes in intended purposes for sharing with non-Federal entities.

The proposed procedures for sharing CEII at §1004.13(j) require Federal entities to follow the Department’s proposed procedures for requesting CEII at §1004.13(k), but do not address specific restrictions on how the CEII will be used or secured. Proposed §1004.13(j)(2) addresses restrictions for non-Federal entities, including limiting the use of the CEII to authorized recipients and purposes and requiring a Non-Disclosure Agreement that, at a minimum, ensures the protection of the information and destruction or return of the information when the intended purpose is complete.³⁶ However, §1004.13(j)(3) requires that “[a]ll entities receiving CEII must execute either a Non-Disclosure Agreement or an Acknowledgement and Agreement or participate in an Electric Reliability Organization or Regional Entity information sharing program that ensure the protection of CEII.”³⁷ This requirement could require Federal entities to limit their use of CEII and protect it, but the minimum requirements in §1004.13(j)(1) are not as clear as they are in §1004.13(j)(2) for non-Federal entities.

EEI agrees that the proposed minimum protections should be applied to non-Federal entities to ensure that the information is protected from disclosure; however, not requiring such

³⁵ See e.g., NOPR §1004.13(e)(1)(i), (iv), and (viii); *Id.* §1004.13(f)(3)(i).

³⁶ NOPR §1004.13(j)(2).

³⁷ *Id.* §1004.13(j)(3).

minimum protections for Federal entities creates disclosure risk for submitters. Although the proposed Federal entity procedures enable the Department to impose restrictions on use and security of the information, the proposal does not require minimum restrictions and security. For example, it is unclear whether the Federal entity can publicly disclose or further share the CEII with other individuals or organizations. The lack of explicit, minimum protections in the proposed procedures creates risk that information shared with the Department could be disclosed inadvertently, knowingly, or willfully to unauthorized individuals or organizations by other Federal entities. To minimize this risk, EEI recommends that in §1004.13(j)(1) the Department explicitly require Federal Entities with which the Department shares CEII to protect the CEII from access or disclosure by individuals or organizations that have not been authorized by the Department and limit their use of the CEII. Also, the Department should consider clarifying that the CEII it shares with Federal entities will be maintained in accordance with the Department's CEII procedures.

Another risk for submitters in the proposed procedures is that §1004.13(e)(1) requires the CEII Coordinator or his/her designee to notify and convene a conference call when a non-Federal entity makes a CEII request, but does not require such notification or consultation when a Federal entity makes a CEII request. Without such notification or consultation, CEII submitters will not know when and which Federal entities have their information and how their information is being used. If a Federal entity is subject to a data breach, the submitter will not know that its information may have been disclosed, especially if the Department does not address the above, section D concern regarding inadvertent disclosures of CEII. To address this risk, EEI recommends that the Department add Federal entity CEII requests to the §1004.13(e)(1)(vi) provisions regarding notification and §1004.13(e)(1)(vii) provisions regarding conference calls

to discuss concerns.

Finally, the proposed procedures require non-Federal entities to destroy or return CEII the Department shares with them once the intended purpose for receiving the CEII is “fulfilled,” but does not address changes in the intended purpose.³⁸ EEI agrees that once the intended purpose of the CEII is fulfilled, the CEII should be destroyed or removed to minimize the risk of disclosure. Although the proposed procedures limit the use of CEII for authorized purposes, the procedures do not require destruction or return of the information if the purpose changes. Because the use of CEII for a different purpose is also an unauthorized purpose, EEI recommends that the Department add “or materially changed” after “fulfilled” in §1004.13(j)(2)(iii).

I. EEI encourages the Department to consider providing CEII submitter remedies for NDA breaches.

The proposed sharing procedures enable the Department to audit the NDA provisions for non-Federal entities,³⁹ but it is unclear whether and when the Department will audit the provisions and provide remedies to submitters if these provisions are breached. EEI encourages the Department to consider providing remedies for NDA breaches to help submitters be more comfortable with sharing CEII with the Department. EEI recommends that the Department consider the following submitter remedies: 1) notifying CEII submitters of NDA audit results, 2) notifying submitters of NDA breaches, 3) notifying CEII submitters of Department responses to audit results and breaches, and 4) enabling CEII submitters to request DOE audits or to conduct their own audits of entities that received their CEII.

³⁸ *Id.* §1004.13(j)(2)(iii).

³⁹ *Id.* §1004.13(j)(2)(v).

J. EEI encourages the Department to consider sharing the minimum requirements for a NDA with stakeholders for input.

The proposed procedures refer to a NDA with minimum requirements.⁴⁰ EEI supports the existing requirements, in addition to the recommendations above. However, we recommend that the Department share the minimum-level NDA with stakeholders for notice and comment to enable input from potential submitters and requesters on what can and should be agreed upon in the minimum-level NDAs. Although EEI recognizes that the facts and circumstances may vary such that changes to the minimum-level NDAs may be necessary, a notice and comment process would be invaluable to the Department's efforts. For example, §1004.13(j)(2) requires “[p]rotection of the information in a secure manner to prevent unauthorized access;” however, it is unclear what level of protections would be sufficient without reviewing the NDA.

Additionally, where data submitters share data reciprocally with DOE and such data is necessary for use in proving compliance to an applicable governmental authority (e.g., during a Reliability Standards audit), the applicable NDA should provide for such use and data sharing. Hence, EEI respectfully submits that sharing these NDA provisions and expectations will help submitters, requesters, and the Department identify and mitigate gaps in their NDAs as well as enable the Department to share these practices and any lessons learned with other Federal entities as contemplated by §1004.13(e)(3)-(4).

K. EEI encourages the Department to share potential international sharing protocols, once developed, with stakeholders for input.

The proposed procedures discuss that the DOE Offices may develop protocols for sharing CEII with Canadian and Mexican authorities.⁴¹ EEI does not oppose the development of such protocols, but recommends that, when these protocols are developed, the Department allow for

⁴⁰ *Id.* §1004.13(j)(2).

⁴¹ *Id.* §1004.13(j)(4).

notice and comment by stakeholders.

III. CONCLUSION

As the need to promote greater public/private sector coordination to protect national security grows so does the importance for government agencies to develop information sharing protocols that encourage private sector entities to share sensitive information with the government. The Department's proposed CEII procedures represent a strong and helpful first step in promoting such information sharing.

EEI appreciates the opportunity to submit comments in response to the NOPR. As discussed above, we encourage the Department to consider enhancing its proposed CEII procedures to clarify its criteria for evaluating whether information should be designated as CEII; the marking requirements for information pre-designated as CEII and machine-to-machine electronic information; the delegation and coordination process; the notification procedures for unauthorized CEII disclosures and CEII designation changes; and that the Department will evaluate whether CEII requests are legitimate. In addition, EEI recommends that the Department seek to reduce the burden on CEII submitters and notes the need to revise the procedure section numbering. EEI asks the Department to consider further aligning its sharing procedures for Federal and non-Federal entities and providing remedies for CEII submitters when a NDA is breached. Finally, EEI recommends providing an opportunity for stakeholder input on the NDA and international sharing protocols once the Department develops them.

These clarifications and enhancements are important to stakeholders' understanding of how the Department will designate, protect, and share CEII in its possession. These enhancements will help private sector entities better understand how their sensitive information will be protected when placed in government stewardship. EEI thanks the Department for its

hard work in this proceeding and looks forward to continuing to partner with the Department to protect critical electric infrastructure.

Respectfully Submitted,

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