**To:** Susan M. Hudson, Clerk

**From:** Vermont Electric Power Company, Inc. ("VELCO")

**Date:** October 22, 2010

**RE:** Workshop to discuss Critical Energy Infrastructure Information ("CEII")

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The following summary of the Federal Energy Regulatory Commission's regulations and procedures for CEII is filed in response to the Public Service Board's request on September 24, 2010. This information is provided to give an accurate description of the current regulations and procedures that VELCO and other similarly situated parties are currently required to follow in national and regional jurisdictions.

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SUMMARY OF FEDERAL ENERGY REGULATORY COMMISSION
CRITICAL ENERGY INFRASTRUCTURE INFROMATION
REGULATIONS AND PROCEDURES

## I. Introduction

The Federal Energy Regulatory Commission ("FERC" or "Commission") began limiting public access to critical energy infrastructure information ("CEII") in October of 2001.[1] This was a direct response to the September 11, 2001 terrorist attacks in an effort to protect the vulnerability of the energy sector.[2] The FERC removed documents from public internet access and instructed public parties to request documents according to Freedom of Information Act information request procedures.[3] Recognizing that FOIA was not adequately structured to handle CEII, the FERC issued Order 630 in March of 2003. Order 630 is intended to "strike the best balance possible between the benefits of information and the protection of people and property."[4] The procedures developed by the FERC through this and subsequent orders are discussed below.

## II. Analysis of FERC CEII Regulations

### a. Order 630 Establishes CEII Protocol for Documents Submitted to FERC

Order 630 specifies what information should be considered CEII and establishes a formal procedure for the management of such information. These regulations, as described in Order 630, are set forth at 18 C.F.R. Parts 375 and 388.

The FERC defines CEII as:

> Specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) relates details about the production, generation,

[1] *Treatment of Previously Public Documents*, Docket No. PL02-1-000, 97 F.E.R.C. ¶ 61,030 (2001).
[2] Order No. 630,*Critical Energy Infrastructure Information*, 102 F.E.R.C. ¶ 61,190, 68 Fed. Reg. 9,857 (2003) (to be codified at 18 C.F.R. Parts 375, 388); *order on reh'g*, Order No. 630-A, *Critical Energy Infrastructure Information*, 104 F.E.R.C. ¶ 61,106, 68 Fed. Reg. 46,456 (2003) (to be codified at 18 C.F.R. Part 388).
[3] 97 F.E.R.C. ¶ 61,030.
[4] Order 630, at ¶ 13.

> transportation, transmission, or distribution of energy; (ii) could be useful to a person in planning an attack on critical infrastructure; (iii) is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552; and (iv) does not simply give the general location of the critical infrastructure.[5]

Critical infrastructure means:

> Existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters.[6]

The FERC opined that these definitions adequately limit the scope of CEII protection to only those documents that expose system vulnerabilities.[7] By way of example, the FERC considered location information such as general geographic maps or right of way diagrams as non-CEII, or public documents.[8] However, the FERC will consider some electric grid information submitted in accordance with FERC Form 715, Annual Transmission Planning and Evaluation Report as CEII. Specifically, Part 3 of FERC Form No. 715, relating to utility maps and diagrams should not be public.[9] Even if this information is publically available elsewhere (such as through GIS maps) the FERC will treat is as CEII so long as it may pose a risk to infrastructure security.[10]

Order 630 also authorizes the creation of a FERC CEII Coordinator. The FERC CEII Coordinator is authorized to: receive and review all requests for CEII information; determine whether specific information is CEII; determine whether a requester should gain access to CEII;

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[5] 18 C.F.R. § 388.113(c) (2010).
[6] *Id.* This definition was taken verbatim from the USA PATRIOT Act. *See* Critical Infrastructure Protection Act of 2001, 42 U.S.C. § 5195c(e) (2006).
[7] Order 630, at ¶ 27.
[8] *Id*. at ¶ 30 (referring to gas and hydropower facility information as an illustration).
[9] *Id.* at ¶ 34.
[10] Order No. 662, *Critical Energy Infrastructure Information*, Docket Nos. RM02-4-003, PL02-1-003 at ¶ 11 (2005) (to be codified at 18 C.F.R. 388).

establish conditions on the release of CEII; and, release information to qualified requesters determined by his/her discretion.[11]

### b. Order 643 Ensures Consistent Treatment of CEII Documents Held by Other Entities

FERC Order 643 was issued shortly after Order 630 to clarify procedures for treatment of CEII retained by individual companies, rather than the Commission[12] Order 643 was intended to ensure consistent treatment of CEII where federal law required companies to release information to the public, an issue not previously considered by Order 630.[13] Order 643 maintains the same definition of CEII found in 18 C.F.R. § 388.113.[14] However, Order 643 authorizes the *applicant* [company] to make a CEII determination internally.[15] The FERC CEII Coordinator will only make a determination in the event of a challenge to an applicant's CEII designation or denied request to access CEII designated information.[16]

### c. Order 890 Requires Transmission Providers to Establish CEII Disclosure Procedures

Pursuant to portions of FERC Order 890, transmission providers are now required to have a disclosure procedure to manage CEII. Order 890 amends the pro forma open access transmission tariff ("OATT") adopted in Order Nos. 888 and 889, in part, to increase the transparency of transmission planning and use rules.[17] In requiring more descriptive information from transmission providers for use by the OATT, the FERC recognized that the current CEII

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[11] 18 C.F.R. § 375.313 (2010).
[12] Order No. 643, *Amendments to Conform Regulations With Order No. 630*, 104 F.E.R.C. ¶ 61,107, at ¶ 1 (2003) (to be codified at 18 C.F.R. Parts 4, 16, 141, and 157).
[13] *Id.*
[14] *See e.g.* 18 C.F.R. § 4.32(k)(1) (2010).
[15] *See e.g.* 18 C.F.R. § 4.32(k)(2).
[16] *See e.g.* 18 C.F.R. § 4.32(k)(3).
[17] Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12,266 (2007) (to be codified at 18 C.F.R. Parts 35, 37).

process may inhibit the level of transparency necessary for a full evaluation of the transmission system.[18] Therefore, the FERC determined that:

> In order to provide transparency and avoid undue delays in providing information to those with a legitimate need for it, the Commission requires transmission providers to establish a standard disclosure procedure for CEII required to be disclosed by the Final Rule. […] Transmission providers will be responsible for identifying CEII and facilitating access to it by appropriate entities, and the Commission will be available to resolve disputes if they arise.[19]

The FERC suggested that confidentiality agreements, non-disclosure agreements, and password protected access to CEII information contained on OASIS will adequately protect CEII while allowing for increased transparency.[20] However, the FERC did not identify specific procedures.

**d. Other CEII Guidance Encourages Proper Treatment by Transmission Owners**

In addition to the FERC orders discussed above, both ISO-New England ("ISO-NE") and the North American Electric Reliability Corporation ("NERC") have required or encouraged proper treatment of CEII. Generally, these policies seek consistent treatment of CEII in accordance with FERC orders.

ISO-NE has developed specific requirements for handling CEII. As a Governance Participant with ISO-NE, operating under the Participants Agreement,[21] VELCO is subject to the ISO-NE Information Policy.[22] ISO-NE classifies CEII under the same definition as the FERC.[23] The ISO-NE Information Policy requires all Governance Participants to "treat CEII as if it were *Confidential Information*, notwithstanding any other provision of this Information Policy, and

[18] *Id.* at ¶ 397.
[19] *Id*. at ¶ 404.
[20] *Id.* at ¶ 460, 471.
[21] Participants Agreement among ISO New England, Inc and the New England Power Pool and Individual Participants (April 10, 2009) *available at* http://www.iso-ne.com/regulatory/part_agree/index.html,
[22] *See* ISO New England Inc. Transmission, Markets and Services Tariff: Attachment D ISO New England Information Policy (Aug. 30, 2010) *available at* http://www.iso-ne.com/regulatory/tariff/attach_d/index.html.
[23] *Id*. at 21.

additionally shall maintain CEII in a secure place."[24] Governance Participants, employees, and agents who have access to *Confidential Information* (by rule above, CEII) must not disclose that information to any other employee, agent, or any other person.[25] However, CEII may be disclosed in the following circumstances:

> (1) if such disclosure is permitted in writing by the Furnishing Entity, DR Information Provider or the ISO, as the case may be, or (2) if disclosure is required by order of a court or regulatory agency of competent jurisdiction or dispute resolution pursuant to the Filed Documents,[26] or (3) as otherwise specifically permitted by this Policy.[27]

In other instances where the Governance Participant may be required by law to disclose CEII, including pursuant to public records laws or discovery orders, disclosure may be permited after prompt written notice is given to the ISO allowing for an opportunity to seek a protective order.[28]

NERC guidelines also encourage transmission owners to have a CEII procedure in place.[29] The policy is intended to help critical infrastructure owners and operators make decisions about what information should be disclosed to government agencies, third parties, and the general public.[30] While not a requirement or mandatory standard of NERC, this guideline recommends that a single person or department should be responsible for reviewing requests for sensitive information, particularly that which will go to the public domain.[31] This is most likely the equivalent of the above referenced FERC CEII Coordinator.

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[24] *Id.* at 22.
[25] *Id.* at 11.
[26] "Filed Documents" refers to: the Transmission, Markets and Services Tariff; the Participants Agreement; the Transmission Operating Agreement; the Rates Design and Funds Disbursement Agreement; and, other documents that affect the rates, terms and conditions of service including all exhibits and attachments to the listed documents. *Id.* at 6.
[27] *Id.*
[28] *Id.* at 12.
[29] *See* Security Guidelines for the Electricity Sector: Protecting Potentially Sensitive Information, NERC (June 14, 2002).
[30] *Id*. at 1.
[31] *Id.* at 2.

## III. FERC Procedures for Treatment of CEII

FERC procedures for CEII management are set forth at 18 C.F.R. §§ 388.112 and 388.113. Pursuant to these regulations, any person submitting documents to FERC containing CEII should file a statement requesting CEII or privileged treatment of relevant information and a detailed justification for doing so.[32] The Commission will place all information claimed as CEII in a nonpublic file while the request is pending. The portion of documents not containing CEII as well as the request for CEII treatment will be public.[33] Thus, only the portion of documents which contain CEII will be removed from public records.

Order 630 anticipates that larger filings will contain both CEII and public information. Those filings should be segregated in separate volumes or appendices and clearly marked for proper treatment.[34] FERC filing guidelines require submissions to separate and properly label documents as Public, Privileged, or CEII.[35] With specific reference to Transmission Planning and Evaluation, FERC CEII filing guidance limits CEII to information in Parts 2, 3, and 6 of Form No. 715. That information includes power flow base cases, transmitting utility maps and diagrams, and evaluations of transmission system performance.[36]

Once labeled as CEII, information is not readily accessible to the public but may still be accessed by a written request[37] to the FERC CEII Coordinator. The requester must include information about the requester's identity and a statement explaining the intended use of the information.[38] Once a request is filed, the FERC CEII Coordinator will determine whether or not the information is CEII and, in his or her discretion, decide whether or not to release the

[32] 18 C.F.R. § 388.112(b).
[33] 18 C.F.R. § 388.112(c).
[34] Order 630, at ¶ 33.
[35] *See* http://ferc.gov/help/filing-guide/file-ceii.asp.
[36] *See* http://ferc.gov/help/filing-guide/file-ceii/ceii-guidelines/form-715.asp.
[37] http://ferc.gov/help/filing-guide/ceii-request/ceii-req-form.doc.
[38] 18 C.F.R. § 388.113(d)(4)(i).

information.[39] Any disputes may be appealed to the General Counsel.[40] A requester receiving CEII will be required to execute a non-disclosure agreement[41] as a matter of course, though additional conditions may be required by the CEII Coordinator.[42]

An owner/operator of a facility or its employees and officers may obtain CEII without the procedures above. As may a federal agency employee acting in the scope of their duties. FERC also provides an exception for landowners in the vicinity of a project to obtain detailed alignment sheets that may contain CEII.[43]

[39] 18 C.F.R. § 388.113(d)(4)(iii).
[40] 18 C.F.R. § 388.113(d)(4)(iv); *see also* 18 C.F.R. § 388.110.
[41] *Available at* http://ferc.gov/legal/ceii/gen-nda.pdf.
[42] 18 C.F.R. § 388.113(d)(4).
[43] *See* 18 C.F.R. § 388.113(d)(1)–(3).