

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

<b>Critical Energy Infrastructure Information</b>	)	<b>Docket No. RM02-4-000,</b>
<b>Notice of Proposed Rulemaking and</b>	)	<b>PL02-1-000</b>
<b>Revised Statement of Policy</b>	)	

**COMMENTS OF WHITFIELD RUSSELL ASSOCIATES**

Whitfield Russell Associates (“WRA”) is filing these comments in response to the Notice of Proposed Rulemaking and Revised Statement of Policy (“NOPR”) that the Federal Energy Regulatory Commission (Commission) issued on September 5, 2002, concerning Critical Energy Infrastructure Information (“CEII”) in the above referenced dockets.

Whitfield Russell Associates is an electric utility consulting firm providing expertise and analysis in all areas of bulk power market transactions, transmission planning and electric utility planning, generation interconnection, operation, marketing, and regulation. The members of the firm have training and experience in electric power engineering, economics, law, accounting, and computer applications.

Clients of the firm include a wide spectrum of power suppliers, load serving entities, consumers and regulators. These clients include: independent power producers, industrial power consumers, state agencies and commissions, federal agencies, consumer groups, and electric utilities owned by investors, municipalities, cooperatives, States and State subdivisions, Canadian provinces and the government of the United States.

WRA notes that power suppliers, load serving entities, consumers and regulators all have benefited greatly from ready access to transmission system maps and diagrams, switching diagrams and load flow data provided by the FERC. Access to this data has vastly improved and speeded up the planning process for new load and supply projects, has reduced the need for litigation and has enhanced the quality of the decisions that result from the reduced instances of litigation. With access to that data, developers pursue fewer dead-ends and can be much better equipped and informed when they enter into negotiations with transmission providers. In the event that negotiations for transmission access and interconnections break down and do result in litigation, developers of load and supply projects can litigate on an equal footing with the transmission owner and can better inform the decider of fact of both sides of the matters in dispute. This greater procedural efficiency and the better-informed stakeholders that result from ready access to such data have paid immense dividends when a region badly needs new transmission or generation capacity.

Since September 11, 2001, WRA has experienced increasing difficulties in obtaining transmission system maps and diagrams, switching diagrams and load flow base cases that had previously been obtainable routinely from the Commission's files and websites. It seems difficult to imagine how the continued access to such materials from the FERC could be used in threatening national security. The Commission should know that the locations of all generation substations, transmission lines and substations are already available from USGS maps and are posted on the internet on Terraserver,<sup>1</sup> a website reachable throughout the world. Therefore, placing restrictions on access to data in the hands of the Commission will not enhance national security but will only place utilities' competitors at a disadvantage in carrying out their tasks of building and interconnecting new generation and transmission facilities. Moreover, if denying access to such information delays infrastructure improvements, then restricted access may perpetuate system vulnerabilities rather than encouraging investment that may enhance reliability

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<sup>1</sup> <http://terraserver.homeadvisor.msn.com/default.aspx>

and reduce the threats posed by terrorist actions. The tacit assumption that greater restrictions reduce the threat of terrorism should be questioned. A continued open access may well prove to be the superior course of action, not only to enhancing competition but also to reduce the vulnerability of the systems to the threat of planned disruptions.

In contrast to the longstanding availability of maps of the nation's electric grids, load flow data became publicly available only when the Commission instituted the requirement for transmission owners to file such data as part of FERC Form 715. As noted previously, the availability of that data has substantially enhanced the ability of independent power producers and transmission customers to develop and locate projects - and to serve loads - more efficiently and at lower cost. Prior to the time at which this data became publicly available, it was routinely exploited by vertically integrated utilities to drive up the costs of competitors. Unless the CEII Administrator is able to process requests for this information on a non-discriminatory, timely basis, WRA is concerned that we will return to the bad old days in which utilities played "hide the ball", hoarding all the data crucial to expanding the nation's grid. In the bad old days, it was routine for utilities to cough up load flow data only in response to motions to compel discovery in litigation. WRA urges the Commission to ensure that the CEII Administrator review process does not devolve into an information bottleneck which results in unwarranted delays and costs to competing market participants.

WRA is very concerned that the current and expanded restrictions on the public availability of information deemed to be "critical energy infrastructure information" may have serious and potentially irremediable harm to (1) the public interest in full disclosure of information relating to the planning and operation of the nation's electric grid, (2) the interests of power suppliers, buyers and regulators that use that grid (that WRA represents) and (3) to the ability of the Commission itself to meet its statutory obligations in reaching decisions that minimize discrimination and that are just and reasonable. Although WRA recognizes that there are legitimate and important concerns raised as a result of the tragic events of September 11, 2001, WRA also feels that draconian restrictions are not called for in order to prevent the abuse of information related to the

electric utility infrastructure. Indeed, the existing and proposed restrictions are likely to inhibit the rational development of workably competitive power markets in the United States. These inhibiting influences come at a time in which an absence of transparency has already caused serious adverse impacts to the electric industry. WRA applauds the serious efforts that the FERC has made to restore public confidence and the viability of the power markets through such initiatives as the Standard Market Design NOPR (“SMD”). However, WRA fears that the proposed restrictions will seriously impede these efforts and erect obstacles to market-driven solutions to our nation’s energy problems.

WRA has for many years assisted its clients, both as suppliers and consumers of electric power, in their efforts to compete in energy markets. The key to success in these efforts was access to transmission. And gaining access to transmission depended upon access to publicly available information contained in such FERC filings as the FERC Form 715<sup>2</sup>, FERC Form 1 and in load flow studies prepared by regional reliability councils and other companies and agencies. WRA has routinely entered into appropriate confidentiality agreements and has maintained a secure working environment to protect the confidential information with which we have been entrusted. While, in the past, many of the non-disclosure issues related to maintaining the confidentiality of proprietary information with commercially-sensitive implications, WRA believes that similar non-disclosure procedures can and should be employed to embody the new concerns related to national security.

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<sup>2</sup> The documents of particular interest are contained in the FERC Form 715. These include transmission system maps and one-line diagrams, load flow base cases, transmission planning criteria, transmission planning assessments and procedure, and evaluations of transmission system performance. These documents are essential for the analysis of transmission systems on issues concerning generation interconnection, addition of new transmission lines, siting, available transmission capacity, losses, and others. WRA believes, based upon years of industry experience in these matters, that reasonable access to the majority of these documents, such as load flow base cases, transmission planning criteria, transmission planning assessments and procedures, and evaluations of transmission system performance, is essential to preserving and expanding effective competition.

However, WRA has been faced with an increasing burden since September 11, 2001 in its efforts to obtain the information necessary to allow its clients to assess essential studies that have been performed. These studies have serious competitive implications. Such studies as generation interconnection, transmission availability and transmission stability routinely result in the determination and allocation of costs to market participants in the hundreds of millions of dollars. With the financial weakness now afflicting the industry, more and more transmission owners are unable to fund upgrades and look instead to developers interconnecting with their grids to pay for upgrades needed by the system as a whole. Even when the Commission allows premium rates of return, it cannot stimulate investments by transmission owners if their cash flows will not support new financings.

WRA believes that the importance of such studies in determining and allocating costs will increase as a result of recent FERC initiatives. WRA would note, by way of example, that the ongoing FERC docket to establish a Standard Market Design embraces the concept of participant funding of transmission, a concept that would potentially impose costs of transmission system upgrades directly upon particular transmission customers rather than roll such costs into the rates paid by all users. Such mechanisms, while potentially having merit, require access to the information used in the studies so that the participants impacted can have the ability to make an independent assessment of the studies to protect their commercial interests and their legal rights before appropriate regulatory bodies, including the FERC. The creativity of many interested and well-funded sectors will be stifled if only the weakened electric utility sector has access to key load flow data that is indispensable to proposing participant-funded project.

WRA can demonstrate the difficulties that they have encountered since September 11, 2001, by way of example. The events of September 11, 2001, caused the Commission to issue a policy statement in Docket No. PL02-1-000 on October 11, 2001. From this point on, the public was denied free access to all sensitive documents, especially those containing system maps. The policy statement directed requesters seeking the FERC Form 715s to follow the Freedom of Information Act (“FOIA”) procedures. WRA

submitted such a request to the Commission in November 2001, but has not yet received any response except for a verbal explanation that the Commission would send WRA's request to the applicable utilities within 20 days, after which time the utilities would have 90 days to respond. Based on conversations with Commission staff, it is apparent that utilities are not required to respond to the FOIA request. In August 2002, over nine months after WRA filed its FOIA request with the FERC, WRA received the only written reply to its request. However, the reply did not address the particulars of the original FOIA filed by WRA, but indicated a limited range of data that was being made available in response to FOIAs filed with the FERC by other parties. As of this date, WRA has been unable to obtain access to the information that was requested.

The Commission may not be aware of the burdens that have been created as a result of the interim removal of access to Form 715 data by market participants. This burden is especially egregious in the area of load flow data. Without access to the uniform data contained in the FERC Form 715 filing, market participants are faced with the need to seek the data from other sources, many of whom are not cooperative and who may have vested interests in denying access to the data. The results often will lead to protracted, contentious and costly procedures, as will be illustrated below. With respect to load flow base cases, there is a wide divergence between the full disclosure practices of some utilities, regional reliability councils and RTOs (PJM and MAIN who make load flow data available on their websites) and the tight lid that has been placed on data related to crucial infrastructures by other utilities, RTOs and regional councils. Despite their clear obligation to share load flow data underlying impact studies and facilities studies that are set forth in the governing OATTs, a certain California utility, its ISO and its regional reliability council rejected numerous requests to share the load flow data underlying the system impact studies performed for developers of wind power projects. The utility has required interconnecting wind generators to fund upgrades costing tens of millions of dollars but refused to provide the underlying studies and load flow data. Only after months of negotiation and pleading by wind generators and their lawyer during which the utility offered shifting stances and rationales for its refusals, did the utility deign to offer a confidentiality agreement which forbade the wind generator's consultants from

divulging the load information to their clients or to the Commission itself. At all relevant times, the ISO possessed the needed load flow data but deferred to the utility with respect to the confidentiality of the load flow data, expressing concern that it would be sued for breaching confidentiality if the ISO provided the data to developers of wind generators. After repeated requests, the ISO did finally release some regional base case load flow data, the very type of data that would have been available on the FERC Form 715 website prior to the revision in FERC's policies.

WRA is gratified to learn that the Commission has recognized infirmities in the FOIA methodology. However, WRA believes that the Commission has not completely understood the magnitude of the problems under the FOIA. While, clearly the FOIA is not "efficient," the FERC has failed to appreciate that it is not even a workable method for market participants. While the Commission has retained the FOIA as a backup, WRA is encouraged that the Commission has acknowledged the need for an alternative mechanism by which market participants can gain access to the information they require. WRA will address the particulars of the current FERC proposal in these comments.

WRA is also concerned, based upon comments filed during the Notice of Inquiry phase of this docket, that certain parties may be using this opportunity in a manner that would reduce competition in the market place. It is apparent from the comments filed by such entities as the Edison Electric Institute ("EEI") that investor-owned utilities are trying to restrict availability of these documents. In addition, EEI and Reliant have informed the Commission that it should reevaluate the need to collect each item of CEII, specifically pointing out the FERC Form 715. WRA strongly opposes the efforts to eliminate the Form 715 reporting requirements. Unless all market participants can obtain and assess this essential information, the competitive market place will be seriously impaired. WRA again appreciates the FERC's sensitivity to this concern and applauds the fact that the FERC has indicated that efforts to use the claims of CEII inappropriately will not be tolerated.

#### **Claims to CEII Status by Submitters to FERC**

WRA appreciates the difficulties that the Commission faces in seeking to balance the interests of the submitters, the Commission, potential intervenors and the relationships between the parties. WRA would hope that the issues before the FERC in these matters could be resolved without creating more adversarial relationships. However, given the novel issues raised since September 11, 2001, and the seemingly endless creativity on the part of some participants to couch pleadings in a manner contrary to, or at least not consistent with, the intent of Commission policy, WRA is not sanguine that there will not be considerable debate arising as to the information that will be sought status as CEII.

WRA believes that the material provided to the Commission under current Form 715 requirements that relates to the location of critical facilities should continue to be granted public access. This is consistent with the Commission determination at point 30 of the NOPR. WRA believes that system maps which traditionally have accompanied such filing clearly falls within this category of information and should be returned to public access as soon as possible. WRA would also encourage the Commission to require that the level of detail provided in prior filings be maintained and that the submitters not be allowed to drop to a lesser standard.

WRA supports the Commission's resolve to prevent filers from invoking CEII privileges in a "sweeping" manner to encompass information that may have other confidentiality concerns under the rubric of the CEII. The Commission's commitment to discipline such filers is encouraging, but, absent specific punitive measures, the deterrence effect may not be adequate to prevent such abuses.

As a general statement, WRA questions the general use of any competitive harm argument in asserting CEII status for information related to transmission. As the Commission correctly points out, the issue should not rest upon how competitors might use the information to "steal customers or undercut prices" but on how the information could be used by terrorists in an "attack on the infrastructure." Under such a perspective, the "financial harm to the owners and operators of the facilities" would be in the form of



“lost opportunity costs as well as repair costs.” However, if such an event were to occur, then from the perspective of transmission owners there would be little competitive harm. We reach this result because transmission continues to be regulated, and terrorist attacks could and should be included under *force majeure* provisions resulting in the recovery of lost revenues in subsequent periods. In addition, costs to rebuild and repair would also generally be borne as a rolled-in cost of the system and be recovered from all users of the transmission system. Thus, it is difficult to imagine how competitive harm would result in most instances.

WRA believes that section § 388.112 may be adequate in the long run. However, in the transition (i.e. implementation) period, WRA believes that the Commission must consider an evaluation, on a generic basis, as to what portions of current Commission data filings would be exempt if requested by a utility, what portions would not likely be exempt unless a compelling case were to be made, and what information would be determined on a case-by-case basis (i.e., would vary based upon the particulars of the filer). This process might be an evolving process based upon a review and challenge of particular applications as they are submitted to the Commission. However, it is imperative that consistency, to the extent practicable be applied across filers for similar information being filed. Delays and costs incurred in obtaining information based upon a need to formally challenge the claims of CEII status by an intervenor engaged in markets in multiple areas could prove to be exorbitant.

#### **Access to CEII Information Filed at the FERC**

WRA is encouraged by the Commission proposal to create a Critical Energy Infrastructure Coordinator (“CEIC”) under § 375.313. WRA believes that the infirmities of the FOIA are legion and that it is imperative that an alternative mechanism should be implemented with the greatest dispatch possible. WRA believes that the need to know coupled with a demonstrated ability and willingness to limit distribution of the information<sup>3</sup> is a potentially workable solution to this difficult problem. As mentioned

above, WRA has found the use of a properly designed confidentiality agreement (i.e. Non Disclosure Agreements (“NDAs”)) is a ready mechanism by which to facilitate access to essential information while protecting the interests of all parties and such a mechanism should be standardized. WRA is anxious to see the objective criteria upon which this determination will be made by the CEIC. WRA hopes that such a determination can and will be made in a timely fashion. While the timing associated with FOIA requests, *viz.*, 20-30 business days may be viewed as a maximum response time, WRA would hope that for routine requests by known market participants, and their consultants, the time could be greatly reduced. WRA is concerned that unnecessary delays might adversely impact the ability of participants to participate meaningfully in ongoing Commission proceedings. While WRA recognizes the Commission’s reluctance to grant “generic approval” to frequent customers at this time<sup>4</sup>, WRA would request that this issue be revisited both to reduce the administrative burden on the Commission staff and to expedite the hearing process before the Commission.

WRA also agrees with the Commission that the CEIC should be the party to negotiate NDAs with requesting parties. As the Commission has succinctly phrased the issue:

There may be too much potential for charges of discriminatory treatment if the Commission leaves it to the discretion of the owner/operator whether to provide information, and under what conditions to provide it.<sup>5</sup>

WRA would suggest that this rule is particularly important when dealing with vertically integrated utilities. The suggestion that a requestor might circumvent the process by a direct application to the submitter is, however, a source of some concern. While offering some potential for a quicker response, this option contains some serious discrimination concerns. Unless all such requests and the submitters’ responses are made available to the CEIC so that equal access can be granted to all appropriate parties then this might

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<sup>4</sup> NOPR at point 42

<sup>5</sup> NOPR at point 45

result in favoritism being shown to certain parties at the expenses of competitors and the competitive process.

In conclusion, WRA would like to take this opportunity to commend the Commission on its efforts to craft a balanced approach to this thorny problem. WRA believes that there is a solid foundation upon which to build and welcomes the opportunity to participate further in this process in the future.

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