

**UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY**

**COMMENTS OF PUBLIC UTILITIES COMMISSION OF OHIO ON PROPOSED
RULE
FOR PROCEDURES FOR HANDLING CRITICAL INFRASTRUCTURE
INFORMATION**

Pursuant to Federal Register Notice of April 15, 2003 (Volume 68, Number 72), the Public Utilities Commission of Ohio (“PUCO”) hereby comments on the Department of Homeland Security’s proposed modification of 6 CFR Part 29 to provide “Procedures for Handling Critical Infrastructure Information.” (“CII”). On behalf of these comments PUCO further states as follows:

I. The Public Utilities Commission of Ohio

The PUCO, along with other state utilities Commissions, and in coordination with relevant Federal agencies, regulates the nation’s public utilities, including electric, natural gas, water, wastewater and telecommunications systems. By law, PUCO is mandated to ensure the reliable, safe and efficient operation of the utility services subject to its jurisdiction. The achievement of these ends, PUCO respectfully suggests, is itself an essential building block of Homeland Security. PUCO, along with other state utilities Commissions, therefore has a profound and direct interest in the terms and conditions of the availability of CII to public agencies such as PUCO.

The entities regulated by PUCO, and other state utilities Commissions -- including the nation’s gas, electric, water, wastewater and telecommunications utilities -- own and operate a central and substantial portion of the nation’s Critical Infrastructure. To fulfill their obligations under law, state utilities Commissions including PUCO have historically relied on facility owners and operators to provide them with high quality and highly detailed information on the nation’s utility infrastructure. The complete and timely provision of this information is essential. Pursuant to the Nation’s tradition of public utility regulation, much of the work done by PUCO

and other state utilities Commissions is in the public view.

PUCO is keenly aware that September 11th and Homeland Security developments compel immediate reflection on, and appropriate revision of, longstanding rules governing access to information regarding utility industry infrastructure. PUCO has an interest in working with DHS to assure that needed restrictions:

1. Protect, to the extent feasible, the ability of PUCO and other state utilities Commissions to obtain information needed to fulfill their regulatory mandate;
2. Recognize that PUCO and other state utilities Commissions are agencies with a “need to know” in regard to CII related to their mandates;
3. Recognize that state utilities Commission fulfillment of their longstanding obligation to assure the safe, reliable, and efficient provision of utility services is itself an important element of Homeland Security protection.
4. Are crafted in a manner that minimizes unneeded red tape and delay.

PUCO applauds DHS for acting swiftly after DHS’ creation to enact a rule to address issues that touch on the proper balances between secrecy and openness in government and between State and Federal authority and responsibility in utility regulation. In the spirit of shared national effort to address and resolve these issues, PUCO offers these comments from its perspective as the lawfully constituted regulator of a substantial portion of the nation’s critical infrastructure.

II Summary

In summary, PUCO has the following comments:

1. *DHS seeks uniformity among agencies but does not address the potential conflicts between its rule and the rule(s) issued by other Federal agencies.*

The DHS rule proposes to establish a “uniform” rule to govern Federal agencies who receive “Critical Infrastructure Information.” DHS does not, however, consider the relation between its terms and those that may becan imposed on CII by rule(s) promulgated by other Federal agencies. For example, the Federal Energy Regulatory Commission (“FERC”) has

recently enacted a rule to protect Critical Energy Infrastructure Information (“CEII”).¹ Also, the Bioterrorism Preparedness Act of 2001 requires water facility vulnerability assessments to be submitted to the U.S. Environmental Protection Agency. *See*, "Public Health Security and Bioterrorism Preparedness and Response Act of 2002," Public Law 107-188, June 12, 2002; Title IV; "Drinking Water Security and Safety."

The definition of CII provided in DHS’s rule would appear to be in substantial conflict with the definition provided in the FERC CEII rule. CII, as defined by DHS, is limited to information “not customarily in the public domain.” FERC, as an expert regulator of the energy utility industry, recognized that much utility infrastructure information *has* customarily been in the public domain. The FERC rule will, therefore, protect energy information even where it *has* customarily been in the public domain.

PUCO appreciates that the “not customarily” test contained in the DHS rule is that established in the Homeland Security Act itself, at Section 212 (3). Nonetheless, DHS should, with particular regard to regulated utility infrastructure, address: (a) the distinction between the DHS and FERC rule; (b) whether, in light of the findings of an expert regulatory agency (such as FERC), DHS officials may make their own determination of the customary treatment of information, and, if so, on what basis; (c) whether utility infrastructure information that, as an expert regulatory agency has found, has historically been in the public domain, may somehow nonetheless qualify as CII.

Moreover, the DHS proposal does not address how the CII review mechanisms it provides will relate to similar mechanisms created by other agencies. In particular, the review mechanisms contained in DHS’ rule appear to duplicate procedures contained in the FERC CEII rule, at least to the extent that the information at issue is deemed protectable under both FERC and DHS rules. A requirement that those, such as PUCO and other state utilities Commissions,

¹ Order No. 630, Critical Energy Infrastructure Information, 102 FERC para. 61, 190 (Feb. 21, 2003)(codified at 18 C.F.R. secs 373.312, 388.112, 388.113).

with a need for timely access to CII data must await multiple reviews may be wasteful and counterproductive. It is therefore requested that DHS review the relation of the DHS procedures to similar procedures created by other agencies for the same data, and determine whether multiple reviews are needed to validate the CII status of, and provide for restricted release of, the same information.

2. The definition of “voluntarily” provided information requires clarification in relation to information provided to agencies other than DHS.

As required by the Homeland Security Act, DHS’ proposed rule recognizes that CII is limited to “voluntarily” provided information. The test for “voluntariness” is whether the data was provided voluntarily to DHS itself. However, the method for determination of whether information is provided voluntarily is not clear where information is first provided to an agency other than DHS which, in turn, may “voluntarily” provide the information to DHS.

3. The terms of the proposed rule may be read in a manner that impairs the ability of state utilities Commissions to perform their statutory functions, and the rule should be clarified to prevent such misreading.

. The DHS rules provide, as required by the Homeland Security Act, that state agencies’ existing rights to collect data directly from regulated entities will remain unimpaired. However, in today’s world of networked and interconnected utility services, PUCO and other state utilities Commissions routinely rely on Federal agencies to provide data -- such as that related to the operation of regional transmission networks -- emanating from utilities beyond individual state jurisdictions.

In this setting, the proposed rule:

(1) provides that DHS “may” withhold CII from state agencies, without any further guidelines that limit discretion to withhold needed data from PUCO and other state utilities Commissions. PUCO respectfully requests that the rule should make clear that state utilities Commissions have a presumptive need to know data relevant to their missions. In short, the rule should be clarified to provide that CII “should” (and not “may”) be made available as long as

non-disclosure requirements can be assured;

(2) may be read to limit PUCO and other state utilities Commissions' use of CII data to purposes related to the prevention of terrorist attacks on facilities. The rule should make clear that the protection of Homeland Security requires that state utilities Commissions are not barred (subject to non disclosure requirements) from using data to fulfill the breadth of their mission.

III. On Behalf of the Requirement for Uniformity, DHS Should Address the Relation of its Definition of CII and its Review Mechanisms for CII to Those Provided by Other Agencies

The DHS proposed rule: (DHS Rule: "Notice of Proposed Rulemaking")

"establishes uniform procedures for the receipt, care, and storage of Critical Infrastructure Information (CII) voluntarily submitted to the Federal Government by the public. These procedures apply to all Federal agencies that receive, care for, or store CII that is voluntarily submitted to the Federal Government pursuant to the CII Act of 2002. 6 U.S.C. 130, *et seq.*"

However, in seeking to establish uniform rules for Federal CII, DHS does not acknowledge the existence of preexisting rules governing the same or similar data. It therefore, does not consider the relation of the proposed rule to those that already exist or that other agencies may issue in the future.

A. DHS Must Consider and Clarify the Relation Between the "Not Customarily in the Public Domain" Requirement for CII and the Findings of FERC's CEII Rule in Regard to Electric and Natural Gas Utility Infrastructure Data

With regard to the scope of the information that is to be protected as CII, DHS states, at 29.2(b):(emphasis added)

"Critical Infrastructure Information or CII means *information not customarily in the public domain* and related to the security of critical infrastructure or protected systems..."

Because of the historic nature of public utility regulation, a great amount, perhaps the preponderance, of information related to regulated electric, gas, water, wastewater and telecommunications utilities (and further "regulated" utilities) has "customarily" been "in the

public domain.” In issuing its Critical Energy Infrastructure Information (“CEII”) rule, the Federal Energy Regulatory Commission (“FERC”) explained that because this is the case, the test of whether information has customarily been in the public domain is one that *it will not* apply to CEII. In its examination of the reach of Freedom of Information Act exemption 4 (“commercial information”), FERC explained that if the test were solely whether CEII data has been previously available, FERC could not now withhold it. FERC explained that changed circumstances regarding customarily available CEII data (including those related to the deregulation of the utility industry as well as recent homeland security concerns) can be a basis for FERC’s determination that information should be protected even where, if the test were its customary status, protection would not be in order.

The proposed DHS rule, at Section 29.6 (e), states that the DHS CII Program Manager shall be responsible for reviewing all submissions to “validate the satisfaction of the definition of CII as established by the law.” Section 29.6 (e) further provides that in making the “initial validation determination, the Program Manager shall give deference to the submitter’s expectation that the information qualifies for protection.”

With great respect, given the great potential amount of claimed CII, it is not clear that the Program Manager will, at least at the onset, have sufficient expertise and experience to make the determination in his/her own right. In these circumstances deference to the submitter without required check from independent sources may not serve the public interest. While a public utility submitter may state that information has not customarily been in the public domain, the FERC and/or state utilities Commissions should nonetheless also be consulted.

In short, with regard to CII relating to infrastructure owned or operated by historically regulated utilities, it is requested that DHS clarify:

(1) whether DHS will defer to determinations as to whether information has customarily been in the public domain made by the expert regulatory agencies vested with jurisdiction over these utilities;

(2) if DHS’ intent is to revisit FERC’s finding regarding the “customary” availability of

utility data within its jurisdiction, on what basis will it do so, and how will it proceed?

B. The Rule's Potential for Reviews of the Same Data By Multiple Federal Agencies Before its Availability to State Agencies Should Be Reconsidered

DHS' proposed rule provides for review of data submitted as CII by a DHS CII Program Manager to determine whether, in fact, the characterization is correct. *See*, Section 29.4. The rule further provides, at Section 29.5 (d) (2):

“The Federal agency or DHS component forwarding the information to the CII Program Manager may not disseminate, distribute, or make public the information until the CII Program Manager has notified the agency or component that the Program Manager has validated the information.”

However, FERC's CEII rule also creates a new office to vet and approve (or disapprove) requests for CEII status and for access to information designated as CEII. It appears that under the DHS rule, those with a need to use CII that also has been submitted as CEII will have to wait the completion of two (or perhaps more, if other agencies are involved) review processes. Where, as in the case of electric utility transmission network information, time may be of the essence in the availability of the data to PUCO and other state utilities Commissions, unneeded delay in access to the data may itself negatively impact homeland security. There is no evident basis for assuming that the reviews will be sufficiently different so that multiple reviews are needed.

Similarly, as noted above, the U.S. EPA has been established as the Federal agency to review and maintain vulnerability assessments regarding the water and wastewater systems. Pursuant to Title IV of the Public Health Security and Bioterrorism Preparedness Act of 2002, the U.S. EPA developed and promulgated "Information Protection Protocol" to safeguard the security of vulnerability assessments conducted by local water systems pursuant to the Act, once these assessments are in EPA's custody. The EPA protocol provides for treatment of the vulnerability studies as "Secret national security information." EPA officials with access to the data (and EPA contractors) will require security clearance. *See*, "Protocol to Secure

Vulnerability Assessments Submitted by Community Water Systems to EPA," "Information Protection Protocol," Pursuant to Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002; effective November 20, 2002.

In sum, PUCO respectfully requests that DHS either provide explanation as to why state utilities Commissions need await DHS review for information already reviewed by FERC or other agencies with critical infrastructure rules comparable to those proposed here, or revise its rule to provide that protected infrastructure information may be made available to PUCO and other state utilities Commissions upon review by an agency operating under an (at least) equivalent set of rules to those governing DHS review.

IV DHS Should Clarify the Measure and Means by which the “Voluntariness” Test is Applied

As required by the Homeland Security Act, the proposed rule provides that CII is limited to information that is provided “voluntarily.” However, the means for testing “voluntariness” in the proposed rule raises questions as to: (1) the treatment of information provided initially to another agency, and then “voluntarily” provided by that agency to DHS; and (2) who makes the determination of “voluntariness” in regard to the provision of information to other agencies -- DHS or that further agency.

Section 29.2 (b) provides:

“Voluntary or voluntarily, when used in reference to any submission of VII to DHS means submitted in the absence of legal authority to compel access to or submission of such information; ...The term does not include information or statements submitted or relied upon as a basis for making licensing decisions, or during regulatory proceedings...the term ‘voluntary’ does not include information or statements contained in any documents or materials filed pursuant to section 12(i) of the Securities Exchange Act of 1934... “

Thus, as just quoted, CII does not include information or statements submitted or relied on in regulatory proceedings. However, this proviso appears not to cover all information

routinely relied on in regulatory decision making. For example, it does not appear to cover data included in required reports, which are not necessarily submitted in conjunction with a proceeding, and which may or may not be relied on as a basis for licensing decisions.

The rule further provides, at Section 29.2(i):

“Submittal to DHS as referenced in these procedures means any transmittal of CII from an entity to DHS. The CII may be provided to DHS either directly or indirectly via another Federal agency, which upon receipt of the CII, will forward it to DHS.”

Thus, as quoted, information that has been involuntarily submitted to an agency other than DHS may qualify as DHS if it is retransmitted by the agency to DHS, and does not meet the “voluntariness” test in regard to DHS’s authority to compel data.

However, Section 29.3(a) of the rule recognizes that:

“...The CII Act of 2002 and these procedures do not apply to any information that is submitted to a Federal agency pursuant to any legal requirement....when information is required to be submitted to a Federal agency to satisfy a provision of any law, it is not to be marked by the submitter, DHS, or by any other party, as submitted or protected under the CII Act of 2002 or to be otherwise afforded the protections of the CII Act of 2002.”

This section, it appears, provides that information submitted involuntarily to an agency does not become “voluntarily” transmitted through retransmission to DHS. At first blush, therefore, Section 29.3(a) would appear to confirm: (1) that the test for voluntariness is to met by looking at the initial submission to an agency, not the agency forwarding to DHS; and (2) information involuntarily submitted to an agency other than DHS does not become voluntarily transmitted by its forwarding to DHS.

FERC, however, has explained that while most submissions to an agency like FERC may appear to be involuntary, the question is not so simple. The Department of Justice, FERC stated in issuing “its” CEII rule, has recognized that the “existence of agency authority to require submission of information does not automatically mean such a submission is ‘required.’

Department of Justice Freedom of Information Act Guide and Privacy Act Overview, May 2002

ed., at 202.

In light of the differing provisions governing “voluntariness,” in short, DHS should clarify: (1) under what circumstances, if any, information can be classified as CII if it is involuntarily provided to another agency and then transmitted to DHS; (2) who shall make the determination as to whether information has been involuntarily provided to another agency– the further agency or DHS (or someone else)?

V. DHS Should Assure that Homeland Security Is Not Compromised By Restriction of State Agency Access to Data Needed to Fulfill Their Public Missions

Consistent with the Homeland Security Act, the proposed rule generally recognizes that state agencies must be afforded access to critical infrastructure information needed to fulfill their missions, with appropriate restrictions on further disclosure. However, elements of the proposed rule may: (1) limit state utilities Commission’s ability to use CII as needed to fulfill their missions; (2) limit their ability to gain access to CII on the timely basis they need to fulfill their missions. As we discuss here, these elements of the rule may be inadvertent.

1. PUCO Applauds DHS Recognition of the Continued Direct Information Gathering Authority of State Agencies and the Openness of Regulatory Proceedings

At the outset, PUCO lauds those aspects of DHS’ rule that assure that the authority of state utilities Commissions to obtain CII directly will not be impaired, and that recognize the continued importance of public access to proceedings that have historically been public. Thus:

(1) The rule, in accord with the Homeland Security Act, makes plain that there is no intent to impair the ability or authority of state utilities Commissions to continue to obtain information directly from entities they regulate to the extent that they have authority to do so.

Thus, Section 29.3(d) provides:

“Independently obtained information. These procedures shall not be construed to limit or in any way affect the ability of a federal, State, or local Government entity, agency, or authority, or any third party, under applicable law, to obtain information by means of a

different law, regulation, rule, or other authority.”

Similarly, section 29.8 (g) (2) provides:

“These procedures do not limit or otherwise effect the ability of a State or local government entity, agency, or authority to obtain information directly from the same person or entity voluntarily submitting information to DHS. Information independently obtained by a State or local government, entity, agency, or authority is not subject to the CII Act of 2002's prohibition on making such information available pursuant to any State or local law requiring disclosure of records or information.”

(2) The rule’s definition of “voluntary” as quoted above, excludes “information or statements submitted or relied upon as a basis for making licensing or permitting determinations, or during regulatory proceedings.” This provides that much, though not all, of the information traditionally available to the public as part of the regulatory process will not be kept from the public as CII.²

2. DHS Should Make Plain That its Rule Presumes that State Utilities Commissions Have a Need to Know CII Relevant to Their Mandates, Subject to Appropriate Disclosure Provisions, to Fulfill Their Statutory Obligations

The proposed DHS rule provides that CII “may” be made available to State agencies such as PUCO and other state utilities Commissions. Section 29.8 (b) provides:

“Federal, State and Local Government access. The CII Program Manager may provide Protected CII to an employee of the Federal Government, or of a State or local government, provided that such information is shared for purposes of securing the critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or for another

² We note that this provision is particularly important because, as provided for by Section 214 of the Homeland Security Act, and included in the proposed rule, prohibitions on *ex parte* communication do not apply to the communication of CII. Thus, the application of CII status to materials that serve as the basis for decisions in regulatory proceedings could compromise the due process rights of hearing participants who may not know about CII communications. The FERC CEII rule, by contrast to the DHS rule, provide for protected CEII status for material provided in regulatory proceedings as CEII. However, the FERC rule provides for notice in the public file that material has been provided on a CEII protected basis.

informational purpose relating to homeland security. Protected CII may be made available to a State or local government entity only pursuant to its express agreement with the Program Manager that acknowledges the understanding and responsibilities of the recipient.”

Section 29.8 (d) (3) provides:

“State and local governments may use Protected CII only for the purpose of protecting critical infrastructure or protected systems, or in furtherance of an investigation or the prosecution of a criminal act.”

As crafted, these provisions raise two potential problems for PUCO and other state utilities Commissions that may limit their ability to do their job. First, the rule appears to give the DHS Program Manager unbridled discretion to withhold CII from state utilities Commissions, without regard to their need to know or the criticality of the data to the performance of their missions. Second, in limiting the use of data to “homeland security” purposes, the proposal might be read to preclude state utilities Commissions from using data as is necessary (subject to appropriate restrictions on disclosure) to fulfill their mandates.

To place the significance of these provisions to PUCO and other state utilities Commissions in context, it must be understood that some information critical to the missions of PUCO and other state utilities Commissions may be available to them only because the information is provided to Federal regulators. The proposed DHS rule, as cited above, does recognize that PUCO and other state utilities Commissions have, and will retain, ability to directly compel production of information. However, this authority typically extends only to utilities within the jurisdiction of each Commission. In today’s networked world, effective regulation requires access to information regarding the operation of non-jurisdictional utilities that are connected to those within state jurisdiction. In the absence of access to such information through the Federal regulatory process, state utilities Commissions may not have access to the data they need to do their jobs.

In the case of electricity, for example, high voltage transmission networks are now operated by utilities on a regional basis. As, for example, the California experience illustrates, it

is essential for state regulators to have data on the ability of their jurisdictional utilities to gain reliable and efficient access to regional transmission networks to import power. PUCO and other state utilities Commissions can compel access to data on transmission from utilities within their jurisdiction, but cannot compel access to data from non-jurisdictional utilities who own or operate portions of the regional transmission network.

a. DHS Should State a Presumption that State Utilities Commissions Are Entitled To Access to CII Needed to Fulfill Their Mandates, Conditioned Only On Assurance that Appropriate Non Disclosure Requirements Will be Honored.

The proposed DHS rule merely states that the data “may” be provided to state agencies such as PUCO by the DHS CII Program Manager. It does not provide guidance that limits the DHS Program Manager in the exercise of his/her discretion. Nor does the rule provide a rationale for the delegation of such broad discretion to the Program Manager.

The FERC CEII rule, by contrast, states a presumption that, upon appropriate showing, state utilities Commissions have a “need to know” data that is relevant to their regulatory obligations.³ The DHS rule should be revised to state a governing presumption that state utilities Commissions such as PUCO are presumptively entitled to data required for the performance of their statutory mandate.

In sum, the rule should be revised to provide that CII “shall” be made available to state utilities Commissions (or other state agencies) on showing of need to know; but the availability may be conditioned on the assurance of adequate security for the information. If the concern is that data will fall into wrong hands, then the rule should provide appropriate limits in that regard.

b. DHS Should Make Clear that CII May Be Used By State Utilities Commissions to Fulfill Their Statutory Mandates Because the Fulfillment of these Mandates is a Building Block

³ The FERC notice of final rule, at para. 53, explains that state utilities Commissions “will be presumed to have a need to know information within their state involving issues within their responsibilities.” State utilities Commissions must provide an explanation of their need to know data about nonjurisdictional entities. *Id.*

of Homeland Security

Sections 29.8 (b) and 28 (d)(3)) restrict the use of CII data by State agencies to homeland security purposes. As quoted, the wording of these provisions might be read to mean that data can only be used insofar as is needed to protect the physical integrity (or the integrity of virtual systems) against terrorist attack. As explained above, in addition to using data on, for example, electric transmission networks to secure the networks against terrorist attack, State utilities Commissions use such data to assure the reliable, safe, and efficient supply of electricity. It is respectfully suggested that while homeland security is dependent on the security of the transmission network from terrorist attack, such security also depends on the nation's ability to assure that the transmission networks will, whether or not under terrorist attack, continue to be available on a safe, reliable, and efficient basis. The present wording of the rule, however, might be read to limit the use of CII data solely to efforts to protect transmission networks against terrorist attacks.

Conclusion

Wherefore, in view of the foregoing it is respectfully requested that DHS reconsider its proposed rule on Critical Infrastructure in consideration of the above, and provide for revisions and modifications where appropriate.

Respectfully submitted,

Scott Hempling
Law Offices of Scott Hempling
301-681-4669 (tel.)
301-681-7211 (fax)
shempling@hemplinglaw.com

Dan Guttman
1920 L Street, N.W.
Suite 400
Washington, D.C. 20036
202-638-6050 (tel.)
202-478-2066 (fax)
dan@dguttman.com

June 16, 2003