

Freedom of Information Act, 5 U.S.C. 552; and (iv) Does not simply give the location of the critical infrastructure.⁵⁵

This definition departed from the prior policy in that it covered proposed facilities as well as existing facilities, and in that it excluded from the definition of CEII information regarding the location of the infrastructure. The majority of comments regarding the proposed CEII definition involve the meaning of "critical infrastructure," the exclusion of location information, and the inclusion of information about proposed facilities.

1. Definition of Critical Infrastructure

25. A crucial element in defining CEII is determining what qualifies as "critical infrastructure." The NOPR proposed to define critical infrastructure as:

Systems and assets, whether physical or virtual, that are so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on the security, national economic security, national public health or safety, or any combination of those matters.⁵⁶

The NOPR proposed definition of critical infrastructure was taken directly from the USA PATRIOT Act (Act).⁵⁷ In proposing that definition, the Commission believed that all components of the energy infrastructure would qualify as critical infrastructure based on a finding in the Act that "[p]rivate business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, energy, financial services, water and transportation sectors."

26. Some commenters agree with the proposed CEII definition, with EEI noting that "[e]lectricity is an essential public service that sustains public health and welfare, including * * * the provision of power for heating and air conditioning, water supply, street and building, hospital services, food storage and processing, computers, and other electrical equipment," and as such, is vital to the nation's health, security, and economy.⁵⁸ Other commenters, however, are concerned that the language could be read to extend CEII coverage only to very large or "vital" projects. For example, the Interstate Natural Gas Association of America (INGAA) requests that the Commission

revise the definition of "critical infrastructure" to include "all facilities used in the production, generation, transportation, transmission, or distribution of energy."⁵⁹ Conversely, the HRC recommends that the Commission consider "only certain documents of high-risk, high priority cases to be available for CEII protections."⁶⁰ Some commenters recommend that the Commission leave it up to the infrastructure owner to determine whether its project qualifies as critical infrastructure,⁶¹ while other commenters voice concern that the definition of CEII is too broad.⁶² In this regard, Reporters Committee states that "[b]y defining CEII in a way that can have all major energy infrastructure fall under the CEII rubric, FERC maximizes the control it maintains over information."⁶³

27. No matter how broadly or narrowly the Commission defines critical infrastructure, in order to qualify for protection as CEII, the information must be useful to terrorists in planning an attack, be exempt from disclosure under the FOIA, and not merely give the location of the infrastructure. This effectively limits the scope of CEII protection. Moreover, the Commission does not want to define CEII in an ambiguous way that will invite disputes over which facilities are covered. The definition of critical infrastructure should encompass all facilities and components of facilities, not just facilities above a certain threshold. Even though a project may be small, destruction of the project could have serious consequences, particularly where it is part of a larger overall system. It is also important to the Commission that computer systems that control or are part of the energy infrastructure are covered. Therefore, the final rule defines critical infrastructure in new § 388.113(c)(2) of the Commission's regulations⁶⁴ as "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."

2. Information on Location of Facilities

28. The majority of commenters object to the Commission's decision not to

classify location information as CEII.⁶⁵ In this regard, some question the Commission's assumption that location information is still publicly available in the wake of September 11.⁶⁶ Others posit that the Commission should be a trailblazer, protecting location information even where it is publicly available elsewhere.⁶⁷ Certain commenters argue that while the Commission should not protect information that is publicly available from other sources, such as USGS or commercial maps, other location information may warrant protection.⁶⁸ Still others contend that information above a certain level of detail should be protected,⁶⁹ for example, "location of

⁵⁵ E.g., American Gas Association at pp. 1-2; Bonneville Power Administration (BPA) at pp. 3-4; Duke at p. 14; INGAA at pp. 8-11; MidAmerican Energy Company (MidAmerican) at pp. 6-7; National Grid USA at pp. 3 and 5; National Hydropower Association at p. 5; Northwest Natural Gas Company (Northwest Natural) at pp. 4-8; Pacific Gas & Electric (PG&E) at p. 1; Williston Basin Interstate Pipeline Company (Williston Basin) at pp. 4-6.

⁵⁶ E.g., BPA at p. 4; Duke at p. 13 (citing articles claiming that numerous groups, including the Bureau of Transportation Statistics, the Department of Energy (DOE), the International Nuclear Safety Center, the Department of Transportation (DOT), the National Imagery and Mapping Agency and the United States Geological Survey, removed geographic information from open public access after September 11); EEI at pp. 8-9 (stating that DOE has removed information regarding nuclear facilities containing weapons-grade plutonium or highly enriched uranium, DOT has removed interactive oil pipeline maps, and the Energy Information Agency has removed similar information); and INGAA at p. 10.

⁵⁷ E.g., American Gas Association at p. 2; Northwest Natural at pp. 7-8; INGAA at pp. 10-11; PG&E at p. 1; Williston Basin at pp. 4-5. These commenters believe that if the Commission protects this information, others may follow suit, eventually "aging" the information in the public domain, making it less useful to potential terrorists. The Commission appreciates these commenters' views, but believes that while this information might gradually become outdated in the public domain, the probability is remote given the availability of GPS equipment and commercial satellite images.

⁵⁸ E.g., PJM Interconnection (PJM) at p. 2, SCE at p. 5. For its part, INGAA, an advocate of protecting location information, concedes "[t]o the extent that maps and/or location information are generally and readily available to the public and contain only non-detailed information of the location of energy facilities [such as state- or county-level maps]," such information could be excluded from the definition of CEII. INGAA at p. 8.

⁵⁹ E.g., GE at p. 6 (location of certain types of equipment, such as "phase-angle regulators or critical FACTS devices" should be protected); MidAmerican at p. 6; National Hydropower Association at p. 5 (protect information that provides "details of the sensitive parts of facilities"); North American Electric Reliability Council (NERC) at pp. 4-5 (protect "detailed network topology maps and the details of the interactions performed by Supervisory Control and Data Acquisition (SCADA) and Energy Management Systems (EMS)"; Northwest Natural at p. 5 ("assumes that medium to highly detailed facility location maps" will be protected); PG&E at p. 6.

⁵⁵ 67 FR 57994 at p. 58000, FERC Stats. & Regs. ¶ 32,564 at p. 34,548.

⁵⁶ *Id.* at pp. 58000-01, ¶ 32,564 at p. 34,548.

⁵⁷ Pub. L. 107-56.

⁵⁸ EEI at p. 2.

⁵⁹ INGAA at p. 3.

⁶⁰ HRC at p. 5.

⁶¹ E.g., MidAmerican Energy at p. 3; National Grid USA at p. 5.

⁶² E.g., HRC at p. 4; Reporters Committee at p. 8; Society of Professional Journalists at p. 2.

⁶³ Reporters Committee at p. 8.

⁶⁴ See new 18 CFR 388.113(c)(2).