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June 17, 2020

The Honorable Lisa Murkowski
The Honorable Joseph Manchin
Members of the Senate Energy and Natural Resources Committee
304 Dirksen Senate Building
Washington, DC 20510

Subject: Requested Hearing on Energy Infrastructure Protection Act of 2020, S. 3688

Dear Chairman Murkowski, Ranking Member Manchin, and Members of the Committee:

We urge you to have a public hearing on S. 3688, the Energy Infrastructure Protection Act of 2020. As currently drafted, this bill would enable utilities to keep many aspects of their regulated operations secret from their ratepayers and the general public. The national security purpose of the bill is not apparent. Because so-called Critical Energy Infrastructure Information (CEII) is already protected under the 2015 FAST Act, this bill should not be necessary.

We agree that CEII deserves protection from potential adversaries. Federal Energy Regulatory Commission (FERC) Order 833 implemented the FAST Act in 18 CFR Parts 375 and 388. The U.S. Department of Energy implemented the FAST Act in 10 CFR Part 1004. These balanced rulemakings provide ample protection for real CEII.

S. 3688 is based on a dubious premise—that utility information normally released through public ratemakings, environmental impact statements, disclosures to affected landowners, Freedom of Information Act (FOIA) requests, and other regulatory proceedings somehow increases risk of infrastructure attack and should be “CEII.” With Google Earth showing the locations and configurations of grid assets, commercial services such as Genscape selling real-time data on electricity flows within the Bulk Power System, and zero-day cybersecurity exploits available for commercial sale, adversaries do not depend on regulatory disclosures to conduct attacks on unprotected infrastructure.

Real protection comes from funded security improvements, not from government secrecy. An unfortunate consequence of S. 3688 would be to conceal information from state public utility commissions and their ratepayer constituents—the very bodies that must approve rate increases to fund security improvements.

S. 3688 would hide utility mismanagement, hamper government regulation, and restrict research. Under the wording of the bill, utilities would have complete discretion as to how their “CEII”

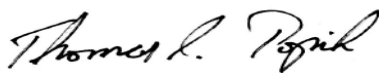
would be protected within their facilities, even if their security procedures are inadequate. In contrast, the U.S. government would be hamstrung by onerous requirements. For example, utilities can employ foreign nationals to generate and use “CEII,” but employees at Department of Energy laboratories would require a Top Secret security clearance to access this same information.

The CEII designation is already being used by utilities to conceal violations of regulatory standards. Anxious to preserve working relationships with utility executives, bureaucrats at FERC seldom dispute CEII designations. For example, FERC allowed the CEII rationale to conceal the identity of utilities who committed 3,619 cybersecurity violations from 2010 to 2019, even when the violations were mitigated and therefore would be of no use to adversaries. FERC also supported the CEII rationale in order to conceal the identity of utilities which violated other reliability standards, including vegetation management standards for transmission lines (i.e., tree trimming standards). With its automatic provisions for long-term information concealment and minimal oversight provisions, S. 3688 would facilitate CEII abuse.

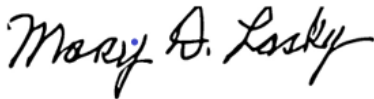
In our democratic society, we recognize that when information is concealed by classification schemes, there must be corresponding protections for the public interest. For DoD information, 6 CFR § 7.21 prevents classification to conceal inefficiency, violations of law, or administrative error; prevent embarrassment to a person, organization, or agency; restrain competition; prevent or delay release of information that does not require protection in the interest of national security. None of these explicit protections for the public interest are contained in S. 3688.

Again, we request your committee hold a hearing on current procedures for protection of CEII and why this bill for further restrictions has been introduced. We would like to provide a witness. It is apparent that utility interests have had substantial input into the drafting of S. 3688. Advocates for the public interest should have their time before the committee, too.

Sincerely,



Thomas S. Popik, President



Mary Lasky, Secretary



Ambassador Henry F. Cooper, Director



William R. Harris, Director Emeritus