

# **DEPARTMENT OF HOMELAND SECURITY**

**UNITED STATES COAST GUARD**

**TRANSPORTATION SECURITY ADMINISTRATION**

## **OFFICE OF MANAGEMENT AND BUDGET**

DOCKET NOS. TSA-2006-24191 AND USCG-2006-24196

### **TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL IMPLEMENTATION**

Comments of the Electric Utility Industry Critical Infrastructure Sector,  
through  
the Edison Electric Institute,  
the American Public Power Association,  
and  
the National Rural Electric Cooperative Association

#### **I. Preface**

Herein are the joint comments in these proceedings of the Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association, united in representing the electric utility industry critical infrastructure sector. Together, the filers of these joint comments represent all segments of the U.S. electric utility industry, and the vast majority of its industry participants. This industry is one of the Critical Infrastructures explicitly specified in the USA PATRIOT Act, the Homeland Security Act, and Homeland Security Presidential Directive No. 7, and is a key component of Emergency Support Function 12 under the National Response Plan.

Edison Electric Institute (EEI) is the association of United States shareholder-owned electric companies, international affiliates and industry associates worldwide. Our U.S. members serve 97 percent of the ultimate customers in the shareholder-owned segment of the industry, and 71 percent of all electric utility ultimate customers in the nation. They generate almost 60 percent of the electricity produced by U.S. electric generators. EEI represents the interests of its members and their customers in regulatory, legislative, and judicial arenas, and has filed comments on the Maritime Security Regulations, as well as in other proceedings before DHS.

The American Public Power Association (APPA) is the national service organization representing the interests of over 2,000 not-for-profit, publicly-owned utilities throughout the United States (all but Hawaii). Collectively, public power utilities deliver electricity to

one of every seven electricity consumers (approximately 43 million people), serving some of the nation's largest cities. However, the vast majority of APPA's members serve communities with populations of 10,000 or less.

The National Rural Electric Cooperative Association (NRECA) is the national service organization that represents the nation's 916 private, not-for-profit, consumer-owned cooperative electric utilities, which provide electric service to 37 million people in 47 states.

Together, we are interested in these proceedings and the proposed regulations for implementing a Transportation Worker Identification Credential (TWIC) program in the maritime sector because we own or operate facilities (1) currently covered by the Maritime Security Regulations (33 C.F.R. §101 & §105), and (2) potentially covered by the proposed TWIC requirements. As owners and operators of one of the most fundamental of all Critical Infrastructures, we take, and have taken, our responsibilities for homeland security and critical infrastructure protection very seriously. We were key participants in the formation in 2000 of the Electric Sector Information Sharing and Analysis Center, in partnership with the FBI and the Department of Energy. We have worked closely with DHS since its inception and through its formation, and each have a seat on the leadership of the Electric Sector Joint Coordinating Council established (from the prior-existing Electric Sector Coordinating Council) under the DHS Critical Infrastructure Partnership Advisory Council pursuant to the Secretary's order of March 24, 2006 (71 Fed.Reg. 14930-14933).

## **II. Summary**

The electric utility sector is not a part of the maritime sector, per se, even if some utility facilities are considered to be covered by the Maritime Security Regulations (33 CFR §101 & §105). Electric utility facilities, including the fuel-handling facilities of a power plant, are really not port facilities in the sense likely to have been intended by Congress when it instructed the Coast Guard to implement greater transportation security at port "secure area[s]" (Maritime Transportation Security Act, 46 U.S.C. §70105): a power plant receiving fuel by water receives little or nothing other than that through such facility — it does not receive modular shipping containers or miscellaneous materials, and its dock facilities generally have very little activity. Certainly utility personnel who have nothing to do with transportation, and little if any connection to fuel-handling facilities, were highly unlikely to have been intended by Congress to be covered by the identification requirements of 46 U.S.C. §70105.

It simply is not reasonable to subject an entire power plant to all of the security regimens of a major shipping center like the Port of Los Angeles. Most utility fuel handling facilities receiving shipments from navigable waterways have no large connection to the remainder of the utility facilities, and are usually physically separate, or separately controlled. The basic nature of the activities at utility fuel handling facilities is very different from that of commercial ports. Moreover, the possible harm is very

different, and the likelihood of harm cannot be anywhere near as significant as at traditional or commercial maritime port facilities.<sup>1</sup>

For these reasons, we request that, for the vast majority of utility facilities, the TWIC proposal:

- not apply at all, or
- if, nonetheless held applicable in any respect to utility facilities, certainly not apply to facilities already operating under significantly equivalent security requirements, such as those of the Nuclear Regulatory Commission (NRC), and
- in any case where the TWIC requirement is held to be applicable to a utility facility, not automatically apply to the entire facility.

Further, we recommend that,

- no matter what portion of utility facilities are covered, if any at all, implementation of the TWIC program by utilities be postponed until all technical and managerial issues are resolved (but not less than twelve months), and
- if any TWIC requirements must go into effect for utilities, temporary or interim access procedures be permitted for situations (1) demanding immediate, unplanned, or temporary access longer than 90 days, (2) when the government system(s) or the required equipment are not functioning, and (3) during administrative delay.

### III. Discussion

#### A. There are Problems in the Regulatory Analysis

As described in the proposed regulations, and at the public meetings, it is clear that the TWIC requirements are intended to apply to (1) transportation workers (2) that have “unescorted” access to “secure” areas of sensitive port facilities. However, as an unintended consequence of this requirement, many thousands of utility personnel will be covered despite being in neither category, in a practical sense. We believe that this will impose an unjustified burden on utilities, and that it is far more complicated for implementation of the TWIC program than anticipated by the U.S. Coast Guard (USCG) or the Transportation Security Administration (TSA).

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<sup>1</sup> On the last point of the threat level facing our sector, we refer you to the recently completed DHS Threat Assessment of the electric utility sector, discussed with sector representatives at a secured briefing in DHS offices only two weeks ago. While we do not believe that assessment is public, we believe it could be made accessible to appropriate personnel of the U.S. Coast Guard and the Transportation Agency.

We are electric, or electric and gas, utilities — we are not in the business of transportation any more than any other element of the nation’s economy which depends upon transportation and operates receiving facilities. Our facilities effectively have little or nothing to do with ports as understood by most people (and likely as intended by Congress). The portions of our facilities devoted to receiving critical supplies (primarily fuel such as coal, with associated bulk products,<sup>2</sup> and fuel oil) via water, are small and strictly for our own use.

The TSA/USCG estimate of impact appears not to include the many thousands of utility personnel who would fit the overly broad description of covered individuals, and does not account for the massive disruption it is likely to have on critical utility operations. Just the utilities we have heard from on this issue estimate a potential impact of about 30,000 utility employees. Due to the short comment period, many other utilities have not yet assessed the potential impact on them. In addition, some utility facilities already (at least informally) have been excluded by certain Captains of The Port (COTPs) from coverage under the TWIC requirements — to include those facilities as would potentially occur under the new regulations has the potential for increasing the estimate of affected utility personnel by several more thousands.

The broad spectrum of workers who need “unescorted access” to utility facilities, coming from unpredictable sources (as discussed in section III.B, below), is mostly not even aware they ever would work at a “port” facility. Numerous other entities and individuals not employed by utilities may be covered by these requirements under the broadest potentially applicable definition of covered utility property. This can include rail, trucking, and other service functions (food service, cleaning, etc.), whether or not related to transportation. Additionally, there could be employer liability if personal information is lost or improperly made public by the government.

Utilities have an extreme need for speed in responding to emergencies, as demonstrated during the response to the hurricanes of 2004 and 2005. They require immediate access in order to ensure the continued functioning of the critical facilities we own and operate — facilities fundamental to the functioning of all other critical facilities, including ports and government. Utilities cannot wait thirty days, sixty days, or likely longer, for TWIC cards and potentially attendant adjudication.

Other, more stringent security measures are already in place for many utility facilities, such as NRC requirements, existing utility practices, HAZMAT endorsement requirements, HAZMAT safety and handling requirements, and industry mandatory security standards for critical cyber assets. As a result, the TWIC program is unnecessary, and potentially duplicative or conflicting. This has the potential for unnecessarily (1) increasing compliance costs and (2) exposing utilities to the increased risk of regulatory liability.

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<sup>2</sup> Such bulk products can include lime, aggregates, and coke.

Perhaps because of the unintended or unanticipated impact on utilities, the proposal's impact in several other areas has been insufficiently assessed, especially regarding small utilities.<sup>3</sup> As the rulemaking notice states in Part VII.B, "At this time, we have not determined if this proposed rule would have a significant economic impact on a substantial number of small entities." Moreover, it is not clear how small entities are supposed to comply. The notice states in Part VII.B that "we foresee small entities complying with the proposed rule in a number of ways." However, there is no mention of the possibly acceptable ways to do so. Further, for all of the problems noted below, and especially those of a technical or managerial nature, the likely and potential cost impacts have been seriously under-estimated. While this holds true for all utilities, it has an even greater adverse impact on small cooperatively-owned and publicly-owned utilities.

Further, municipal and other government-owned utilities will be subject to unfunded mandates far more than simply as owners or operators of vessels as briefly alluded to in Parts VII.E and VII.F. As noted elsewhere herein, the proposal's broad definitions could conceivably necessitate every employee and every contract or sub-contract laborer who has any access to any portion of a subject utility facility for any period longer than 90 days to obtain a TWIC card. This could have a devastating financial impact on some government utilities. The need to remedy these latter two regulatory-analysis deficiencies makes it even less likely the TWIC program can be implemented on the proposed schedule, as discussed below.

#### B. The are Numerous Technical, Managerial, and Legal Issues

Given the many implementation challenges, as noted below, it does not seem possible that the TWIC program will be implemented by TSA and the USCG on schedule. This puts into serious question both (1) the ability of utilities to implement the program as apparently required, as well as (2) the potential liability of utilities unable to implement the program because the necessary government systems are not yet in place. For instance, thirty to sixty days is unlikely to be the actual period needed for TWIC approval and card issuance. And, as discussed below, even a thirty-day period would be unacceptable to utilities due to their need for speedy facility access.

The Government Accountability Office very recently noted<sup>4</sup> that the "I-9" process for employment verification is flawed. This makes it very unlikely that the proposed TWIC program, especially if it relies on the same or similar databases, will produce reliable identity verification in a timely manner. As the I-9 process is generally intended to be an

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<sup>3</sup> Note the comments in these proceedings of the Small Business Administration Office of Advocacy (July 5, 2006), that recommends revising and correcting that analysis. Those comments also raise a number of practical issues similar or parallel to the issues raised in section III.B herein.

<sup>4</sup> "Immigration Enforcement - Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts," Testimony of Richard M. Stana, Director - Homeland Security and Justice, before the Subcommittee on Immigration, Border Security, and Citizenship, of the Senate Committee on the Judiciary (June 19, 2006).

employer-enforced program, it is simpler than the proposed TWIC process. Moreover, even DHS has recognized there are serious structural problems that make employer enforcement of the I-9 process ineffective.

While DHS has proposed to revise the I-9 process, it has not yet done so. Further, and even more disturbing, a pilot program for improving the I-9 process itself has serious problems. In particular, and most relevant to implementation of a timely, accurate TWIC program, the GAO notes that the pilot does not have the ability to detect identity fraud, and that DHS has not completed entering data into the pilot's databases. These assessments of a simpler, already existing identity program do not bode well for timely, effective implementation and operation of the new, far more complex TWIC program.

The proposed schedule for TWIC program implementation by utilities can not be known at this time. It is not clear whether utility facilities will be in the first "wave" of facilities for which TWIC will be required. Nonetheless, it is unlikely that any affected facilities will be able to obtain the required TWIC cards in the time allotted. For instance, DHS does not appear yet to have sufficient budget, any staff, or the necessary systems in place and proven operational to implement the program. As DHS appears unable to implement the program on its own proposed schedule, it is unreasonable to expect entities and personnel subject to the TWIC requirements to comply with the program on that same schedule.

It also appears that untested or unproven technology is to be required. There is no proposal for what to do when readers are damaged or otherwise non-functioning. This can easily occur with "contact" card readers, especially when located in an outdoor or marine environment. Some sort of alternate access control, or some temporary waiver process will be necessary in such circumstances. There is a similar lack of real-world experience with the concept of linking together all the many separately-operating systems.

There appears to be no contingency plan for a loss of government system(s), such as can easily happen in cases of natural disaster or other incidents of national significance. However, it is in those very circumstances that our employees and contractors must not be prevented from rapidly accessing our own sites. Rapid access is fundamental to assuring continuity of our critical infrastructure service to customers, including those such as port facilities and government.

Nothing in the proposed regulations appears to address the critical safety issues involved with equipment used in strictly regulated liquid natural gas (LNG) environments. Owners and operators of such environments<sup>5</sup> are required to use "intrinsically safe" or "self-contained" (anti-spark) equipment. Such requirements may completely preclude the use of the mandated "contact" card readers in those areas. At

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<sup>5</sup> In the utility sector, LNG facility owners or operators are primarily investor-owned utilities, and APPA takes no position on LNG-related issues.

the least, such requirements may make the use of “contact” readers so cumbersome as to be completely impractical.

There is almost certainly going to be duplication or conflict between these proposed regulations and several pre-existing requirements. Some of those requirements simply cannot be waived or pre-empted by DHS, especially regarding NRC-jurisdictional and LNG facilities. Moreover, the DHS office for preventing problems from inconsistencies and duplication (the Office of Screening Coordination and Operations) is not functioning and appears not to have received funding for 2007. While more stringent state requirements or existing utility practices are permitted under this proposal, it is likely that the costs associated with the unnecessarily broad impact of the proposal, as noted herein, will force all security practices down to the lower TWIC level. Such a “lowest common denominator” effect could be avoided if the scope of the application of the TWIC program were more focused and restricted.

Workers who need “unescorted” access to utility facilities during emergencies, repairs, scheduled maintenance, environmental abatement projects, and retrofits lasting longer than 90 days can come from many sources which cannot be predicted. Usually, they are employees of engineering and contracting firms, and are under direct utility control. Most of those employers utilized by the utility industry are used at utility facilities in many different kinds of locations. Therefore, they and their direct employers are not even aware they ever would work at a “port” facility requiring specially secured access. As a result, they are certainly not likely to have TWIC cards prior to being called to duty. And, even if they did, blocking access after three incorrect “PIN” entries is impractical for credentialed workers that rarely require such access, but need it at a moment’s notice.

Applying the TWIC program to non-transportation workers ignores the realities of working life. For instance, three-factor authentication is far more stringent and burdensome than necessary for most workers at utility facilities of any kind outside of the nuclear context. Also, requiring finger-print biometric data from manual laborers may be impractical due to constant impairment of the print from tar, chemicals, scarring, or other common real-world occurrences. More fundamentally, many manual laborers may not be eligible under the proposed denial criteria, and their actual or direct employers may have no idea that those workers will even need to begin the TWIC card application process until immediately prior to beginning work. This will make it potentially impossible to obtain a sufficient work force in a timely manner. Further, the cost of TWIC cards may be prohibitive for manual laborers needed during vital utility facility work such as emergency repairs, environmental abatement, or maintenance.

A number of managerial issues are insufficiently addressed, such as:

- the treatment of background investigations if a TWIC request is withdrawn;
- the enrollment process being unnecessarily cumbersome, focused on individual submissions and office visits, and not allowing for group submittals and card-

conveyance;

- the likely lack of sufficient processing centers or staff;
- the lack of any procedures for the protection of worker information as required under 46 U.S.C. §70105(e);
- the lack of functioning, proven system implementation and integration, as noted elsewhere herein.

There are likely to be conflicts between a worker's bargaining-unit rights and the TWIC requirement. First, the simple change in situation, now that a TWIC card will be considered a requirement for performing the employee's job, is very likely to require a change in the bargaining agreement. More fundamentally, whenever an application for that required TWIC card is denied, particularly since the reasons will not be communicated to the worker or their employer per 46 U.S.C. §70105(e). Such a procedure may be considered a denial without cause in violation of the employee's rights (despite the proposed governmental adjudication procedures). Further, there may be a conflict with the rights of the employee under the Privacy Act of 1974 (5 U.S.C. §552a).<sup>6</sup> At the very least, these questions will require time-consuming discussion, as well as the potential of contentious and expensive renegotiation of all applicable bargaining agreements or contracts.

It is not yet clear what exactly is meant by "unescorted" access. In the absence of a TWIC card, it could require actual, one-on-one accompaniment or "monitoring" at all times, in all parts of a covered facility. For utilities, this is unmanageable as well as unjustified by a risk analysis, and unnecessary from a security perspective. For instance, workers engaging in emergency repairs or critical maintenance or construction of facilities and equipment at a utility location typically do not have unlimited access to all areas of the facility (such as the control room), but are not usually accompanied one-on-one, or even in a group while they are performing their duties, particularly while in the construction or work zone. This is true for highly skilled engineers as well as for manual laborers, as many types and levels of skills are needed on a utility work team. Moreover, the construction or work zone is normally well-defined and well-known, as are other, more restricted areas, and constant observation to observe potential non-authorized behavior is simply not necessary.

It is not yet clear what exactly is meant by "secure" area. At least during the pilot TWIC program, some COTPs have stated that the secure area may be limited to identifiable, separately controlled areas immediately adjacent to the fuel handling facilities associated with navigable waterways. Other COTPs, however, have not taken such a common-sense approach. It is not clear at this time which of those two approaches will be required under the proposed TWIC regulations.

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<sup>6</sup> See Department of Justice "Overview" at [http://www.usdoj.gov/foia/04\\_7\\_1.html](http://www.usdoj.gov/foia/04_7_1.html).

We believe that utility fuel-handling facilities, whether or not subject to the Maritime Security Regulations should be the only facilities, if any at all, subject to the TWIC program. Further, we believe that those facilities, if at all subject to the TWIC requirements, should only be subject to them while actually in use for off-loading from barge or boat. Such operations typically occur only during a very small percentage of any year. This is similar to (as the inverse of) the proposed concepts of a “passenger access area” (§104.106), or a “public access area” (§105.106) where escort is not needed.

In closing, we also note that crews of foreign vessels are not covered by the TWIC proposal. This creates the potential for a much larger security “hole” than any created by non-credentialed utility personnel at some relatively small, isolated utility fuel-handling facility. If foreign vessels can be excluded from coverage under the TWIC program, in deference to their own security measures, then domestic utilities and associated personnel should also be excluded in reliance on their security measures.

#### **IV. Proposed Utility Solution and Request**

For all of the reasons stated above, the TWIC proposal should not be applied to utility facilities at all. However, if the USCG and TSA determine that they are applicable to utilities, the TWIC requirements certainly should not apply to facilities already operating under NRC, or other stringent, security requirements. And, if applicable at all to utilities, the TWIC requirements should not be applied to the entire facility. A more limited area should be determined and controlled by the utility. That determination and control would then be communicated to the COTP, as part of the process of approving facility security plans under the Maritime Security Regulations.

No matter what utility facilities, or portions thereof, are covered by the TWIC requirements, if any at all, utility implementation should be delayed until all technical and managerial issues are resolved, and certainly by not less than twelve months. Further, even after any TWIC requirements go into effect for utilities, temporary or interim access procedures satisfactory to the critical infrastructure needs of utilities must be permitted. This must be applicable also to contractors and others who require immediate, unplanned, temporary, or emergency access for longer than 90 days. Further, this must apply to any situation when the government system(s) or the required card-reading equipment are not functioning, or during administrative delay, such as for appeals of TWIC-card denials.

We recognize that there may be some isolated, uncommon circumstances where utility fuel handling facilities are located extremely close to highly sensitive maritime transportation facilities. In such cases, and when justified based on substantial risk/benefit assessments, specialized, stringent personnel identification arrangements can be developed on an individual basis and submitted to the COTP as part of the process of approving facility security plans under the Maritime Security Regulations.

Finally, the USCG and TSA have asked for comment regarding the proposed possible extension of the TWIC program to other transportation sectors such as pipelines. The pipeline situation, in particular, directly affects some gas/electric utilities. Based on the problems noted above, we urge that, until the TWIC program is working accurately, efficiently, and reliably in the maritime sector, it not be extended to any other area.

## **V. Conclusion**

Wherefor all of the foregoing reasons, we united representatives of the electric utility industry critical infrastructure sector request that the Department of Homeland Security, through the United States Coast Guard and the Transportation Security Administration, accept and adopt the above requested proposals.

Respectfully submitted,

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