

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to
Continue Implementation and
Administration of California
Renewables Portfolio Standard
Program.

Rulemaking 08-08-009
(Filed August 21, 2008)

**CLEAN COALITION RESPONSE TO SCE'S PETITION FOR MODIFICATION OF
D.10-12-048**

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1/16/12

CLEAN COALITION RESPONSE TO SCE'S PETITION FOR MODIFICATION OF D.10-12-048

The Clean Coalition respectfully submits this response to Southern California Edison's (SCE) Petition for Modification (PFM) of D.10-12-048, submitted on Dec. 16, 2011.

The Clean Coalition is a California-based advocacy group, part of Natural Capitalism Solutions, a non-profit entity based in Colorado. The Clean Coalition advocates primarily for vigorous feed-in tariffs and "wholesale distributed generation," which is generation that connects primarily to distribution lines close to demand centers. Clean Coalition staff are active in proceedings at the Commission, Air Resources Board, Energy Commission, the California Legislature, Congress, the Federal Energy Regulatory Commission, and in various local governments around California.

Our main points are as follows:

- The Critical Infrastructure Information Act ("Act") only applies to information submitted voluntarily to the federal government and, in particular, to the Department of Homeland Security
- These circumstances do not apply in the present case so the Act has no bearing on this matter
- The Commission opined correctly in D.10-12-048 that the Act has no bearing on the information SCE discusses in its PFM, but mis-reads the statute
- The Commission relied in D.10-12-048 on a 2009 California Appellate case that also misreads the Act. The Commission and the appeals court should have opined that the Act does not apply at all in either matter because the Act only protects information submitted voluntarily to the federal government

- State and local governments are discussed in the Act, but only insofar as information is provided to them by DHS, which must be previously received from a private entity. This is not the case in the present matter
- Accordingly, SCE's arguments lack merit with respect to the Act and the PFM should be rejected in its entirety.

I. Introduction

The Commission decision created the Renewables Auction Mechanism (RAM) in December, 2010, with D.10-12-048. RAM is an auction program for renewable projects 20 megawatts and smaller. RAM is innovative in a number of ways, including in its requirements for the sharing of interconnection data and the creation of online maps for use by parties bidding into the RAM. The Commission's intent with these requirements was to increase access to key information for bidders, in order to spur development of viable renewable energy projects, by making it easier for developers to obtain early-stage information about interconnection potential costs and other hurdles. The decision imposed a number of criteria on the utilities in this regard and also required that the utilities work continuously to improve the maps.

The Commission imposed further data sharing requirements in Resolution E-4144, which implements further RAM program details. In particular, Res. E-4144 requires that SCE provide significant further map information by March 31, 2012.

On December 16, 2011, Southern California Edison (SCE) submitted a petition for modification (PFM) of D.10-12-048. SCE argued that the Critical Infrastructure Information Act (CIIA or Act) protects certain interconnection information that D.10-12-048 and Res. E-4144 required to be shared with the Commission and made public in the interconnection maps. SCE argues (p. 1, PFM) that "the Decision should be modified to prevent unrestricted public access to confidential transmission and distribution system information, the dissemination of which presents a serious risk to public safety and

security.”

SCE also argues (p. 4) that the information the Commission requires by March 31, 2012 is unnecessary: “The information [already] provided should be sufficient to support the development of small generation.”

II. Discussion

a. The Critical Information Infrastructure Act of 2002 only protects information provided voluntarily by private entities to the Department of Homeland Security

The Critical Information Infrastructure Act of 2002 (“CIIA” or Act) is an attempt to encourage the sharing of information, by private parties, with the federal government, by eliminating disincentives that private entities had previously faced when deciding whether or not to submit information to the federal government about security vulnerabilities at their facilities.

Accordingly, the CIIA simply doesn’t apply to the situation at hand because the Commission is not part of the federal government and DHS has had no involvement in RAM or any related program.

We describe in further detail below the structure and requirements of the CIIA with respect to protected information, and point out other flaws in SCE’s reasoning.

The Act and its regulations (6 C.F.R. § 29, *et seq.*) make a distinction between critical infrastructure information (“CII”) and Protected Critical Infrastructure Information (“PCII”). (6 C.F.R. §29.2 (b) and (g)). Only PCII is entitled to the protections of the CIIA. (6 C.F.R. § 29.5). CII becomes PCII only when:

1) It is voluntarily submitted ... to the Department of Homeland Security’s (DHS) PCII Program Manager or the PCII Program Manager’s designee;

2) The information is submitted for protected use regarding the security of critical infrastructure; and

3) The information is labeled with an express statement that it is being voluntarily submitted to the Federal government in expectation of protection from disclosure as provided by the CIIA. (*Id.*)

“Information that is not submitted to the PCII Program Manager or the PCII Program Manager's designees will not qualify for protection under the CII Act.” (6 C.F.R. 29.5(b)).

Once the Department of Homeland Security (“DHS”) determines that information it receives is PCII, certain protections apply at the federal and state level – but only if information is submitted first to DHS. At the federal level, for example, PCII cannot be obtained through a FOIA request. (6 U.S.C. §133(a)(1)(A)). At the State and local level, when a State or local government or government agency receives information designated PCII, from DHS, it cannot make the information available under local laws requiring disclosure, and it cannot be used for purposes other than protection of critical infrastructure. (*Id.* at § 133(a)(1)(E)).

The CIIA distinguishes between submitters of CII and recipients of PCII. *See County of Santa Clara v. Superior Court* (2009) 170 Cal. App. 4th 1301, 1319.¹ State and local government entities are required to protect and maintain the information only when PCII is given to the state or local government by DHS. (6 C.F.R. 29.5(c)).

¹ The appellate court seemed to miss the fact that the Act only applies to “state and local governments” if the information at issue is first submitted to DHS. (6 U.S.C. sec. 133(a)(1)(E)(iii) is subordinate to sec. 133(a)(1), which refers only to information submitted to “a covered federal agency”). The court focuses instead on a distinction between the County in that case being a recipient of information rather than a submitter. This is also true, but the more basic issue with respect to the Act is the fact that the Act applies to state and local governments only if the information at issue has first been submitted to “a covered federal agency,” which was not the case. The relevant passage from *County of Santa Clara* is on page 9:

The CII Act provides that CII that has been voluntarily submitted "shall be exempt from disclosure" under the federal Freedom of Information Act (5 U.S.C. § 552 *et seq.*). (6 U.S.C. § 133(a)(1)(A).) As more particularly relevant here, it also prohibits disclosure of PCII "pursuant to any State or local law requiring disclosure of information or records"--but only "if provided *to* a State or local government" (*Id.*, § 133(a)(1)(E)(i), italics added.)

Accordingly, information provided to the Commission by a utility is not PCII, and is not entitled to the protection of CIIA. As the PUC already stated in D.10-12-048, the CIIA “has no bearing on the Commission’s decision about whether information should be provided to potential distributed generation developers” because no PCII has been provided to a state or local government agency. (D.10-12-048 at 73). The Commission did not make it clear, however, in D.10-12-048 that the Act simply does not apply because the information at issue has not and will not be submitted first to DHS, and then to a state or local government. This is a key distinction and the Act is only applicable under this condition (and others).

Despite the protections offered by the statute, the CIIA specifically provides that CII can be obtained independently by state, local, and federal government through other applicable laws including those that disclose the information generally or broadly to the public. (6 U.S.C. § 133(a)(2)(c)). Even if information submitted to another agency is identical to that voluntarily submitted to DHS as CII, the information is not protected if obtained through means independent of the CIIA. (6 C.F.R. 29.3(a)). The CIIA only protects information that the private sector does not otherwise disclose to the government.

b. SCE’s legal arguments mis-read the Act’s applicability to state and local governments

SCE mis-reads the statute and its legal reasoning is unsound. The PFM states that “SCE has likely already voluntarily provided the Commission with at least some information about ... its distribution and transmission systems.... Any such voluntarily supplied information would fall squarely within the scope of the Critical Infrastructure Information Act [], which prevents CII that is voluntarily shared with federal, state or local government agencies from public disclosure by the government.” (SCE PFM at 5-6).

This account of the CIIA is inaccurate for four reasons. First, at the most basic level, the information the CPUC requires SCE to make public is not PCII because it was not voluntarily submitted to the DHS for protection.

Second, the PFM states that any CII voluntarily shared with federal, state or local government agencies is prevented from being publicly disclosed. (SCE PFM at 5-6.) This is simply not true. Only CII that is voluntarily shared with DHS, and which meets the other elements of PCII discussed above, is entitled to protection under CIIA.

Third, even if the information the CPUC is requesting had been submitted to DHS, and even if it had been deemed PCII, the CIIA would offer no protection from CPUC's request because the information was not received by the CPUC from DHS.

Finally, even if the information were PCII, the CIIA does not limit the ability of a state agency to obtain and make public information about SCE's transmission and distribution grid in a manner legally independent from the CIIA.

c. Much of the information SCE worries about as a public safety risk is already in the public domain

SCE also argues that public safety and grid reliability demand that the information the Commissions requires to be made public remain, instead, confidential. SCE worries about the potential for attacks on large substations to harm the grid. (PFM at 4): "If one or more substations serving major loads were attacked, it could result in a wide scale outage for a prolonged period." This argument also lacks merit because the location of SCE substations is readily apparent from their very presence – they're hard to miss. Moreover, public maps are already available showing the location of all SCE substations. For example, the CEC/CPUC Renewable Energy Transmission Initiative (RETI) has released various maps in recent years showing the location of substations and other electricity infrastructure.

III. Conclusion

In sum, the Act does not apply to the information SCE seeks to keep confidential, for a variety of reasons, but primarily because CII must first be submitted to DHS. Thus, the PFM should be rejected in its entirety.

Sincerely,

A handwritten signature in black ink, appearing to read 'TH' followed by a stylized flourish.

Tamlyn Hunt

Attorney for the Clean Coalition

VERIFICATION

I, Tamlyn Hunt, am the attorney for the Clean Coalition and am the organization's representative for this proceeding. I am authorized to make this verification on the organization's behalf. The statements in the foregoing document are true of my own knowledge, except for those matters which are stated on information and belief, and as to those matters, I believe them to be true.

I am making this verification on the Clean Coalition's behalf because I have unique personal knowledge of certain facts stated in the foregoing document. I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2012, at Santa Barbara, California.

A handwritten signature in black ink, appearing to read 'TH' followed by a stylized flourish.

Tamlyn Hunt