UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Version 4 Critical Infrastructure	**)**	
Protection Reliability Standards	**)**	**Docket No. RM11-11-____**

MOTION FOR LIMITED CLARIFICATION, OR IN THE ALTERNATIVE, REQUEST FOR REHEARING, OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AND THE AMERICAN PUBLIC POWER ASSOCIATION

To the Commission:

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[1] the National Rural Electric Cooperative Association ("NRECA") and the American Public Power Association ("APPA")[2] respectfully submit their motion for limited clarification of the Commission's Order No. 761, issued on April 19, 2012.[3] Specifically, NRECA and APPA request that the Commission provide further clarification of the Final Rule with respect to its certification pursuant to the Regulatory Flexibility of Act of 1980[4] that the implementation of Version 4 of the Critical Infrastructure Protection Reliability Standards ("CIP Version 4") will not have a significant impact on a substantial number of small entities. In the event that the Commission does not clarify its Final Rule, NRECA

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1 18 CFR § 385.212 (2011).

2 NRECA is the not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives, including 66 generation and transmission cooperatives that supply wholesale power to their distribution cooperative owner-members. APPA is the national service organization representing the interests of more than 2,000 not-for-profit, publicly owned electric utilities throughout the United States.

3 *Version 4 Critical Infrastructure Protection Reliability Standards*, Order No. 761, 139 FERC ¶ 61,058 (2012)("Order No. 761" or "Final Rule").

4 U.S.C. § 601 *et seq*, as amended ("RFA").

and APPA respectfully seek rehearing of this limited – yet important – aspect of the rule pursuant to Rule 713 of the Commission's Rules of Practice and Procedure.[5]

In support of their motion, NRECA and APPA state as follows:

I. MOTION FOR LIMITED CLARIFICATION

At the outset, NRECA and APPA emphasize that they support approval and implementation of CIP Version 4 as part of a comprehensive approach to addressing the Commission's directives in Order No. 706 and to ensure the protection of the nation's electric utility infrastructure. As we explained in the Trade Association comments jointly submitted in this proceeding on November 21, 2011, CIP Version 4 represents a logical step by NERC and the industry to address all of the directives in the Commission's Order No. 706. By establishing specific criteria for Critical Asset identification, CIP Version 4 also appropriately addresses the substantive criticisms of CIP Version 3 with respect to self-identification and potential under reporting of Critical Assets.

Although CIP Version 4 represents a forward step, NRECA and APPA respectfully request that the Commission explain, as is required by the RFA, the following four issues:

1. How it reached the conclusion set out in Paragraph 127 of the Final Rule, that "only 12 of the total small entities applicable to this final rule will experience a total one-time impact" as a result of the implementation and subsequent periodic assessment required under CIP Version 4.[6]

[5] 8 CFR § 385.713 (2011).
[6] Final Rule at P 127.

2. How the Commission also determined that "[using] the NERC registry…the number of small entities applicable to this rule is 306,"[7] since these values then form the basis for the Commission's determination that 12 out of 306 (3.9%) small entities is not a substantial number of entities, and that therefore, the Final Rule will not have a "significant impact on a substantial number of small entities" so as to warrant a RFA analysis.[8]
3. How the Commission also determined that the 12 affected entities "will experience a total one-time impact of $4,285,623 (an average of $357,135 per entity)."[9]
4. How the Commission will provide relief to the small entities impacted by this Final Rule as required under section 223 of SBREFA.[10]

The numerator (12) and denominator (306) values of the Commission's assessment cited above appear to be inexplicably low given the number of small entities on the NERC Compliance Registry. Further, the resulting "one-time" costs of compliance with the series of CIP Reliability Standards for entities that identify Cyber Assets or Critical Cyber Assets as a result of the new bright line criteria set out in the Final Rule are inexplicably low and do not include the ongoing costs incurred by small entities that will be subject to CIP-002 through CIP-009 for the first time.

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7 *Id.*
8 *Id.*at P 129.
9 *Id.*at P 127.
10 Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 601 et seq.)("SBREFA").

As set out in the Notice of Proposed Rulemaking underlying the Final Rule,[11] the Commission acknowledges that an overwhelming majority (over 92%) of electric utility companies in the United States are small entities:

> 77. The Commission analyzed the affect of the proposed rule on small entities. The Commission's analysis found that the DOE's Energy Information Administration (EIA) reports that there were 3,276 electric utility companies in the United States in 2009, and 3,015 of these electric utilities qualify as small entities under the Small Business Administration (SBA) definition. Of these 3,276 electric utility companies, the EIA subdivides them as follows: (1) 875 cooperatives of which 843 are small entity cooperatives; (2) 1,841 municipal utilities, of which 1,826 are small entity municipal utilities; (3) 128 political subdivisions, of which 115 are small entity political subdivisions; (4) 171 power marketers, of which 113 individually could be considered small entity power marketers; (5) 200 privately owned utilities, of which 93 could be considered small entity private utilities; (6) 24 state organizations, of which 14 are small entity state organizations; and (7) 9 federal organizations of which 4 are small entity federal organizations. [12]

In conjunction with its required information collection requirements prepared for the Office of Management and Budget ("OMB"), the Final Rule concludes that 1,501 out of 2,057 United States entities are registered for at least one CIP function.[13] The Commission's analysis should explain how it determined that, of the 1,501 entities it has identified, only 306 (approximately 20%) are small entities under the RFA. On its face, the Commission's analysis does not make sense, in as much as EIA's analysis indicates

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11 *Version 4 Critical Infrastructure Protection Reliability Standards*, 76 FR 58730 (Sept. 22, 2011), FERC Stats & Regs. ¶ 32,679 (2011)("NOPR").

12 *NOPR* at P 77, citing Energy Information Administration Database, Form EIA-861, Dept. of Energy (2009), available at http://www.eia.doe.gov/cneaf/electricity/page/eia861.html (internal citations omitted).

13 *Id*. at n.162.

that all but 261 of the 3,276 electric utility companies in the United States qualify as small entities under the SBA definition.

The denominator value of the Commission's analysis may also be significantly understated because the Commission is only using the NERC Compliance Registry to assess impacted small entities under the Final Rule. This means of assessing impact on small entities does not appear to take into consideration the presence of Joint Registration Organizations ("JROs") pursuant to Rule 507 of the NERC Rules of Procedure. Under Rule 507, small entities would never appear on the NERC Compliance Registry in the first instance, and thus would not have been included in the 1,501 identified entities. One registration of a generation and transmission cooperative or a joint action agency, for example, could represent the obligations of a dozen or more distribution cooperatives or municipal systems that all fall under the Small Business Administration ("SBA") small entity definition.[14] As the EIA statistics relied upon in the NOPR suggest, NRECA's membership is comprised of over 96% cooperatives that are small entities. It has approximately 50 generation and transmission cooperatives and 123 distribution cooperative members altogether identified on the NERC registry. Similarly, APPA's membership is comprised of almost exclusively small entities, and has approximately 328 separate members listed on the NERC registry. But for the JRO rules, however, dozens (if not hundreds) more distribution cooperatives and municipalities may be required to separately register for the Load Serving Entity ("LSE") function, thus subjecting them to the CIP requirements. The Commission should clarify if and how such entities were taken into consideration in reaching its determination of potential impact on small entities.

[14] Final Rule at P 126 and nn.171-72.

Turning to the numerator, it appears that the Commission is only considering the effect of the Final Rule on small entities based on a metric of an **initial** change from having **no** Cyber Assets or Critical Cyber Assets to having **one or more** such assets. Twelve (12) small entities are identified, but the Final Rule does not explain who such entities are or how they were identified (*e.g.*, what asset(s) these entities own that will subject them to the CIP standards). Nor did the Commission present any analysis that indicates whether small entities that have identified assets under the existing CIP-002-3 Reliability Standard will now be required to identify substantially more Critical Cyber Assets that will subject them to the full gamut of CIP-003 through CIP-009 Reliability Standards. The lack of information provided with respect to those small entities – whether a class of 306 entities or more – makes it difficult to assess the impacts of CIP Version 4. Clearly there will be *some* economic impact of initial and continuing compliance with the CIP requirements.

The RFA, as amended by SBREFA, obligates the Commission to look at all costs of compliance with the proposed rule. The SBA Office of Advocacy publishes a guide for agencies entitled "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act" ("RFA Compliance Guide").[15] At page 85, the RFA Compliance Guide June 2010 explains:

> [a]gencies regulating activities of small entities are required, under section 223 of SBREFA, to establish a policy or program to provide for the reduction (and, under appropriate circumstances, the waiver) of civil penalties for violations of a statutory or regulatory requirement by a small entity.[16]

[15] The most recent version of the RFA Compliance Guide, dated June 2010, can be found on internet at: http://archive.sba.gov/advo/laws/rfaguide.pdf (last accessed May 16, 2012).

[16] *Id.* at p. 85.

That guide is clear that assessment of economic impact should evaluate the regulation's entire effect.[17] In this instance, economic impact must include not only small entities that need to comply with the CIP standards for the very first time, but also those small entities that may have had certain assets that were deemed Critical Cyber Assets, but now as a result of CIP Version 4 will have more assets that will be subject to CIP-003 through CIP-009 Reliability Standards. For example, an entity might identify Critical Cyber Assets at an entirely discrete location from other Critical Cyber Assets, thus causing significantly higher costs to comply with the substantive requirements of CIP-003 through CIP-009. To the extent such analysis has been performed by the Commission, it should produce such results as part of the clarification requested herein.

NRECA and APPA also note that the Commission's results reported as part of its justification of a lack of substantial impact for RFA purposes are also somewhat counterintuitive to the policy concerns underlying the Final Rule and a concern dating back to the directives issued in Order No. 706, that is: entities are not identifying or are significantly underreporting Critical Cyber Assets as a result of biased, flawed or otherwise inadequate criteria in the current self-directed risk-based assessment methodology adopted in Reliability Standard CIP-002-3. As noted above, NRECA and APPA believe that the implementation of CIP Version 4 will result in more entities identifying more Cyber Assets and Critical Cyber Assets. This fact was made clear for all registered entities in two reports given to the FERC Office of Electric Reliability in a NERC filing on May 27, 2011[18] and June 30, 2011.[19] These NERC filings show in detail

[17] *Id.*at p. 77, *citing Mid-Tex Electric Coop., Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

[18] http://www.nerc.com/files/Final_Final_CIP_V4_DR_45-day_Response_20110527.pdf (last accessed May 16, 2012).

the projected increases in the number of Critical Assets and Critical Cyber Assets due to the implementation of bright line criteria of Attachment 1 in CIP Version 4. NRECA and APPA would assume that seeing this data would have been a red flag for the Commission to perform a RFA analysis in conjunction with the Final Rule. And in conjunction with the Commission's OMB certification, the Final Rule suggests that of the other 1,200 entities (1,501 – 306) that are not small entities, no entity will identify Critical Assets and Critical Cyber Assets for the first time as a result of the implementation of a bright line test. Given the significant level of perceived underreporting that justified the Final Rule, NRECA and APPA find this premise counterintuitive.

NRECA and APPA respectfully request that the Commission clarify and provide greater detail with respect to its RFA certification. Such detail may require that the Commission prepare a RFA analysis in lieu of a certification that the Final Rule will not cause a "significant impact on a substantial number of small entities" and take further steps pursuant to section 223 of SBREFA.

II. REQUEST IN THE ALTERNATIVE FOR REHEARING

If the Commission elects not to grant clarification as set out in Section I, above, NRECA and APPA respectfully request rehearing of the Final Rule. NRECA's and APPA's Statement of Issues, as required by the Commission is as follows:

1. The Commission's certification that it need not perform a RFA analysis in conjunction with the issuance of the Final Rule is arbitrary and capricious and contrary to the requirements of the RFA.

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[19] http://www.nerc.com/files/Final_Part_2_CIP_V4_DR_2011%2006%2030.pdf (last accessed May 16, 2012).

The Commission erred in invoking Section 605 of the RFA, which states that an agency is not required to perform an Initial or Final RFA Analysis for any proposed or final rule if the agency Chairman certifies that the rule, if promulgated, will not have a "significant economic impact on a substantial number of small entities." This certification required under the RFA must provide a substantive justification. The passage supporting the Commission's determination that it does not need to perform an analysis is unsubstantiated and unsupported by facts presented on the record. In the absence of such an analysis, Section 604(a) requires that when an agency promulgates a final rule under section 553 of this Administrative Procedure Act ("APA"), after being required by that section or any other law to publish a general notice of proposed rulemaking, or promulgates a final interpretative rule involving the internal revenue laws of the United States as described in section 603(a), the agency shall prepare a final RFA analysis. An agency must conduct an analysis demonstrating that it has considered the potential effects of the regulation on small entities.[20] When considering potential effects, *all* effects of the rule on small entities must be considered, not just initial compliance costs or only the costs associated with small entities that identify, for the first time, facilities that are Critical Assets or Critical Cyber Assets under CIP Version 4.[21]

Failure to conduct an RFA analysis or appropriately certify that no analysis is required is reversible error and the resulting rule is arbitrary and capricious. The APA's arbitrary and capricious standard requires that agency rules be reasonable and reasonably explained. Under *State Farm*, a court must assess, *inter alia*, whether the agency

[20] *See, e.g., North Carolina Fisheries Ass'n v. Daley*, 16 F.Supp.2d 647, 652 (E.D. Va. 1997).
[21] *See* notes 13 and 14, *supra*.

decision was based on "consideration of the relevant factors."[22] The RFA makes the interests of small businesses a "relevant factor" for certain rules. Therefore, the APA together with the RFA require that a rule's impact on small entities be reasonable and reasonably explained. A RFA is, for APA purposes, part of an agency's explanation for its rule.[23]

[22] *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted)

[23] *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539 (D.C. Cir. 1983) ("a reviewing court should consider the regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable"); *see also Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) ("Thus, if data in the regulatory flexibility analysis – or data anywhere else in the rulemaking record – demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, the rule cannot stand.") (citation omitted).

III. CONCLUSION

WHEREFORE, NRECA and APPA respectfully request that the Commission (i) clarify Order No. 761 consistent with the requirements of the RFA, or in the alternative, (ii) grant rehearing.

Respectfully Submitted,

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