

140 FERC ¶ 61,109  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Philip D. Moeller, John R. Norris,  
Cheryl A. LaFleur, and Tony T. Clark.

Version 4 Critical Infrastructure Protection Reliability Standards      Docket No. RM11-11-001

ORDER DENYING CLARIFICATION AND REHEARING

(Issued August 3, 2012)

1. The National Rural Electric Cooperative Association (NRECA) and the American Public Power Association (APPA) filed a joint request for clarification or, in the alternative, rehearing of Order No. 761, in which the Commission approved the “Version 4” Critical Infrastructure Protection (CIP) Reliability Standards, submitted by the North American Electric Reliability Corporation (NERC).<sup>1</sup> NRECA and APPA contend that the Commission erred in certifying that, pursuant to the Regulatory Flexibility Act of 1980 (RFA),<sup>2</sup> implementation of the Version 4 CIP Reliability Standards would not have a significant impact on a substantial number of small entities. For the reasons discussed in the body of this order, we deny the request for clarification and rehearing.

**I. Background**

2. On February 10, 2011, as supplemented on April 12, 2011, NERC filed a petition seeking Commission approval of the Version 4 CIP Reliability Standards, CIP-002-4 to CIP-009-4. The Version 4 CIP Reliability Standards modified CIP-002 by replacing a risk-based assessment methodology for identifying “Critical Assets” with 17 uniform

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<sup>1</sup> *Version 4 Critical Infrastructure Protection Reliability Standards*, Order No. 761, 77 Fed. Reg. 24,594 (April 25, 2012), 139 FERC ¶ 61,058 (2012).

<sup>2</sup> 5 U.S.C. §§ 601-612 (2006).

“bright line” criteria for identifying Critical Assets.<sup>3</sup> NERC proposed non-substantive, conforming changes to CIP-003 through CIP-009.

3. On September 15, 2011, the Commission issued a Notice of Proposed Rulemaking (NOPR) proposing to approve the Version 4 CIP Reliability Standards.<sup>4</sup> Further, the NOPR proposed to certify that no RFA analysis was necessary because the Version 4 CIP Reliability Standards will not have a significant impact on a substantial number of small entities. Based on the Department of Energy’s Energy Information Administration (EIA) data, the NOPR stated that approximately 3,015 electric utilities qualify as small entities under the Small Business Administration (SBA) definition, but that the majority of small entities are not required to comply with the CIP Reliability Standards because they are not listed in the NERC Compliance Registry.<sup>5</sup> In addition, the Commission explained in the NOPR’s RFA Certification:

The new CIP version 4 bright line criteria generally result in the identification of relatively larger Bulk-Power System equipment as Critical Assets. For the most part, the small entities do not own or operate these larger facilities. There is a limited possibility that these entities would have facilities that meet the bright line criteria and therefore be subject to the full CIP standards (CIP-002 through CIP-009). The Commission expects only a marginal increase in the number of small entities that will identify at least one Critical Asset under the Version 4 CIP Reliability Standards that have not done so previously.<sup>6</sup>

Thus, the NOPR estimated that twelve small and medium size entities would experience increased costs “associated with creating a cyber security program along with the actual cyber security protections associated with the identified Critical Cyber Assets.”<sup>7</sup> The

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<sup>3</sup> The CIP Version 4 standards also modified the criteria for identifying the Critical Cyber Assets associated with certain generation Critical Assets. *See* Reliability Standard CIP-002-4, Requirement R2.

<sup>4</sup> *Version 4 Critical Infrastructure Protection Reliability Standards*, 76 Fed. Reg. 58,730 (Sept. 22, 2011), FERC Stats. & Regs. ¶ 32,679 (2011) (NOPR).

<sup>5</sup> *Id.* P 77.

<sup>6</sup> *Id.* P 78.

<sup>7</sup> *Id.* P 79.

NOPR requested comment on the potential implementation costs and subsequent cost increases that could be experienced by small entities.

4. In response, 28 interested entities filed NOPR comments.<sup>8</sup> No comments specifically addressed the proposed RFA Certification.<sup>9</sup>

5. In Order No. 761, the Commission adopted the NOPR proposal, approved the Version 4 CIP Reliability Standards, and certified that no RFA analysis was required. The Commission provided the following rationale for the RFA Certification:

This Final Rule may have a significant economic impact on some small entities. The Commission estimates that 12 of the total small entities applicable to this final rule will experience a total one-time impact of \$4,285,623 (an average of \$357,135 per entity). However, the Commission has determined that 12 small entities is not a “substantial number” in terms of the total number of regulated small entities under this Final Rule. .... Using the NERC registry, the Commission found that the number of small entities applicable to this rule is 306. The Commission does not consider 12 out of 306 (3.9%) to be a substantial number.<sup>10</sup>

## **II. Request for Clarification or, in the Alternative, Rehearing**

6. On May 18, 2012, NRECA and APPA requested clarification of Order No. 761 regarding the RFA Certification that the implementation of Version 4 of the CIP Reliability Standards “will not have a significant impact on a substantial number of small entities.”<sup>11</sup>

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<sup>8</sup> NRECA and APPA submitted comments jointly with the Electricity Consumers Resource Council, the Edison Electric Institute, the Electric Power Supply Association, and the Transmission Access Policy Study Group.

<sup>9</sup> Two NOPR commenters, Hydro-Québec TransÉnergie and NV Energy, generally questioned the accuracy of the Commission’s cost estimates, but provided no additional details.

<sup>10</sup> Order No. 761, 139 FERC ¶ 61,058 at P 127.

<sup>11</sup> Request for Clarification at 1. On June 5, 2012, the ISO/RTO Council filed an untimely Motion for Clarification.

7. NRECA and APPA seek clarification on how the Commission determined that twelve small entities will experience a total one-time impact as a result of the implementation and subsequent periodic assessment required under the Version 4 CIP Reliability Standards.<sup>12</sup> NRECA and APPA state that 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).”<sup>13</sup> NRECA and APPA also contend that, while the Commission is obligated to look at all costs of compliance with a proposed rule, the RFA estimates do not take into consideration small entities who now identify at least one Critical Cyber Asset but who will have to identify additional Critical Cyber Assets under the Version 4 CIP Reliability Standards.<sup>14</sup> NRECA and APPA also assert that the RFA Certification is “counterintuitive to the policy concerns underlying the Final Rule” (*i.e.*, the Version 3 CIP Reliability Standards do not identify enough Critical Assets and the Version 4 CIP Reliability Standards will result in “entities identifying more Cyber Assets and Critical Cyber Assets” than under Version 3) and is not supported by industry data provided by NERC in response to a Commission data request.<sup>15</sup>

8. NRECA and APPA seek clarification on how the RFA Certification estimated that “the number of small entities applicable to this rule is 306.”<sup>16</sup> NRECA and APPA contend that this estimate is incongruous with other figures referenced in the Final Rule. Referencing a statement in the Final Rule’s Information Collection Statement that “of the 2,057 U.S. entities [in the NERC Compliance Registry], approximately 1,501 were registered for at least one CIP related function,” NRECA and APPA question how the Commission determined that only 306 entities are small entities under the RFA.<sup>17</sup> NRECA and APPA question the accuracy of the Commission’s analysis because “all but 261 of the 3,276 electric utility companies [according to EIA data] in the United States

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<sup>12</sup> Request for Clarification at 2-3.

<sup>13</sup> *Id.* at 6.

<sup>14</sup> *Id.* at 6-7.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> Request for Clarification at 3 (citing Order No. 761, 139 FERC ¶ 61,058 at P 127).

<sup>17</sup> Request for Clarification at 4 (citing Order No. 761, 139 FERC ¶ 61,058 at P 122, n. 162).

qualify as small entities under the SBA definition.”<sup>18</sup> Further, NRECA and APPA state that the RFA estimate may understate the number of registered entities that are registered for at least one CIP Reliability Standard function because the RFA analysis relies on the NERC Compliance Registry and “does not appear to take into consideration the presence of Joint Registration Organizations (“JROs”) pursuant to Rule 507 of the NERC Rules of Procedure.”<sup>19</sup> According to NRECA and APPA, “[b]ut for the JRO rules ... 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.”<sup>20</sup>

9. NRECA and APPA also seek clarification on how the Commission will provide relief to the small entities impacted by Order No. 761 pursuant to section 223 of the Small Business Regulatory Enforcement Fairness Act.<sup>21</sup>

10. In the alternative, NRECA and APPA seek rehearing of Order No. 761. They contend that the Commission erred in certifying that a RFA analysis is not required for Order No. 761. NRECA and APPA argue that, with respect to this issue, the analysis supporting the Commission’s determination “is unsubstantiated and unsupported by facts presented on the record” and, therefore, the resulting rule is arbitrary and capricious.<sup>22</sup>

### **III. Discussion**

11. We deny APPA and NRECA’s request for clarification or, in the alternative, rehearing of Order No. 761.<sup>23</sup> The Commission’s certification on the potential economic

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<sup>18</sup> Request for Clarification at 4-5, referencing the CIP Version 4 NOPR, FERC Stats. & Regs. ¶ 32,679 at P 77 (discussing Department of Energy’s Energy Information Administration data on electric utility companies).

<sup>19</sup> Request for Clarification at 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 3 (citing Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 8).

<sup>22</sup> *Id.* at 8-10.

<sup>23</sup> Pursuant to section 313(a) of the FPA, we deny ISO/RTO Council’s Motion for Clarification as an untimely request for rehearing. 16 U.S.C. § 8251(a) (2006); *see also City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (“The 30-day time requirement of the [FPA] is as much a part of the jurisdictional threshold as the

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impact of the Version 4 CIP Reliability Standards on small entities satisfies the RFA requirement with a “statement providing the factual basis for such certification,” including the number of affected entities, the size of the economic impacts, underlying assumptions and an explanation why certification was appropriate.<sup>24</sup> NRECA and APPA do not explain how the Commission’s RFA Certification does not satisfy the obligations imposed by the RFA and provide no evidence to contradict the factual basis of the RFA Certification. Instead, NRECA and APPA merely express their skepticism, without supporting evidence, as to the estimates, or they argue that the RFA Certification should include information not required under the statute or unavailable to the Commission.<sup>25</sup>

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mandate to file for a rehearing.”); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-98, 979 (1st Cir. 1978) (describing identical rehearing provision of Natural Gas Act as “a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion.”); *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,160 (2012) (rejecting request for clarification as untimely request for rehearing); *Louisiana Energy and Power Authority*, 117 FERC ¶ 61,258 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P 10 (2005); *Texas-New Mexico Power Company*, 107 FERC ¶ 61,316, at P 22 (2004); *California Independent System Operator Corporation*, 105 FERC ¶ 61,322, at P 9 (2003); *American Electric Power Service Corporation*, 95 FERC ¶ 61,130, at 61,411-12 (2001).

<sup>24</sup> 5 U.S.C. § 605(b). The SBA offers the following guidance on the meaning of “factual basis”:

What is a “factual basis?” The Office of Advocacy interprets the “factual basis” requirement to mean that, at a minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification. The agency’s reasoning and assumptions underlying its certification should be explicit in order to elicit public comment.

Small Business Administration, *A Guide for Government Agencies: How to Comply with Regulatory Flexibility Act* 10 (June 2010), <http://archive.sba.gov/advo/laws/rfaguide.pdf> (“SBA Guidance Document”).

<sup>25</sup> In addition, while they submitted comments in response to the NOPR, NRECA and APPA did not comment on the RFA Certification proposal or present any information or data relevant to the certification.

12. With regard to the estimate that 12 small entities will experience a total one-time impact of \$4,285,623,<sup>26</sup> we reject NRECA and APPA's assertion that the RFA Certification was flawed because it did not explain "who such entities are" or identify the assets these entities own that subject them to the Version 4 CIP Reliability Standards.<sup>27</sup> The Commission is not required to provide an RFA certification at such a level of detail. That position is supported by the SBA Guidance Document, which explains that "a description of the number of affected entities" is required. Indeed, such a requirement is not imposed under a RFA *analysis*, which is required when an agency does not certify that an action will not have a significant impact on a substantial number of small entities. Even in those situations, in the initial regulatory flexibility analysis, an agency must provide "a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply."<sup>28</sup> In the final regulatory flexibility analysis, the agency must provide "a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available."<sup>29</sup> In the instant case, NRECA and APPA's request for greater detail than what is required is particularly inapt in light of the fact that neither entity submitted any information in response to the RFA Certification proposed in the NOPR.<sup>30</sup>

13. We reject NRECA and APPA's contention that the RFA Certification was flawed because it should have considered small entities that, while previously owning or operating Critical Assets with associated Critical Cyber Assets, would be required to identify *additional* Critical Cyber Assets under Version 4.<sup>31</sup> First, the NOPR reasoned that the Version 4 CIP Reliability Standards were not likely to affect small entities because the significant size thresholds used to identify Critical Assets created only a

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<sup>26</sup> Order No. 761, 139 FERC ¶ 61,058 at P 127.

<sup>27</sup> Request for Clarification at 6.

<sup>28</sup> 5 U.S.C. § 603(b)(3).

<sup>29</sup> *Id.* § 604(a)(3).

<sup>30</sup> NRECA and APPA state that their memberships consist mostly of small entities. Request for Clarification at 5. Yet, NRECA and APPA have not submitted any data from their members regarding the RFA Certification, either in response to the NOPR or in the instant request, despite the fact that those entities are arguably in the best position to supply the information to the Commission.

<sup>31</sup> Request for Clarification at 7.

limited possibility that small entities would own or operate qualifying assets.<sup>32</sup> Accordingly, small entities that previously did not identify Critical Assets were unlikely to identify Critical Assets under the Version 4 CIP Reliability Standards and Critical Assets previously identified by small entities could potentially no longer qualify as Critical Assets under Version 4. The NOPR further reasoned that entities already identifying Critical Assets, including small entities, would benefit from the lower cost of applying the Version 4 bright line criteria as opposed to developing and applying their own annual risk-based assessment methodology.<sup>33</sup> No comments were received on the NOPR's rationale. Thus, we believe that the RFA Certification reasonably considered the costs to small entities based on the information available.

14. We also reject NRECA and APPA's argument that the RFA Certification is "counterintuitive" in light of the Commission's statements of underlying concern that "entities are not identifying or are significantly underreporting Critical Cyber Assets" and that the Version 4 CIP Reliability Standards "will result in more entities identifying more Cyber Assets and Critical Cyber Assets."<sup>34</sup> While these statements accurately express the Commission's concerns, they do not demonstrate a flaw in the Commission's RFA Certification. As explained in the NOPR, "[t]he new CIP version 4 bright line criteria generally result in the identification of relatively larger Bulk-Power System equipment as Critical Assets."<sup>35</sup> For example, the Version 4 CIP Reliability Standards, Attachment 1 Criteria provide a 1500 MVA threshold for generation at a single plant location (Criterion 1.1), transmission facilities operated at 500 kV or higher (Criterion 1.6), and control centers used to control generation equal to or exceeding 1500 MW in a single interconnection (Criterion 1.15). Given these relatively significant size thresholds, it is appropriate to estimate that the Version 4 CIP Reliability Standards would implicate few small entities. Indeed, while NRECA and APPA claim that the Final Rule's estimate was "counterintuitive," they offer no estimate of their membership that may be subject to CIP compliance for the first time, or have incrementally greater obligations, under the Version 4 CIP Reliability Standards. Therefore, we reject NRECA and APPA's argument that the RFA Certification is inconsistent with either our cyber security policy concerns or industry survey data provided by NERC.

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<sup>32</sup> *Id.* P 78. The NOPR also stated that the Version 4 bright line criteria identified as Critical Assets less generation below 300 MVA. *Id.* P 23.

<sup>33</sup> *Id.* P 71.

<sup>34</sup> Request for Clarification at 7.

<sup>35</sup> NOPR, FERC Stats. & Regs. ¶ 32,679 at P 78.

15. We also reject NRECA and APPA's questioning of the accuracy of the RFA estimate that the Version 4 CIP Reliability Standards are applicable to 306 small entities out of a total of 1,501 registered entities. NRECA and APPA claim that this figure "does not make sense" because the EIA data shows that 3,015 out of 3,276 electric utility companies in the United States qualify as small entities, suggesting that the Version 4 CIP Reliability Standards should be applicable to more than 306 small entities. NRECA and APPA's argument rests entirely on a comparison of two different data sets (i.e., the EIA data and the NERC Compliance Registry). The NOPR cited the EIA data to show that 3,015 out of 3,276 "electric utility companies" qualify as small entities under the SBA definition. However, the NOPR and Final Rule used the NERC Compliance Registry to determine the number of entities that are registered for functions that make them subject to the Version 4 CIP Reliability Standards (i.e., 1501 entities) and the subset of those entities that qualify as small entities (i.e., 306). NRECA and APPA do not provide any data to contradict the RFA Certification's determination, based on the NERC Compliance Registry, that 306 small entities qualify other than to argue that it "does not make sense" in light of the EIA data set.<sup>36</sup>

16. We are also not persuaded that, without considering the use of Joint Registry Organizations under Rule 507 of the NERC Rules of Procedure, the RFA Certification analysis "may" understate the number of small entities registered to comply with the Version 4 CIP Reliability Standards.<sup>37</sup> The RFA Certification includes an estimate of the number of small entities registered to comply with Version 4, which is derived from the NERC Compliance Registry. NRECA and APPA have not provided data to contradict that estimate. As for Rule 507 and the use of Joint Registry Organizations, the NOPR considered their impact and stated that "small entities could join a joint action agency or similar organization, which could accept responsibility for compliance with mandatory Reliability Standards on behalf of its members and also divide the responsibility for

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<sup>36</sup> NRECA and APPA assume a one-to-one correspondence between the NERC Compliance Registry data and the EIA data, treating the NERC Compliance Registry data as a subset of the EIA data. This assumption is misplaced as evidenced by the fact that the NERC Compliance Registry lists entities not identified in the EIA data, including certain generator owners, generator operators, transmission owners, transmission operators, transmission service providers, balancing authorities, reliability coordinators, load-serving entities, as well as federal entities. As an example, certain independent power producers are registered by NERC as generator owners/operators, but are not listed in the EIA data.

<sup>37</sup> Request for Clarification at 5.

compliance with its members.”<sup>38</sup> Moreover, according to NRECA and APPA, Rule 507 will continue to exempt “dozens (if not hundreds)” of small entities from the CIP requirements.<sup>39</sup> Thus, NRECA and APPA have not provided an adequate explanation to cause us to revise our RFA Certification based on the joint registration of small entities.

17. We also deny NRECA and APPA’s request for clarification regarding relief to the small entities impacted by Order No. 761 pursuant to section 223 of the SBREFA. The Commission complied with section 223 in Order No. 594 by establishing a policy to provide for the reduction, and under appropriate circumstances, for the waiver of civil penalties for violations of statutory or regulatory requirements by small entities.<sup>40</sup> Moreover, contrary to the assertion made by NRECA and APPA in their request,<sup>41</sup> the provisions of section 223 of the SBREFA have no bearing on the Commission’s certification pursuant to section 605(b) of the RFA that an RFA analysis was unnecessary.

18. Finally, with respect to the alternative request for rehearing, we disagree with NRECA and APPA’s assertion that the analysis supporting the Commission’s RFA Certification is unsubstantiated and unsupported by the record. The record on this matter consists of NERC’s petition, as amended, NERC’s two data request responses, and the NOPR comments. Further, the Commission analyzed data regarding applicable entities available in NERC’s Compliance Registry. NRECA and APPA elected not to comment on the proposed RFA Certification in the NOPR. In addition, NRECA and APPA offered no independent analysis of the industry survey data or any other record data in their request for rehearing. We find that the record supports our RFA Certification that the Version 4 CIP Reliability Standards will not have a significant impact on a substantial number of small entities.

19. Accordingly, we deny NRECA and APPA’s request for clarification or, in the alternative, rehearing for the reasons discussed above.

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<sup>38</sup> NOPR, FERC Stats. & Regs. ¶ 32,679 at P 81.

<sup>39</sup> Request for Clarification at 5.

<sup>40</sup> *Statement of Compliance with Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996*, Order No. 594, 78 FERC ¶ 61,334 (1997) (promulgating section 2.500 of the Commission’s regulations, 18 C.F.R. § 2.500 (2012)).

<sup>41</sup> Request for Clarification at 6-7.

The Commission orders:

The Commission hereby denies clarification or, in the alternative, rehearing, for the reasons discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.