

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Mandatory Reliability Standards for the Bulk-Power System))	Docket No. RM06-16-000
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**JOINT COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION AND THE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
ON REGULATORY FLEXIBILITY ACT ISSUES ASSOCIATED
WITH NOTICE OF PROPOSED RULEMAKING**

In accordance with the Commission’s “Notice of Proposed Rulemaking” issued October 20, 2006 (“NOPR”), and the “Notice Granting in Part Motions for Extension of Time to File Comments and Announcing Rulemaking Proceeding” issued November 27, 2006¹ in the above-noted docket, the American Public Power Association (“APPA”) and the National Rural Electric Cooperative Association (“NRECA”) hereby submit their joint comments regarding one aspect of the NOPR pertaining to the mandatory electric reliability standards proposed by the North American Electric Reliability Corporation (“NERC”): the Commission’s obligations under the Regulatory Flexibility Act (“RFA”)² to analyze impacts on small entities as part of the rulemaking. NRECA and APPA are each filing separate comments addressing the remaining issues associated with the NOPR.

¹ *Mandatory Reliability Standards for the Bulk-Power System*, Notice of Proposed Rulemaking, 117 FERC ¶ 61,084 (October 20, 2006), 71 Fed. Reg. 64,770 (November 3, 2006); 71 Fed. Reg. 70,695 (December 6, 2006).

² 5 U.S.C. §§ 601-612.

Description of APPA and NRECA

APPA's and NRECA's respective interests in this rulemaking are discussed in their individual comments being filed this same date. For purposes of these limited joint comments, APPA further notes that based on 2005 data (and excluding the four U.S. Territories of Puerto Rico, Guam, the Virgin Islands and American Samoa), all but 39 public power utilities had less than 4 million MW hours in sales (defined as sales to consumers plus sales for resale), and thus meet the definition of a "small utility" set out by the Small Business Administration ("SBA").³ This equals 1,971 public power utilities, or 98% of the total. Of these public power systems, 1,775, or 90%, are distribution utilities only, 48 are wholesale only, and 148 make both wholesale and retail sales.

Similarly, NRECA notes that its membership includes approximately 930 not-for-profit, member-owned rural electric cooperatives, a great majority of which are distribution cooperatives that provide retail electric service to over 40 million consumer-owners in 47 states. In addition, NRECA members include approximately 65 generation and transmission ("G&T") cooperatives that supply wholesale power to their distribution cooperative owner-members. Forty of NRECA's 65 member G&T cooperatives and all but four if its distribution cooperative members had less than 4 million MW hours in sales under the SBA's "small utility" definition. Both distribution and G&T cooperatives

³ NOPR at P 1172 ("The SBA's Office of Size Standards develops the numerical definition of a small business. (See 13 CFR 121.201.) For electric utilities, a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding 12 months did not exceed four million megawatt hours.").

were formed to provide electric service to their owner-members at the lowest reasonable cost consistent with adequate and reliable service.

Joint Comments

I. BACKGROUND

The Commission requests comments on proposed reliability regulations to further implement Section 1211 of the Energy Policy Act of 2005, and particularly new Section 215 of the Federal Power Act (“FPA”) created thereunder.⁴ The Commission seeks comment on its proposal to implement 83 of 107 proposed Reliability Standards, including six of the eight regional differences, and the Glossary of Terms Used in Reliability Standards developed by NERC. This NOPR follows Order Nos. 672 and 672-A,⁵ also part of the EAct 2005 mandate, which created the processes for the certification of one entity as the Electric Reliability Organization (“ERO”), the development and approval of mandatory Reliability Standards, and compliance with and enforcement of approved Reliability Standards.

In the Order No. 672 rulemaking proceeding, both APPA and NRECA raised concerns that the Commission had not addressed fully its statutory obligations under the RFA to analyze the impacts of its orders on small entities. In Order No. 672, the Commission affirmatively disavowed any obligation to comply with the analysis obligations of the RFA, determining that the rule “does not place any significant or

⁴ The Energy Policy Act of 2005, Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005), to be codified at 16 U.S.C. 824o (2000)(“EAct 2005”).

⁵ *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, 71 FR 8662 (February 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006)(“Order No. 672”), *order on reh’g*, Order No. 672-A, 71 FR 19814 (April 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006)(“Order No. 672-A”).

substantial impact on entities other than the ERO and the Regional Entities.”⁶ The Commission further explained, “[u]ntil the Commission has approved a specific Reliability Standard that impacts a particular type/class of users, it is premature to consider NRECA’s and APPA’s concerns and RFA implications, if any, or the Commission’s implementation of section 215 of the FPA.”⁷

APPA’s and NRECA’s prior concerns about the Commission’s apparent disregard of the impacts of the proposed Reliability Standards regime on small entities protected by the RFA are only amplified by the instant NOPR.

II. THE RFA REQUIRED THE COMMISSION TO ISSUE A FULL INITIAL ANALYSIS AT THE TIME IT ISSUED THE NOPR.

The RFA generally requires a description and an analysis of rules that will have significant economic impact on a substantial number of small entities in the context of any federal agency’s notice and comment rulemaking process. Only rulemaking actions that affect small entities or small entity concerns trigger the protections of the RFA.⁸ The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business which is independently owned and operated and which is not dominant in its field of operation.⁹ The Small

⁶ Order No. 672 at P 866. In *Mid-Tex Elec. Coop v. FERC*, 773 F.2d 327 at 342-3 (D.C. Cir. 1985), the court held that “an agency may properly certify that no regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.” Further, the Commission has no duty to conduct a small entity impact analysis of effects on entities it does not regulate, as affirmed in *United Dist. Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

⁷ Order No. 672 at P 866.

⁸ *Atlantic Fish Spotters Ass’n v. Evans*, 206 F. Supp. F.2d 81, 93 (D. Mass. 2002).

⁹ 15 U.S.C. § 632 (2000).

Business Size Standards component of the North American Industry Classification System defines a small electric utility as one, including its affiliates, that is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal year did not exceed 4 million MWh.¹⁰ As noted above, the Commission acknowledges and employs this RFA standard in the NOPR and elsewhere.¹¹

The RFA is a prophylactic statute, requiring actual analysis of impacts on small entities at the NOPR stage of a rulemaking, so that the resulting rule is fashioned to minimize such impacts. As explained in the Introduction section of the SBA manual entitled *How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies*,¹²

[i]n essence, the RFA asks agencies to be aware of the economic structure of the entities they regulate and the effect their regulations may have on small entities. To this end, the RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities. The concept underlying this analytical requirement is that agencies will revise their decision-making processes to take account of small entity concerns in the same manner that agency decisionmaking processes were modified subsequent to the enactment of the National Environmental Policy Act (NEPA).[] The RFA then acts as a statutorily mandated analytical tool to further assist

¹⁰ 13 C.F.R. § 121.201 (section 22, Utilities, North American Industry Classification System, NAICS) (2004). It is no coincidence that this 4 million threshold also appears as part of Section 201(f) of the FPA, as amended by EPAct 2005.

¹¹ NOPR at P 1172, citing 13 C.F.R. § 121.201; *see also* 18 C.F.R. Parts 50 and 380 Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors, 115 FERC ¶ 61,334 at P 72 n. 14 (2006).

¹² *How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies*, Small Business Administration, Office of Advocacy, May 2003 (hereinafter, the “SBA Compliance Guide”).

agencies in meeting the rational rulemaking standard set forth in the Administrative Procedure Act, just as NEPA was intended to rationalize decisions concerning major federal actions that would affect the environment.^[13]

This protection in the rulemaking process is not just contemplated by the *SBA Compliance Guide*, it is codified in the RFA. As the RFA explains, whenever an agency is required to publish a general NOPR, it must prepare and make available for public comment an initial regulatory flexibility analysis (“Initial Analysis”).¹⁴ The Initial Analysis is to be published in the Federal Register at the time of the publication of the NOPR, and the agency is required to transmit a copy of the Initial Analysis to the SBA Chief Counsel. The contents of the Initial Analysis must include: the reasons for the agency action being considered; the objectives and legal basis for the proposed rule; a description and estimate of the number of small entities affected; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities subject to the requirements, and the skills necessary for preparation of the report or record; and an identification of all relevant federal rules which may duplicate, overlap, or conflict with the proposed rule.¹⁵

In addition, each Initial Analysis must contain a description of any significant alternatives to the proposed rule that accomplish the same objectives and minimize any significant economic impact on small entities. Section 603(c) of the RFA provides several examples of types of significant alternatives. These include:

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the

¹³ *Id.* at p. 2.

¹⁴ 5 U.S.C. § 603(a).

¹⁵ 5 U.S.C. § 603(b).

resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.^[16]

In preparing the Initial Analysis, the agency may provide either a quantifiable or numerical description of the effects of the proposed rule, or a more general qualitative description if quantification is not practicable.¹⁷ The requirements of the Initial Analysis do not alter any standards otherwise applicable by law to the agency's (in this instance, the Commission's) action.¹⁸

The Initial Analysis is itself not subject to judicial review. It does, however, provide the foundation for a valid RFA final analysis ("Final Analysis"), a further step required at the time a final rule is issued. The Final Analysis is subject to judicial review. As the *SBA Compliance Guide* explains, a regulatory agency cannot develop an adequate Final Analysis if the Initial Analysis does not lay the proper foundation for eliciting public comments and seeking additional economic data and information on the regulated industry's profile and the regulatory impacts of the rule on small entities.¹⁹ Additionally, without an adequate Initial Analysis, small entities cannot provide informed comments on regulatory alternatives.²⁰

¹⁶ 5 U.S.C. § 603(c).

¹⁷ 5 U.S.C. § 607 (2006).

¹⁸ 5 U.S.C. § 606 (2006).

¹⁹ *SBA Compliance Guide* at p. 71.

²⁰ *Id.*, citing *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411 at 1434, 1436 (M.S. Fla.

III. THE NOPR’S FAILURE TO INCLUDE A FULL INITIAL RFA ANALYSIS SUBJECTS IT TO JUDICIAL DELAY

The NOPR acknowledges that the Commission does have *some* affirmative obligation to conduct an analysis under the RFA, and does not simply find that there is “no significant impact” on small entities.²¹ Specifically, the NOPR, after explaining the scope of new FPA Section 215(b), states in relevant part that

[t]he Commission believes that the proposed Reliability Standards may cause some small entities to experience significant economic impact. While the Commission is mindful of the possible impact on small entities, the Commission is also concerned that Bulk-Power System reliability not be compromised based on an unwillingness of entities, large or small, to incur reasonable expenditures necessary to preserve such reliability.

. . .

While we cannot rule on the merits until a specific proposal has been submitted, we believe that reasonable limits on applicability based on size may be an acceptable alternative to lessen the economic impact on the proposed rule on small entities. We emphasize, however, that any such limits must not weaken Bulk-Power System reliability.^[22]

The NOPR also estimates that only 2,000 entities would be affected by the rule in total.²³ This estimate acknowledges that small entities not otherwise subject to the Commission’s jurisdiction (or NERC standards) may be affected, but is, for the most part, dismissive of such concerns for the time being. As the Commission explained:

1998)(“the agency could not possibly have complied with § 604 by summarizing and considering comments on an [Initial Analysis] that [National Marine Fisheries Service] never prepared”).

²¹ NOPR at PP 1172 to 1176.

²² *Id.* at PP 1175-76 (footnotes omitted).

²³ *Id.* at P 1161.

NERC has indicated that it will propose specific limits on the applicability of Reliability Standards to small entities that do not have a material impact on the Bulk-Power System. While we do not pre-judge this proposal, we note that Commission acceptance of such a proposal could also have a significant impact on the reporting burden of small entities that have not previously complied with the NERC standards on a voluntary basis.^[24]

The Commission also explained that

some small entities may join together in Joint Action Agencies or other such organizations that will be responsible for certain aspects of their members' compliance with mandatory Reliability Standards. Such umbrella organizations may lessen the reporting burden of individual users, owners and operators.^[25]

APPA and NRECA respectfully submit that, given what is known and acknowledged concerning the Commission's proposal to adopt Reliability Standards in this rulemaking, what has already been set forth in Order No. 672, the significant potential effects on small entities, and the expansive nature of certain of the Commission's proposals in the NOPR (which threaten to sweep in a very large number of small utilities not included in NERC's current proposed reliability regime), much more is required to comply with the RFA as part of this rulemaking.

While the RFA does afford certain opportunities for a regulatory agency to defer, waive or even dispose of the requirement to perform an Initial Analysis, it does not appear that the Commission proposes to invoke those provisions in this NOPR.²⁶ Instead, the Commission has simply noted that any analysis of impact on small entities will occur only *after* NERC proposes certain limits on the applicability of Reliability Standards.

²⁴ *Id.* at P 1160.

²⁵ *Id.* at P 1161.

²⁶ *See, e.g.*, 5 U.S.C. §§ 605, 608. Indeed, it would be very difficult for the Commission to do so given the acknowledgement of impacts contained in the NOPR.

Alternatively, as noted above, the Commission indicates that some small entities may join together in Joint Action Agencies or other such organizations to lessen the reporting burden of affected entities.²⁷

APPA and NRECA respectfully submit that the Commission's discussion at NOPR PP 1172-1176 does not satisfy the letter or the spirit of its statutory obligations under the RFA, and are improper at this juncture of the rulemaking process. The NOPR's RFA discussion fails in a number of respects.

First, the NOPR's RFA statement substantially understates the number of entities affected by the rule, further skewing not only the Information Collection Requirements provisions of the NOPR required by the Office of Management and Budget,²⁸ but also the RFA impacts. As noted above, based on 2005 data, APPA believes that 1,971 public power utilities (98%) would qualify as small utilities within the relevant SBA definition. NRECA reports that approximately 860 distribution cooperatives (99+%) meet the same definition.²⁹ In addition to those entities, there are hundreds, if not thousands, of small industrial facilities, small generators and small qualifying facilities that may also meet the small entity definition. Most such entities do not own facilities that have a material impact on the reliability of the bulk power grid in this country, yet the NOPR in its current state appears to contemplate that they would all be subject to NERC's mandatory reliability regime.

²⁷ But as noted in APPA's separate comments submitted contemporaneously with these joint comments and in response to the NOPR at P 53, the Commission's direction to NERC to consider registration of Joint Action Agencies may be too narrow and exclude circumstances where entities such as RTOs and other wholesale power suppliers perform certain reliability functions on behalf of transmission system users, including small load serving entities.

²⁸ See 5 CFR § 1320.11 (2006).

²⁹ This statistic excludes the approximately 65 generation and transmission cooperatives that are members of NRECA, 40 of which sell less than 4 million MWh annually, and notwithstanding, most of which are currently subject to NERC reliability standards.

Second, and more significantly, the NOPR does not include several good faith efforts to adopt common sense approaches that would minimize unnecessary regulatory impacts for small entities. Quite to the contrary, the NOPR *sua sponte* included certain proposals that promise to *substantially increase the number of small utilities subject to NERC's mandatory reliability regime*. For example, the Commission at NOPR P 68 proposes to define the term “bulk electric system” (“BES”) in a manner that goes well beyond NERC’s own definition, thus sweeping in facilities that are unnecessary to the reliable operation of the high-voltage bulk transmission system. If the Commission promulgates this “interpretation” of the BES in its Final Rule, many small transmission owners and operators of lower-voltage transmission will find themselves unnecessarily required to bear the costs of complying with NERC’s mandatory reliability regime, including the requirement to train NERC-certified operators, as well as the many obligations under the Transmission Operations (TOP) and Transmission Planning (TPL) Reliability Standards. This will substantially increase regulatory burdens on these small entities—yet the RFA section of the NOPR says nothing about this issue. Similarly, the RFA section of the NOPR says nothing about the proposals at NOPR PP 252 and 262 to make Communications (COM) Reliability Standards COM-001-0 and COM-002-1 applicable to all distribution providers, actions that apparently would sweep in many more distribution providers than NERC itself has contemplated would be subject to its reliability regime.

If the Commission fails to cure the NOPR’s procedural and substantive shortcomings, the entire reliability NOPR is subject to judicial delay. If the Commission is to meet its obligations to preserve the reliability of the grid this coming summer, it

must act quickly to conduct a proper RFA review.

IV. THE COMMISSION CAN SIGNIFICANTLY REDUCE IMPACTS ON SMALL ENTITIES BY FOCUSING ON MATERIALITY.

To be clear, APPA and NRECA have no desire to throw a monkey wrench into this critical rulemaking process. Nor are APPA and NRECA advocating a generic waiver of any Reliability Standards for all small utilities as defined by the SBA. There are, of course, limited situations where even a small entity could play a pivotal role in regional reliability, and those entities should be subject to Reliability Standards. Reliability is a matter of the utmost importance to both APPA and NRECA. This is evident from their support for the mandatory reliability legislation in the debates leading up to the passage of EPCRA 2005, the Order No. 672 rulemaking, this proceeding and elsewhere.

Simply stated, APPA and NRECA want to get it right, and do so in a manner that is consistent with EPCRA 2005, the RFA, and sound administrative rulemaking practices. An over-inclusive mandatory reliability regime, however, that sweeps in small entities whose activities cannot materially impact the reliability of the bulk power system is inconsistent with all of these goals.

As APPA and NRECA explain in their individual filings, it is clear from the language and history of EPCRA that Congress intended the target of NERC's mandatory reliability standards to be those entities and facilities that can through their actions materially impact the reliability of the bulk electric system/bulk power system. EPCRA was intended only to codify "NERC with teeth."

If the Commission similarly focuses on that statutory goal – rather than on making the maximum possible jurisdictional reach – the Commission too can satisfy its

obligations under both EPAAct and the RFA. On the other hand, the Commission will have failed to meet its obligations under either statute if it adopts an over-inclusive mandatory reliability regime that sweeps in small entities whose activities cannot materially impact the reliability of the bulk power system. An over-expansive reliability regime violates the RFA by imposing unnecessary regulatory burdens on small entities. An over expansive reliability regime also undermines the Commission's efforts to ensure the reliable operation of the interconnected transmission grid by diverting NERC's and the Commission's resources away from those entities and activities most crucial to the reliability of the system.

As NRECA and APPA discuss in greater detail in their separate rulemaking comments, there are at least two simple ways in which FERC can achieve these goals, by returning to the principles set out in NERC's July 20, 2006 Filing.³⁰ First, the Commission can adopt NERC's definition of BES (at P 62) in place of the NOPR's much broader "interpretation" of the term. (at P 68) NERC drafted its reliability standards with a very specific definition of BES in mind. By altering the definition of BES, the NOPR indirectly alters and expands all of the reliability standards that reference the BES, potentially sweeping in a large number of small entities that are immaterial to the reliable operation of the transmission system. The Commission very properly decided not to make that same change by substituting the term "bulk power system" ("BPS") for the term BES throughout the standards (at P 67).

³⁰ NRECA proposes a third approach in its separate pleading. In addition to the other two actions, NRECA further argues that the Commission must recognize that Congress intended the term BPS to reach the same set of facilities and entities as has been encompassed by NERC's definition of BES. See NRECA Comments on the Proposed Reliability Standards at pp. 10-17.

Second, the Commission should rethink the “standard-by-standard” approach to defining “users, owners, and operators” of the bulk power system, set out in NOPR P 51, and accept in the Final Rule the June 2006 Registry Criteria (discussed below) that NERC has proposed, as revised to reflect NERC’s further discussions with industry.³¹ The Commission should further defer to NERC’s and the Regional Entities’ (“REs”) technical expertise in applying those criteria. Only those entities on the Compliance Registry should be subject to NERC, RE, or FERC audits and enforcement actions, although entities can be added to the registry prospectively if it is determined that they have a material impact on the reliable operation of the interconnected bulk power system. This would make the definition of “users, owners, and operators of the bulk power system” co-extensive with the entities listed on NERC’s Compliance Registry, bringing a measure of much needed clarity to the mandatory compliance regime, and limiting the number of small utilities to which NERC’s mandatory reliability regime applies.

As the Commission notes at NOPR P 43, the reliability standards themselves state their applicability to industry entities in terms of NERC’s functional model. These functions include categories such as “Distribution Providers” (“DPs”), “Load-Serving Entities” (“LSEs”), “Generation Owners” (“GOs”), “Generation Operators” (“GOPs”), “Transmission Owners” (“TOs”) and “Transmission Operators” (“TOPs”), but no size limitations are attached to these categories. Hence, without some clearly defined outer

³¹ The Commission should be aware that NERC has continued to refine and expand the Registry Criteria as it moves towards compilation of the preliminary version of the registry. NERC is currently participating in a series of workshops with industry representatives in various regions of the country where it is receiving feedback on the registration process from many affected entities aiming to focus more sharply on the identification of potential material impacts on reliability. The latest version of NERC’s “Statement of Compliance Registry Criteria” is Revision 2, dated December 13, 2006. APPA and NRECA are working to assist NERC with the registration of those members of the two organizations that meet the Registry Criteria, through public outreach to their respective memberships.

limit on the “user of the bulk power system,” *all* DPs, LSEs, GOs, etc., no matter how small and no matter how immaterial their impact on the bulk power system, would have to review every proposed standard that NERC or REs has or will propose henceforward, ascertain whether it applies to them, and protest any application they believed to be unwarranted.

Foreseeing this problem, APPA and NRECA, together with the Electricity Consumers Resource Council (“ELCON”), raised this issue in Spring 2006 with NERC. After substantial discussions, NERC filed with the Commission as part of its Reply Comments in Docket No. RR06-1 on June 12, 2006 (as corrected June 13, 2006) an Appendix B entitled “Statement of Compliance Registry Criteria” (“June 2006 Registry Criteria”). The purpose of the June 2006 Registry Criteria was to set out those entities in certain Functional Model classes (DPs, LSEs, GOs, GOPs, TOs and TOPs) who would be expected to register with their REs and thus become subject to compliance with NERC’s and the REs’ mandatory reliability standards.

While APPA and NRECA believed that the criteria set out in the June 2006 Registry Criteria were in certain respects over-inclusive, they, along with ELCON, filed joint reply comments to NERC’s Reply Comments on July 3, 2006, expressing their general support for the approach that NERC intended to take regarding entity registration and enforcement of mandatory reliability standards only as to entities listed on the registry. APPA and NRECA did so because it thought NERC’s approach, while not perfect, made a good faith attempt to separate those industry participants whose actions could materially impact bulk power system reliability from those who could not, and to tailor the mandatory reliability regime accordingly. By so doing, NERC itself sought to

limit the impact of its mandatory reliability regime on numerous small industry entities whose activities could not adversely impact bulk electric system reliability, and thus to conserve NERC's and the REs' own scarce compliance and enforcement resources.

The Commission in its NOPR, however, essentially disregards the June 2006 Registry Criteria NERC filed, reverting to the amorphous "standard-by-standard" approach it alludes to in NOPR P 51. It then states at NOPR P 1176 that although it believes that "reasonable limits on applicability based on size may be an acceptable alternative to lessen the economic impact on [sic] the proposed rule on small entities," it "cannot rule on the merits until a specific proposal has been submitted." APPA and NRECA submit that such a proposal was submitted several months before this NOPR, and is in fact before the Commission now, in the form of the June 2006 Registry Criteria. The Commission's failure to acknowledge this in the context of its RFA analysis is unexplained and inexplicable.

Unless the Commission takes action to limit the unnecessary adverse impacts of NERC's mandatory reliability regime on small utilities, at the very least by adopting NERC's definition of BES and by approving the June 2006 Registry Criteria that NERC proposed as ultimately revised, the Commission's failure to include in the NOPR an Initial Analysis, as the RFA requires, will endanger the legal foundation of the entire Final Rule.

Conclusion

APPA and NRECA respectfully request that the Commission in its Final Rule take the appropriate measures outlined above to meet its obligations under the RFA to minimize the adverse impacts on small utilities, as defined by the SBA.

Respectfully submitted,

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