UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Relay Loadability	**)**	
Reliability Standard	**)**	**Docket No. RM08-13-000**

COMMENTS OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

On May 21, 2009, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a Notice of Proposed Rulemaking[1] pursuant to section 215 of the Federal Power Act ("FPA") concerning modification and approval of Reliability Standard PRC-023-1 (Transmission Relay Loadability Reliability Standard) developed by the North American Electric Reliability Corporation ("NERC") and originally submitted to the Commission on July 30, 2008. Pursuant to the Commission's July 13, 2009 "Notice of Extension of Time" issued in this proceeding, the National Rural Electric Cooperative Association ("NRECA") respectfully submits these comments.

Introduction and Summary

NRECA is the not-for-profit national service organization representing approximately 930 not-for-profit, member-owned rural electric cooperatives. The great majority of these cooperatives are distribution cooperatives, which provide retail electric service to over 42 million consumer-owners in 47 states. Kilowatt-hour sales by rural electric cooperatives account for approximately 10% of total electricity sales in the United States. NRECA's members also include approximately 65 generation and transmission ("G&T") cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T

[1] *Transmission Relay Loadability Reliability Standard*, Notice of Proposed Rulemaking, 127 FERC ¶ 61,175, Docket No. RM08-13-000 (May 21, 2009)("NOPR").

cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

NRECA's membership represents a broad array of users, owners, and operators of the Bulk Power System ("BPS"). Based on a review of the 1,800-plus entities listed on the current NERC compliance registry as of July 30, 2009,[2] approximately 160-170 electric cooperative members of NRECA, or approximately nine (9) percent of all registered entities, are directly registered with NERC as performing one or more functions. Moreover, while many of NRECA's members are registered separately, there are also several hundred load-serving, retail distribution cooperatives that are registered as Type 1 or Type 2 Joint Registration Organization ("JRO") entities pursuant to NERC Rules 501 and 507 and delegation agreements between the distribution cooperatives and their respective G&T cooperatives. In the aggregate, NRECA estimates that between 400 and 450 of its members are registered and have associated NERC Reliability Standards responsibilities.

Nearly all of the distribution cooperatives in the country (approximately 860) and a majority of the G&T cooperatives constitute small utilities within the meaning of the Regulatory Flexibility Act as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("RFA").[3] A substantial number of these utilities own transmission voltage facilities, primarily for radial operation and use for delivery of wholesale electric power to its member-consumer loads. NRECA estimates, based on 2007 data, that its members own or operate approximately 26,000 miles of transmission lines at or above 100 kV, and approximately 9,900 miles of those transmission lines are at or above 230 kV.

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2 http://www.nerc.com/files/NERC_Compliance_Registry_Matrix_Excel20090729.xls (accessed August 17, 2009).

3 *Regulatory Flexibility Act of 1980*, 5 U.S.C. §§ 601 *et seq, P.L.* 96-354 (1980), as amended by *the Small Business Regulatory Enforcement Fairness Act of 1996*, P.L. 104-121 (1996), amended P.L. 110-28 (2007).

The membership statistics set out above are important because, as described herein, the Commission, as part of its approval of Reliability Standard PRC-023-1, has proposed to direct NERC to investigate specific issues that would broaden significantly the scope of the standard to encompass virtually ***all*** facilities operated above 100 kV. If so broadened in the future, the standard will affect significantly both currently registered and non-registered entities, particularly among NRECA's membership. Requirement ("R") 3, as proposed by NERC, "requires planning coordinators to designate which transmission lines and transformers with low-voltage terminals operated or connected between 100 kV and 200 kV are critical to the reliability of the bulk electric system (because they prevent a cascade) and therefore subject to Requirement R1" and then maintain and provide a list of such facilities.[4] The NOPR seeks comment on the Commission's own proposal to substantially modify R3 so as to include "(1) transmission owners, generation owners, and distribution providers with facilities operated between 100 kV and 200 kV and facilities operated below 100 kV that are designated as critical to the reliability of the [Bulk Electric System]; and (2) generator step-up and auxiliary transformers."[5]

Section 215 of the FPA requires the Commission to give "due weight to the technical expertise"[6] of NERC, as the Electric Reliability Organization ("ERO") in matters relating to approval of new or modified Reliability Standards, and approve the proffered standard or alternatively, the Commission may "remand to the [ERO] for further consideration a proposed Reliability Standard or a modification to a Reliability Standard that the Commission disapproves in whole or in part."[7] The Commission proposes in its NOPR, to approve, but also to "direct the ERO to use its Reliability Standards development process to modify PRC-023-1 to address

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4 NOPR at P 24.
5 NOPR at P 35.
6 16 USC § 824o(d)(2).
7 16 USC § 824o(d)(4).

specific concerns" including the scope of R3, as set out above.[8] NRECA believes that the Commission's proposal would significantly enlarge the scope of NERC's and its Regional Entities' mandate from this point forward and impose serious burdens on a significant number of its members and other entities throughout the industry, even though a vast majority of the facilities drawn into the standard have no material impact on the reliability of the BPS. Based on its own statistics collected from its members concerning ownership of facilities above 100 kV and above 230 kV, NRECA believes the Commission's proposed modification to R3 increases the miles of line that may be subject to the rule by 260 percent. Given the implications of such changes and the lack of a factual (and perhaps statutory) basis justifying a departure from NERC's current approach, the NOPR's proposed expansion of Reliability Standard PRC-023-1 is not warranted. Certain of NRECA's members that do not have facilities which otherwise fall into the definition of BPS facilities due to their voltage levels, radial operation or for other reasons, will be affected by the proposed change. Other members that have protection systems on lower voltage facilities will have significantly greater responsibility. Compliance costs and costs of physical modifications to the affected facilities will also be significant.

Paragraph 43 of the NOPR indicates that it intends to "direct the ERO to modify PRC-023-1 to make it applicable to all facilities operated at or above 100 kV" and further that it proposes "to consider exceptions on a case-by-case basis for facilities operated between 100 kV and 200 kV that demonstrably would not result in cascading outages, instability, uncontrolled separation, violation of facility ratings, or interruption of firm transmission service."[9] NRECA respectfully submits that there is no reason to abandon the applicability recommendations of NERC, which are predicated on the analysis of the 2003 blackout and subsequent work

[8] NOPR at P 34.
[9] *Id*. at P 43.

performed across the industry to ensure that transmission loadability does not contribute to the potential for future cascading outages. There is also no reason or statutory foundation to predetermine the outcome of any additional modifications to the standard that NERC may be required to investigate as a result of a Commission directive pursuant to section 215(d)(5) of the FPA. The Commission certainly has the statutory authority to request that NERC investigate such modifications, but it must also afford "due weight to the technical expertise of the Electric Reliability Organization"[10] as to the conclusions it reaches with respect to the need for expansion of the standard. The statute does not require NERC to adopt a specific result.

As set out in greater detail herein, the Commission's notion of future expansion of the proposed Reliability Standard expressed in the NOPR has not been justified from a technical and engineering standpoint and is contrary to the objectives set forth in section 215 of the FPA. Specifically, the Commission's directives with respect to future modification of Reliability Standard PRC-023-1:

(i) will create unnecessary and presently incalculable impacts, particularly on small entities, with little or no appreciable benefit regarding the reliability goals of section 215 of the FPA, and in contravention of the RFA;

(ii) is contrary to the recommendations of, *inter alia*, NERC, the U.S.-Canada Power System Outage Task Force, the NERC System Protection and Control Task Force, the standard drafting team, and operating experiences of industry members;

(iii) subverts Regional Entities' and Planning Coordinators' determinations as to the identification of facilities critical to the reliability of the BPS, and assumes further without any technical or engineering justification that Planning Coordinators might abdicate responsibilities set out in the standard; and

[10] 16 USC § 824o(d)(2).

(iv) will divert limited time and financial resources, both from entities that own and operate the facilities in question, and from the Regional Entities and Planning Coordinators, to efforts that have not been demonstrated to produce any enhancement of reliability of the BPS.

Comments

1. The Scope of PRC-023-1 R3 as Proposed by NERC Reflects the Results of the Final Blackout Report and the Input of Experienced Planners and Operators of the Bulk Power System

Establishing appropriate means to evaluate, set and communicate relay settings for facilities comprising the BPS in a manner that does not limit transmission loadability or interfere with system operators' ability to protect system reliability is a fundamental NERC and Commission reliability objective. NRECA supports that objective. Significant efforts already undertaken to evaluate and remediate relay loadability issues should guide the implementation of a mandatory Reliability Standard on transmission relay loadability. Absent any sound justification for discarding the appreciable gains that have been made to date, there is no reason to ignore such experience and industry guidance.

Since the completion of the analysis of the U.S.-Canada Power System Outage Task Force's ("Blackout Task Force") April 2004 *Final Report on the August 14, 2003 Blackout in the United States and Canada: Causes and Recommendation*,[11] significant resources have been devoted to addressing relay loadability issues. NRECA and its members have been, and continue to be, active participants in such efforts. As set out in greater detail in NERC's petition (at pp. 17-18), using the conclusions reached in the Final Blackout Report, the NERC System Protection and Control Task Force ("SPCTF"), created an initial methodology for assessing circuits 200 kV and above, initially with respect to zone 3 relays, and later with respect to load

[11] https://reports.energy.gov/BlackoutFinal-Web.pdf (accessed August 17, 2009)("Final Blackout Report").

responsive relays other than zone 3. The SPCTF targeted those facilities for modifications consistent with a set of defined criteria. Since 2005, the SPCTF's method of analysis has been applied to more than 22,000 circuit terminals, and has resulted in the modification of more than 4,000 circuit terminals. As reported by NERC, the SPCTF-directed program has relegated relay loadability to a "much lesser factor" on the list of contributory factors for North American disturbances since August 2005. In fact, according to NERC, there have been only two such incidents attributable to relay loadability reported during the period August, 2005 to the date on which the instant petition for a new Reliability Standard was filed.[12]

These improvements are a testament to the industry's commitment to enhancement of reliability, even in the absence of a mandatory rule or Reliability Standard. It is also validation that the SPCTF's method of analysis, which targeted relay settings on facilities of 200 kV and above, and produced the desired and quantifiable enhancement of reliability. Now, as NERC seeks to maintain the advances it has made by codifying requirements into a Reliability Standard, the question arises: why change course?

In its petition, NERC, supported by broad participation and technical assistance provided by an expansive stakeholder process including some of the most knowledgeable planners and operators within the industry, specifically considered many options to define the applicability of the standard. NERC, through its standards development process, concluded that an approach to Reliability Standard PRC-023-1 that specifically gave the relevant Planning Coordinator the ability to designate lower voltage facilities was appropriate. This determination was parallel to the determination reached by the Blackout Task Force; Recommendation No. 21A in the Final Blackout report indicated that transmission owners should evaluate zone 3 relays "of 230 kV and

[12] NERC Petition at p. 25. One incident involved a facility identified pursuant to the SPCTF program as requiring modifications to a circuit, but the corresponding remedial work was not to be completed until later that year.

higher" and lower voltage facilities that are "*operationally significant* 115 kV and 138 kV lines, e.g., *lines that are part of monitored flowgates or interfaces*."[13]

Oddly, the Commission now cites Recommendation 21A of the Final Blackout Report as its primary justification for a Reliability Standard that includes all facilities above 100 kV.[14] The Final Blackout Report's conclusions are clear and concise, therefore, need not be broadened significantly in the PRC-023-1 Reliability Standard.

2. Section 215 of the FPA Requires that the Commission Give Due Weight to the Determination of the ERO in Response to a Proposed or Changed Reliability Standard

Section 215 of the FPA gives the Commission broad authority to ensure the reliability of the BPS, and among its statutory responsibilities is the obligation to duly certify an ERO that, *inter alia* "has the ability to develop and enforce . . . reliability standards that provide for an adequate level of reliability of the [BPS]."[15] Reliability Standards proposed by the ERO, whether original or modified from a previous standard, must be filed with and approved by the Commission, and thereafter the Commission's approval of any such filing must declare the standard to be "just, reasonable, not unduly discriminatory or preferential, and in the public interest."[16] Subsection (d)(2) of section 215 of the FPA explains further that

> [t]he Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard or modification to a reliability standard and to the technical expertise of a regional entity organized on an Interconnection-wide basis with respect to a reliability standard to be applicable within that Interconnection, but shall not defer with respect to the effect of a standard on competition. A proposed

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[13] Final Blackout Report at p. 158, Recommendation No. 21A (emphasis supplied). The Commission acknowledged this conclusion in the NOPR at P 13.

[14] NOPR at P 41.

[15] 16 USC § 824o(c)(1).

[16] 16 USC § 824o(d)(2).

> standard or modification shall take effect upon approval by the Commission.[17]

If the Commission cannot make a determination that the standard comports with the principles set out above, subsection (d)(4) of section 215 is equally clear that it "shall remand to the Electric Reliability Organization for further consideration a proposed reliability standard or a modification to a reliability standard that the Commission disapproves in whole or in part."[18] The Commission also has certain authority to direct the ERO "to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section."[19]

The NOPR makes clear that FERC proposes to accept, not remand, the Reliability Standard PRC-023-1. It also suggests that FERC may, in the course of approval of a standard, direct specific changes to a standard, such as the applicability of the standard to a broader set of facilities. In carrying out its duties under section 215, however, NRECA believes that nothing within the statutory authority states that the Commission may bypass the obligation to give due weight to the ERO's expertise, as set out above. The statute affords FERC an opportunity to address reliability concerns that NERC has not; it does not suggest that FERC can substitute its own judgment for that of the ERO. With that in mind, NRECA respectfully requests that the Commission keep an open mind on the matter and, in this instance, accept the NERC's position on Reliability Standard PRC-023-1 as just and reasonable.

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17 *Id.*
18 16 USC § 824o(d)(4).
19 16 USC § 824o(d)(5).

3. A Reliability Standard that Sweeps All Facilities Under Its Purview Will Burden the Affected Registered Entities, Regional Entities and Planning Coordinators and Detract From Other Necessary Work That Will Indeed Enhance Reliability

Of course, the Commission should not adopt a standard that is insufficiently inclusive to advance the stated objective of enhanced reliability. To do so would not be just and reasonable. However, the vices of an overly inclusive standard are also serious, and equally unjust and unreasonable. In this instance, substantial reformation of an important standard crafted by the ERO to address relay loadability on higher voltage facilities and certain operationally significant lower voltage facilities would not be in the best interests of reliability. Broad-based participation in the SPCTF program to identify necessary changes to relays and relay settings on facilities at or above 230 kV has enhanced the reliability of the BPS and inclusion of all such facilities in the proposed Reliability Standard will ensure that this enhanced reliability is sustained. NERC's proposal to permit Planning Coordinators to identify lower voltage facilities that are "operationally significant" and engage in an "add in" process to hold such facilities to a similar standard as 230 kV and above facilities further ensures exceptions do not emasculate the rule.

The Commission confidently states that it "expects that the planning coordinator's process for determining the facilities operated between 100 kV and 200 kV that are critical to the reliability of the bulk electric system will be robust enough to identify all such facilities and will be consistent across regions."[20] What follows, however, is the opposite of confidence. Given the significant facilities that will be addressed by the standard as filed, NERC's proposed "add in" approach – which defers to the Planning Coordinator the requirement to identify lower voltage facilities critical to the BPS – will not subvert the goals of the proposed Reliability

[20] NOPR at P 39.

Standard. There is no basis to conclude that the Planning Coordinators will not meet the Commission's expectations.

In place of NERC's proposal, the Commission would mandate an "all in" 100 kV or greater approach to the PRC-023-1 standard. NRECA submits that expansion of the standard in this manner will come at great expense with no appreciable advancement of the stated objectives of the Final Blackout Report. Registered entities will need to identify, modify and possibly replace relays to meet the criteria of R1 and R2. Entities that are currently registered pursuant to a JRO and not listed individually on the NERC compliance registry will have to modify existing agreements and then comply. Depending on the extent of the proposed changes suggested by the Commission, additional entities may be required to register.

Similarly, Regional Entities will have increased duties, both with respect to enforcement and audit of the Reliability Standard across a broader group of registered entities, and with respect to processing the numerous requests of those same entities that will seek to be relieved of compliance obligations due to the fact that the facilities, while in excess of 100 kV, are not operationally significant to the reliability of the BPS. As the Commission is well aware, the Regional Entities already face a significant backlog of alleged violations stemming from initial implementation of the mandatory Reliability Standards and a considerable task of auditing registered entities. NRECA fails to see how diverting the limited resources of the Regional Entities to addressing the issues associated with a far reaching PRC-023-1 standard advance the goals of enhanced reliability. To the contrary, such an obligation may detract from more important work at hand.

Again, NRECA asks, why change course? As noted in the comments of one of NRECA's members, Georgia Transmission Corporation, filed in this proceeding,

> Facilities operated below 200KV are generally load serving and not critical to the reliability of the bulk electric system. They do not contribute to cascading outages, instability or uncontrolled separation. The evidence is in the many years of operating the system and not experiencing the type of events at 100 to 200 kV that the standards are put in place to mitigate. To further support the opposition to this directive, the SERC Engineering Committee recently decided to keep the reporting for misoperations at 200 kV and above. Furthermore it would be a tremendous burden on the Planning Coordinators to run simulations and assessments at the 100 to 200 kV level **only to produce results that are consistent with the many years of operating experience and show no evidence of 100 kV facilities being critical to the bulk electric system**.[21]

NRECA is also concerned that the Commission's directive to NERC to consider generic expansion of the applicability of a Reliability Standard for *fear* that the entity responsible for identifying lower voltage facilities critical to the BPS will not do a comprehensive job is a first step down a slippery slope. As discussed herein, it is not the role of the Commission to *sua sponte* propose modifications to Reliability Standards in place of and without deference to the recommendations of NERC, its standards drafting process and its extended resources such as, the SPCTF. Modifications to existing or proposed standards, such as the standards at issue in the NOPR, should be rooted in actual, not hypothetical, circumstances. And more importantly, Commission action should be proposed only after NERC has had an opportunity to examine the circumstances that warrant modification to a Reliability Standard, inclusive of the scrutiny of NERC's standards development process.

4. The Expansion of the Rule To Include All Facilities Above 100 kV Violates the Regulatory Flexibility Act

NRECA also has concerns that the Commission, if it directs NERC to modify proposed PRC-023-1 R3 as set out in the NOPR or even based on a more limited set of criteria, has not

[21] "Comments of Georgia Transmission Corporation," Docket No. RM08-13-000 at p. 3 (July 27, 2009) (emphasis supplied).

considered the impacts of such a decision under the RFA. 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.[22]

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.[23] The Small 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.[24] As noted above, 99 percent of NRECA's distribution cooperative members and a significant number of its G&T members are classified as small electric utilities.

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*,[25]

> [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

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

23 15 U.S.C. § 632 (2000).

24 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.

25 *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*").

> 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 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.[[26]]

This protection in the rulemaking process is not just contemplated by the *SBA Compliance Guide*, it is codified in the RFA. Under the RFA, an agency is required to publish a general RFA analysis ("Initial Analysis").[27] 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.[28]

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

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[26] *Id.* at p. 2.
[27] 5 U.S.C. § 603(a).
[28] 5 U.S.C. § 603(b).

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 resources available to small entities;
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> (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;
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> (3) the use of performance rather than design standards; and
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> (4) an exemption from coverage of the rule, or any part thereof, for such small entities.[29]

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.[30] 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.[31]

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.[32] Additionally, without an adequate Initial Analysis, small entities

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29 5 U.S.C. § 603(c).
30 5 U.S.C. § 607 (2006).
31 5 U.S.C. § 606 (2006).
32 *SBA Compliance Guide* at p. 71.

cannot provide informed comments on regulatory alternatives.[33]

In the Order No. 672 rulemaking proceeding, NRECA together with the American Public Power Association ("APPA"), raised concerns that the Commission had not addressed fully its statutory obligations under the RFA to analyze the impacts of its Reliability Standards 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 substantial impact on entities other than the ERO and the Regional Entities."[34] 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."[35] Here, while the Commission indicates that it will accept NERC's standard, but is considering further direction to NERC to make very specific modifications to the scope of the standard that will affect small entities, the letter and spirit of the RFA has been compromised.

Directives that require expansion of the applicability of the standard, such as proposed here will have significant impacts for many NRECA members. Yet the NOPR eschews any affirmative obligation to conduct an Initial Analysis under the RFA, as set out above; it simply finds that by reviewing the current NERC compliance registry, "525 entities will be responsible for compliance with the new Reliability Standard" and that "[b]ased on this understanding . . . this rule will not have a significant economic impact on a substantial number of small entities."[36]

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

[34] 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."

[35] Order No. 672 at P 866.

[36] NOPR at PP 117-118.

The Commission does not state how many of the 525 entities are small entities, or even which entities currently on the NERC compliance registry are within the 525 entities that have been counted for the purposes of this conclusion. The Commission also does not indicate how many additional entities will be drawn into the standard if NERC has no alternative but to revise PRC-023-1 to include *all* facilities above 100 kV.

The use of the compliance registry is not a reasonable basis to provide a proxy as to the number of entities that may be affected by the rule. The scope of the Commission's proposed modifications to Reliability Standard PRC-023-1 R3 creates a bright line standard that makes the standards applicable to *any* entity (whether registered as a Transmission Owner, Distribution Provider, or not at all) that owns and/or operates facilities at or above 100 kV, subject to certain very limited exceptions. The Commission's approach also does not consider the impacts on the significant number of small entities that are registered pursuant to a JRO arrangement.

NRECA respectfully submits that, given what is known and acknowledged concerning the Commission's proposal to modify and adopt Reliability Standard PRC-023-1, what has already been set forth in Order No. 672, and the significant potential effects on many more small entities than indicated in the NOPR, much more is required to even minimally 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 dispense with the requirement to perform an Initial Analysis, it does not appear that the Commission proposes to invoke those provisions in this NOPR.[37] Instead, the Commission has simply noted that no analysis of impact on small entities is necessary. This conclusion is not supported by the record in this rulemaking.

[37] *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.

NRECA respectfully submits that in light of its very specific directives to NERC, the Commission's dismissal of its RFA obligations are improper at this juncture of the rulemaking process. The NOPR's RFA discussion fails in a number of respects. First, as noted above, the NOPR's RFA statement does not state the basis for the number of small entities affected by the rule, or which may be affected by the Commission's proposed directives to NERC to modify the standard. This failure also calls into question the Information Collection Requirements provisions of the NOPR required by the Office of Management and Budget.[38] Second, the NOPR rejects NERC's common-sense approach to the scope of the Reliability Standard based on observed conditions and remedial actions, which reflects the approach recommended by the Final Blackout Report and which would minimize unnecessary regulatory impacts on small entities, as well as large entities. The NOPR's approach builds into the Reliability Standard a requirement that small entities *must* comply, or affirmatively seek relief from the standard from the Regional Entity. Seeking a waiver of the standard will have a cost, with no guarantee that the request will result in a favorable outcome, compounding costs to stay in compliance in the event a waiver is not granted. This will substantially increase regulatory burdens on these small entities. Yet the RFA section of the NOPR says nothing about this issue.

NRECA's concerns are not hypothetical. One of its members, Y-W Electric Association, Inc. ("Y-WEA"), a small distribution cooperative located in rural northeastern Colorado, submitted comments separate from NRECA on this very point.[39] Y-WEA serves approximately 8,700 retail meters, and in 2008 sold approximately 333,000 MWH. Through a relationship with another small, neighboring distribution cooperative, Y-WEA shares engineering department

[38] NOPR at *See* 5 CFR § 1320.11 (2009).

[39] See "Comments of Y-W Electric Association, Inc. in Response to the Notice of Proposed Rulemaking of the Federal Energy Regulatory Commission," Docket No. RM08-13-000 (August 10, 2009)("Y-WEA Comments").

resources, providing it with 1.4 full-time equivalent engineers. It is by any measure a small entity. It owns a single thirteen-mile-long radial 115 kV transmission line and approximately 90 miles of radial 69 kV transmission lines, all of which is used for local distribution of power from BPS transmission facilities owned by others.

Y-WEA's comments explain that many entities in the Western interconnection (itself included) own and operate facilities between 100 kV and 200 kV that are not used for any bulk transfer of power, but are rather used as local distribution systems for geographically diverse and often isolated load centers. As Y-WEA explains:

> [t]hrough its operational experiences with various system outages over the past several years, Y-WEA confidently asserts that these facilities that are operated between 100 kV and 200 kV are not critical to the reliability of the BES. Through its experience with the system, when certain 230 kV lines have experienced outages, the 115 kV transmission system has followed suit and failed to serve the connected load. However, when a section of 115 kV line experiences an outage, it has been observed that the load connected to the faulted portion of the 115 kV network is the only part of the system that is affected. Other sections of the 115 kV transmission system do not appear to suffer adverse effects, and the 230 kV system has not been observed to suffer from outages relating to a broken 115 kV loop. In other words, in Y-WEA's experience, lines operated between 100 kV and 200 kV do not necessarily always have an impact on the operation and reliability of the BES. It is also Y-WEA's understanding that this is not an isolated phenomenon in the western interconnection. This being the case, there would be a large amount of transmission line throughout the western interconnection operated between 100 kV and 200 kV that is not used for bulk power flows or to support higher-voltage bulk power flows, but to distribute electricity to moderately-sized load centers that are separated by relatively large distances.[40]

These operating characteristics lead Y-WEA to conclude, and reasonably so, that its facilities are not operationally critical to the BPS.

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40 *Id.* at pp. 6-7.

Under the Commission's proposed directives to NERC to modify to the scope of PRC-023-1 R3, Y-WEA will be subject to the substantive requirements (and sub-requirements) of R1 and R2 unless and until a waiver can be obtained from its Regional Entity. Y-WEA conservatively estimates that it will take its shared in-house engineering resources ten hours a year to assess each of its thirteen protective systems on its system, and an additional ten hours for recordkeeping, each at an internal cost of $75 per hour.[41] This value is significantly higher than the burden estimates suggested by the Commission. Y-WEA's estimates also do not include work associated with audit and self-certifications that may be required by the Regional Entity, or (as warranted by the operating characteristics described above) the process of seeking a waiver.

Y-WEA is one example of the adverse consequences of failure to consider the RFA. If the Commission fails to cure the NOPR's procedural and substantive shortcomings, small entities like Y-WEA will be affected adversely, and the standard may be subject to judicial delay. If the Commission desires to enhance the reliability of the BPS in a manner consistent with the Final Blackout Report, it should carefully tailor the standard to concerns NERC has found need to be addressed by NERC. Otherwise, it cannot discharge its obligations under the RFA.

5. In the Alternative, if the Commission Does Not Defer to NERC's Technical Determination Concerning the Scope of R3, It Should Clarify That its Directives in the Proposed Rule are "for further consideration" and are not Dictating a Specific Result

For all the reasons set out above, NRECA believes that the scope of PRC-023-1 proposed by NERC bears the greatest correlation to benefits to the reliability of the BPS, and the Commission should give due weight to NERC's conclusion on that technical issue, and accept the Reliability Standard as proposed. Thus, there is no reason to go any further at this juncture.

[41] *Id.* at pp. 11-12.

But if the Commission declines to give NERC's conclusion that weight and *sua sponte* conclude that it would be better for the standard to apply to any facilities below 200 kV (except those facilities deemed to be operationally significant by the Planning Coordinator), NRECA respectfully submits that the Commission should adopt the proposed standard as just and reasonable and more broadly direct the ERO to address the Commission's continuing concerns about lower voltage transmission relays and their potential contribution to cascading outages on the BPS.[42] In so doing, the Commission should make clear that while NERC must address the specific matter raised by the Commission – the proper scope of the rule – NERC need not adopt any specific modification to the standard. Rather, NERC should conduct a technical examination based on quantitative data, NERC's assessment of the BPS in this post-mandatory standard era, the presence (or absence) of complaints or other stated concerns from the Regional Entities, or NERC itself, and clear criteria that may be appropriate for inclusion as part of Reliability Standard PRC-023 in the future. NERC's ultimate conclusions, and the modifications it proposes to the standard in response (if any) should be based on NERC's best technical judgment and cannot be bound in advance by any preconceptions or Commission "direction." NRECA is confident that the Commission wants to give NERC and the Reliability Standards drafting team the freedom they need to conduct the most technically rigorous evaluation they can, and to develop the very best standards language possible, without concern that their efforts are wasted because only a single result could ever pass regulatory muster.

[42] 16 U.S.C § 825o(d)(4).

Conclusion

NRECA appreciates the opportunity to comment on the Commission's NOPR and urges the Commission to accept Reliability Standard PRC-023-1 based on the applicability of the standards in R3 as proposed by NERC, and looks forward to participating in the continuing dialogue on this important subject.

Respectfully submitted,

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