

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

Pacific Gas and Electric Company

)

Docket No. EL09-72-001

**MOTION FOR LEAVE TO INTERVENE OUT-OF-TIME OF CERTAIN ISO/RTO
COUNCIL MEMBERS AND REQUEST FOR CLARIFICATION, OR, IN THE
ALTERNATIVE, REQUEST FOR REHEARING, OF THE ISO/RTO COUNCIL**

Pursuant to Rules 212 and 214 of the Commission’s Rules of Practice and Procedure¹ the ISO/RTO Council (“IRC”)² respectfully submits this motion for leave to intervene out of time, and, together with the California Independent System Operator, an IRC member which is already a party (together referred to as “IRC”), respectfully requests clarification of the Commission’s December 17 order in the above-captioned proceeding (“December 17 Order”).³

The IRC has no issue with the December 17 Order’s determinations that the Pacific Gas and Electric Company (“PG&E”) may recover: (i) its costs to develop a regional synchrophasor project (“Synchrophasor Project”) in its electric transmission rates; and (ii) one hundred percent of abandoned plant costs in the event that the Synchrophasor Project is cancelled for reasons beyond PG&E’s control. The IRC recognizes both that great benefits that may come from the

¹ 18 C.F.R. §§ 385.212 and 214 (2009).

² The IRC is comprised of the Independent System Operator operating as the Alberta Electric System Operator (“AESO”), the California Independent System Operator Corporation (“CAISO”), Electric Reliability Council of Texas (“ERCOT”), the Independent Electricity System Operator of Ontario (“IESO”), ISO New England Inc. (“ISO-NE”), Midwest Independent Transmission System Operator, Inc. (“MISO”), New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, L.L.C. (“PJM”) Southwest Power Pool, Inc. (“SPP”) and New Brunswick System Operator (“NBSO”). AESO and NBSO are not joining in this filing. The IESO is not subject to the Commission’s jurisdiction and its participation in this joint filing does not constitute agreement or acknowledgement that it can be subject to the Commission’s jurisdiction.

³ *Pacific Gas and Electric Company*, 129 FERC ¶ 61,251 (2009).

creation of a “smart grid” and that nothing is more important than ensuring that smart grid systems do not compromise the reliability or cybersecurity of the Bulk Electric System.⁴

Nevertheless, the IRC is concerned that the Commission’s “observations” at Paragraph 46 of the December 17 Order could be misinterpreted. Paragraph 46 states that:

[I]t is important for entities to designate the substations where phasor measurement units and the phasor data concentrators are located as critical assets under CIP-002. In addition, if the phasor measurement units and phasor data concentrators will feed directly into operational decisions, then such devices should also be identified and protected as Critical Cyber Assets.

The IRC reads this statement to be non-precedential *dicta* given the context of the rest of the order and the surrounding paragraphs, including Paragraph 47. However, Paragraph 46 might be construed as an attempt to mandate, in the context of an unrelated proceeding concerning incentive rates, that certain systems and facilities be classified as “Critical Assets” and “Critical Cyber Assets.” As is discussed below, such a mandate would be inconsistent with the rest of the December 17 Order in this proceeding. It would also be overbroad because many existing synchrophasor systems, and the substations where they are located, do not currently meet the North American Electric Reliability Corporation’s (“NERC”) definitions of “Critical Assets” or “Critical Cyber Assets.” In addition, the overbroad statements could undermine the Commission’s own policies by discouraging future synchrophasor investments and by causing Responsible Entities to misallocate compliance resources. Finally, the December 17 Order could not lawfully establish a new mandate under Section 215(d) of the Federal Power Act (“FPA”)⁵ and the Administrative Procedure Act (“APA”).⁶

⁴ Capitalized terms that are not otherwise defined herein should be understood to have the meaning specified in NERC’s *Glossary of Terms Used in Reliability Standards*, See http://www.nerc.com/files/Glossary_12Feb08.pdf, or in the text of CIP-002.

⁵ 16 U.S.C. § 824o.

⁶ 5 U.S.C. § 500, *et. seq.*

The IRC respectfully requests that the Commission clarify that the statements in Paragraph 46 were not binding Commission rulings on what constitutes Critical Assets or Critical Cyber Assets. Rather, the statements are non-binding *dicta* that should not be interpreted as a directive to require Responsible Entities to identify particular phasor measurement units (“PMUs”), phasor data concentrators (“PDCs”), or the substations where they are located as Critical Assets or Critical Cyber Assets without reference to their actual characteristics and potential to impact the Bulk Electric System. Responsible Entities that have reasonably determined that particular PMUs, PDCs, or substations are neither Critical Assets nor Critical Cyber Assets should continue to be in compliance with NERC’s Critical Infrastructure Protection (“CIP”) standards.

Although the IRC believes that Paragraph 46 was not meant to establish a mandate, should the Commission deny clarification, the IRC seeks rehearing under Section 313 of the Federal Power Act (“FPA”)⁷ and Rule 713.⁸

I. COMMUNICATIONS AND CORRESPONDENCE

The IRC respectfully requests that all pleadings, correspondence and other communications concerning this proceeding be directed to the following persons, and that their names and addresses be placed on the official service list for Docket No. EL09-72-000.

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⁷ 16 U.S.C. § 8251.

⁸ 18 C.F.R. § 385.713 (2009).

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II. MOTION FOR LEAVE TO INTERVENE OUT-OF-TIME⁹

The IRC is comprised of the ten functioning ISOs and RTOs in North America. The IRC's mission is to work collaboratively to develop effective processes, tools and standard

⁹ The CAISO joins in the IRC's request for clarification and alternative request for rehearing but does not join in its motion to intervene out-of-time as it has previously filed a timely motion to intervene in this proceeding. *See* December 17 Order at P 23.

methods for improving the competitive electricity markets across North America. In fulfilling this mission, it is the IRC's goal to provide a perspective that balances reliability standards with market practices so that each complements the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers.

Each IRC member is a "Responsible Entity"¹⁰ subject to the requirements of CIP-002. Some members already operate synchrophasor systems and/or substations where they are located. Others expect to do so in the near future. Various IRC members are active participants in regional smart grid efforts supported by grants from the Department of Energy under the American Recovery and Reinvestment Act of 2009.¹¹

The IRC's members would each be significantly impacted by the December 17 Order if Paragraph 46 is not clarified or modified on rehearing as requested herein. Paragraph 46 has already caused confusion that could discourage participation in smart grid projects in which IRC members are participating. It could also lead Responsible Entities to commit too great a portion of their resources to protecting PMUs, PDCs, and related substations before such treatment is warranted, to the potential detriment of assets more important to the Bulk Electric System that require greater cybersecurity protections. The IRC, therefore, has a direct and vital interest in this proceeding that cannot be adequately represented by any other party.

Commission precedent allows interventions after the issuance of a dispositive order if the movants demonstrate good cause for intervening out of time. There is good cause to permit the IRC to intervene at this juncture because its Commission-jurisdictional members outside of the Western Electricity Coordinating Council ("WECC"), the region where the Synchrophasor

¹⁰ CIP-002 defines "Responsible Entity" very broadly. The term encompasses Reliability Coordinators, Balancing Authorities, Transmission Operators, and Transmission Service Providers.

¹¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

Project is being developed, had no reason to participate prior to the appearance of Paragraph 46.¹² The official notice of PG&E's filing gave no indication that the Commission might use the proceeding to establish new generic policies. In addition, no party would be prejudiced if the IRC's intervention were permitted because the IRC will accept the record that has been developed to date. The IRC should therefore be granted leave to intervene out-of-time.

III. REQUEST FOR CLARIFICATION

A. **The Commission Should Clarify that Paragraph 46 Does Not Mandate that All Substations Where PMUs or PDCs Are Located Must Be Treated As Critical Assets**

The December 17 Order determined that PG&E's portion of the Synchrophasor Project would not adversely affect the reliability or cybersecurity of the Bulk Electric System. This finding was based in part on PG&E's voluntary commitment, as part of its petition, to designate the substations where its PMUs and PDCs would be located as Critical Assets. The Commission emphasized that "this finding is specific to the facts and circumstances of PG&E's petition and that future applications will be assessed based on then existing conditions."¹³

The Commission also expressly agreed with NERC's assessments that: (i) "[m]ost Synchrophasor applications are not critical to the operation of the Bulk Electric System *today*" although they "could become critical in the future as new applications develop and mature;" and (ii) "synchrophasor data today is mostly used for after-the-fact analysis and seldom if ever feeds directly into operational decisions."¹⁴ The Commission anticipated that future smart grid

¹² By contrast, the only Commission-jurisdictional IRC member located in the WECC, *i.e.*, the CAISO, previously intervened in this proceeding.

¹³ December 17 Order at P 42. *See also Id.* at P 45 ("We emphasize that this finding as to PG&E's petition is only with regard to the synchrophasors and their current role in after-the-fact analysis. Future "real-time" applications of synchrophasor data and communications will require their own detailed demonstration of no adverse reliability and cybersecurity impact.").

¹⁴ *Id.* at PP 43-44.

applications might make direct operational use of synchrophasor data and, to the extent that they did, would likely raise future reliability and cybersecurity issues.¹⁵

In short, there is nothing in the foregoing discussion that suggests that the December 17 Order was intended to have binding effects on any entity other than PG&E. Nor is there anything to suggest that all substations where PMUs or PDCs are located should be designated as Critical Assets before the PMUs and PDCs warrant classification as Critical Assets themselves, *i.e.*, when they reach the point where their destruction, degradation, or unavailability would affect the operability or reliability of the Bulk Electric System. Further, Paragraph 47 appears to signal that Paragraph 46 is not intended to change how Critical Assets are classified. Finally, as discussed in Section IV below, establishing such a mandate outside the framework of Section 215 of the FPA and the APA would be unlawful.

Nevertheless, Paragraph 46 could possibly be construed as requiring that all substations where PMUs or PDCs are located, be designated as Critical Assets without regard to the possibility that the physical characteristics and importance to the Bulk Electric System might not justify such a designation. The IRC's members fully appreciate the importance of cybersecurity and take their responsibilities under the CIP standards very seriously. At the same time, there are costs to classifying systems and facilities as Critical Assets when they do not warrant that designation, including the misallocation of resources away from assets that are truly "critical."

The Commission should therefore clarify that Paragraph 46 is not intended to modify the currently effective version of CIP-002 by requiring all Responsible Entities to treat all substations where PMUs and PDCs are located as Critical Assets. Paragraph 46 should be understood as merely expressing the Commission's opinion that such substations should be

¹⁵ *Id.* at P 44.

counted as Critical Assets to the extent that PMUs and PDCs become more involved in real-time operations in the future and therefore become Critical Assets themselves.

B. The Commission Should Clarify that Paragraph 46 Does Not Mandate that All PMUs and PDCs that Will “Feed Directly Into Operational Decisions” Must Be Treated as Critical Cyber Assets

Paragraph 46 also indicates that all PMUs and PDCs must be identified and protected as Critical Cyber Assets, if they “feed directly into operational decisions.”¹⁶ For the reasons already noted above, the IRC also understands this statement to be *dicta*. However, this statement could be misconstrued and lead to confusion regarding the correct application of CIP-002. The IRC, therefore, respectfully requests that the Commission clarify that this statement was not a binding Commission ruling that all items that “feed directly into operational decisions” constitute Critical Cyber Assets.

The fact that an asset is used by operators in making operational decisions is not sufficient alone to make the asset “essential to the operation of Critical Assets” and thus does not suffice to make it a Critical Cyber Asset under NERC’s definition of that term. Operators make decisions based on various data that could not reasonably be defined as Critical Cyber Assets, *e.g.*, weather forecasts, calls from customers, public news broadcasts, *etc.* Some PMUs may well qualify as Critical Cyber Assets, *e.g.*, in certain cases where PMU data were used for wide area control, but not all PMUs will be “essential to the operation of Critical Assets” simply because they “feed directly into operational decisions.”

C. The Commission Should Clarify that Paragraph 46 Was Not Intended to Override the Currently Effective CIP-002 Asset Classification Procedures

The Commission should clarify that Paragraph 46 is not intended to override the existing provisions of CIP-002. Under the currently effective version of CIP-002, “Responsible Entities”

¹⁶ *Id.* at P 46.

develop, document, and use a “risk-based assessment” methodology to identify their Critical Assets.¹⁷ They then develop a list of associated Critical Cyber Assets that are essential to the operation of their Critical Assets and that have certain other characteristics.¹⁸ Critical Cyber Assets are subject to the requirements of CIP-003 and CIP-009, which require that Responsible Entities take a variety of actions to ensure that the assets are protected.

CIP-002 does not currently specify how particular types of assets are to be classified. Instead, it requires each Responsible Entity to make its own reasoned determinations in the first instance. At the Commission’s behest, NERC has issued informal security guidelines for identifying both Critical Assets and Critical Cyber Assets.¹⁹ NERC is already working through its normal standards development process to develop a new version of CIP-002 that would provide more direction regarding asset identification and require external reviews of individual determinations to ensure greater accuracy and consistency. The latest proposed revisions to CIP-002 would include more concrete guidance concerning the treatment of synchrophasors but would not include the asset-specific mandates that appear to be contemplated by Paragraph 46.

Paragraph 46, however, could be construed as overriding the existing CIP-002 framework by dictating that all PMUs, PDCs, and substations with certain characteristics must be classified as Critical Cyber Assets or Critical Assets. The IRC requests that the Commission clarify that

¹⁷ See CIP-002, Requirement R1 (Critical Asset Identification Method — The Responsible Entity shall identify and document a risk-based assessment methodology to use to identify its Critical Assets). See also, *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order No. 706, 122 FERC ¶ 61,040 at P 235, *order on reh’g*, Order No. 706-A, 123 FERC ¶ 61,174 (2008), *order on clarification*, Order No. 706-B, 126 FERC ¶ 61,229 (2009) (“Order No. 706”).

¹⁸ *Id.* at Requirement R3 (indicating that Critical Cyber Assets are those that have at least one of the following characteristics: (1) uses a routable protocol to communicate outside the Electronic Security Perimeter; or (2) uses a routable protocol within a control center; or (3) is dial-up accessible).

¹⁹ See Order No. 706 at P 253 (directing NERC to issue additional guidance on the development of a risk-based assessment methodology to identify critical assets).

this was not its intent so as to avoid confusion and controversy regarding both the legality of the December 17 Order, and the scope of CIP-002.

D. The Requested Clarifications Will Avoid Unintended Consequences

Unless the Commission clarifies the meaning of Paragraph 46 as specified above, there could be a number of adverse consequences that were presumably unintended by the Commission and that could undermine important Commission policies.

First, because compliance with CIP-003 through CIP-009 can be costly, Paragraph 46 could make synchrophasor investments less attractive to the extent that it is perceived as subjecting a potentially large number of facilities that do not currently warrant heightened cybersecurity protection to the CIP standards. A number of IRC Members have already heard that Paragraph 46 is causing their stakeholders to consider withdrawing from ongoing smart grid projects, or scaling back their participation for this very reason. Absent clarification, needed synchrophasor investments are likely to be discouraged. Decreased investment in synchrophasors would harm the development of the smart grid and could delay necessary improvements to the reliability of the Bulk Electric System, since phasor technology will likely reduce the vulnerability of SCADA systems to cyber attacks by providing a backup source of data for operations.

Second, many Responsible Entities have determined, in line with the existing NERC CIP framework, that PMUs, PDCs, and the substations where they are located are neither Critical Assets nor Critical Cyber Assets. Absent clarification, Paragraph 46 could be construed as calling such entities' compliance with the CIP standards into question without reasonable notice or due process. Such an outcome would further discourage new synchrophasor investments by creating uncertainty and regulatory risk.

Third, if Paragraph 46 were understood to require all PMUs, PDCs, and related substations to be classified as Critical Assets or Critical Cyber Assets without considering their actual significance to the Bulk Electric System it would cause Responsible Entities to unnecessarily over-invest in protecting them. Over-investing in one area could result in an inefficient allocation of resources to the detriment of systems and facilities that are more critical to reliability.

Fourth, Paragraph 46 has the potential to subject many distribution assets that are not part of the Bulk Electric System to the CIP standards. As future generations of relays develop, it is likely that synchrophasors will cease to be physical devices and will principally become functions within relay systems that include a phasor algorithm embedded within the control system. It may well be that phasor functions in the future will be embedded within every feeder, including distribution feeders. If Paragraph 46 were understood to require all new relay control systems to be secured under the CIP standards it would impose significant costs without bringing commensurate reliability or cybersecurity benefits. Similarly, to the extent that synchrophasor data is used by other distribution assets in the future all such assets would appear to be subject to the CIP standards under Paragraph 46.

Finally, if Paragraph 46 is understood to mandate that assets that the Commission and NERC alike have acknowledged are not yet critical to reliability must be Critical Cyber Assets then many other assets that are more important, but also not yet “critical,” would presumably be subject to the CIP standards as well. That is not an appropriate or justifiable result. As was stated above, treating assets as “critical” when they do not warrant that treatment expends resources without bringing commensurate reliability benefits and diverts resources from assets that should be the focus of protective efforts.

IV. ALTERNATIVE REQUEST FOR REHEARING

Although the IRC believes that Paragraph 46 was not intended to establish a mandate it is submitting the following alternative request for rehearing in the event that the Commission denies its request for clarification.

A. To the Extent that the December 17 Order Was Intended to Mandate the Classification of Critical Assets and Critical Cyber Assets it Would Be Unlawful Under Section 215(d) of the FPA

FPA Section 215(d) grants the Commission ultimate authority over the approval of reliability standards, but precludes it from unilaterally drafting them. Section 215(d)(2) gives the Commission the authority to “approve . . . a proposed reliability standard or modification to a reliability standard” if the applicable criteria are satisfied.²⁰ Section 215(d)(4), in turn, requires that the Commission “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.”²¹ To the extent that the Commission determines, on its own motion, that a new standard should be adopted or an existing standard modified, Section 215(d)(5) gives the Commission the authority to “order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter”²²

In addition, Section 215(d)(2) requires the Commission to 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” The only exception is that the Commission need not defer with respect to a reliability standard’s effect on competition.

²⁰ 16 U.S.C. § 824o(d)(2).

²¹ 16 U.S.C. § 824o(d)(4).

²² 16 U.S.C. § 824o(d)(5).

As these provisions make clear, the Commission has ultimate authority over the approval or rejection of proposed reliability standards in the United States, and may direct NERC to develop reliability standards that address specific issues. The Commission may not, however, unilaterally create new standards or revise existing ones. Congress clearly intended that the crafting of the actual reliability standards that are put in place and enforced under FPA Section 215 be performed by NERC and the Regional Entities, with stakeholder input.

The Commission acknowledged the limitations on its authority to draft standards in its rulemakings implementing FPA Section 215.²³ Its implementing regulations reflect the oversight authority granted under FPA Section 215, while also restraining the Commission's ability to engage in the actual drafting of reliability standards.²⁴

Therefore, to the extent that Paragraph 46 was intended to mandate all PMUs, PDCs, or the substations where they are located be classified as Critical Cyber Assets or Cyber Assets, it would contravene FPA Section 215. CIP-002 was developed and approved using NERC's Commission-approved reliability standards development process. If Paragraph 46 was meant to establish an asset classification mandate, it would be an unlawful revision to CIP-002 outside of the statutory process. If the Commission wishes to direct changes to CIP-002 it must follow the steps specified in Section 215 and in its own regulations.

B. To the Extent that the December 17 Order Was Intended to Make Generic Findings Regarding the Classification of Critical Assets and Critical Cyber Assets it Constitutes Unlawful “Legislative Rulemaking” Under the APA

²³ *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 184, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007) (“[The Commission] affirms the four possible courses of action that it will take with regard to each proposed Reliability Standard: (1) approve; (2) approve as mandatory and enforceable; and direct modification pursuant to Section 215(d)(5); (3) request additional information; or (4) remand.”).

²⁴ 18 C.F.R. § 39.5.

If Paragraph 46 is to be understood to establish new asset classification requirements, it would be unlawful under the APA even if it passed muster under the FPA. The APA requires federal agencies to provide notice of rulemakings of general applicability and to provide an opportunity to comment before they go into effect.²⁵ Although the APA exempts certain types of rulemakings from these requirements there is no question that they apply to “legislative” rulemakings.²⁶ Similarly, although agencies may make policy through various kinds of non-legislative rulemakings, or through non-rulemaking adjudications, they have no authority to adopt or alter legislative rules without following the statutory notice and comment procedures.

Under the APA a “legislative rule” is one that is “of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy”²⁷ Courts have found that an agency may only amend an existing legislative rule by going through another legislative rulemaking process, including the use of notice and comment procedures.²⁸ Additionally, the Supreme Court has held that where an agency adopts a new position inconsistent with, or that effects a substantive change in, a legislative rule, notice and comment procedures are required.²⁹

In light of the foregoing, if Paragraph 46 is an attempt to revise the existing CIP-002 framework by introducing new mandatory and enforceable asset-classification requirements it contravenes the APA. CIP-002 was adopted by Order No. 706 and its progeny, all of which

²⁵ 5 U.S.C. § 553(b).

²⁶ See, e.g., *United States Telecom Ass’n v. FCC*, 400 F.3d 29 at 35 (D.C. Cir. 2005).

²⁷ 5 U.S.C. § 551(4).

²⁸ *United States Telecom Ass’n v. FCC*, 400 F.3d 29 at 35 (D.C. Cir. 2005), citing, *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C.Cir. 1993) (stating that a rule that “effectively amends a prior legislative rule” is “a legislative, not an interpretative rule”) and *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C.Cir. 2003) (noting that “an amendment to a legislative rule must itself be legislative” (quotation marks omitted)).

²⁹ *United States Telecom Ass’n v. FCC*, 400 F.3d 29 at 35 (D.C. Cir. 2005), citing *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995).

were legislative rules developed through notice and comment procedures. Under the Order No. 706 framework, Responsible Entities identify Critical Assets and Critical Cyber Assets using their own methodologies and judgment in the first instance. The Commission may not alter that framework without conducting a rulemaking and allowing for notice and comment. Similarly, the Commission could not effectively revise the regulations promulgated under Order No. 672, which recognized the statutory limitations on the Commission's ability to create or revise reliability standards, without conducting a rulemaking.

Finally, because legislative rules can only be changed through rulemakings, any mandate established under Paragraph 46 could not be lawfully implemented until the Commission has completed the analysis that the Regulatory Flexibility Act ("RFA") requires agencies to complete before legislative rules may go into effect.³⁰

C. To the Extent that the December 17 Order Was Intended to Make Generic Findings Regarding the Classification of Critical Assets and Critical Cyber Assets Those Findings are Arbitrary, Capricious, and Not Based on Reasoned Decision-Making

The Supreme Court has established that an agency decision will be deemed to be:

arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³¹

Similarly, an agency decision will be deemed to be arbitrary and capricious if it is not based on reasoned decision-making,³² or if it departs from prior precedent without sufficient

³⁰ 5 U.S.C. § 604.

³¹ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

³² See, e.g., *O'Keefe's v. U.S. Consumer Product Safety Com'n*, 92 F.3d 940 (9th Cir. 1996) (stating that "[a] decision is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463

explanation.³³ To the extent that Paragraph 46 is intended to establish a mandatory and enforceable requirement that all PMUs, PDCs, or the substations where they are located must be classified as Critical Cyber Assets or Cyber Assets it is arbitrary, capricious and inconsistent with reasoned decision-making.

Such a ruling would fail to consider NERC's conclusion that "[m]ost Synchrophasor applications are not critical to the operation of the Bulk Electric system today" without offering a rationale for departing from it. It would unreasonably base generic conclusions regarding the significance of PMUs, PDCs, and related substations on a single company's voluntary commitments regarding its individual facilities. It would overlook the adverse consequences described in Section III above and their impact on the Commission's policies. Finally, it would depart from the Commission's own regulations and precedent without offering any justification. Such a ruling would therefore be arbitrary, capricious, and inconsistent with reasoned decision-making.

V. SPECIFICATIONS OF ERRORS AND STATEMENT OF ISSUES

Pursuant to Rule 713(c)(1) and (c)(2), the IRC respectfully submits the following specifications of error and statement of issues.

1. To the extent that the December 17 Order was intended to make generic findings regarding the classification of Critical Assets or Critical Cyber Assets it is unlawful under Section 215 of the FPA.³⁴

U.S. 29 (1983); *accord Hawaii Helicopter Operators Ass'n v. Federal Aviation Admin.*, 51 F.3d 212, 214-15 (9th Cir. 1995)).

³³ *See, e.g., Atchison v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (Stating that an agency has a "duty to explain its departure from prior norms" and that "[w]hatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.").

³⁴ *See* 16 U.S.C. § 824o(d); *See also, Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 184, *order on reh'g*, Order No. 693-A, 120 FERC ¶ 61,053 (2007).

2. To the extent that the December 17 Order was intended to make generic findings regarding the classification of Critical Assets and Critical Cyber Assets it constitutes unlawful “legislative rulemaking” under the APA.³⁵
3. To the extent that the December 17 Order was intended to make generic findings regarding the classification of Critical Assets and Critical Cyber Assets those findings would be arbitrary, capricious, and not based on reasoned decision-making.³⁶

VI. CONCLUSION

For the foregoing reasons, the IRC respectfully requests that the Commission grant its request for leave to intervene, grant its requested clarifications, or, in the alternative, grant rehearing, for all of the reasons specified above.

Respectfully submitted,

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³⁵ See 5 U.S.C. § 551(4); *see also*, *United States Telecom Ass’n v. FCC*, 400 F.3d 29 at 35 (D.C. Cir. 2005).

³⁶ *See*, *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also*, *O’Keeffe’s v. U.S. Consumer Product Safety Com’n*, 92 F.3d 940 (9th Cir. 1996) and *Atchison v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in these proceedings in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. §385.2010.

Dated at Washington, D.C., this 19th day of January, 2010.

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