

UNITED STATES OF AMERICA
BEFORE THE
OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY
DEPARTMENT OF ENERGY

Grid Security Emergency Orders:
Procedures for Issuance

RE: Notice of Proposed
Rulemaking and Request for
Comment, RIN 1901-AB40

**COMMENTS OF AMERICAN PUBLIC POWER
ASSOCIATION, LARGE PUBLIC POWER
COUNCIL, NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION, AND
TRANSMISSION ACCESS POLICY STUDY GROUP**

The American Public Power Association (“APPA”), the Large Public Power Council (“LPPC”), the National Rural Electric Cooperative Association (“NRECA”), and the Transmission Access Policy Study Group (“TAPS”) (together, “Joint Commenters”) submit these joint comments in response to the Notice of Proposed Rulemaking issued by the Department of Energy (“DOE”),¹ proposing regulations to implement emergency authority given to DOE under section 61003 of the Fixing America’s Surface Transportation Act (“FAST Act”).² Section 61003 promulgated new section 215A of the Federal Power Act (“FPA”), codified at 16 U.S.C. § 824o-1. These comments:

- Urge DOE to undertake discussion with the industry and the North American Electric Reliability Corporation (“NERC”) as soon as feasible to spell out the nature of the orders that may issue under FPA section 215A;

¹ *Grid Security Emergency Orders: Procedures for Issuance*, 81 Fed. Reg. 88,136 (proposed Dec. 7, 2016) (“NOPR”).

² Pub. L. No. 114-94, § 61003, 129 Stat. 1312, 1773 (2015).

- Ask DOE to continue to bear in mind the vital importance of consultation and outreach prior to issuance of an emergency order, to ensure that such orders are based on complete and accurate information;
- Request that DOE clarify, in consultation with the industry, the Electric Subsector Coordinating Council (“ESCC”), NERC, and the Electricity Information Sharing and Analysis Center (“E-ISAC”), how emergency orders will be communicated;
- Suggest that, to facilitate prompt issuance of and compliance with emergency orders, DOE adopt the practice of the Federal Energy Regulatory Commission (“FERC”) to use the FERC-approved definition of the bulk electric system to define the practical scope of the bulk-power system;
- Urge DOE to revise proposed 10 C.F.R. § 205.389 to specify the FPA provision under which DOE would enforce emergency orders;
- Request that DOE clarify the procedures for requesting reconsideration, clarification, rehearing, and judicial review of orders issued under section 215A; and
- Ask DOE to eliminate or, at minimum, clarify language regarding other bodies’ authority over cost recovery.

BACKGROUND AND INTERESTS OF JOINT COMMENTERS

FPA section 215A authorizes the Secretary of Energy, following a Presidential directive or determination identifying a grid security emergency, to issue orders for emergency measures addressed to the Electric Reliability Organization, regional entities,

or the owners, users, or operators of critical electric infrastructure or defense critical electric infrastructure with the aim of protecting or restoring the reliability of the grid. Section 215A(b) further directs the Secretary of Energy to establish rules and procedures for the exercise of this authority, following notice and public comment.

APPA is the national service organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities account for 15 percent of all sales of electric energy (kilowatt-hours) to ultimate customers and collectively serve over 49 million people in every state except Hawaii. Public power utilities own approximately 10 percent of the total installed generating capacity in the United States. Approximately 264 public power utilities are registered entities subject to compliance with NERC mandatory reliability standards. APPA represents a broad range of public power systems, both large and small.

LPPC is an association of the 25 largest state-owned and municipal utilities in the nation. LPPC members are located throughout the nation, both within and outside Regional Transmission Organization boundaries. LPPC represents the larger, asset-owning members of the public power sector.

NRECA is the national service organization for America's Electric Cooperatives. The nation's member-owned, not-for-profit electric cooperatives constitute a unique sector of the electric utility industry with a unique set of challenges. NRECA represents the interests of the nation's more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Electric cooperatives are driven by their purpose to power communities and empower their members to improve their quality of life. Affordable electricity is the lifeblood of the American economy, and

for 75 years electric cooperatives have been proud to keep the lights on. Because of their critical role in providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve.

America's Electric Cooperatives bring power to 75 percent of the nation's landscape and 12 percent of the nation's electric customers, while accounting for approximately 11 percent of all electric energy sold in the United States. NRECA's member cooperatives include 65 generation and transmission ("G&T") cooperatives and 840 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. The G&Ts generate and transmit power to nearly 80 percent of the distribution cooperatives, those cooperatives that provide power directly to the end-of-the-line consumer-owners. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

TAPS is an association of transmission-dependent utilities ("TDUs") in more than 35 states, promoting open and non-discriminatory transmission access.³ As TDUs, TAPS members have long recognized the importance of maintaining a reliable, capable grid at a reasonable cost. TAPS members are also users of the bulk-power system and are highly

³ David Geschwind, Southern Minnesota Municipal Power Agency, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS Vice Chair. John Twitty is TAPS Executive Director.

reliant on the reliability of facilities owned and operated by others for the transmission service required to meet TAPS members' loads.

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COMMENTS

I. DOE SHOULD ENGAGE IN CONSULTATION AT ALL STAGES OF THE PROCESS

A. *DOE should undertake discussion with the industry and NERC as soon as feasible to spell out the nature of the orders that may issue under FPA section 215A.*

Along with other industry trade groups, Joint Commenters supported the passage of legislation empowering DOE to take emergency action on a short-term basis following a presidential directive. Though Joint Commenters see potential benefit in real-time governmental action in the event of national emergencies, the trade groups have also been concerned that such authority must be exercised carefully, with recognition given to the fact that the electric grid is operated in real-time by expert system engineers, and that longer-term grid reliability is already governed by NERC's Critical Infrastructure Protection ("CIP") standards. These concerns are why Joint Commenters strongly urge DOE to undertake a joint dialogue with the industry and NERC to establish a set of shared parameters governing the nature of emergency orders that DOE may issue under this new authority.

FPA section 215A itself contains no expressly articulated limiting principles defining the nature of the orders DOE might issue following a presidential directive or determination. The absence of express statutory limitations makes it imperative that DOE work closely with the electric sector to ensure that ongoing and recovery-related industry operations are supported by the issuance of emergency orders, and not subject to conflicting and counter-productive signals.

This discussion must include NERC. NERC's CIP standards adopt a risk-based approach that begins with an inventory of critical assets, and attaches a comprehensive

suite of protective measures encompassing security management controls, personnel and training, electronic security perimeters, physical security, system security management, incident reporting, response planning, and recovery. The standards pertaining to response planning and recovery are particularly important when one considers how an emergency order from DOE may be processed and integrated with existing protocols. Ensuring that DOE officials have a comprehensive understanding of the industry's pre-arranged recovery and response techniques will help ensure that these processes are not at cross-purposes with any emergency orders DOE may issue. DOE would benefit as well from related discussions with the industry and NERC regarding which entities are best positioned to take actions with respect to declared emergencies.⁴

Joint Commenters appreciate that the proposed regulations, reflecting the FAST Act, call for the Secretary to consult, to "the extent practicable," with governmental authorities in Canada and Mexico, the ESCC, FERC, and other appropriate federal agencies before issuing orders;⁵ as discussed in Section I.B below, we believe that such consultation is vital. Yet, consultation in the hurried context of an emergency is no substitute for careful advance planning and a common understanding of the circumstances and nature of the orders that may be forthcoming.

Joint Commenters do not have a pre-conceived notion for how the dialogue they contemplate should be undertaken. For discussion at the highest level, conversation

⁴ This discussion should include a conversation that informs DOE regarding the scope of responsibilities, and limitations on those responsibilities, undertaken by owners/operators of the electric grid. Relevant limitations on such responsibilities for certain entities can be found in NERC registration documentation, in which (for example) multiple entities sharing ownership of a facility may designate one to be responsible for operation and NERC compliance. Given the complexity of arrangements among the many entities that play a role with respect to facilities that may be subject of an emergency order, coordination is essential to avoid unnecessary confusion.

⁵ Proposed 10 C.F.R. § 205.383 (NOPR at 88,142).

between DOE and industry representatives to the ESCC seems appropriate. Following that, a process somewhat similar to the one undertaken by DOE in eliciting input on preparation of the Spare Transformer Plan directed under section 61004 of the FAST Act⁶ may commend itself. That process was undertaken through a combination of written comments and town-hall style meetings.

B. If and when a grid security emergency occurs, DOE should conduct outreach and consultation to the maximum extent practicable before issuing an emergency order to better achieve the statute's goals.

The NOPR states, with respect to the procedures for issuing an emergency order, and with respect to outreach and consultation in particular:

[T]he Department would follow these procedures to the extent practicable, but subject to the Secretary's judgment of the urgency of the situation and the best approach under the circumstances. *Consistent with the Department's longstanding practice, all reasonable efforts will be made to consult with stakeholders prior to the issuance of an emergency order. The statute also requires the Secretary to consult with other governmental authorities and non-governmental entities before issuing emergency orders, "to the extent practicable in light of the nature of the grid security emergency and the urgency of the need for action."* The Department understands that electric reliability entities and private industry will likely be impacted by the emergency and have important situational awareness to assist the Department in identifying mitigation or protection measures.

NOPR at 88,138 (emphasis added).

Joint Commenters understand that the time available for consultation, and the type of consultation feasible, will depend on the urgency of the particular situation. However, to ensure that orders issued pursuant to section 215A achieve their goals, without

⁶ Pub. L. No. 114-94, § 61004, 129 Stat. 1312, 1779 (2015).

unintended negative consequences, it is essential that the Secretary take every opportunity to consult with other government agencies and with non-governmental entities, including users, owners, and operators of critical electric infrastructure, to the maximum extent possible. Particularly with respect to a system as complex as the bulk-power system, acting based on incomplete or inaccurate information may in some cases do more harm than delaying action to obtain a clearer understanding of the emergency. Such a result would be inconsistent with the purpose of the statute. Accordingly, we strongly urge DOE, consistent with the statute and the proposed rule, to make clear that it will consult with other government agencies and stakeholders to the maximum extent practicable in every declared grid security emergency.

II. DOE SHOULD CLARIFY, IN CONSULTATION WITH THE INDUSTRY, THE ESCC, NERC AND THE E-ISAC, HOW EMERGENCY ORDERS WILL BE COMMUNICATED.

Section 205.384 of the proposed regulations provides that DOE will “rely on existing coordinating bodies, such as the [ESCC] and the [E-ISAC], in addition to any other form or forms of communication most expedient under the circumstances, to communicate the content of emergency orders.”⁷ As also expressed by NERC in comments filed contemporaneously in this docket, Joint Commenters appreciate the effort to rely on existing institutions such as the ESCC and the E-ISAC in order to communicate emergency orders. For reasons explained by NERC, DOE’s ability to rely on the E-ISAC’s information broadcasting capability offers DOE a powerful and proven communications network.

⁷ Proposed 10 C.F.R. § 205.384 (NOPR at 88,142).

Having said that, it seems clear, given the conceivable range of emergencies to which DOE may choose to react, and the potential for orders aimed at individual utilities, that additional detail regarding DOE's anticipated communications is needed. This is particularly true if, as the proposed regulation suggests, DOE chooses to use "any other form or forms of communication most expedient under the circumstances," apart from the E-ISAC.⁸ Particularly if these communications call for action by individual utilities, it is essential that there is a common understanding of the means by which communications will be effectuated. Joint Commenters strongly suggest that additional attention be devoted to this matter, with DOE working together with the ESCC, NERC, and the industry to establish commonly understood protocols.

III. DOE SHOULD FOLLOW FERC'S PRACTICE OF INTERPRETING THE BULK-POWER SYSTEM AS CONTIGUOUS WITH THE FERC-APPROVED DEFINITION OF BULK ELECTRIC SYSTEM.

The contours of the "bulk-power system" are a crucial component of DOE's jurisdiction under section 215A of the Federal Power Act. "Critical electric infrastructure," as defined in section 215A, is limited to "a system or asset of the *bulk-power system*, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters."⁹ That reliance on the bulk-power system carries over to the definitions of a "grid security emergency,"¹⁰ and to the identity of the entities potentially subject to an emergency order to address a grid security emergency under

⁸ *Id.*

⁹ 16 U.S.C. § 824o-1(a)(2) (emphasis added).

¹⁰ 16 U.S.C. § 824o-1(a)(7).

section 215A.¹¹ Thus, both the nature of the events that may be addressed by orders under section 215A, and the entities that may be subject to such orders, are limited based on the definitions of the bulk-power system (and defense critical electric infrastructure).

Proposed 10 C.F.R. § 205.380 simply restates the FPA section 215(a)(1)'s definition of "bulk-power system,"¹² which section 215A incorporates by reference:¹³

(A) facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and

(B) electric energy from generation facilities needed to maintain transmission system reliability.

The term does not include facilities used in the local distribution of electric energy.

For over ten years, the definition of the bulk-power system has been the underpinning of FERC's and NERC's authority to establish and enforce reliability and cyber-security standards. In carrying out that authority, FERC has relied on the bulk *electric* system definition that has gone through several revisions since section 215 of the FPA was adopted. Without determining whether the bulk-power system may be broader than the bulk electric system, FERC determined that it was appropriate to use the more precise bulk electric system definition to provide certainty to enforcers and regulated entities. FERC and NERC went to significant effort to revise the initial bulk electric system definition in a way that would unambiguously yield the correct result for as many

¹¹ 16 U.S.C. § 824o-1(b)(4).

¹² FPA § 215(a)(1), 16 U.S.C. § 824o-1(a)(1); NOPR at 88,141-42.

¹³ 16 U.S.C. § 824o-1(a)(1).

facilities as possible, with a process for deciding harder cases on the margins.¹⁴ The resulting definition and process have now been in place for several years, and the facilities that make up the bulk electric system have thus largely been identified.

We urge DOE to follow FERC's practice of relying on the FERC-approved NERC definition of the bulk electric system, as that definition may be revised, with FERC's approval, over time, to set the practical boundaries of the bulk-power system.¹⁵ Using the already-developed and applied definition of the bulk electric system will avoid the need for DOE to go through the very time-consuming and contentious process of developing a separate list of facilities potentially subject to its jurisdiction under section 215A, either now or in the course of issuing an emergency order, and will avoid confusion (and, potentially, appeals) regarding the extent of DOE's jurisdiction.

IV. DOE SHOULD CLARIFY THE PROPOSED PROCEDURES

A. DOE should specify the FPA provision under which it would enforce emergency orders.

Proposed section 205.389 states that the Secretary of Energy may take or seek to take enforcement action "in accordance with Part III of the Federal Power Act."¹⁶ The preamble similarly references Part III generically.¹⁷ But the broad reference to Part III of the FPA could lead to confusion as to which section(s) of Part III are meant. Under the

¹⁴ See, e.g., *Revision to Elec. Reliability Org. Definition of Bulk Elec. Sys.*, Order No. 743, 75 Fed. Reg. 72,910 (Nov. 26, 2010), 133 FERC ¶ 61,150 (2010), *on reh'g*, Order No. 743-A, 76 Fed. Reg. 16,263 (Mar. 23, 2011), 134 FERC ¶ 61,210 (2011); *Revisions to Elec. Reliability Org. Definition of Bulk Elec. Sys. & Rules of Procedure*, Order No. 773, 78 Fed. Reg. 804 (Jan. 4, 2013), 141 FERC ¶ 61,236 (2012), *clarified on reh'g*, Order No. 773-A, 78 Fed. Reg. 29,210 (May 17, 2013), 143 FERC ¶ 61,053 (2013), *clarified*, 144 FERC ¶ 61,174 (2013), *review denied sub nom. New York v. FERC*, 783 F.3d 946 (2d Cir. 2015).

¹⁵ See, e.g., *S. La. Elec. Coop. Ass'n*, 145 FERC ¶ 61,232, PP 33-34 (2013) (quoting Order No. 773, P 7) (affirming FERC's use of the bulk electric system definition in construing extent of bulk-power system).

¹⁶ Proposed 10 C.F.R. § 205.389 (NOPR at 88,143).

¹⁷ NOPR at 88,138.

Department of Energy Organization Act,¹⁸ the Secretary has authority to exercise certain enumerated powers from the FPA.

42 U.S.C. § 7151(b) provides as follows:

(b) Except as provided in subchapter IV of this chapter, there are transferred to, and vested in, the Secretary the function of the Federal Power Commission, or of the members, officers, or components thereof. The Secretary may exercise any power described in section 7172(a)(2) of this title to the extent the Secretary determines such power to be necessary to the exercise of any function within his jurisdiction pursuant to the preceding sentence.

In turn, 42 U.S.C. § 7172(a)(2) provides, in relevant part:

(2) The Commission may exercise any power under the following sections to the extent the Commission determines such power to be necessary to the exercise of any function within the jurisdiction of the Commission:

(A) sections 4, 301, 302, 306 through 309, and 312 through 316 of the Federal Power Act [16 U.S.C. 797, 825, 825a, 825e to 825h, 825k to 825o].

Thus, the enforcement authority granted to DOE includes section 316 (General Penalties). However, it does *not* include section 316A (Violations; Civil Penalties), which establishes different penalties and different standards for assessing them.

To avoid confusion, we suggest that the final rule preamble and regulation recognize the limits on DOE's enforcement authority. Section 205.389 should be revised to state: "In accordance with section 316 of the Federal Power Act (16 U.S.C. § 825o), the Secretary may take or seek enforcement action against ordered parties who fail to comply with the terms of an order issued under section 215A(b) of that Act." And the preamble should be revised accordingly.

¹⁸ Pub. L. No. 95-91, 91 Stat. 565 (1977).

B. *DOE should clarify the procedures for requesting clarification, reconsideration, rehearing, and appeal.*

1. DOE should establish generally-applicable procedures for requesting reconsideration or clarification of an emergency order.

The proposed regulations include brief procedures for seeking reconsideration or clarification of an emergency order: such requests “must be submitted in writing to the Secretary, and will be posted on the DOE Web site consistent with CEII criteria.”

Proposed 10 C.F.R. § 205.385 (NOPR at 88,143). According to the preamble, “[s]hould the Secretary issue such an order, the order itself would set out the requirements and procedures for impacted entities to seek clarification or reconsideration of that particular order.” NOPR at 88,138. Joint Commenters are not aware of any reason why the procedures for seeking reconsideration or clarification of an emergency order would need to vary from one emergency order to another, and thus encourage DOE to establish generally-applicable procedures in the final rule; for example, the submission method(s) (via email, via electronic submission to a website, etc.), the office and address to which requests should be sent, and any requirements regarding formatting and signatures should be the same for all emergency orders.

2. DOE should clarify the procedures with respect to requests for rehearing pursuant to section 313 of the FPA.

The proposed regulations separately state that the rehearing and appeal provisions of the FPA¹⁹ apply to “motions for rehearing of orders issued under section 215A(b) . . . filed for the purpose of preserving appellate rights.” Proposed 10 C.F.R. § 205.390 (NOPR at 88,143).

¹⁹ These provisions of the FPA apply to the Secretary of DOE as well as FERC, pursuant to 42 U.S.C. §§ 7151(b), 7172(a)(2).

There is no explanation, in either the preamble or the proposed regulations, of how proposed sections 205.385 (Clarification or reconsideration) and 205.390 (Rehearing and Judicial Review) are meant to interact. In the final rule, DOE should clarify that a properly-submitted “request for clarification or reconsideration” of an emergency order under proposed section 205.385 can also, if the filing entity so designates, be a request for rehearing pursuant to section 313(b) of the FPA²⁰ and proposed section 205.390. A single submission should suffice for both purposes. We suggest that proposed sections 205.385 and 205.390 be combined for greater clarity.

In addition, in proposed section 205.390, pertaining to requests for rehearing, it is not clear what is intended by “filed for the purpose of preserving appellate rights.”²¹ The requester’s subjective intent should have no bearing on the applicable procedures. DOE should delete this extraneous, confusing text from the final rule.

3. DOE should clarify what procedures apply to challenges to orders other than emergency orders.

It is unclear what procedures an entity would follow to challenge an order other than an emergency order (for example, a DOE enforcement action) under these rules. The final rule should include such procedures, or a reference to where applicable procedures can be found (for example, a DOE enforcement action could be considered a “Remedial Order” governed by Part 205, Subpart O of DOE’s regulations).

²⁰ 16 U.S.C. § 825l(b).

²¹ Proposed 10 C.F.R. § 205.390 (NOPR at 88,143).

V. DOE SHOULD ELIMINATE OR REVISE THE PROPOSED REGULATIONS' PROVISION REGARDING COST RECOVERY.

FPA section 215A(b)(6)(A) provides for cost recovery. It states:²²

If the [Federal Energy Regulatory] Commission determines that owners, operators, or users of critical electric infrastructure have incurred substantial costs to comply with an order for emergency measures issued under this subsection and that such costs were prudently incurred and cannot reasonably be recovered through regulated rates or market prices for the electric energy or services sold . . . , the Commission shall, consistent with the requirements of [section 205], after notice and an opportunity for comment, establish a mechanism that permits such owners, operators, or users to recover such costs.

FPA section 215A(b)(6)(B) provides for the owners and operators of a critical defense facility to bear the cost of emergency measures taken by an owner or operator of defense critical electric infrastructure pursuant to an emergency order.²³

The proposed regulations state that “[a] party seeking recovery of costs associated with compliance with an order issued under section 215A(b) . . . must petition the appropriate State regulatory agency, the United States Court of Federal Claims, or the Commission for relief.” Proposed 10 C.F.R. § 205.391 (NOPR at 88,143). The preamble (NOPR at 88,138) explains that the DOE will not adjudicate cost recovery, but will leave that to “the Commission, state regulators, or the United States Court of Federal Claims.”

The proposed regulatory language is unnecessary, and may cause confusion. It deviates from the statutory text without explanation, and uses terms that are not defined.²⁴

²² 16 U.S.C. § 824o-1(b)(6)(A).

²³ 16 U.S.C. § 824o-1(b)(6)(B).

²⁴ “State regulatory agency” (used in the proposed regulation) does not appear to be defined elsewhere in Part 205 of DOE’s regulations. See 10 C.F.R. § 205.2. However, “state regulatory authority” is defined, for purposes of 10 C.F.R. parts 500-507, in a way that seems to exclude the ratemaking bodies of municipal electric utilities that are not “state regulated electric utility[ies].” 10 C.F.R. § 500.2. On the other hand,

Nor is it clear whether it is meant to be advisory or prescriptive. Given that DOE does not adjudicate cost recovery, proposed section 205.391 should be omitted from the final rule.

Alternatively, if DOE believes that its regulations must make clear that DOE is not responsible for cost recovery, the final rule should simply state that DOE does not adjudicate cost recovery, or quote or reference the relevant statutory language.

While section 215A, rather than a regulation of an agency that lacks authority over cost recovery, would govern cost recovery, we urge DOE to avoid adopting unnecessary regulations or using terms that create confusion.

CONCLUSION

For the reasons discussed above, the DOE should issue a final rule that reflects the comments submitted by Joint Commenters.

Respectfully submitted,

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Federal Power Act § 3(21) defines “state regulatory authority” to include rate-setting bodies of municipal utilities. More fundamentally, there is no reason for the DOE, an agency with no responsibility for administering FPA § 215A(b)(6)(A), to issue regulations addressing the question as to whether and how that section applies to entities that, pursuant to FPA § 201(f), are exempt from most provisions of Part II of the FPA.

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February 6, 2017