



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 205

RIN 1901-AB40

Grid Security Emergency Orders: Procedures for Issuance

AGENCY: Office of Electricity Delivery and Energy Reliability, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (“DOE”) is issuing a final rule that establishes procedural regulations concerning the Secretary of Energy’s issuance of an emergency order under the Federal Power Act. The statute authorizes the Secretary of Energy to order emergency measures, following a Presidential declaration of a grid security emergency, to protect or restore the reliability of critical electric infrastructure or defense critical electric infrastructure during the emergency. A grid security emergency could result from a physical attack, a cyber-attack using electronic communication, an electromagnetic pulse (EMP), or a geomagnetic storm event, damaging certain electricity infrastructure assets and impairing the reliability of the Nation’s power grid. The procedures established by this final rule will ensure the expeditious issuance of emergency orders under the Federal Power Act.

DATES: These procedures are effective as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Jeffrey Baumgartner, (202) 586-1411; U.S. Department of Energy, Office of Electricity Delivery and Energy Reliability, Mailstop OE-20, Room 8G-017, 1000 Independence Avenue, SW, Washington, DC 20585; or oeregs@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The Fixing America's Surface Transportation Act (FAST Act or the Act), Public Law 114-94, contains several provisions designed to protect and enhance the Nation's electric power delivery infrastructure. Section 61003 adds a new section 215A, titled "Critical Electric Infrastructure Security," to Part II of the Federal Power Act (FPA), codified at 16 U.S.C. 824o-1. New section 215A(a) defines, among other terms, a "grid security emergency," and authorizes the Secretary of Energy to order emergency measures after the President declares a grid security emergency. A grid security emergency could result from a physical attack, a cyber-attack using electronic communication, an electromagnetic pulse (EMP), or a geomagnetic storm event, damaging certain electricity infrastructure assets and impairing the reliability of the Nation's power grid. Emergency orders responding to grid security emergencies would aim to mitigate or eliminate threats to reliability as quickly and efficiently as possible.

The statute authorizes the Secretary of Energy to issue orders for emergency measures as are necessary, in the Secretary's judgment, to protect or restore the reliability of critical electric infrastructure or defense critical electric infrastructure during the emergency. Critically, the Department's centralized direction following a declared grid security emergency will help the Department to coordinate resources efficiently to minimize the impact of the emergency.

The authority granted in section 215A of the FPA supplements the Secretary's existing authority, under section 202(c) of the FPA, to order temporary emergency measures, if the Secretary finds "that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes," that the Secretary believes "will best meet the emergency and serve the public interest." To that end, the Secretary may issue orders under section 202(c) of the FPA requiring the "temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy" to best meet the emergency and serve the public interest.

The new section 215A(b) also directs the Secretary, "after notice and opportunity for comment," to "establish rules of procedure that ensure that such authority can be exercised expeditiously." To ensure that stakeholders and the public understand how the Department would issue an order responding to a grid security emergency, the Department published a notice of proposed rulemaking in the *Federal Register* on December 7, 2016 (81 FR 88136) to establish procedures to implement section 61003 of the FAST Act. After consideration of the comments received, as discussed in Section II of this preamble, the Department issues this final rule to establish the procedures it would expect to follow in the event of such an emergency. These procedures are added to the existing subpart W in 10 CFR part 205.

The final rule establishes a consistent yet flexible set of procedures by which the Secretary will engage potentially impacted parties in the issuance of emergency orders under new section 215A(b) of the FPA.

II. Discussion of Comments

Comments were submitted by entities representing components of the electricity subsector, State governments, the general public, and other interested parties. Commenters included the American Public Power Association, Berkshire Hathaway Energy, the Edison Electric Institute, the EIS Council, Grid Assurance, the Independent System Operator Regional Transmission Operator Council, the Large Public Power Council, the National Association of State Energy Officials, the Nuclear Energy Institute, the North American Electric Reliability Corporation, the National Rural Electricity Cooperative Association, the Pennsylvania Public Utility Commission, and Transmission Access Policy Study Group. The comments expressed support for the proposed rule, sought additional clarity, highlighted issues and concerns, or offered suggestions for modifications to the proposed rule. DOE has considered all of the comments in developing the final rule, and has made changes to the proposal as a result of the comments, as described below.

Many commenters expressed the need to integrate issues pertaining to grid security emergencies into the ongoing partnership between DOE and the electric subsector to enhance emergency preparedness. The electricity industry has implemented, and continues to develop, extensive capabilities and procedures, such as cyber mutual aid networks, to mitigate impacts from catastrophic events that can cause a grid security emergency. The Department is committed to working with all necessary parties through existing mechanisms such as the Electricity Subsector Coordinating Council (ESCC) and the Electricity Information Sharing and Analysis Center (E-ISAC) to align emergency measures with ongoing preparedness activities. These efforts, including training and exercises, will seek to ensure that the electricity subsector and other relevant stakeholders are provided necessary information, where appropriate, to inform planning and preparedness for potential emergency orders for a grid security emergency,

including identifying methods to ensure the prompt and secure communication of emergency orders. Sustained coordination with these ongoing preparedness activities will enhance crisis management activities and will help ensure effective integration of capabilities and resources during grid security emergencies. DOE intends to conduct additional outreach to the electricity subsector subsequent to issuance of this final rule. DOE's plans include continuing to organize and participate in emergency exercises and discussions at appropriate subsector forums, such as those focused on security. The intent is to help subsector entities understand their involvement in developing a potential grid security emergency order.

Several commenters asked for revision or clarification of defined terms, including the term “emergency measures” and the enumeration of agencies involved in coordinating responses to grid security emergency orders. The final rule defines “emergency measures” and “electric reliability organization” in response to commenters’ concerns, and §§205.383 and 205.384 capture the range of entities potentially responsible for consultation and response. Another comment asked the Department to interpret the bulk-power system according to the FERC-approved definition of “bulk electric system.” The Department declines to adopt an interpretation of “bulk-power system” different from the statutory definition in the Federal Power Act.

In defining the procedures for consultation prior to the issuance of an emergency order, listed in §205.383 of the final rule, commenters sought assurance that the Department will seek input from external parties. Many commenters, particularly those representing the electricity industry, expressed the necessity of aligning consultation procedures with existing emergency management protocols in the energy sector. This included highlighting the important role of the senior DOE leadership involvement with the ESCC as a coordinating body that could help

maximize the effectiveness of any potential emergency order. Commenters also sought assurance that appropriate Federal and State entities would be engaged prior to the issuance of the order, to ensure emergency orders benefit from the expertise of electric grid owners and operators, as well as to maintain compliance with existing regulatory requirements.

In response to these concerns, the Department has clarified in the final rule its intention to use existing protocols and mechanisms to consult and engage with all necessary parties, with the text at §205.383 expanded to include State agencies, the Nuclear Regulatory Commission, and relevant trade and industry associations, prior to the issuance of any emergency order. The procedures established by this final rule also continue to ensure the Secretary retains the flexibility to act in accordance with the conditions presented by the grid security emergency.

The importance of utilizing existing mechanisms and protocols for communicating emergency orders to impacted parties under the procedures detailed in §205.384 was also expressed by commenters. Commenters stressed the existence of detailed frameworks for crisis communication within the electricity subsector, and sought additional clarity on the means by which the Department intends to communicate grid security emergency orders. The Department is supportive of these suggestions, and has adapted §205.384 of the final rule to more clearly express DOE's intention to align any orders with existing frameworks, such as Emergency Support Function (ESF) #12 and the National Response Framework. The Department also intends to work with the electricity subsector to identify options for most effectively communicating emergency orders under a range of potential scenarios.

Concerns were raised about procedures for governing interactions between the Department and potentially impacted parties after the issuance of an emergency order covered

under §§205.385 to 205.389 of the final rule. These sections in the final rule are intended to supplement existing authorities, including federal electric reliability standards, to ensure the expeditious issuance of emergency orders by the Secretary under the FPA. To ensure consistency between the procedures for the utilization of various authorities held by the Department under the FPA, DOE will consider comments submitted in response to the proposed rule in any review of procedures governing the issuance of emergency orders under section 202(c) of the FPA.



A number of changes were made to §§205.385 to 205.389 of the final rule to address comments specific to the process for issuing emergency orders in response to a grid security emergency. Language was added to §205.385 of the final rule to encourage any entity that believes that an issued emergency order lacks necessary clarity for implementation, or conflicts with the technically feasible operations of the electric grid or existing regulatory requirements, to seek immediate clarification from DOE. Section 205.386 of the final rule was expanded to provide additional clarity on the treatment of sensitive information, particularly critical electric infrastructure information (CEII), which will be addressed in accordance with DOE Freedom of Information Act (FOIA) procedural regulations. Revisions to §205.387 of the final rule provide the Secretary with the flexibility to align the requirements for tracking compliance with an emergency order to the conditions presented by the grid security emergency. In response to comments concerning DOE's enforcement authorities, §205.388 was revised to clarify that DOE may pursue all legally authorized enforcement authorities. DOE does not resolve specific questions about its enforcement authorities in this procedural rule. Procedures for rehearing and judicial review under §205.389 of the final rule were revised to more closely align with §205.385 of the final rule—specifically, to allow a filing entity to request clarification or reconsideration,

as well as rehearing, in a single filing if so designated. In addition, §205.391 of the proposed rule regarding cost recovery has been omitted to avoid confusion with the statutory text, which is sufficiently detailed. Section 205.386 of the proposed rule, concerning termination of an order, was moved to §205.391 of the final rule to follow a more chronological order.

One commenter suggested that the final rule set out methods of communication to ensure that, in the event of a maliciously motivated grid security emergency, evidence of criminal activity is not accidentally or deliberately destroyed. In accordance with Presidential Policy Directive 41 (United States Cyber Incident Coordination), DOE will defer to the Department of Justice regarding communications to ensure preservation of evidence of criminal activity.

Comments were also received that supported restricting the Department's ability to issue an emergency order responding to a grid security emergency, such that the Department could not use the full statutory authority granted by the FAST Act to respond to such emergencies. For example, a commenter sought clarification on exactly how a request for an emergency order should be carried out, and another commenter urged vetting by the ESCC before issuance of an order. Given the need for flexibility to respond to any grid security emergency that may arise, DOE did not revise the proposal in light of those comments.

III. Summary of Final Rule

A. Definitions.

The final rule defines key terms in §205.380. Further explanation for the defined terms provided in the paragraphs that follow.

“Bulk-power system” encompasses the facilities used to transmit electricity and energy needed to maintain the reliability of that system of interconnected facilities—in essence, the electric power grid for which the President might declare a grid security emergency and authorize the Secretary to issue emergency orders to protect or restore its reliability. The term excludes facilities used in local electric distribution.

“Electric Reliability Organization” refers to the organization, certified by the Federal Energy Regulatory Commission (FERC) under section 215(c) of the FPA, which establishes and enforces reliability standards with FERC oversight. As of this rulemaking, the FERC’s designated Electric Reliability Organization is the North American Electric Reliability Corporation (NERC).

“Electricity Information Sharing and Analysis Center” (E-ISAC) refers to the organization, operated on behalf of the electricity subsector by the North American Electric Reliability Corporation, that gathers and analyzes security information, coordinates incident management, and communicates mitigation strategies with stakeholders within the electricity subsector, across interdependent sectors, and with government partners. E-ISAC is one of the organizations with which the Secretary will consult, to the extent practicable, in issuing an emergency order.

The “Electricity Subsector Coordinating Council” (ESCC) refers to the organization that aims to foster and facilitate the coordination of sector-wide, policy-related activities and initiatives designed to improve the reliability and resilience of the electricity subsector, including physical and cyber security infrastructure. The ESCC is one of the organizations with which the Secretary will consult, to the extent practicable, in issuing an emergency order.

“Electricity subsector” means both commercial and industrial actors who generate and deliver electric power, along with the facilities those actors use to generate and deliver electric power.

“Electromagnetic pulse” means one (1) or more pulses of electromagnetic energy emitted by a device capable of disabling or disrupting operation of, or destroying, electronic devices or communications networks, including hardware, software, and data, by means of such a pulse.

The “Emergency & Incident Management Council” (EIMC) refers to the organization, internal to the Department and chaired by the Deputy Secretary of Energy, designed to increase cooperation and coordination across the Department to prepare for, mitigate, respond to, and recover from emergencies. The EIMC plays a central role in grid security emergency orders, as it will meet, if practicable, after the President declares a grid security emergency to prepare recommendations to the Secretary.

“Geomagnetic storm” means a temporary disturbance of the Earth’s magnetic field resulting from solar activity. These natural phenomena are sometimes powerful enough to disrupt the bulk-power system. If the disruption is sufficiently severe, a grid security emergency could result.

“Regional entity” refers to organizations responsible for enforcing reliability standards for the bulk-power system in certain, defined regions. These organizations operate under NERC and FERC oversight.

B. Summary of Final Rule

The final rule establishes procedures by which the Secretary intends to issue emergency orders in response to a grid security emergency. The Secretary is authorized to issue emergency orders “[w]henever the President issues and provides to the Secretary [of Energy] a written directive or determination identifying a grid security emergency.” The purpose of an emergency order is to designate “emergency measures as are necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during such emergency.” The declaration of a grid security emergency does not preclude electric utilities from taking time-sensitive action to secure the safety, security, or reliability of the electric grid prior to the issuance of an emergency order.

Responses to grid disruptions will need to be tailored to the particular circumstances of any event, and this final rule will assist the Department in exercising its authority to respond as necessary to mitigate the effects of a grid security emergency. Because the nature of a grid security emergency is uncertain, the procedures allow for flexibility in response measures and, as the statute requires, to “ensure that such authority can be exercised expeditiously.” While the procedures in this final rule are expected to produce the most efficient and effective emergency response possible under the circumstances, the Secretary has final authority to issue appropriate grid security emergency orders.

In this final rule, the Department details procedures for outreach; consultation; communication of orders; clarification or reconsideration of orders; temporary access to classified and sensitive information; termination of orders; tracking compliance with an order; enforcement; rehearing and judicial review; and liability exemption pertinent to the issuance of orders resulting from a grid security emergency. These procedures are intended to establish a common framework for engagement with all potentially impacted entities, while providing the

Department with the maximum flexibility necessary to best respond to the unique conditions presented by any action that may constitute a grid security emergency.

As described in §205.381 of the final rule, emergency orders issued under section 215A(b) of the FPA may apply to the pertinent Electric Reliability Organization (NERC, as of this rulemaking), regional entity or entities, or “any owner, user, or operator of critical electric infrastructure or of defense critical electric infrastructure within the United States.”

In the event of a grid security emergency, DOE will immediately activate its unified command structure and coordinate outreach efforts. DOE expects that the EIMC will anchor the Department’s proposed response via its recommendations to the Secretary. Based on the nature and timing of the grid security emergency, however, the Secretary maintains discretion, based on a judgment of the relevant circumstances, to issue an emergency order without EIMC input. To the extent practicable, DOE will promptly alert stakeholders impacted by the grid security emergency through existing alert mechanisms, such as the NERC alert system and ESCC communication coordination processes.

Section 205.382 of the final rule outlines the EIMC procedures. When the Department is notified, in writing, that the President has declared a grid security emergency and has directed the Secretary to order emergency response measures, the EIMC will be activated. The EIMC will create ad hoc task groups, assign recommendation development tasks to these groups, and coordinate the Department’s consultation efforts. The EIMC may take other actions but only as necessary and practicable to develop the Department’s recommendations to the Secretary. After the EIMC makes its recommendations, the Secretary will issue the emergency order.

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 organizations and private industry will likely be impacted by grid security emergencies, and can offer important situational awareness and expertise to assist the Department in identifying mitigation or protection measures. The Department also recognizes the importance of aligning consultation efforts with the existing ESF #12 structure, Presidential Policy Directive 41, emergency management practices under the National Response Framework, and existing entities for coordination between government and industry, such as the ESCC and E-ISAC.

Section 205.383 outlines how the Department will coordinate its communication with other entities. Within the Department, the Office of Electricity Delivery and Energy Reliability (OE) will be the lead program office supporting the Secretary in issuing grid security emergency orders. As set forth in this final rule, OE would be responsible for conducting the required consultations under the statute. Consultation would include the Department’s effort to obtain information and recommended emergency measures from government entities,¹ electric

¹ DOE notes that the regulatory text of §205.383 discusses consultation with agencies supporting ESF #12. For clarification, ESF #12 outlines the Department of Energy’s responsibilities to help reestablish damaged energy systems and components when an incident requires a coordinated Federal response. The scope of ESF #12 includes providing technical expertise; collecting, evaluating, and sharing information on energy system damage; estimating the impact of system outages locally, regionally, and nationally; helping government and private sector entities overcome challenges in reestablishing energy systems; and providing information about the status of energy reestablishment efforts.

reliability organization, and owners, users, or operators of critical electric infrastructure or of defense critical electric infrastructure—including private-sector entities—impacted by the grid security emergency. Historically, the Department has collaborated with other Federal agencies in an energy emergency to obtain waivers or special permits to facilitate expedited restoration. The Department also intends to work with other Federal agencies during grid security emergencies to obtain waivers or special permits necessary to comply with the Secretary's order.

After the Secretary issues an emergency order, the Department will communicate the emergency order's content to the entities subject to the emergency order, as noted in §205.384 of the final rule. The Department will also align communication with the existing ESF #12 structure and emergency management procedures under the National Response Framework, and enlist the ESCC and E-ISAC to communicate the emergency order's content to those affected, when appropriate. The Department will also use any other form of communication most appropriate under the circumstances. Optimal communication on grid security emergencies will be paramount during such emergencies, and the Department will work to ensure that information is shared that will help it to respond most effectively. For that reason, according to §205.384 of the final rule, and consistent with obligations to protect classified information and the procedures established in §205.386 of the final rule, the Secretary may declassify information eligible for that change in status to ensure maximum distribution of information critical to the emergency response. CEII will be handled in accordance with DOE FOIA regulations at 10 CFR part 1004.

This final rule is limited to the Department's procedures for issuing an emergency order in response to a grid security emergency. Should the Secretary issue such an emergency order, the order itself would set out the requirements and procedures for impacted entities to seek clarification or reconsideration of that particular order. Section 205.385 of the final rule provides

general requirements for such requests. In particular, this section of the final rule provides that anyone subject to a particular order may submit a request for clarification or reconsideration in writing to the Secretary, and encourages this in cases where the ordered entity believes the emergency order lacks necessary clarity for implementation, or conflicts with the technically feasible operations of the electric grid or existing regulatory requirements. Such requests would be posted on the Department's website consistent with criteria established for treatment of critical electric infrastructure information. In acting on a request for clarification or reconsideration, the Secretary may grant or deny the request, or may abrogate or modify the final order, in whole or in part, with or without further proceedings, as soon as practicable. Such a request would not stay an emergency order unless the Secretary so determined.

Section 205.386 of the final rule provides that, as warranted and to the extent practicable and consistent with obligations to protect classified information, the Secretary may allow key personnel of ordered entities temporary access to classified information.

As described in §205.387 of the final rule, the Department also plans to determine compliance with grid security emergency orders. At the time the Department issues an emergency order, or shortly after such issuance, the Department may require the ordered party to provide a detailed account of compliance actions.

As noted in §205.388 of the final rule, the Department may take enforcement action for failure to comply with orders issued under section 215A. For appeal purposes, as noted in §205.389 of the final rule, the FPA includes the requirements for a rehearing request and the process for an appeal of a decision.

Finally, the FAST Act shields parties affected by emergency orders from liability for what would otherwise be violations of the FPA or FERC-approved reliability standards, except in cases of gross negligence. New section 215A(f) of the FPA states that any action or omission taken to comply with an emergency order that causes noncompliance “with any rule, order, regulation, or provision” of the FPA, as well as any FERC-approved reliability standard, “shall not be considered a violation” of that legal requirement. The same subsection of the Federal Power Act incorporates the liability protection for emergency orders issued under section 202(c) of the FPA. That protection, for actions or omissions resulting in noncompliance with “any Federal, State, or local environmental law or regulation,” not only frees the ordered party from violations of those laws or regulations, but also shields the ordered party from “any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation,” even if a court subsequently stays, modifies, or sets aside the order. Section 205.390 of the final rule describes all of these protections.

Section 205.391 of the final rule describes termination of emergency orders. An emergency order remains effective for up to fifteen (15) days and may be extended for subsequent periods of up to 15 days if the President issues another directive to the Secretary that the original grid security emergency has not ended or that the emergency measures already ordered are still required. If warranted, the Secretary may also terminate an emergency order before the 15 days have elapsed. The entity or entities subject to the emergency order may also request that the Secretary terminate an emergency order if the entity or entities believes that the grid security emergency ceases to exist and that protection or restoration of the grid has been achieved.

IV. **Regulatory Review**

A. **Executive Order 12866**

This final rule has been determined to be a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51,735 (Oct. 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

B. **National Environmental Policy Act**

DOE has determined that this final rule is covered under Categorical Exclusions found in the DOE’s National Environmental Policy Act regulations at appendix A to subpart D, 10 CFR part 1021, specifically A1, A6, A9, A11, A12, and A13. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

C. **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE’s procedures and policies are available on the Office of General Counsel’s Web site: <http://www.energy.gov/gc/downloads/executive-order-13272-consideration-small-entities-agency-rulemaking>.

DOE has reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This final rule sets forth procedures that DOE expects to use to issue an emergency order in the event of a declared grid security emergency. The procedures govern DOE activities in the issuance of an emergency order and therefore impact DOE, a Federal agency, rather than any small entities.

DOE further expects that these emergency orders would be issued rarely. In addition, the FAST Act authorizes DOE to issue emergency orders only to specific entities – namely, the pertinent Electric Reliability Organization (NERC, as of this rulemaking), regional entity or entities, or any owner, user or operator of critical energy infrastructure or defense critical energy infrastructure. DOE has determined that these entities most likely fall under NAICS code 221121, “Electric Bulk Power Transmission and Control.” To be considered a small entity, these businesses must have 500 employees or less. Due to the nature of the orders to protect and/or restore infrastructure, DOE has determined that it is likely to consult with large businesses.

An entity subject to an emergency order may request clarification or rehearing of an emergency order, or the termination of an emergency order. DOE does not expect that these provisions, which would help an entity to understand an emergency order or, in the case of a termination granted by the Secretary, end the applicability of an emergency order, to impose a significant impact on any entity. DOE may also consult with any of these entities to understand a grid security emergency and to obtain recommendations to address such emergency. DOE also does not expect these consultations to result in a significant impact on any entity because the interaction would not order the entity to perform any action, but would rather be an exchange of information to help DOE understand the grid security emergency and consider measures to protect and/or restore infrastructure. In addition, it is likely that only entities with equities that

could be impacted by emergency orders would be consulted. In the event that an emergency order is issued to address a grid security emergency, because the contents of any such order would be highly dependent upon the nature of the particular grid security emergency, DOE again emphasizes that the emergency order itself, rather than these procedures, would specify the requirements necessary to address that grid security emergency.

DOE's certification of no significant impact on a substantial number of small entities and its supporting statement of factual basis were provided to the Chief Counsel for Advocacy of the Small Business Administration subsequent to issuance of the proposed procedures, pursuant to 5 U.S.C. 605(b). DOE made only minor changes to the proposal that did not affect the initial regulatory flexibility analysis prepared for the proposed rule. DOE did not receive comments on the certification, and any comments on the economic impact of the rule were addressed elsewhere in the preamble. DOE made only minor changes to the proposal that did not affect the certification and factual basis prepared for the proposed rule.

On the basis of the foregoing, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking.

D. Paperwork Reduction Act

This final rule does not contain information collection requirements subject to approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and the procedures implementing that Act at 5 CFR part 1320. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Public Law 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of \$100 million or more in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments. 2 U.S.C. 1534.

This final rule will establish the procedures DOE expects to use issue an emergency order in the event of a declared grid security emergency. In the event that an emergency order is issued to address a grid security emergency, the order itself, rather than these procedures, would specify the requirements necessary to address the grid security emergency. The final rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

F. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. The final rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

G. Executive Order 13132

Executive Order 13132, “Federalism,” 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this final rule and has determined that it will not preempt State law and will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule would establish the procedures DOE expects to use issue an emergency order in the event of a declared grid security emergency. In the event that an emergency order is issued to address a grid security emergency, the order itself, rather than these procedures, would specify the requirements necessary to address that grid security emergency. No further action is required by Executive Order 13132.

H. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (Feb. 7,

1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or whether it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

I. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy. The final rule would establish the procedures DOE expects to use issue an emergency order in the event of a declared grid security emergency. In the event that an emergency order is issued to address a grid security emergency, the order itself, rather than these procedures, would specify the requirements necessary to address that grid security emergency. In addition, the statute requires that the emergency order must "protect or restore" critical electric infrastructure or defense critical electric infrastructure. Therefore, the final rule is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Approval by the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 10 CFR Part 205

Administrative practice and procedure, Energy, and Recordkeeping and reporting requirements.

Issued in Washington, DC, on January 4, 2018.

Mark W. Menezes
Under Secretary of Energy

For the reasons stated in the preamble, DOE amends part 205 of chapter II, subchapter A, of Title 10 of the Code of Federal Regulations as set forth below:

PART 205-ADMINISTRATIVE PROCEDURES AND SANCTIONS

- 1. The authority citation for part 205 continues to read as follows:

AUTHORITY: Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (42 U.S.C. Section 7101). Federal Power Act, Pub. L. 66-280, 41 Stat. 1063 (16 U.S.C. Section 792) *et seq.*, Department of Energy Delegation Order No. 0204-4 (42 FR 60726). E.O. 10485, 18 FR 5397, 3 CFR, 1949-1953, Comp., p. 970 as amended by E.O. 12038, 43 FR 4957, 3 CFR 1978 Comp., p. 136.

- 2. Subpart W is amended by revising the heading, adding an undesignated center heading after §205.379, and adding §§ 205.80 through 205.391 to read as follows:

Subpart W—Electric Power System Permits and Reports; Applications; Administrative Procedures and Sanctions; Grid Security Emergency Orders

Sec.

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INTERNAL PROCEDURES FOR ISSUANCE OF A GRID SECURITY EMERGENCY ORDER

- 205.380 Definitions.
- 205.381 Applicability of emergency order.
- 205.382 Issuing an emergency order.
- 205.383 Consultation.
- 205.384 Communication of orders.
- 205.385 Clarification or reconsideration.
- 205.386 Temporary access to classified and sensitive information.
- 205.387 Tracking compliance.

205.388	Enforcement.
205.389	Rehearing and judicial review.
205.390	Liability exemptions.
205.391	Termination of an emergency order.

§ 205.380 Definitions.

As used in this subpart:

Bulk-power system means the same as the definition of such term in paragraph (1) of section 215(a) of the Federal Power Act.

Critical electric infrastructure means the same as the definition of such term in paragraph (2) of section 215A(a) of the Federal Power Act.

Defense critical electric infrastructure means the same as the definition of such term in paragraph (4) of section 215A(a) of the Federal Power Act.

Department means the United States Department of Energy.

Electric Reliability Organization means the same as the definition of such term in paragraph (2) of section 215(a) of the Federal Power Act.

Electricity Information Sharing and Analysis Center (E-ISAC) means the organization, operated on behalf of the electricity subsector by the Electric Reliability Organization, that gathers and analyzes security information, coordinates incident management, and communicates mitigation strategies with stakeholders within the electricity subsector, across interdependent sectors, and with government partners. The E-ISAC, in collaboration with the Department of Energy and the

Electricity Subsector Coordinating Council, serves as the primary security communications channel for the electricity subsector and enhances the subsector's ability to prepare for and respond to cyber and physical threats, vulnerabilities, and incidents.

Electricity subsector means both commercial and industrial actors who generate and deliver electric power.

Electricity Subsector Coordinating Council (ESCC) means the organization that aims to foster and facilitate the coordination of sector-wide, policy-related activities and initiatives designed to improve the reliability and resilience of the electricity subsector, including physical and cyber security infrastructure.

Electromagnetic pulse means the same as the definition of such term in paragraph (5) of section 215A(a) of the Federal Power Act.

Emergency & Incident Management Council (EIMC) means the organization, internal to the Department of Energy and chaired by the Deputy Secretary of Energy, designed to increase cooperation and coordination across the Department to prepare for, mitigate, respond to, and recover from emergencies.

Emergency measures means measures necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during a grid security emergency as defined in section 215A(a) of the Federal Power Act.

Emergency order means an order for emergency measures under section 215A(b) of the Federal Power Act.

Geomagnetic storm means a temporary disturbance of the Earth's magnetic field resulting from solar activity.

Grid security emergency means the same as the definition of such term in paragraph (7) of section 215A(a) of the Federal Power Act. A grid security emergency is “declared” once the President of the United States has issued and provided to the Secretary a written directive or determination identifying the emergency.

Regional entity means an entity having enforcement authority under section 215(e)(4) of the Federal Power Act, 16 U.S.C. 824o(e)(4).

Secretary means the Secretary of Energy.

§ 205.381 Applicability of emergency orders.

An order for emergency measures under section 215A(b) of the Federal Power Act (emergency order) may apply to the Electric Reliability Organization, a regional entity or entities, or any owner, user, or operator of critical electric infrastructure or of defense critical electric infrastructure within the United States. Emergency measures may be issued if deemed necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during a presidentially-declared grid security emergency.

§ 205.382 Issuing an emergency order.

(a) The Secretary will use the procedures outlined in this section in issuing emergency orders, unless the Secretary determines that alternative procedures are more appropriate for the

unique circumstances presented by the emergency. In all instances, the Secretary has final authority on the procedures to be used in issuing an emergency order.

(b) Upon the Department's receipt of the President's written directive or determination identifying a grid security emergency, the Emergency & Incident Management Council (EIMC) will convene at least one emergency meeting. Resulting from this meeting, the EIMC's responsibilities will include, but not be limited to:

- (1) Assigning consultation and situational awareness tasks;
- (2) Creating ad hoc task groups;
- (3) Assigning recommendation development tasks to the ad hoc task groups it has created; and
- (4) Presenting its recommendations to the Secretary as expeditiously as possible and practicable.

(c) Following receipt of the EIMC's recommendations, unless the Secretary has determined alternative procedures are appropriate, the Secretary will issue an emergency order as quickly as the Secretary determines that the situation requires.

§ 205.383 Consultation.

(a) To obtain information related to a particular grid security emergency and recommended emergency measures from those government entities, electric reliability organizations, and private sector companies, and their respective associations where applicable, affected by the emergency, the Department of Energy's Office of Electricity Delivery and

Energy Reliability will conduct consultation related to each emergency order. Before an emergency order is put into effect and, to the extent practicable in light of the nature of the grid security emergency and the urgency of the need for action, efforts will be made to consult with at least the following, as appropriate:

- (1) The Electricity Subsector Coordinating Council;
 - (2) The Electricity Information Sharing and Analysis Center;
 - (3) The Electric Reliability Organization;
 - (4) Regional entities; and
 - (5) Owners, users, or operators of critical electric infrastructure or of defense critical electric infrastructure within the United States; and
 - (6) At least the following government entities:
 - (i) Authorities in the government of Canada;
 - (ii) Authorities in the government of Mexico;
 - (iii) Appropriate Federal and State agencies including, but not limited to, those supporting Emergency Support Function No. 12;
 - (iv) The Federal Energy Regulatory Commission; and
 - (v) The Nuclear Regulatory Commission.
- (b) The Department recognizes the expertise of electric grid owners and operators and other consulted entities in seeking to ensure that emergency orders result in the safe and effective operation of the electric grid, align with additional priorities including evidence collection, and comply with existing regulatory requirements, where required. The Department will endeavor, to the extent practicable, to conduct consultation in alignment with the existing Emergency

Support Function No. 12 structure and established emergency management processes under the National Response Framework.

§ 205.384 Communication of orders.

The Department will communicate the contents of an emergency order to the entities subject to the order, utilizing the most expedient form or forms of communication under the circumstances. The Department will attempt to conduct communication of emergency orders in alignment with the existing Emergency Support Function No. 12 structure and established emergency management procedures under the National Response Framework by relying on existing coordinating bodies, such as the ESCC and the E-ISAC, and, recognizing the existence of established crisis communication procedures, any other form or forms of communication most expedient under the particular circumstances. To the extent practicable under the particular circumstances, efforts will be made to declassify eligible information to ensure maximum distribution.

§ 205.385 Clarification or reconsideration.

(a) Any entity subject to an emergency order may request clarification or reconsideration of the emergency order. All such requests must be submitted in writing to the Secretary. The Department will post all such requests on the DOE website consistent with 10 CFR part 1004. To the extent the ordered entity believes the grid security emergency order lacks necessary clarity for implementation, or conflicts with the technically feasible operations of the electric grid or existing regulatory requirements, the ordered entity should seek immediate clarification from the Department.

(b) Upon receipt of a request for clarification or reconsideration, the Secretary may, in his or her sole discretion, order a stay of the emergency order for which such clarification or rehearing is sought. The Secretary will act as soon as practicable on each request, with or without further proceedings. Such responsive actions may include granting or denying the request or abrogating or modifying the order, in whole or in part.

§ 205.386 Temporary access to classified and sensitive information.

(a) To the extent practicable, and consistent with obligations to protect classified and sensitive information, the Secretary may provide temporary access to classified and sensitive information, at the level necessary in light of the conditions of the incident, related to a grid security emergency for which emergency measures are issued to key personnel of any entity subject to such emergency measures, to the extent the Secretary deems necessary under the circumstances. The purpose of this access, as defined under section 215A(b)(7) of the Federal Power Act, is to enable optimum communication between the entity and the Secretary and other appropriate Federal agencies regarding the grid security emergency.

(b) CEII will be shared, where deemed necessary by the Secretary, in accordance with 10 CFR part 1004.

§ 205.387 Tracking compliance.

Beginning at the time the Secretary issues an emergency order, the Department may, at the discretion of the Secretary, require the entity or entities subject to an emergency order to provide a detailed account of actions taken to comply with the terms of the emergency order.

§ 205.388 Enforcement.

In accordance with available enforcement authorities, the Secretary may take or seek enforcement action against any entity subject to an emergency order who fails to comply with the terms of that emergency order.

§ 205.389 Rehearing and judicial review.

The procedures of Part III of the Federal Power Act apply to motions for rehearing of an emergency order. A request for clarification or reconsideration filed under §205.385 of this subpart, if the filing entity so designates, may serve as a request for rehearing pursuant to section 313(a) of the Federal Power Act.

§ 205.390 Liability exemptions.

(a) To the extent any action or omission taken by an entity that is necessary to comply with an emergency order issued pursuant to section 215A(b)(1) of the Federal Power Act and this Part, including any action or omission taken to voluntarily comply with such order, results in noncompliance with, or causes such entity not to comply with any rule, order, regulation, or provision of or under the Federal Power Act, including any reliability standard approved by the Federal Energy Regulatory Commission pursuant to section 215 of the Federal Power Act, the Department will not consider such action or omission to be a violation of such rule, order, regulation, or provision.

(b) The Department will treat an action or omission by an owner, operator, or user of critical electric infrastructure or of defense critical electric infrastructure to comply with an emergency order issued pursuant to section 215A(b)(1) of the Federal Power Act as the

functional equivalent of an action or omission taken to comply with an order issued under section 202(c) of the Federal Power Act for purposes of section 202(c).

(c) The liability exemptions specified in paragraphs (a) and (b) of this section do not apply to an entity that, in the course of complying with an emergency order by taking an action or omission for which the entity would otherwise be liable, takes such action or omission in a grossly negligent manner.

§ 205.391 Termination of an emergency order.

(a) An emergency order will expire no later than 15 days after its issuance. The Secretary may reissue an emergency order for subsequent periods, not to exceed 15 days for each such period, provided that the President, for each such period, issues and provides to the Secretary a written directive or determination that the grid security emergency for which the Secretary intends to reissue an emergency order continues to exist or that the emergency measures continue to be required.

(b) The Secretary may rescind an emergency order after finding that the grid security emergency for which that order was issued has ended, and that protective or mitigation measures required by that order have been sufficiently taken.

(c) An entity or entities subject to an emergency order issued under this subpart may, at any time, request termination of the emergency order by demonstrating, in a petition to the Secretary, that the emergency no longer exists and that protective or mitigation measures required by the order have been sufficiently taken.

[FR Doc. 2018-00259 Filed: 1/9/2018 8:45 am; Publication Date: 1/10/2018]