

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 THE
NATIONAL ASSOCIATION OF STATE ENERGY OFFICIALS**

The National Association of State Energy Officials (“NASEO”) respectfully tenders for filing these Comments in the above-captioned proceeding in response to the Notice of Proposed Rulemaking¹ issued by the Department of Energy (“DOE”), proposing to issue procedural regulations concerning the Secretary of Energy’s issuances of an emergency order following the President’s declaration of a Grid Security Emergency, under section 215A of the Federal Power Act, codified at 16 U.S.C. § 824o-1. These proposed regulations are intended to implement the emergency authority granted to DOE under section 61003 of the Fixing America’s Surface Transportation Act (“FAST Act”)². As discussed below, these Comments are limited to address one discrete issue, namely that the Secretary of Energy will take advantage of the existing mechanisms and communication procedures in utilizing its new broad authority to issue orders addressing grid security emergencies by coordinating with a multitude of parties, such as NASEO, given its ongoing role in responding to all types of energy emergencies.

I. CONTACT INFORMATION

Correspondence, requests for any supplemental information, and any other communication in this proceeding should be addressed to the following representatives:

¹ 81 *Fed. Reg.* 88,136.

² *Pub. L. No.* 114-94.

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II. DESCRIPTION OF NASEO

NASEO represents the 56 state and territorial governor-designated energy officials who serve their states in setting and implementing energy policies and as energy advisors for governors and state legislatures. Formed by the states in 1986, NASEO facilitates peer learning among state energy officials, serves as a resource for and about state energy offices, and advocates the interests of the state energy offices to Congress and federal agencies.

Since its creation, NASEO has served as coordinator between the federal government and the states in energy emergency situations. The State and Territory Energy Offices (“SEOs”) were formed in response to the energy crisis of the early 1970s. SEOs serve critical roles in that they aid in emergency response and mitigation related to energy infrastructure, liquid fuels, and cyber security; advance practical energy policies and support energy technology research, demonstration, and deployment; partner with the private sector to accelerate energy-related economic development and enhance environmental quality; focus on energy efficiency and renewable energy programs, transportation fuel diversity, and traditional fuel development; and

allocate or oversee more than \$7 billion in energy-related funds derived from ratepayers and state appropriations annually, as well as billions of dollars in energy financing programs.

While state Public Utility Commissions (“PUCs”) have responsibility over utilities’ (generally only investor-owned utilities) planning, response and mitigation efforts under their supervision, the actions during an emergency are typically managed by the governor’s office in consultation with the SEO and others. In addition, SEOs have responsibility for all energy sectors during energy emergencies including liquid petroleum products, such as gasoline, propane and heating oil from industries not under investor-owned utility style regulation, as well as coordination with consumer-owned utilities. SEOs serve as the Emergency Support Function (“ESF”) #12 in the state emergency planning operations in many states. As the ESF #12 – Energy, SEOs facilitate the restoration of damaged energy systems and components when activated by the Secretary of Homeland Security for incidents requiring a coordinated Federal response. Together with DOE, and based on its ESF #12 designation, SEOs are responsible for maintaining continuous and reliable energy supplies for the United States through preventive measures and restoration and recovery actions.

III. RELEVANT BACKGROUND

On December 4, 2015, the bipartisan FAST Act was signed into law. The FAST Act contains several provisions intended to protect and enhance the resiliency of the Nation’s electric power delivery infrastructure in the event of a grid security emergency. *See* Division F, *Pub. L.* 114-94. Such emergencies may be the result of natural disasters, infrastructure failures, a geomagnetic storm, an electromagnetic pulse, a physical attack or cyber-attack that impairs the reliability of the Nation’s bulk electric system. Following a declared grid security emergency, the FAST Act provides the Secretary of Energy with broad and nearly unilateral authority to

issue orders for emergency measures to protect or restore the reliability of critical electric infrastructure or defense critical electric infrastructure during the emergency. In addition, DOE is designated as the lead cyber security agency for the energy sector responsible for collaborating with other federal agencies, owners of critical infrastructure associated with the energy sector, and with state, local and independent agencies. *See id.* at 61003(c)(2)(B). Accordingly, DOE will play a crucial role in minimizing the impacts of an emergency.

Subsequently, the DOE issued the NOPR to establish procedures to allow the Secretary of Energy to issue emergency orders to help prevent or quickly eliminate threats to grid reliability. The NOPR outlines procedures for DOE orders to last 15 days (and can be extended for another 15 days in the event the declared emergency persists) in response to grid security emergencies. The emergency orders may apply to the North American Electric Reliability Corporation (“NERC”), Regional Entities defined by section 215 of the Federal Power Act, or “any owner, user or operator of critical electric infrastructure or of defense critical electric infrastructure within the United States.” 81 *Fed. Reg.* 88,140. This authority to issue emergency orders would be triggered by a presidential directive declaring a grid security emergency situation and would bypass NERC and its standards development processes, which have already led to the existing NERC Critical Infrastructure Protection (“CIP”) Reliability Standards. DOE may require the ordered party to provide a detailed account of its compliance actions. To the extent in responding to the grid emergency order, an ordered entity violates a mandatory and enforceable NERC Reliability Standard (or another provision of the Federal Power Act), the ordered entity is to be exempted from liability unless there is gross negligence. With respect to cost recovery, the NOPR provides that it is the responsibility of FERC, state commissions or the US Court of Federal Claims. *Id.* at 88.143.

These Comments are tendered pursuant to the December 7, 2016 publication of the NOPR in the *Federal Register* establishing February 6, 2017, as the date on which comments are due. Accordingly, these Comments are submitted timely.

IV. COMMENTS

In implementing the provisions of the FAST Act, DOE should be mindful of the existing mechanisms in place to secure the Nation's bulk electric system, including the current communications protocols for coordination and information sharing purposes. As the NOPR recognized, before issuing an emergency order, the statute mandates that "to the extent practicable in light of the nature of the grid security emergency and the urgency of the need for action" the Secretary must consult with other governmental and non-governmental authorities.³ Given NASEO's ongoing role in responding to all types of energy emergencies, NASEO emphasizes the importance of building off of the existing knowledge base and state energy emergency plans, also called energy assurance plans, and urges the Secretary to consult with all stakeholders upfront before there is a need to issue an emergency order in order to get the most accurate picture of the existing mechanisms in place to address emergency situations as well as the roles played by each of the stakeholders on a daily basis. In addition, it is crucial for the DOE to collaborate with SEOs in the event of an emergency in order to maximize the emergency response and mitigation tools available to SEOs on a local level, take advantage of lessons learned, and coordinate with SEOs, the Electric Subsector Coordinating Council ("ESCC"), NERC and the Electricity Information Sharing and Analysis Center ("E-ISAC") in order to proceed with the most effective and efficient communication regarding the emergency orders.

The SEOs were created to respond to energy emergencies as result of the first oil embargo in 1973. The SEOs also have responded to weather related events such as hurricanes,

³ 81 *Fed. Reg.* 88,138.

ice storms and blizzards, as well as accidental spills, leaks and breakages in the energy infrastructure. Due to the heightened concern regarding intentional and criminal physical and cyber security breaches, which would disrupt access to energy supplies and cause network malfunctions, SEOs have taken on a more expanded role. Efforts in the states by the SEOs to coordinate response and recovery efforts have evolved in order to address these additional threat situations. SEOs now coordinate with state, federal and private sector entities regarding the increasing threat of physical and cyber-related interruptions and the associated disruptions to the Nation's grid and critical energy infrastructure.

SEOs work with state emergency management agencies to implement plans to respond to the energy emergency situations described above in order to protect the life and property of the citizens of their states. Furthermore, SEOs oversee the response by the private sector producers, refiners, and distributors of liquid fuels to events that impact the supply and delivery of these products, such as heating oil and gasoline. In more serious instances, on behalf of the governor, SEOs may work to implement petroleum set-asides and allocation under executive orders or laws to respond to shortages of petroleum products. SEOs work with local officials and private entity actors without regard to traditional regulatory regimes, which allows SEOs to be influential even in those segments of the energy industry not subject to extensive federal and state legislation and regulation. SEOs have vital experience in coordinating with various parties and preparing for and mitigating energy emergencies.

NASEO is the primary interface between the SEOs and various federal agencies and departments with responsibility and authority to respond to energy emergencies regardless of the cause. NASEO has already established proven methods of interaction between federal agencies and state energy officials. The Energy Emergency Assurance Coordinators ("EEAC") program

is one such example. It is a cooperative effort between NASEO, the National Association of Regulatory Utility Commissioners (“NARUC”), the National Governors Association (“NGA”), the National Emergency Management Association (“NEMA”), and the DOE’s Office of Electricity Delivery and Energy Reliability (“OE”), Infrastructure Security and Energy Restoration (“ISER”) Division. The EEAC provides for points of contact in each state and serves as an information sharing forum with respect to planning for, and responding to, energy emergencies. It supports a secure, cooperative communications environment for state and local government personnel with access to information on energy supply, demand, pricing, and infrastructure. Designated members have expertise in electricity, petroleum, and natural gas. Nearly 200 professionals comprise the current membership and represent state energy offices, public utility organizations, state legislators, emergency management agencies, homeland security agencies, local governments, and Governors’ offices.

The EEAC program has been in place since 1996 and was updated and improved in a February 2016 Memorandum of Understanding between DOE and the state associations, wherein the parties recognized the need to increase cooperation between the federal government and the entities representing the states. This led to enhanced communication protocols to assist in response and recovery both during and after an energy emergency caused by weather or human actions. Each state has assigned at least one primary and one secondary designee and may designate contacts for each energy source (electricity, natural gas, and petroleum). In the event of an energy supply disruption or emergency, OE relies upon the EEAC contacts to provide an up-to-date assessment of energy markets in the effected states, while states rely on OE to share assessments, situation reports and other relevant information. During these emergency

situations, as well as other non-emergency situations in which the list may be used, the EEACs serve as the link between the state, industry, and OE.

In addition to the EEAC program, NASEO also develops and executes emergency exercise drills regarding energy supply disruptions and other energy events to test existing procedures and incident response plans. Recently, a number of states in the Northeast and Mid-Atlantic participated in a joint DOE/NASEO cyber-incident exercise designed to affect a number of energy industries, including the utilities and petroleum companies. Over the years, NASEO has found that exercises are the most effective means—short of an actual energy emergency event—to test the planning and coordination by the various government and private industry actors in responding to an event. Oftentimes, the results and after-action reports of the exercises highlight circumstances and identify lessons learned that must be addressed and remedied in the future.

In addition to testing the coordination among the various federal and state governmental agencies and the private sector entities in response to an energy emergency, these exercises also allow SEOs to implement their state energy assurance plans that are developed with expert assistance from NASEO. These plans are tailored to the energy supply and demands of the state. The plans incorporate information about the relevant energy infrastructure located within the state and the various energy supply networks and distribution systems that provide energy products and services to the state. They contain an assessment specific to the types of risks to the energy supply and distribution system within the state and include incident response plans to those identified threats. Because an event affecting one segment of the energy system can lead to consequences throughout the energy system, energy assurance plans examine the interdependencies among the various energy infrastructure components. Execution of these plans

during the regularly run exercises prepare state and local authorities for coordination with federal agencies and for assisting the private sector in an energy emergency. The plans detail means for government authorities at all levels to deliver complete and timely information to the public, as well as those directly responding to the event. This communication effort avoids panic and facilitates effective and efficient resolutions. By minimizing adverse public reactions to these events, the government and private sector entities may better and more quickly focus on recovery efforts. For example, the OE/NASEO-coordinated communications efforts in 2016 regarding the shut-down of the Colonial Pipeline were effective at sharing information and preventing panic.

Accordingly, the final rule in this proceeding must recognize the critical role that NASEO and SEOs that serve as ESF #12 would play in responding to an emergency order. SEOs, with ESF #12 responsibilities, in an emergency event are well prepared to assist in coordinating responses from other state and local government partners to assist the utilities in removing regulatory barriers that might impede the restoration of generation, transmission and distribution systems, or in the case of pipelines with response and remediation of interruptions to their delivery and storage systems. While state public utility commissions have an integral role during energy emergency situations with the industries under their supervision, SEOs, as members of the state governor's executive department, can access and leverage assistance and resources needed for the response to and recovery from the emergency. Moreover, SEOs have experience coordinating grid exercises and working with the industry through the state-specific energy assurance plans created with the assistance of NASEO in order to fine-tune incident response plans, coordination with and roles of all stakeholders and communication efforts. As a result, NASEO strongly urges DOE to: (1) coordinate and consult with NASEO and the SEOs in determining how best to utilize DOE's new authority to issue emergency orders; (2) collaborate

with NASEO to the extent feasible upon learning of a President-declared grid emergency in order to ensure that recovery-related activities of the industry as overseen by SEOs are receiving the support and information necessary to achieve remediation promptly; and (3) continue and expand robust energy emergency response execution.

V. CONCLUSION

WHEREFORE, the National Association of State Energy Officials respectfully requests that the Department of Energy issue a final rule consistent with the comments contained herein.

Dated: February 6, 2017

Respectfully submitted,

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