

**Morgan Lewis**

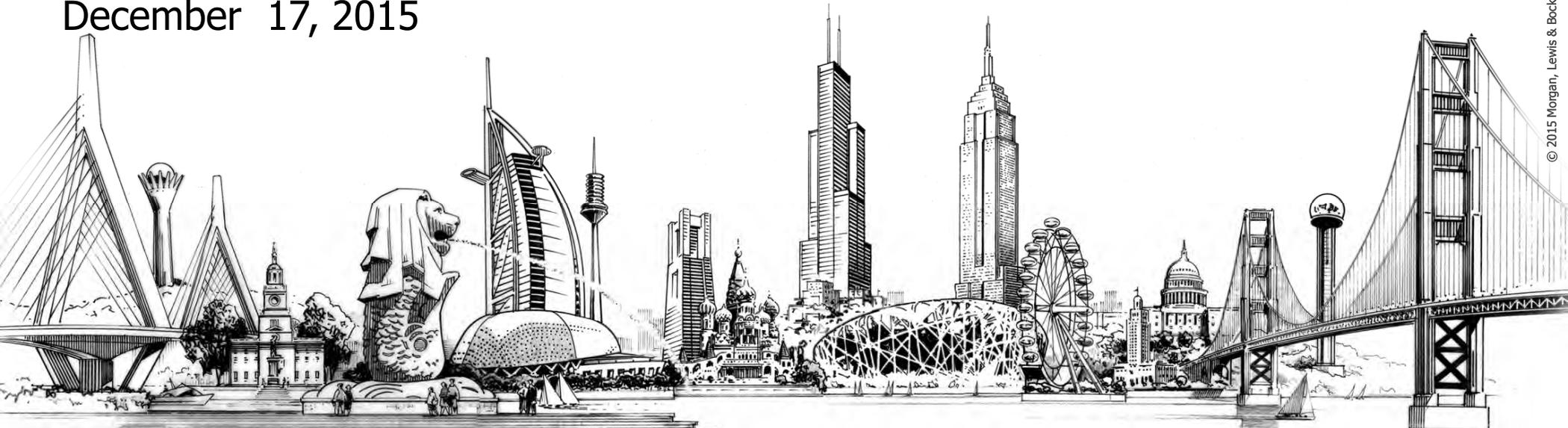
# **WHAT SECTION 215A OF THE FEDERAL POWER ACT MEANS FOR ELECTRIC UTILITIES**

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# Agenda

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# **INTRODUCTION: FAST ACT**

# Fixing America's Surface Transportation Act

- On December 4, 2015, President Obama signed into law a \$300 billion highway bill—the Fixing America's Surface Transportation (FAST) Act.
  - H.R. 22, 114th Cong. (2015) (enacted)
- Although the FAST Act is a federal transit spending law, it also includes provisions relating to energy security and critical infrastructure that are directly relevant to investor-owned utilities.
- The new law amends the Federal Power Act (FPA) to facilitate a more effective and efficient response to electric grid emergencies by the federal government and utilities.
- Also adds several new statutory provisions long-sought by the electric industry.

# **FAST ACT ENERGY SECURITY MEASURES**

# New DOE Emergency Order Authority

## Key Issues

- Critical electric transmission infrastructure may be vulnerable to a variety of threats.
  - Malicious Cyber or Physical Attack
  - Geomagnetic Disturbance (GMD)
  - Natural disaster
  - Severe weather event
- NERC Reliability Standards are the only current tool for requiring mandatory security measures by electric utilities.
  - They can take a year or more to develop and become effective.
  - Insufficient to protect against the evolving security threats to critical infrastructure.

# New DOE Emergency Order Authority (cont'd)

## New Measures

- Creates new FPA section 215A.
- DOE is authorized to order utilities, the North American Electric Reliability Corporation (NERC), and Regional Entities to implement emergency security measures for up to 15 days at a time.
  - Emergency authority follows Presidential determination of a grid security emergency.
- Emergency orders can be reissued if the emergency is ongoing.
- Utilities will be exempt from penalties for FPA regulatory violations, including violations of Reliability Standards.
- DOE to complete procedures implementing emergency authority by early June 2016.
  - Procedures subject to notice and public comment.

# New DOE Emergency Order Authority (cont'd)

## Analysis

- Top-down emergency authority and penalty exemption can facilitate a better-coordinated, more effective response to electric grid emergencies.
- No clear limitation or guidance on the type of security measures DOE can direct.
  - Left to the discretion of DOE.
- Costs of implementing emergency orders may not be recoverable through cost-based or market-based rates.
  - FERC will establish a separate mechanism for cost recovery.

# Resolving Environmental and Grid Reliability Conflicts

## Key Issues

- FPA section 202(c) grants DOE emergency authority to order electric utility interconnection, service, or operation.
  - DOE can issue emergency orders to ensure reliability.
  - Authority rarely used, but has been used to direct generators to continue operating in reliability emergencies and to direct utilities to interconnect on a temporary basis after natural disasters.
- These orders have occasionally created liability for generators that could be required to run in accordance with emergency order, but simultaneously incur penalties for operating in violation of environmental laws.
  - Mirant Corporation, 2005
  - GenOn, Inc., 2012
- FERC has previously called on Congress to address this gap.
  - Prior legislation failed to pass both House and Senate (H.R. 4273, 112th Cong. (2012)).

# Resolving Environmental and Grid Reliability Conflicts (cont'd)

## New Measures

- Amends FPA section 202(c).
- Utilities responding to emergency orders are now exempt from liability for noncompliance with “any Federal, State, or local environmental law or regulation.”
  - Clean Water Act
  - Clean Air Act
  - National Ambient Air Quality Standards
- DOE is encouraged to tailor emergency orders to minimize violation of environmental laws.
  - 90-day limit on 202(c) emergency orders creating environmental violations.

# Resolving Environmental and Grid Reliability Conflicts (cont'd)

## Analysis

- Eliminates regulatory compliance “Catch-22” for utilities, a long-term goal of the electric industry.
- Although DOE authority has been invoked only rarely, even FERC has recognized that it is unfair to require utilities to violate environmental laws and thereby become subject to fines.

# Enhanced CEII Protections

## Key Issues

- Critical Energy Infrastructure Information (CEII) includes certain engineering, vulnerability, or design information that, if available to bad actors, could be used to threaten the reliability of critical infrastructure.
- Recent events have highlighted the risks of mishandled or inconsistently designated CEII.
  - 2015 DOE Inspector General Report on FERC's information protection controls.
- FERC's existing CEII regulations seen as weak.
  - Little confidence that CEII is necessarily FOIA-exempt.
  - FERC rules provide for easy CEII access for any party with need and an NDA.

# Enhanced CEII Protections (cont'd)

## New Measures

- CEII defined as:
  - “information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to the Commission or other Federal agency, other than classified national security information, that is designated as critical electric infrastructure by the Commission or the Secretary.”
  - Information defined as CEII under FERC’s regulations.
- CEII is exempt from mandatory disclosure under the Freedom of Information Act (FOIA).
- CEII held by other federal agencies, states, local authorities, or tribal authorities also exempt from transparency laws applicable to those entities.
- CEII designation lasts for five years, and can be undesignated during that time if it would no longer pose a threat.

# Enhanced CEII Protections (cont'd)

## New Measures

- Commission must develop criteria and procedures for CEII designation and to prohibit “unauthorized” disclosure of such information.
  - New regulations must develop sanctions for Commission and DOE personnel who “knowingly and willfully” engage in unauthorized CEII disclosure.
    - Recent history suggests a need for such sanctions.
  - CEII designations subject to in camera judicial review.
- Commission required to segregate CEII within its data.
- Commission to develop procedures to encourage voluntary sharing of CEII between public and private sector parties.
- New regulations to be proposed and implemented by early December 2016.

# Enhanced CEII Protections (cont'd)

## Analysis

- New measures enhance overall protection of CEII, while also encouraging voluntary sharing among relevant agencies.
  - Scope of CEII subject to FERC rulemaking.
  - FERC may continue to permit wide “authorized” disclosure of information, similar to current process.
- 5-year limitation on CEII designation and option of judicial review aims to prevent unnecessary or overbroad restrictions on information.
- New law also encourages the government to provide temporary access to classified information for entities that are subject to emergency measures.

# Establishment of Strategic Transformer Reserve

## Key Issues

- Unexpected outages to critical transmission infrastructure pose a significant risk to grid reliability.
  - Physical or cyber attack
  - Electromagnetic pulse
  - GMDs
  - Severe weather or seismic events
- Existing programs are in place to restore the nation's transmission system in the event of emergency events, such as terrorist attacks.
  - EEI's Spare Transformer Equipment Program (STEP) facilitates the maintenance and transfer of spare transformers to affected utilities.

# Establishment of Strategic Transformer Reserve (cont'd)

## New Measures

- Requires development of Strategic Transformer Reserve Plan, with goal of enabling the quick deployment of spare large transformers and emergency mobile substations.
- DOE, in consultation with FERC and NERC, must develop a Strategic Transformer Reserve Plan for storing spare large power transformers and emergency mobile substations.
  - Strategic location for equipment
  - Number of spare transformers and mobile substations necessary to restore grid resiliency
  - Costs of implementation, including fees paid by transmission owners and operators
- DOE must develop the Strategic Transformer Reserve Plan by early December 2016.

# Establishment of Strategic Transformer Reserve (cont'd)

## Analysis

- Utilities should be prepared to participate in the development of the Strategic Transformer Reserve Plan.
  - Provisions of the Strategic Transformer Reserve Plan will determine the eligibility criteria for withdrawing from the Strategic Transformer Reserve, the process for returning or replacing such equipment, and fees paid by eligible utilities.

# Designation of DOE as Sector-Specific Agency

## Key Issues

- Presidential Policy Directive-21 (PPD-21), Critical Infrastructure Security and Resilience, identified 16 critical infrastructure sectors, including the energy sector.
- Sector-Specific Agencies (SSAs) are designated agencies with specialized expertise in those sectors and are tasked with various roles and responsibilities, such as development of Sector-Specific Plans (SSPs).
- DOE was previously designated the SSA for the energy sector.

# Designation of DOE as Sector-Specific Agency (cont'd)

## New Measures

- Designate DOE as the SSA for cybersecurity within the energy sector.
- DOE will expand its existing scope of SSA responsibilities as lead SSA for cybersecurity.
  - Responsibilities include day-to-day coordination with the Department of Homeland Security and all applicable regulatory agencies on sector-specific activities, incident management, and providing support to identify and mitigate vulnerabilities within the energy sector.

# Designation of DOE as Sector-Specific Agency (cont'd)

## Analysis

- The SSPs provide outlines of actions and examples of coordination on activities at the national level relevant to each sector.
- DOE expected to continue highlighting cybersecurity goals and priorities in the Energy SSP.

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# Questions?

## **What Section 215A of the Federal Power Act Means for Electric Utilities**

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