BEFORE THE
UNITED STATES DEPARTMENT OF ENERGY

In re: Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid, July 2025	Submitted via e-mail to: AskCR@hq.doe.gov August 6, 2025

Motion to Intervene and Protective Request for Rehearing by the Attorneys General of Maryland, Washington, Illinois, Michigan, Minnesota, Arizona, Colorado, Connecticut, and New York

The Attorneys General of Maryland, Washington, Illinois, Michigan, Minnesota, Arizona, Colorado, Connecticut, and New York ("the States") make this filing to raise our concerns with the Department of Energy's ("Department" or "DOE") report titled *Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid*, published July 7, 2025 ("Report"),[1] and request rehearing of the same.

Given that DOE has not yet applied the report to issue future emergency orders, the States do not concede that the Federal Power Act requires the States to request rehearing at this time.[2] Still, the States acknowledge that President Trump instructed DOE to use the methodology in this report as part of a "protocol" to issue orders pursuant to Section 202(c) of the Federal Power Act preventing the retirement of power plants identified as critical to reliability in DOE's report.[3] DOE has indicated that it intends to comply with that mandate and use this Report to "guide reliability interventions" and issue Section 202(c) emergency orders.[4] The States reserve all rights to present these objections, or any other objection or legal challenge to the Report or DOE's reliance on this report going forward. However, out of an abundance of caution and to preserve their arguments, the States also formally request rehearing of the methodology,

[1] Available at https://www.energy.gov/sites/default/files/2025-07/DOE%20Final%20EO%20Report%20%28FINAL%20JULY%207%29_0.pdf [https://perma.cc/J2XU-2RRJ].
[2] *See* 16 U.S.C. § 825*l*.
[3] *See* Exec. Order No. 14,262, 90 Fed. Reg. 15,521 (Apr. 14, 2025).
[4] *See* U.S. DEP'T OF ENERGY, *Fact Sheet: The Department of Energy's Resource Adequacy Report Affirms The Energy Emergency Facing The U.S. Power Grid* (2025), https://www.energy.gov/sites/default/files/2025-07/DOE_Fact_Sheet_Grid_Report_July_2025.pdf [https://perma.cc/YLX7-8G7T] (explaining that DOE's methodology will be used, pursuant to the executive order, "prevent [] generation resources from leaving the bulk-power system"); Press Release, U.S. Dep't of Energy, Department of Energy Releases Report on Evaluating U.S. Grid Reliability and Security (July 7, 2025), https://www.energy.gov/articles/department-energy-releases-report-evaluating-us-grid-reliability-and-security [https://perma.cc/8TEJ-AGH6]. (stating that its "methodology also informs the potential use of DOE's emergency authority under Section 202(c) of the Federal Power Act"); Report at *vi* (explaining that DOE's standard will be used to "guide reliability interventions"), 1 (emphasizing the need for DOE's "decisive intervention" in energy markets), 10 (analyzing ERCOT because "FPA Section 202(c) allows DOE to issue emergency orders to ERCOT").

standards, and protocol identified in this Report under Section 313*l* of the Federal Power Act, 16 U.S.C. § 825*l*.

This filing details the ways in which the Report is arbitrary and why it would be unlawful to rely on it to justify future Section 202(c) orders. The States also request DOE review the Report independently before it is used in any capacity in order to address the serious errors in the analysis highlighted here.

I. Motion to Intervene

The Attorneys General of Maryland, Washington, Illinois, Michigan, Minnesota, Arizona, Colorado, Connecticut, and New York move to intervene in this proceeding pursuant to Section 313*l* of the Federal Power Act, 16 U.S.C. § 825*l*, and request that the Department of Energy grant rehearing of its July 7, 2025 report titled *Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid*.

Executive Order 14262 and DOE's own statements alongside the Report's publication indicate that it will be used to "guide reliability interventions" and justify issuance of emergency orders under Section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c). The Report is deeply flawed and, if DOE is taken at its word, it will inflict significant harm on our states.

Many of the retiring resources targeted by this report are located in our states. In Washington, for example, the Transalta Centralia coal-fired power plant is scheduled to retire in December 2025. In Colorado, the Craig and Comanche coal-fired power plants are scheduled to retire by the end of the year as well and the state's remaining coal fired power plants are scheduled to retire by 2031. These retirements have been thoroughly vetted by state and regional authorities and approved only following an extensive examination of cost considerations and reliability impacts.

And even when a source is not located directly in one of our states, the ratepayer impacts of overriding a planned retirement based on the DOE Report will often be felt by our residents. That is because many of these resources operate within regional transmission systems that spread costs across all, or a portion of, their footprint. In MISO, for example, ratepayers across the ISO's north and central regions are being asked to foot the bill for the continued operation of the J.H. Campbell coal-fired power plant in Michigan pursuant to a Section 202(c) order issued by DOE in May. In just five weeks, complying with that Order has cost the plant's owner $29 million.[5] The order is expected to cost consumers close to $100 million if it expires on August 21 and is not renewed.[6]

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[5] *See* CMS Energy Corp., Quarterly Report (Form 10-Q) (Jul. 31, 2025), https://www.sec.gov/ix?doc=/Archives/edgar/data/0000201533/000081115625000071/cms-20250630.htm.

[6] Brian Dabbs, *Coal Plant Ordered to Stay Open Cost $29M to Run in 5 Weeks*, POLITICO ENERGYWIRE (Aug. 1, 2025), https://subscriber.politicopro.com/article/eenews/2025/08/01/coal-plant-ordered-to-stay-open-cost-29m-to-run-in-5-weeks-00487542.

Our states are also harmed when Section 202(c) is used to keep polluting facilities from retiring in upwind locations. Fossil-fuel power plants are large sources of ozone-forming pollution and toxic emissions that contribute to nonattainment of air quality standards in downwind states like Connecticut, New York, and Maryland. Planned retirements have the benefit of reducing this pollution and overriding those state and regional determinations based on the DOE Report will further the harm that downwind states face from upwind sources.

Moreover, the report unlawfully intrudes on the states' authority to regulate generation resources within their borders. Section 201 of the Federal Power Act clearly reserves to the states their traditional authority "over facilities used for the generation of electric energy."[7] That authority "is a matter that has traditionally rested with the states, and it should continue to rest there."[8]

Both EO 14262 and subsequent statements by DOE make clear that the report will be used to justify Section 202(c) orders going forward.[9] The States are aggrieved by the report which paints an unrealistic picture of resource adequacy to justify use of DOE emergency authority. Exercising that authority in non-emergency situations will harm ratepayers and the environment and unlawfully infringe on an area of state sovereign authority. Moreover, our states are also purchasers of retail electricity and are directly harmed by the rate impacts from these decisions.

II. Background

a. Resource adequacy is highly regulated at the state and regional levels.

Existing regulatory mechanisms govern both federal requirements for reserve margins and state resource adequacy determinations. Resource adequacy is an integral part of prudent, least-cost, utility planning in every state and region of the country.[10] DOE plays no role in the complex proceedings to determine either reserve margins or specific resource adequacy conclusions. The Report fails to grapple with the complicated task of resource adequacy planning undertaken by state utility offices and regional grid planners across the country, yet these existing procedures are a key part of the alleged resource adequacy conundrum which the DOE Report claims to address.

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[7] 16 U.S.C. § 824(b)(1).
[8] *Devon Power LLC et al.,* 109 FERC ¶ 61,154, para. 47 (Nov. 8, 2004).
[9] *See* U.S. Dep't of Energy, Order No. 202-25-4 (May 30, 2025) [https://perma.cc/PS3M-6CJA] [*hereinafter* "Eddystone Order"] (The methodology "will be used to establish a protocol to identify which generation resources within a region are critical to system reliability and prevent identified generation resources from leaving the bulk power system. . . . DOE plans to use [the July 7] methodology to further evaluate Eddystone Units 3 and 4.").
[10] *See* SYNAPSE ENERGY ECONOMICS & LAWRENCE BERKELEY NATIONAL LABORATORY, BEST PRACTICES IN INTEGRATED RESOURCE PLANNING 1-2 (Nov. 2024), https://www.synapse-energy.com/sites/default/files/IRP_Best_Practices_2024_Synapse_LBNL_24-061_1.pdf [https://perma.cc/D68F-WHWQ].

i. States directly regulate resources to ensure an adequate supply of electricity.

Most states rely on resource planning processes to ensure that adequate generation is available to meet projected demand. While some states have largely delegated this authority to the regional grid operators and rely on market-based mechanisms to ensure future demand is met, it is ultimately the state that retains regulatory authority over generation resources.[11] These state processes are transparent and iterative, relying on technical and expert analysis to ensure that adequate resources are procured in a prudent manner. The States describe just a few of the mechanisms at play in our jurisdictions as relevant examples below.

1. Arizona

Arizona, like other states, regulates the power generation, transmission, and distribution needs of the electric grid to ensure resource adequacy and reliability. This regulatory authority is established in the State's constitution. The Arizona Constitution grants the Arizona Corporation Commission ("ACC") broad authority to regulate public service corporations, including electric utilities.[12] The Arizona Constitution also empowers the ACC to set just and reasonable classifications, rates, and charges, as well as to make and enforce rules, regulations, and orders for the governance of utilities. This constitutional authority underpins the ACC's ability to establish requirements for resource planning and grid reliability.[13]

The ACC has reliability requirements in its Resource Planning and Procurement ("RPP") rules.[14] The ACC's RPP rules require load-serving entities to file and seek acknowledgement of their prospective, 15-year resource plans every three years, which include projected data for generating units and power supply systems, capital costs, environmental impacts, and cost analyses.

The most recent version of Integrated Resource Plans was authorized by the ACC on October 21, 2024,[15] which approved the power generation, transmission, and distribution acquisition plans that were submitted by Arizona Public Service,[16] Tucson Electric Power,[17] and UNS Electric.[18] The ACC requires similar data from its electric cooperatives in order to improve

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[11] 16 U.S.C. § 824(b)(1).
[12] ARIZ. CONST. art. 15, § 3.
[13] *Id.*
[14] A.A.C. R14-2-701.
[15] ACC Decision No. 79589, https://docket.images.azcc.gov/0000212120.pdf?i=1754080707112.
[16] ARIZONA PUBLIC SERVICE, *2023 Integrated Resource Plan* (Nov. 1, 2023), https://docket.images.azcc.gov/E000031965.pdf?i=1754080707112.
[17] TUCSON ELECTRIC POWER, *Tucson Electric Power 2024 Integrated Resource Plan* (Nov. 1, 2023), https://docket.images.azcc.gov/E000031960.pdf?i=1754080707112.
[18] UNS ELECTRIC, *UNS Electric 2023 Integrated Resource Plan* (Nov. 1, 2023), https://docket.images.azcc.gov/E000031961.pdf?i=1754080707112.

grid performance and reliability in rural areas of the state.[19] The decision requires technology-neutral portfolio methodologies, annual load forecast accuracy reports, and analysis of coal-fired power plant retirement timelines to enhance reliability, building on existing triannual utility analyses. It also requires sharing modeling data with stakeholders.

While one major utility in Arizona, the Salt River Project, is not subject to the ACC's jurisdiction, it has adopted its own planning and goal-setting requirements, referred to as the Integrated System Plan.[20]

2. New York

The New York Independent System Operator ("NYISO") plays a significant role in safeguarding electric grid reliability while supporting the clean energy transition.[21] As part of its biennial reliability planning process, NYISO first conducts a Reliability Needs Assessment, which examines whether New York's power grid will have enough generation, storage, and transmission capacity to meet demand over the next ten years.[22] Specifically, the Assessment uses probabilistic simulations to evaluate whether New York meets the Loss of Load Expectation (LOLE) criterion of not more than 0.1 event-days/year (equivalent to one day in ten years), which is the standard reliability criterion used by the New York State Reliability Council and the Northeast Power Coordinating Council.[23] The Assessment also evaluates how New York's environmental and energy laws—such as the Climate Leadership and Community Protection Act, which requires 100% zero-emission electricity by 2040—will affect grid reliability, especially as fossil fuel-fired power plants retire, and electricity demand increases due to building electrification and the continued growth of the electric vehicle market.[24]

Following the Reliability Needs Assessment, NYISO completes the biennial planning process by issuing a Comprehensive Reliability Plan that documents the plans for a reliable electric grid over the same ten years.[25] The Comprehensive Reliability Plan provides solutions to any shortfalls identified in the Reliability Needs Assessment, such as accelerating battery deployment, deferring certain retirements, upgrading transmission lines, or increasing demand-side participation.[26] While the 2022 Reliability Needs Assessment did not identify any actionable

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[19] ARIZONA ELECTRIC POWER COOPERATIVE, *Demand-and Supply-Side Data Filing* (Apr. 1, 2025), https://docket.images.azcc.gov/E000042810.pdf?i=1753996193952.
[20] SALT RIVER PROJECT, *Integrated System Plan* (Apr. 1, 2025), https://www.srpnet.com/grid-water-management/future-planning/integrated-system-plan.
[21] *See About Us*, NYISO, https://www.nyiso.com/about-us.
[22] *See* NYISO, 2024 RELIABILITY NEEDS ASSESSMENT (Nov. 19, 2024), https://www.nyiso.com/documents/20142/2248793/2024-RNA-Report.pdf.
[23] *Id.* at 41.
[24] *Id.* at 23-24 fig. 13.
[25] *See* NYISO, 2023–2032 COMPREHENSIVE RELIABILITY PLAN (Nov. 28, 2023), https://www.nyiso.com/documents/20142/2248481/2023-2032-Comprehensive-Reliability-Plan.pdf (following the 2022 RNA and incorporating finding and solutions from the quarterly short term reliability process).
[26] *See id.*

reliability shortfalls, the 2023–2032 Comprehensive Reliability Plan nonetheless provided a forward-looking analysis that evaluated key risk factors related to reliability, including delays in major transmission projects, winter peaking and gas shortage risks, and extreme weather.[27]

In parallel with the biennial reliability planning process, as of 2019, NYISO also conducts a quarterly short-term reliability ("STAR") process to identify reliability needs that may arise over the next five years due to various changes in the grid, such as generator deactivations, revised transmission plans, or updated electricity demand.[28] For example, NYISO's Quarter 2 2023 STAR report, published on July 14, 2023, identified the potential for electricity supply shortfalls in New York City beginning in the summer 2025 as a result of the New York State Department of Environmental Conservation's "Peaker Rule," which seeks to reduce nitrogen oxide (NO_x) emissions from simple-cycle combustion turbines that supply backup generation during peak demand.[29] Following this STAR report, NYISO sought proposed solutions from market participants and ultimately exercised its authority under the Peaker Rule to require specific peaker units to remain operational until long-term solutions—such as the Champlain Hudson Power Express line, scheduled to enter service in spring 2026, bringing 1,250 MW of hydropower to New York City—could come online.[30] NYISO incorporates any needs or shortfalls identified in the STAR process into its biennial reliability planning process.[31]

3. Connecticut

Connecticut General Statutes § 16a-3a requires that the Department of Energy and Environmental Protection ("DEEP") prepare an Integrated Resource Plan ("IRP"). An IRP is composed of an assessment of the future electric needs and a plan to meet those future needs. It is "integrated" in that it looks at both demand side (conservation, energy efficiency, etc.) resources as well as the more traditional supply side (generation/power plants, transmission lines, etc.) resources in making its recommendations on how best to meet future electric energy needs in the state. Connecticut's current IRP was completed in 2020 and updated in 2022. DEEP is currently developing the 2025 IRP, which involves planning for the next ten years.

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[27] *Id.* at 48-67.

[28] *See Short-Term Reliability Process*, NYISO, https://www.nyiso.com/short-term-reliability-process (last visited July 28, 2025); *Reliability Planning Process and Declaring a Reliability Need: Next Steps*, NYISO (July 14, 2023), https://www.nyiso.com/-/reliability-planning-process-and-declaring-a-reliability-need-next-steps.

[29] NYISO, Short-Term Assessment of Reliability: 2023 Quarter 2 (July 14, 2023), https://www.nyiso.com/documents/20142/16004172/2023-Q2-STAR-Report-Final.pdf/5671e9f7-e996-653a-6a0e-9e12d2e41740.

[30] Press Release, NYISO, *NYISO Identifies Solution to Solve New York City Reliability Need* (Nov. 20, 2023), https://www.nyiso.com/-/press-release-%7C-nyiso-identifies-solution-to-solve-new-york-city-reliability-need.

[31] *See* NYISO, 2023–2032 COMPREHENSIVE RELIABILITY PLAN, *supra* note 25, at 30–32.

4. Colorado

Colorado regulations require every investor-owned retail electric utility and wholesale electric generation and transmission cooperative operating in the state to file an energy resource plan ("ERP") with the Public Utilities Commission ("PUC") every four years.[32] ERPs must contain electric demand and energy forecasts, evaluation of existing resources, an assessment of planning reserve margins and contingency plans for the acquisition of additional resources.[33] If an ERP includes retirement of an existing coal-fired generating facility, detailed workforce transition and community assistance plans must be filed.[34]

The planning process includes a reserve margin to meet a 0.1 days per year loss of load expectation standard.[35] Utilities use this reserve margin to propose additional generation for the planning period, where necessary. Those proposals are vetted through extensive stakeholder input and consideration by the Colorado PUC and the additional generation must satisfy availability and dispatchability criteria.[36] And where generation needs arise outside of the four-year ERP process, interim ERPs and applications for certificates of public convenience and necessity can be filed to meet those needs.[37] These proceedings are transparent and iterative and conducted with technical and expert analysis of grid conditions and ratepayer impacts.

5. Illinois

Illinois ratepayers are served by two Regional Transmission Organizations ("RTO"), Midcontinent Independent System Operator, Inc. ("MISO") and PJM Interconnection, L.L.C. ("PJM"). Central and Southern Illinois are encompassed by MISO Local Resource Zone 4 and a small portion of Northwest Illinois is included in MISO Local Resource Zone 1.[38] The service area of Commonwealth Edison Company, the load serving entity for Illinois electricity customers in Northern Illinois, is encompassed by PJM's ComEd Zone.[39] The Illinois Attorney General's office represents Illinois ratepayers who have a significant interest in resource adequacy and maintaining reliable service at least possible cost that is materially affected by the outcome of this proceeding.

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[32] 4 COLO. CODE REGS. § 723-3-3603(a).
[33] 4 COLO. CODE REGS. § 723-3-3604(b-f).
[34] COLO. REV. STAT. § 40-2-125.5(4)(a)(VII).
[35] *See* Colo. Pub. Utils. Comm'n Proceeding No. 24A-0422E, HE 109 and HE 109 ZM-1; Colo. Pub. Utils. Comm'n Proceeding No. 21A-0141E, Hrg. Exh. 115, pp. 8-10.
[36] COLO. REV. STAT. § 40-2-125.5 (4)(d)(II).
[37] *Id*.
[38] *See* MISO Tariff, Attachment VV, Map of Local Resource Zone Boundaries, https://docs.misoenergy.org/miso12-legalcontent/Attachment_VV_-_MAP_of_Local_Resource_Zone_Boundaries.pdf.
[39] *See* MISO Tariff, Attachment VV, Map of Local Resource Zone Boundaries, https://docs.misoenergy.org/miso12-legalcontent/Attachment_VV_-_MAP_of_Local_Resource_Zone_Boundaries.pdf.

6. Washington

Washington electric utilities file clean energy implementation plans to the Washington Utilities and Transportation Commission once every four years with a biennial update filing at the midway point of every plan.[40] They also file long term integrated resource plans every four years.[41] For investor-owned utilities, if an integrated resource plan identifies a resource need within the next four years, the utility must file a request for proposal with the Commission for approval.[42]

7. Michigan

In Michigan, ratepayers are served primarily by MISO, with a smaller portion included within PJM. In MISO, the regulation of resource adequacy planning has both a state and federal aspect. MISO member states have a capacity obligation under the MISO tariff. MISO's resource adequacy requirements, however, are designed to be complementary to the primary role of the states in ensuring resource adequacy.[43] In Michigan, the investment decisions of utilities are regulated by the Michigan Public Service Commission ("MI PSC"). Through Michigan's state Integrated Resource Planning process, the MI PSC exercises regulatory authority over utilities in order to ensure that the utilities obtain the amounts of capacity they need to meet their obligations under the MISO tariff, and that they do so at the best value to ratepayers, and with a composition of resources that otherwise complies with state law, including environmental requirements.

Michigan's IRP statute requires electric utilities whose rates are regulated by the MI PSC to periodically file an integrated resource plan. The IRP is a projection of the utility's load obligations and a plan to meet those obligations.[44] The IRP statute directs the MI PSC to approve

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[40] *See* WASH. REV. CODE § 19.405.060; WASH. ADMIN. CODE § 480-100-640, -645; *see also* WASH. UTILS. AND TRANSP. COMM'N, *Clean Energy Implementation Plans*, https://www.utc.wa.gov/regulated-industries/utilities/energy/conservation-and-renewable-energy-overview/clean-energy-transformation-act/clean-energy-implementation-plans-ceips.

[41] *See* WASH. REV. CODE § 19.280.040 to 050; WASH. ADMIN. CODE § 480-100-620, -625; *see also* WASH. UTILS. AND TRANSP. COMM'N, *Integrated Resource Plans*, https://www.utc.wa.gov/integrated-resource-plans-irps.

[42] *See* WASH. ADMIN. CODE § 480-107-009(2), -017.

[43] *Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,215, 62,606 at P 13 (2020) ("approximately 90% of the load in MISO is served by vertically integrated LSEs, the vast majority of which are subject to state integrated resource planning processes. To accommodate the make-up of the MISO's footprint, MISO's proposed Tariff provisions accepted in the February 2018 Order provide that its resource adequacy requirements "are complementary to the reliability mechanisms of the states and the Regional Entities ... within the [MISO] region."); *see also id*. ("MISO's proposed Tariff language explains that the resource adequacy requirements 'are not intended to and shall not in any way affect state actions over entities under the states' jurisdiction.' In other words, unlike the centralized capacity constructs used in the Eastern RTOs/ISOs, MISO's Auction is not—*and has never been*—the primary mechanism for its [Load Serving Entities] to procure capacity."); *Midwest Indep. Transmission Sys. Operator, Inc*., 119 FERC ¶ 61,311, 62,722 at P 75 (2007) ("From the beginning . . . the Commission has recognized the role that state resource planning plays in managing the resource adequacy of [MISO]").

[44] MICH. COMP. LAWS § 460.6t(3).

a plan if the MI PSC determines that it "represents the most reasonable and prudent means of meeting the electric utility's energy and capacity needs."[45] To make that decision, the statute instructs the MI PSC to consider whether the IRP appropriately balances seven statutory factors: (i) resource adequacy and capacity to serve anticipated peak electric load, applicable planning reserve margin, and local clearing requirement; (ii) compliance with applicable state and federal environmental regulations; (iii) competitive pricing; (iv) reliability; (v) commodity price risks; (vi) diversity of generation supply; and (vii) whether proposed levels of peak load reduction and energy waste reduction are reasonable and cost effective.[46]

The IRP statute also directs the MI PSC to establish – among other things – computer modeling scenarios that must be used to analyze the costs of possible plans in an IRP, including costs associated with plant retirement dates.[47] In Consumers Energy's 2021 IRP, for example, the company conducted modeling that compared other possible retirement dates of its J.H. Campbell coal-fired power plant to a 2025 retirement and concluded that the most cost-effective retirement date was 2025.

8. Minnesota

Since 1991, Minnesota law has required each public utility to propose a set of resource options that the utility could use to meet the electricity service needs of its customers over a forecast period of 15 years.[48] The resource options include using, refurbishing and constructing utility plant and equipment, buying power generated by other entities, controlling customer loads, and implementing customer energy conservation. The Minnesota Public Utilities Commission ("Minnesota Commission") evaluates the plan's ability to ensure reliability of utility service, keep customer's bills and utility rates as low as practicable, minimize adverse socioeconomic effects and adverse effects on the environment, and limit risk.[49] The Commission uses an extensive notice and comment process in which the utilities and stakeholders evaluate detailed modeling of demand and various resource costs. The Minnesota Commission may approve, reject or modify utility resource plans.[50] In the most recent resource plan for Minnesota's largest utility, the Minnesota Commission approved including in the resource plan a new natural-gas fired 420 MW combustion turbine plant to address peak load.[51]

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[45] MICH. COMP. LAWS § 460.6t(8)(a).
[46] *Id*.
[47] MICH. COMP. LAWS § 460.6t(1).
[48] MINN. STAT. § 216B.2422; MINN. R. ch. 7843; *see also Electric Integrated Resource Planning (IRP)*, MINN. PUB. UTILS. COMM'N, https://mn.gov/puc/activities/economic-analysis/planning/irp/ (last accessed Aug. 6, 2025).
[49] MINN. R. 7843.0600, subp. 3.
[50] MINN. STAT. § 216B.2422.
[51] MINN. PUB. UTILS. COMM'N, Dkt. No. E-002/RP-24-67; E-002/CN-23-212, Order Approving Settlement Agreement With Modifications (Apr. 21, 2025), https://www.edockets.state.mn.us/documents/%7B30F45996-0000-CF1F-80E3-5E41B2F16918%7D/download?contentSequence=0&rowIndex=3.

ii. Regional operators establish mechanisms to ensure resource adequacy and grid stability.

State primacy over resource adequacy is further complemented by the regional transmission operators. For example, MISO and PJM both have extensive processes for obtaining resource adequacy and reliability. MISO works collaboratively with its member states to ensure resource adequacy throughout its service area.[52] MISO ensures there is sufficient generation capacity through forecasting demand growth, assessing existing generation assets, and planning for new generation resources.[53] MISO accounts for state Integrated Resource Planning and also operates a capacity auction where utilities and other load-serving entities can procure the necessary generation capacity to meet projected demand. MISO's capacity market is intended to incentivize the development and maintenance of adequate generation resources.[54] MISO's annual Planning Resource Auction ("PRA") procures sufficient resources and allows market participants to buy and sell capacity via the auction.[55]

Resource adequacy within the PJM footprint is subject to an established, extensive, layered, framework of oversight and regulation. The resource adequacy contribution of each PJM electric generating plant operating is subject to ongoing, technical reviews by PJM, pursuant to its tariff, and in conformity with rules promulgated and periodic grid reliability reviews conducted by Reliability First Corporation and NERC, respectively.[56] PJM also conducts an auction, its base residual auction ("BRA"), for the procurement of capacity from generating resources.

b. Historic use of 202(c) is limited.

Section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c), grants the Secretary of Energy the authority to issue orders that require the "temporary connection[]" of power plants and the "generation, delivery, interchange, or transmission of electric energy" in order to address certain emergencies "and serve the public interest."[57] The law also effectively waives compliance with "any Federal, State, or local environmental law or regulation" that would conflict with any

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[52] *System Planning*, MISO, https://www.misoenergy.org/meet-miso/about-miso/industry-foundations/grid_planning_basics/ (last visited July 30, 2025).
[53] *Id.*
[54] *Id.*
[55] *Resource Adequacy*, MISO, https://www.misoenergy.org/planning/resource-adequacy2/resource-adequacy/#t=10&p=0&s=FileName&sd=desc (last visited July 30, 2025).
[56] *See, e.g., North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g & compliance*, 117 FERC ¶ 61,126 (2006), *aff'd sub nom*. *Alcoa, Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009); Order No. 748, Final Rule, 134 FERC ¶ 61,213 (2011). FERC approved regional reliability standards applicable to PJM, developed by RFC and submitted to FERC by NERC. *Notice of Proposed Rulemaking on Plan. Res. Adequacy Assessment Reliability Standard*,133 FERC ¶ 61,066 (2010) (proposed rule for RFC); *Plan. Res. Adequacy Assessment Reliability Standard*, Order No. 747, 134 FERC ¶ 61,212 (2011) (final approval of RFC's Resource Adequacy Reliability Standard).
[57] 16 U.S.C. § 824a(c)(1).

party's obligations under such an order, but limits the length of any order that conflicts with a pollution control requirement to 90-days, with extension possible.[58]

That authority originated principally as a wartime power of what was then the Federal Power Commission. Section 202(c) was enacted in 1935, in the leadup to World War II, with the same "emergency" language that exists in the statute today, specifically to guard against energy related shortages that were viewed as hampering national security during World War I.[59] It was initially used largely to issue "interconnection" orders specifically between utilities at a time when America's electric grid was more fragmented, monopolized, and less diversified than it is today.[60] Interconnection was seen as a powerful means to increase grid reliability, but the federal government largely lacked regulatory power over the electric sector at the time.[61] The then-Federal Power Commission did not invoke its emergency authority until the United States entered World War II.[62] Section 202(c) orders were issued repeatedly during the war, primarily to order interconnection between utilities, but the provision was rarely invoked once the war ended. A number of organizational changes ensued in the decades following the War and the provision's authority eventually came to rest with the Secretary of Energy.[63]

From 2000, when the authority of Section 202(c) was "rediscovered" in response to the California Energy Crisis, through 2024, the provision was sparingly invoked to respond to true emergencies to avoid imminent widespread blackouts.[64] Most 202(c) orders issued during this period involved natural disasters or other acute power outages.[65] These emergencies included one high-profile incident near the nation's capital that led to the statute's 2015 amendment, adding the provisions explicitly waiving environmental liability due to compliance with a Section 202(c) order, leading the statute to read as it does today.[66] Orders issued during this period were typically of limited duration, lasting for a period of days to weeks.[67]

The typical process for issuing a Section 202(c) order is outlined by DOE implementing regulations at 10 C.F.R. §§ 205.370-379. In the normal course, requests for Section 202(c) orders originate with a grid operator or utility facing an acute and unforeseen emergency that normal processes and demand response mechanisms are incapable of addressing, though they may be issued by the Department unprompted as well.[68] Applications for Section 202(c) orders made by

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[58] *Id.* at § 824a(c)(3)-(4).
[59] For a deeper discussion of the history of Section 202(c), see Benjamin Rolsma, *The New Reliability Override*, 57 CONN. L. REV. 789 (2025). *See also id.* at 798-802.
[60] *Id.* at 802-804.
[61] *Id.* at 801-802.
[62] *See id.* at 803 n.82 *and accompanying text*.
[63] *Id.* at 803-04; 42 U.S.C. § 7151(b).
[64] *Id*. at 805-509.
[65] Rolsma, *supra* note 59, at 805-09, 839-42 tbl.1.
[66] *Id.* at 806-08 (citing DEP'T OF ENERGY, ORDER NO. 202-05-3 (Dec. 20, 2005)); 16 U.S.C. § 824a(c)(3)-(5).
[67] *See* Rolsma, *supra* note [x], at 839-42 tbl.1 (chronicling all Section 202(c) orders issued "after dissolution of the Federal Power Commission").
[68] *See* 10 C.F.R. § 205.370.

outside entities are to include specific details to "be considered by the DOE in determining that an emergency exists" and the appropriate intervention.[69] This information is supposed to include "[d]aily peak load and energy requirements for each of the past 30 days and projections for each day of the expected duration of the emergency," "[a] description of the situation and a discussion of why this is an emergency, … includ[ing] any contingency plan of the applicant and the current level of implementation," and "[a] description of efforts made to obtain additional power through voluntary means and the results of such efforts."[70] Section 202(c) orders bypass environmental review under NEPA and can waive pollution control requirements that would otherwise apply to the facilities.[71]

c. President Trump Declares a National Energy Emergency on his first day in office and subsequently issues EO 14262.

On January 20, 2025, his first day in office, President Trump issued Executive Order 14156 titled "Declaring a National Energy Emergency".[72] That unilateral declaration did not provide any factual support for its assertion that emergency conditions had overtaken the electricity grid.[73]

On April 8, 2025, President Trump issued Executive Order 14262, "Strengthening the Reliability and Security of the United States Electric Grid."[74] Section 3(b) of the executive order directs the Secretary of Energy (Secretary) to:

> develop a uniform methodology for analyzing current and anticipated reserve margins for all regions of the bulk power system regulated by the Federal Energy Regulatory Commission and shall utilize this methodology to identify current and anticipated regions with reserve margins below acceptable thresholds as identified by the Secretary of Energy.[75]

It further requires that the methodology in the Report (Methodology) "be published, along with any analysis it produces, on the Department of Energy's website within 90 days of the date of this order," or July 7, 2025.[76]

The Executive Order describes the featured role that the Report will play in future DOE actions. EO 14262 § 3 is titled "Addressing Energy Reliability and Security with Emergency Authority" and § 3(c) directs the Secretary to "establish a process by which the [Methodology],

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[69] 10 C.F.R. § 205.373.
[70] 10 C.F.R. §§ 205.373(a)-(o).
[71] *See, e.g.*, *Environmental Integrity Project v. DOE*, 471 F. Supp. 3d 132 (D.D.C. 2023).
[72] 90 Fed. Reg. 8433.
[73] *See Id*. (providing no factual support for claimed emergency). Many of the States have since joined litigation challenging that declaration. *See* Complaint, *Washington v. Trump*, NO. 2:25-cv-00869 (W.D. Wa. May 9, 2025).
[74] The EO was signed alongside Exec. Order No. 14261, Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241, 90 Fed. Reg. 15517 (Apr. 8, 2025), at a White House event with members of the coal industry.
[75] Exec. Order No. 14262, 90 Fed. Reg. 15521, 15521 (Apr. 8, 2025).
[76] Exec. Order No. 14262, 90 Fed. Reg. 15521, 15521 (Apr. 8, 2025) (referring to § 3(b)(iii)).

and any analysis and results it produces, are assessed on a regular basis, and a protocol to identify which generation resources within a region are critical to system reliability."[77] It indicates the protocol shall "include all mechanisms available under applicable law, including Section 202(c) of the Federal Power Act, to ensure any generation resource identified as critical within an at-risk region is appropriately retained as an available generation resource within the at-risk region."[78] In short, Executive Order 14262 instructs DOE to publish a methodology by July 7, 2025 that will form the basis for future exercises of its Section 202(c) authority.

d. DOE's 2025 Emergency Orders Preventing the Retirement of Fossil Fuel Power Plants.

Since January 20, 2025, the U.S. Department of Energy (DOE) has issued five emergency orders under Section 202(c) of the Federal Power Act (FPA), a sharp uptick from the less than one order per year issued on average from 2017-2024.[79] Three of these orders were largely in line with DOE's historic Section 202(c) practice – allowing units to modify their operations in response to acute risks to the grid.[80] However, in late May 2025 DOE issued a pair of Section 202(c) orders requiring facilities that were slated to retire the very next business day to remain on-line. These orders represent a marked shift in how Section 202(c) has historically been used.[81]

For example, the orders for the J.H. Campbell Generating Station in Michigan and the Eddystone Plant in Pennsylvania, both previously slated for retirement, cited general concerns about resource adequacy and not any acute emergency. In Michigan, regulators warned that the Campbell order would place upward pressure on ratepayers, particularly in Consumers Energy's service territory, where decommissioning costs were already being recovered through base rates. One Michigan regulator estimated that the costs of complying with DOE's order for 90 days would approach $100 million.[82] Consumers Energy has since disclosed that continued operation

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[77] Exec. Order No. 14262, 90 Fed. Reg. 15521, 15522 (Apr. 8, 2025) (referring to § 3).
[78] Exec. Order No. 14262, 90 Fed. Reg. 15521, 15522 (Apr. 8, 2025) (referring to § 3) (emphasis added).
[79] U.S. DEP'T OF ENERGY, *DOE Issues 202(c) Orders to PREPA for Grid Stability*, https://www.energy.gov/ceser/does-use-federal-power-act-emergency-authority.
[80] *See* Duke Energy Carolinas (Order No. 202-25-5) (allowing increased operations to support grid stability); H.A. Wagner (Order No. 202-25-6) (allowing exceedance of operational limit – but maintained compliance with pollution control requirements – to allow units to respond to demand); PREPA (Order No. 202-25-1) (requiring measures to mitigate outage risks during high load conditions)
[81] U.S. Dep't of Energy, Order No. 202-25-3 (May 23, 2025), https://www.energy.gov/sites/default/files/2025-05/Midcontinent%20Independent%20System%20Operator%20%28MISO%29%20202%28c%29%20Order_1.pdf [https://perma.cc/Q7P7-TDTX] [*hereinafter* "Campbell Order"]; Eddystone Order, *supra* note 9.
[82] *See, e.g.*, Ella Nilsen, *The Trump Admin Ordered a Coal Power Plant to Stay On Past Retirement. Customers in 15 States Will Foot the Bill*, CNN (June 6, 2025), https://www.cnn.com/2025/06/06/climate/michigan-coal-plant-energy-cost-wright.

of the plant in the first five weeks since the Order was issued has resulted in a net financial impact of $29 million.[83]

e. DOE Publishes its Methodology and Reliability Standard to Guide Future Section 202(c) "Reliability Interventions."

On July 7, 2025, DOE published a "Report on Evaluating U.S. Grid Reliability and Security," which set forth the methodology and reliability standard that the Executive Order had mandated. *See* Report at *vi* (hereinafter, "the Report"). DOE stated the methodology "will be assessed on a regular basis to ensure its usefulness for effective action among industry and government decision-makers across the United States." *Id*. Despite this statement, DOE has not explained how or when it will re-assess the methodology and, to date, has not involved the public in the creation of the methodology or offered an opportunity for public comment on the methodology.

i. DOE did not provide public notice or an opportunity for comment on the Report.

Before publishing the Report, DOE provided no public notice or request for comment on methods or reliability standards that DOE was considering. DOE did not consult with the undersigned States or, to the States' knowledge and belief, consult with any grid operator or other State on appropriate mechanisms to ensure grid reliability and grid reliability issues around the country.[84] Other than the statements in the Report, DOE has not made the underlying data or models available to allow the public to reproduce or test DOE's analysis. DOE has not requested public comment on the Report, opened any administrative proceeding to otherwise involve the public in DOE's methodology, or published the Report in the Federal Register.

DOE has confirmed, consistent with the Executive Order's mandate, that it will rely on the Report to justify future Section 202(c) orders.[85] DOE explained in the June 2025 Eddystone Order that it would use the forthcoming Report "to establish a protocol to identify which generation resources within a region are critical to system reliability and prevent identified generation resources from leaving the bulk power system[,]" including potential Section 202(c) orders extending DOE's Eddystone Order.[86] DOE also issued the Report with a "Fact Sheet,"

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[83] *See supra* notes 5-6 *and accompanying text*; NRDC, *Trump Administration's DOE Is Forcing Coal Plants to Stay Open. Michigan Is the First Target* (June 16, 2025), https://www.nrdc.org/bio/derrell-e-slaughter/trump-administrations-doe-forcing-coal-plants-stay-open-michigan-first.
[84] *See* Report at i (acknowledging lack of data from regional and utility levels).
[85] See Report at vi (explaining that DOE's standard will be used to "guide reliability interventions"), 1 (emphasizing the need for DOE's "decisive intervention" in energy markets), 10 (analyzing ERCOT because "FPA Section 202(c) allows DOE to issue emergency orders to ERCOT").
[86] Eddystone Order, *supra* note 9.

wherein DOE explained that the methodology will be used to "prevent [] generation resources from leaving the bulk-power system."[87]

ii. DOE's analysis rests on key assumptions about load growth, retirements, and capacity additions.

The Report's analysis rests on assumptions about future electricity demand (referred to as "load growth"), anticipated retirements of existing facilities ("retirements"), and future electricity generation sources (referred to as "capacity additions"). DOE made additional assumptions, some explicit and others implicit, which the States have not yet been able to fully analyze or comment on here.[88]

Regarding load growth, DOE assumes 101 Gigawatts ("GW") of new load will be added to the grid by 2030.[89] DOE projects that data centers, especially for developing Artificial Intelligence ("AI"), will add 50 GW of that new load, and other demand growth will add 51 GW. DOE appears to assume that data-center load will be "firm," meaning electricity to meet that demand must be guaranteed at all times.[90] That is in contrast to "interruptible" load for which supply can be reduced during peak periods.[91] DOE also appears to assume that all the new data centers will connect to the grid, rather than rely on "behind-the-meter" generation and that regulators and grid operators will allow every MW of new load to connect to the grid on a firm basis, even if doing so threatens the grid's reliability.[92] Based on these assumptions, DOE projects a 15% increase in load by 2030.[93]

The Report assumes 51 GW of non-data-center load, purportedly based on the NERC's 2024 ITCS projections.[94] DOE does not explain why using projections from a NERC report on inter-regional transmission is reasonable or why those projections are reliable for DOE's purposes. Additionally, NERC's 2024 projections likely already include some data center load expectations, as well as policies to encourage the electrification of transportation, heating and cooling, and other energy uses that the Trump Administration has rescinded or is planning to

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[87] U.S. DEP'T OF ENERGY, *Fact Sheet: The Department of Energy's Resource Adequacy Report Affirms The Energy Emergency Facing The U.S. Power Grid* (2025), https://www.energy.gov/sites/default/files/2025-07/DOE_Fact_Sheet_Grid_Report_July_2025.pdf [https://perma.cc/YLX7-8G7T]; *see also* Press Release, U.S. Dep't of Energy, Department of Energy Releases Report on Evaluating U.S. Grid Reliability and Security (July 7, 2025), https://www.energy.gov/articles/department-energy-releases-report-evaluating-us-grid-reliability-and-security [https://perma.cc/8TEJ-AGH6] (stating that its "methodology also informs the potential use of DOE's emergency authority under Section 202(c) of the Federal Power Act").
[88] *See generally* Report at 10-19.
[89] Report at 2-3.
[90] Report at 18.
[91] *Id.*
[92] *See id.* at 2-3, 15-18.
[93] *See* Ric O'Connell, *GridLab Analysis: Department of Energy Resource Adequacy Report* (July 11, 2025), https://gridlab.org/gridlab-analysis-department-of-energy-resource-adequacy-report/ [https://perma.cc/GN56-VLNA].
[94] *See* Report at 11.

rescind.[95] DOE apparently did not account for shifting electrification policies in its load projections.

Regarding retirements, DOE assumed 104 GW of "firm capacity" retirements by 2030, roughly three-quarters from coal-fired power plants and one-quarter gas plants.[96] *Id*. at 5; see also Report at 3, 12-13, A1-A8. DOE included approximately 50 GW of "confirmed retirements," retirements that have been formally recognized by system operators as having started the official retirement process and are assumed to retire on their expected date.[97] DOE also included approximately 50 GW of "announced retirements," which are generators that have publicly stated retirement plans but not formally notified system operators or initiated the retirement process.[98]

Regarding capacity additions, DOE took a more conservative approach. Rather than including all announced projects, DOE assumed "that only projects considered very mature in the development pipeline—such as those with signed interconnection agreements—will be built." Report at A-5. These projects, known as Tier 1 resources, are by their very nature likely to be built in the short term. As a result, DOE assumed "minimal capacity additions beyond 2026." *Id*. In addition, DOE does not appear to have modeled new transmission projects, despite their grid reliability benefits.

The Report's assumptions about load growth and electricity supply differ significantly from other forecasts.[99] As one grid reliability expert commented, DOE's report "used aggressive assumptions regarding load growth and retirements, but conservative assumptions about how much new generation capacity will be added, even assuming no new resources after 2026."[100] For example, DOE assumed 15% load growth by 2030, but the U.S. Energy Information Agency recently assumed just 6% in their "high" growth" case.[101] Other differences with the Energy

[95] *See* NERC, 2024 Long Term Reliability Assessment Report 8 (July 15, 2025), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_Long%20Term%20Reliability%20Assessment_2024.pdf [https://perma.cc/NMP4-KRN5] (discussing how "the continued adoption of electric vehicles and heat pumps is a substantial driver for demand around North America").
[96] Report at 5.
[97] *Id.* at 12; *see also* O'Connell, *supra* note 93.
[98] Report at 12.
[99] Report at 2 (noting that demand forecasts vary widely).
[100] O'Connell, *supra* note 93.
[101] U.S. Energy Information Administration, Form EIA-860 (June 11, 2025) https://www.eia.gov/electricity/data/eia860/.

Information Agency forecasts are described in the chart below:[102]

DOE Report Assumptions vs. U.S. Energy Information Administration Data:

	DOE Report	EIA 860
Load growth:	101 GW	N/A
Capacity Additions	209 GW	200 GW
Gas Capacity Additions	22 GW	35 GW
Battery Capacity Additions	31 GW	53 GW
Retirements	104 GW	52 GW

The Report also does not address actions already being taken by states, utilities, and regional grid operators to meet increased load growth or how markets are already responding to increasing demand. As GridLab explained in its analysis:

> Markets and utilities have already responded with plans to add new capacity and fast track new resources. These include PJM's Reliability Resource Initiative, which plans on adding 11 GW of new firm resources by 2030. SPP and MISO both have proposals at FERC (called ERAS) that could add another 30 GW of firm resources. Those three regional efforts alone would add roughly twice what the DOE assumed for the entire nation.[103]

iii. Based on these assumptions and DOE's resource adequacy standard, DOE concluded intervention in electricity markets is needed to prevent outages.

DOE then adopted a novel "resource adequacy standard," using a combination of non-traditional and non-standardized metrics ("Loss of Load Hours" and "Normalized Unserved Energy").[104] DOE selected the target to be achieved with each metric.[105]

DOE did not define what energy sources it considered "firm" capacity or why only those sources provide the necessary attributes for grid reliability. DOE's usage of the term in the report suggests that only coal or gas power plants count as "firm" capacity and excluded other sources that could provide similar, greater, or different levels of reliability (like batteries or transmission) from its analysis.[106]

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[102] O'Connell, *supra* note 93.
[103] *Id*.
[104] Report at 3-4.
[105] *Id.*
[106] *See, e.g.*, *id.* at 1, 32, 37.

DOE portrayed three scenarios in an attempt to assess the impact of planned retirements on resource adequacy in 2030.[107] The first scenario is "Plant Closures," which assumes that announced retirements and capacity additions "in the final stages for connection" that are "either under construction or ha[ve] received approved planning requirements" will occur.[108] The second scenario is "No Plant Closures," which has the same assumption about additions as the "Plant Closures" scenario but assumes no retirements.[109] The third scenario is "Required Build" which uses the "Plant Closures" scenario's assumptions about retirements and then artificially adds enough hypothetical perfect capacity to the system to meet DOE's new reliability standard.[110] Perfect capacity is hypothetical capacity that experiences no outages and is used in the modeling "to avoid the complex decision of selecting specific generation technologies, as that is ultimately an optimization of reliability against cost considerations."[111]

DOE then concluded, based on the above assumptions, the risk of power outages in 2030 would be 100 times higher in 2030 than it is today.[112] DOE concluded that "decisive intervention" and "robust and rapid reforms" are necessary to avoid this result and to accommodate "projected demand for manufacturing, re-industrialization, and data centers driving artificial intelligence (AI) innovation.[113] Numerous grid experts have commented on the shortcomings of this approach.[114]

III. Statement of Issues and Specification of Errors.

1. The Report is arbitrary, capricious, contrary to law, and unsupported by substantial evidence in violation of the Administrative Procedure Act and Federal Power Act because it suffers from numerous analytical, mathematical, and empirical flaws, including but not limited to the following:
    a. DOE relies on key assumptions about load growth, retirements, and capacity additions that are unreasonable and unsupported by evidence or logic.

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[107] *Id.* at 3, 5.
[108] *Id.* at 4-5.
[109] *Id.*
[110] *Id.*
[111] *Id.* at 5.
[112] *Id.* at 1.
[113] *Id.*
[114] *See, e.g.*, Jeff St. John, *Critics Fear Trump Will Use Flawed DOE Report to Push Pro-Coal Agenda*, CANARY MEDIA (July 14, 2025), https://www.canarymedia.com/articles/fossil-fuels/trump-doe-report-open-coal-plants [https://perma.cc/2T7L-3FWX]; Matthias Fripp & Brendan Pierpont, *Energy Department's Flawed Grid Study Props Up Expensive, Zombie Power Plants*, UTILITYDIVE (July 24, 2025), https://www.utilitydive.com/news/doe-grid-reliability-study-zombie-power-plants/753596/ [https://perma.cc/QH3V-KM5R]; INST. FOR POL'Y INTEGRITY, ENOUGH ENERGY: A REVIEW OF DOE'S RESOURCE ADEQUACY METHODOLOGY (July 2025), https://policyintegrity.org/files/publications/IPI_EnoughEnergy_FinalReport.pdf [https://perma.cc/WN39-K9LE].

b. DOE assumes the transmission grid will remain static over the next five years and fails to consider how new transmission projects in development will impact reliability.
c. DOE fails to define "firm power capacity" or reasonably explain why DOE apparently considers only coal and gas to be "firm power capacity" when other generation sources, energy storage, or transmission could provide similar or greater reliability attributes.
d. DOE's assumptions unreasonably presume that the market, grid operators, and state regulators will take no action in the next five years to address load growth or reliability issues, and that no alternative other than preserving aging coal and gas power plants will ensure grid reliability.
e. DOE's analysis suffers from mathematical errors, analytical flaws, and lacks sufficient data or regional input. Those flaws are amply described in the attached analysis by the Institute for Policy Integrity and are incorporated and adopted here. *See* IPI Report (attached as Ex. XX).
f. Although DOE acknowledged that data and input from states and regional entities could improve the analysis, DOE chose not to consult with those entities or seek to obtain that data.
g. DOE selected non-traditional and non-standardized resource adequacy metrics and targets to be achieved without providing a reasoned explanation for its choices, including why it selected Normalized Unserved Energy ("NUSE") and Loss of Load Hours ("LOLH") instead of other possible metrics that would provide different data, an explanation of the costs and benefits of its choices and the target to be achieved, and why a nationwide target is appropriate despite regional differences in the costs and benefits with regard to resource adequacy.
h. DOE offers no reasonable explanation how the Report could be used to identify "at-risk region[s] and guide reliability interventions" when it arbitrarily relies on geographic groupings that do no match boundaries used by utilities, balancing authority areas, transmission planning regions, regional wholesale markets, NERC regional entities, or NERC reliability coordinators to reliably operate the nation's electric grid.

These assumptions and omissions work together to arbitrarily tip the scales in favor of finding a resource adequacy risk. *See Motor Vehicles Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983); *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222, 1237 (10th Cir. 2017); *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985); *see also infra* Section 4.a.

2. The Report is arbitrary, capricious, contrary to law, and unsupported by substantial evidence in violation of the Administrative Procedure and Federal Power Acts because it pursues an extra-statutory motive of preserving aging and uneconomic fossil fuel

power plants at consumer expense, which contradicts the Federal Power Act's express goal of preserving just and reasonable rates and preventing undue discrimination or preference. The Administration's energy actions, when viewed collectively, also demonstrate that DOE has prejudged the outcome of this proceeding and intended its analysis to reach only one result: preventing the retirement of fossil-fueled power plants. *See Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019); *Gresham v. Azar*, 950 F.3d 93, 104 (D.C. Cir. 2020), *vacated as moot*, *Becerra v. Gresham*, 142 S. Ct. 1665 (2022). *See also infra* Section 4.a.iii-iv.

3. The Report is arbitrary, capricious, contrary to law, and unsupported by substantial evidence in violation of the Administrative Procedure and Federal Power Acts because it purports to guide emergency action under Section 202(c) of the Federal Power Act but does not describe an "emergency" within the meaning of the Federal Power Act or DOE's implementing regulations. *See* 16 U.S.C. § 824a(c)(1); 10 C.F.R. § 205.371; *Otter Tail Power Co. v. Federal Power Com.*, 429 F.2d 232, 234 (8th Cir. 1970). *See also infra* Section 4.b.

4. The Report is arbitrary, capricious, contrary to law, and unsupported by substantial evidence in violation of the Administrative Procedure and Federal Power Acts because it "fails to consider an important aspect of the problem" and fails to consider reasonable alternatives. Specifically, the Report ignores alternatives, or in some cases actively prevents viable alternatives with no explanation, such as expanding interregional transmission, batteries, renewable energy, incorporating data centers flexibly into load, and the existing resource adequacy mechanisms that are used by states and regional grid operators to assess reliability and respond to resource adequacy needs. *See State Farm*, 463 U.S. at 43. *See also infra* Section 4.a. (arbitrary and capricious) and section 4.c. (existing resource adequacy mechanisms)].

5. The Report is *ultra vires* and contrary to law in violation of the Administrative Procedure and Federal Power Acts because it intrudes upon matters reserved for the States and the Federal Energy Regulatory Commission. DOE does not possess authority to set nationwide resource adequacy standards or regulate sources of electricity generation. *See* 16 U.S.C. § 824b(1); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). *See also infra* Section 4.d.

6. The Report violates the Administrative Procedure Act, 5 U.S.C. 553, because it establishes a legislative rule without first providing public notice and comment. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99–100 (1995); *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014); *Children's Health Care v. Centers for Medicare & Medicaid Servs.*, 900 F.3d 1022 (8th Cir. 2018). *See infra* Section 4.e.

7. The Report is arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act because it allegedly supports issuing Section 202(c) emergency orders based on factors and procedures that conflict and are inconsistent with DOE's existing regulations. *See Emergency Interconnection of Electric Facilities*, 46 Fed. Reg. 39,984 – 39,989 (Aug. 6, 1981); 10 C.F.R. §§ 205.371 *et seq*. *See infra* Section 4.e.ii.

8. The Report is arbitrary and capricious in violation of the Administrative Procedure Act because DOE failed to acknowledge that its methodology and protocol for issuing Section 202(c) orders is inconsistent with the factors for determining when an emergency exists that DOE's regulations already set out. *See Emergency Interconnection of Electric Facilities*, 46 Fed. Reg. at 39,985; 10 C.F.R. §§ 205.371, 205.373. It is also inconsistent with DOE's previous position that emergency orders are inappropriate for long-term reliability issues and a "utility must solve long-term problems itself." 46 Fed. Reg. at 39,985; *see also* 10 C.F.R. § 205.371. Agencies act arbitrarily when they fail to display awareness that they are changing position and offer good reasons for the change in policy. *See Food & Drug Administration v. Wages & White Lion Invs*., 604 U.S. ---, 145 S. Ct. 898, 918 (2025); *see also infra* Section 4.e.

IV. Request for Rehearing

a. DOE's Report is Based on Flawed and Arbitrary Assumptions and is Unsupported by Substantial Evidence.

The Report's conclusions rest on critical assumptions about load growth, retirements, and capacity additions, but DOE did not reasonably explain how it arrived at those assumptions or support its choices with substantial evidence. At times, DOE's assumptions are internally inconsistent and arbitrarily tip the scales in favor of finding a need to prevent scheduled retirements. The Report also seems to adopt a definition of "firm capacity" that includes only fossil-fuel power plants, but does not explain why other generation sources or batteries are not also "firm capacity." DOE has also failed to make the data it relied on publicly available – rendering it impossible to fully test DOE's analysis.[115]

[115] Due to the lack of public notice or any consultation or opportunity for involvement in the DOE's development of this report, the States have not had an opportunity to fully analyze DOE's methodology. DOE also has not made the data or models it used publicly available, which would allow the States to critically assess or replicate DOE's analysis and uncover additional flaws in DOE's approach. As such, the States reserve the right to raise additional flaws with DOE's analysis and conclusions at a later date, as they continue to analyze the Report.

Agencies act arbitrarily when they base decisions on key assumptions that are irrational or unsupported.[116] Moreover, when agencies use complex models, they must publicly reveal the assumptions and data incorporated into their models and "provide a full analytical defense" of their model.[117]

i. DOE fails to reasonably explain or support its load growth assumptions

DOE assumes 15% load growth by 2030, half of which DOE assumes will serve new data centers.[118] In doing so, DOE presumes – without evidence or a rational explanation – that data center load is firm (i.e., it cannot be interrupted at peak times). That assumption is arbitrary and directly undermined by recent advances in both policy and technology.

Some policymakers are already requiring data centers to be flexible, interruptible load.[119] In Texas, for example, a new law grants ERCOT more flexibility to curtail certain data center loads in the event of a grid emergency.[120] DOE did not grapple with the impact of this law on its underlying assumptions despite the fact that curtailing such load during peak hours "could go a long way towards avoiding the DOE-identified resource adequacy problem" in ERCOT.[121]

DOE also ignores the possibility of industry reducing its demand for electricity either as a matter of policy or innovation in this rapidly developing field. NVIDIA, the foremost supplier of hardware for AI data centers, recently announced a new power supply unit that can reduce peak grid demand by up to 30%.[122] In another recent example, Google agreed to a demand response framework with two utilities that would reduce how much electricity is used by its data centers during peak hours.[123]

DOE's reliance on an inflexible assumption for data center load reflects a failure to consider how this rapidly developing industry may adapt to address its significant energy

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[116] *WildEarth Guardians v. U.S. Bureau of Land Mgmt*., 870 F.3d 1222, 1237 (10th Cir. 2017); *Hisp. Affs. Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) (noting agencies' affirmative duty to examine key assumptions underlying their policies).
[117] *Nat. Res. Def. Council, Inc. v. Herrington,* 768 F.2d 1355, 1385 (D.C. Cir. 1985); *see also Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998).
[118] Report at 18.
[119] *See* Ex. D, Nicholas Institute Report at 25; *see also* Ex. C, IPI Report at 24
[120] S.B. No. 6 § 4, 89th Legislature (Tex. 2025) (to be enacted at Tex. Util. Code § 39.170); *See also* Ex. C, IPI Report at 26.
[121] Ex. C., IPI Report at 26.
[122] Meris Lutz, *NVIDIA addresses AI peak power demand, spikes in new rack-scale systems*, UtilityDive (July 30, 2025), https://www.utilitydive.com/news/nvidia-rack-scale-system-smooth-ai-power/756279/.
[123] Laila Kearney, *Google agrees to curb power use for AI data centers to ease strain on US grid when demand surges*, Reuters (Aug. 4, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/google-agrees-curb-power-use-ai-data-centers-ease-strain-us-grid-when-demand-2025-08-04/.

demand. This renders DOE's blunt conclusions regarding resource adequacy arbitrary and capricious.[124]

The Report also adopts an unreasonably high estimate of future data center load, arbitrarily claiming it is simply adopting a "midpoint assumption." Report at 15. DOE admits that there are "wide variations" in estimates of future data center load growth, yet the agency does not appear to have conducted any actual evaluation of those estimates to determine their respective accuracy. DOE must explain why its adoption of an estimated 50 GW load growth is more reliable or likely than other projections. It cannot just pick what it calls a "midpoint" from available studies and move forward. A rational approach would involve projecting future growth under a number of scenarios. Indeed, DOE did not account for a number of factors that temper against aggressive assumptions for future data center load growth. Those factors include the fact that data center developers often make duplicative requests for service; that data center deployment is limited by the availability of chips and processing systems; that data center efficiency may increase in the future as technology develops; and that utilities are incentivized to adopt aggressive load forecasts.[125]

The Report also assumes an additional 51 GW of non-data center load growth. DOE states that it adopted this assumption from NERC's 2024 ITCS Report. But NERC's 2024 ITCS Final Report does not contain its own load growth projections.[126] DOE has not cited which NERC projections it is relying on, what data underlie those projections, or why DOE considers it reliable for purposes of setting a uniform resource adequacy standard and guiding reliability interventions. Moreover, NERC's forecasts already contain data center load expectations meaning the Report may be double counting projected future demand from data centers.[127] NERC's forecasts may also contain other assumptions that are no longer appropriate, such as demand forecasts based on federal incentives to electrify transportation that no longer exist. Additionally, as the Institute for Policy Integrity explains in its report, DOE's method for distributing load growth across the country is questionable and does not necessarily reflect actual market decisions.[128]

ii. DOE arbitrarily assumes 104 GW of retiring capacity by 2030 but only 22 GW of additions in the same time period.

The Report also assumes the retirement of 104 GW of generating capacity by 2030, an extremely aggressive estimate that cannot withstand any level of scrutiny. [129] That assumption is inconsistent with the U.S. Energy Information Administration's data from June 2025 showing

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[124] *See* Report at 17, 40; *see also* Ex. C, IPI Report at 26 ("DOE should have considered the possibility that some of the projected data center load would be flexible, especially in ERCOT").
[125] *See generally* Ex. E, London Economics International Report.
[126] Ex. A, NERC ITCS Report.
[127] Report at 17.
[128] See Ex. C, IPI report at 24; *see also* Ex. E, LEI Report at 10-14 (noting that data centers have many choices where to locate).
[129] *See* Report at 5, A-5.

only half of that capacity is actually set for retirement. [130] This projection is also flawed because it arbitrarily includes announced retirements even though those generators have not formally provided notice of their retirement or initiated the retirement process. [131] Many of these resources have, however, pushed back their actual retirement dates due to changing market conditions and the policies of the current administration.[132]

At the same time that the Report overestimates the amount of load growth and retirements by 2030, it underestimates capacity additions that can be reasonably expected to come online in that same timeframe. DOE assumes only Tier 1 projects will be built by 2030. Because Tier 1 additions are projects that are either under construction or received approved planning requirements, nearly all will be in service by 2026.[133] DOE acknowledged that the Tier 1 assumption "results in minimal capacity additions beyond 2026," Report at A-5, yet DOE did not explain why that assumption was nonetheless reasonable when forecasting conditions to 2030.

By focusing solely on Tier 1 projects, DOE excludes announced capacity additions or even capacity additions that are seeking approval to interconnect to the grid (NERC "Tier 2" projects).[134] Excluding capacity that has been requested but has not yet received approval for planning requirements does not make sense for predictions stretching out five years from now. Both common sense and history suggest that at least some of these additions will receive approval in that time.[135] DOE has thus adopted a view of generator additions that is completely at odds with its projection of generator retirements and together the approach arbitrarily tips the scales in favor of finding a resource adequacy risk.

These assumptions seem to ignore a fundamental property of market dynamics: that supply will respond to rising demand. DOE assumes that generators who have not initiated the retirement process will retire even if remaining in the market would still be economic for them. And DOE assumes that developers will refrain from building any new energy projects from 2027-2030 despite market signals that additional capacity is needed. Those assumptions are unreasonable and render the Report arbitrary and capricious.[136]

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[130] U.S. Energy Information Administration, Form EIA-860 (June 11, 2025) https://www.eia.gov/electricity/data/eia860/.
[131] *See* Report at 5, A-5.
[132] Kevin Clark, *Where coal plant retirements are happening – And what could delay them*, Power Engineering (July 14, 2025), https://www.power-eng.com/coal/plant-decommissioning/where-coal-plants-are-closing-and-what-could-delay-them/. *See also,* Joe Schulz, *We Energies will delay Oak Creek coal plant retirement by one year to 2026*, Wisconsin Public Radio (June 26, 2025), https://www.wpr.org/news/we-energies-delay-oak-creek-coal-plant-retirement-2026. See also Ex. C, IPI Report at 23-24 (explaining why DOE's retirement figure likely overstates retirements).
[133] NERC, *2024 Long-Term Reliability Assessment* at 22, 136-37 (2024), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_Long%20Term%20Reliability%20Assessment_2024.pdf.
[134] *Id*.
[135] *See also* Ex. C, IPI Report at 21-22 (applying historical statistics and data to demonstrate why DOE's exclusion of Tier 2 additions is unreasonable).
[136] *See* Report at 1 (concluding that, based on its model, intervention is needed to ensure a reliable power grid and meet the AI growth requirements).

DOE also arbitrarily excludes new transmission projects from its analysis altogether. Interregional transmission improvements are known to be one of the most cost-effective ways of improving grid reliability.[137] DOE apparently assumes that the nation's transmission will remain static over the next five years, despite ongoing planning processes and reforms to increase transmission projects and the well-documented reliability benefits that more transmission can provide.[138] DOE also appears to undercount the reliability benefit of existing transmission systems in its analysis.[139] It is nonsensical to ignore the benefits of new transmission when DOE is purportedly seeking to improve the reliability of the electric grid and keep costs affordable for consumers.

iii. DOE's analysis lacks sufficient regional granularity and suffers from other analytical flaws.

DOE's analysis also suffers from mathematical errors, analytical flaws, and lacks sufficient data or regional input further highlighting the importance of leaving resource adequacy to the states. DOE itself recognized that the Report's lack of regional data was a shortcoming that undercut its conclusions. As DOE acknowledges, "[e]ntities responsible for the maintenance and operation of the grid have access to a range of data and insights that could further enhance the robustness of reliability decisions, including resource adequacy, operational reliability, and resilience."[140] Despite this admission, DOE made no attempt to consult with States or grid operators on reliability issues or to obtain this data. An agency "may not tolerate needless uncertainties in its central assumptions when the evidence fairly allows investigation and solution of those uncertainties."[141]

This lack of state and regional granularity contributes to the report's unreasonable assumptions and overstated conclusions. Rather than focus on a region-specific analysis, DOE engaged in broad approximations to allocate nationwide projections to the various regions. For example, DOE started with a nationwide estimate of 50 GW of incremental data center load, allocated it across regions using state-level growth ratios from S&P's forecast, then mapped these state-level projections to the regions used for its analysis, the NERC Transmission Planning Regions (TPRs).[54] It is also unclear how DOE accomplished this mapping, given that the referenced NERC TPRs do not perfectly map to states.[56]

Further, the Report's conclusions regarding resource adequacy are contradictory at times, even within a single region, rendering DOE's characterization of certain regions' resource adequacy arbitrary and capricious. To guide its assessments, DOE set reliability standards of "[n]o more than 2.4 hours of lost load in an individual year" and "[n]o more than an NUSE [Normalized Unserved Energy] of 0.002%."[142] In its analysis of the PJM region, the Report highlights PJM's average loss of load figure of 2.4 hours under the current system analysis, apparently to indicate resource inadequacy despite clearly not *exceeding* the threshold DOE set,

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[137] *See generally* Ex. A, NERC ITCS Report; *see also* Ex. F, GridStrategies Report at 1.
[138] *See generally* Ex. A, NERC ITCS 2024 Report (identifying areas where new transmission can significantly improve reliability); Ex. F, GridStrategies, Resource Adequacy Value of Interregional Transmission (June 2025)
[139] *See* Ex. C, IPI Report at 25.
[140] Report at i.
[141] *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1391 (D.C. Cir. 1985).
[142] Report at 4.

while also describing the region's current system as "experienc[ing] shortfalls, but … below the required threshold."[143] At the same time, the Report notes that "[f]or the current system, this analysis identifies an additional 2.4 MW of capacity to meet the NUSE target for PJM," despite the Report's summary of the PJM's modeled NUSE metric in the current system clocking in at 0.0008%, again clearly meeting the reliability threshold that DOE itself selected.[144]

The Report also fails to explain how it could be used to identify "at-risk region(s) and guide reliability interventions"[145] while relying on many geographic groupings that do not match the boundaries used by utilities, balancing authority areas, transmission planning regions, regional wholesale markets, NERC regional entities, or NERC reliability coordinators to reliably operate the nation's electric grid.

For example, the "Front Range" region in the Report includes Colorado and portions of New Mexico and Wyoming but those boundaries are geographically different from regions analyzed in NERC's reliability assessments. NERC's 2025 Summer Reliability Assessment includes Colorado, most of Wyoming, and parts of Nebraska and South Dakota in the "WECC-Rocky Mountain" region, and includes Arizona and New Mexico, most of Nevada, and small parts of California and Texas in the "WECC-Southwest" region.[146] The regional grouping used in the Report is arbitrary and inconsistent with these existing groupings.

The Report states its model is derived from NERC's Interregional Transfer Capability Study ("ITCS")[147] and asserts the subregions used in the Report, called Transmission Planning Regions ("TPRs"), "match the regional subdivisions in the NERC ITCS study, itself based on FERC's transmission planning regions."[148] However, the ITCS makes clear that FERC's transmission planning regions were altered to create the TPRs for the ITCS,[149] which was focused on transfer capability between neighboring regions and not resource adequacy. [150] The ITCS Final Report does not explain how specific footprints were determined in any detail.[151] In January 2025 comments filed with FERC in response to the ITCS report, DOE commented "[t]he subregion boundaries used in the ITCS are useful for evaluating interregional transfer capability given the chosen methodology, *but not for evaluating resource adequacy of those subregions*."[152] DOE explained the ITCS subregions do not reflect actual monitored transmission constraints, nor

[143] Report at 27 & Tbl. 8.
[144] Report at 9, 27 Tbl. 8. *See also* Ex. C, IPI Report at 20.
[145] Report at vi.
[146] NERC, *2025 Summer Reliability Assessment* at 36, 38 (May 2025), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_SRA_2025.pdf.
[147] Report at 2.
[148] Report at 10 n.14.
[149] Ex. A, NERC ITCS Report at 7.
[150] Fiscal Responsibility Act of 2023, H.R. 3746, 118th Congress (2023–2024) (directing NERC to study the total transfer capability between transmission planning regions).
[151] *See* Ex. A, NERC ITCS Report at 7.
[152] Comments of the U.S. Dep't of Energy, FERC Docket No. AD25-4-000, at 6 (Jan. 17, 2025) (emphasis added).

do they accurately capture the service territories or balancing authority areas that are the footprints on which resource adequacy decisions are made.[153]

Despite DOE's earlier comments, the DOE Report fails to explain why the TPR subregions, many of which have no similarities to the regions actually used by NERC to assess reliability nor the planning regions used by entities with resource adequacy obligations, are now appropriate geographic boundaries for running resource adequacy scenarios and guiding reliability interventions. Returning to the example of the Front Range region, neither the ITCS Final Report nor the DOE Report explain why resource adequacy analysis should be done collectively for Colorado and portions of New Mexico and Wyoming, in which the load serving entities and balancing authorities plan their systems, acquire generating resources, and decide to interconnect to neighboring systems under completely separate processes. Because many of the Report's subregions are divorced from how the grid is actually planned and operated, they risk inaccurate groupings of load and available generating resources and incomplete understandings of how transmission capacity may be used in times of peak demand.

The Report suffers from other analytical shortcomings, which are amply described in the Institute for Policy Integrity's report and are expressly incorporated and adopted here.[154] As the Institute for Policy Integrity explained, DOE fails to offer a reasonable explanation for its choice of resource adequacy metrics and targets, outage thresholds, or the use of a deterministic model instead of a more accurate probabilistic model. By relying solely on weather data from recent years in a deterministic model, rather than a more statistically accurate probabilistic model, the Report "does not sufficiently account for uncertainty," weakening the strength of its modeled findings for 2030.[155]

Given the abundant shortcomings in DOE's methodology, it is unreasonable to rely on the data and analysis contained in the Report to draw any firm conclusions about the resource adequacy of any region of the United States electrical grid now or in 2030, and DOE's various findings of resource inadequacy despite these flaws is arbitrary and capricious.

iv. DOE's flawed analysis establishes an arbitrary and unlawful preference for fossil fuel plants over other methods to preserve grid reliability, contrary to the Federal Power Act.

The flawed assumptions discussed above lead to an obvious conclusion: that DOE designed the Report to satisfy the White House's goal of bailing out uneconomic and environmentally harmful power plants. DOE's report is not addressing an emergency, but seeking to prop up a coal industry that is unable to compete with cheaper and cleaner modern energy sources like wind, solar, and batteries.

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[153] *See id.* at 6-7.
[154] See Ex. C, IPI Report at 18-26
[155] *Id*. at 21.

Executive Order 14262 was signed alongside EO 14261 *Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241*. EO 14261 claims to "encourage and support our Nation's coal industry to increase our energy supply, lower electricity costs, stabilize our grid, create high-paying jobs, support burgeoning industries, and assist our allies." And President Trump's statements at the signing ceremony make clear that the two orders are intended to serve a complementary purpose. As the President said, with coal workers lining the stage behind him for a photo-op, "we're bringing back an industry that was abandoned" and "all those plants that have been closed are going to be opened."[156]

The President's Grid Reliability Order references his earlier Declaration of an Energy Emergency, *see* EO 14156 "Declaring a National Energy Emergency," which created an energy emergency based on an alleged shortage of affordable and domestic energy sources. In all orders, the President narrowly focuses on fossil fuels and specifically excludes wind, solar, or batteries from the definition of "energy." And the Administration has simultaneously taken steps to derail the wind and solar industries, revoking previously issued permits for offshore wind projects, pausing the issuance of approvals, permits, and loans for wind projects nationwide, and adding bureaucratic hurdles to the permitting process for wind and solar.[157]

To the extent that the Report advances the Administration's policy of discriminating against renewable energy, batteries, and transmission to advance the extra-statutory motive of preserving aging fossil fuel power plants at consumer expense, it is contrary to express goals of the Federal Power Act.[158] Sections 205 and 206 of the Federal Power Act require rates to be just and reasonable and not unduly discriminatory or preferential.[159] Purporting to justify Section 202(c) orders for fossil fuel plants that are not needed and ignoring other viable methods to preserve grid reliability at a lower cost for consumers is likely to result in unjust and unreasonable rates. While 202(c) permits deferral of this issue to FERC in a rate proceeding, DOE must – at minimum – consider how a streamlined and uniform methodology may impact rates and cost recovery.

Significantly, when DOE proposed in 2017 that FERC adjust its rates to compensate generation that could store 90 days of fuel on-site (i.e., coal and nuclear generation), FERC unanimously rejected that proposal.[160] FERC concluded that DOE failed to demonstrate that allowing all eligible resources to receive a special rate regardless of the specific reliability needs of that region would be a just and reasonable outcome.[161] DOE also failed to show that such a remedy "would not be unduly discriminatory or preferential" since only "certain resources [could] be eligible for the rate, thereby excluding other resources that may have resilience

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[156] Adam Burke, *Trump orders coal revival, but market favors natural gas*, NPR (April 17, 2025) https://www.npr.org/2025/04/16/nx-s1-5359013/trump-orders-coal-revival-market-favors-natural-gas.
[157] *See generally*, Complaint, New York, et al. v. Trump, et al., No. 25-cv-11221 (D. Mass., filed May 5, 2025) (describing Administration's assault on wind energy). *See also e.g.,* Department of the Interior, Secretarial Order 3437, https://www.doi.gov/document-library/secretary-order/so-3437-ending-preferential-treatment-unreliable-foreign; Department of the Interior, Secretarial Order 3438, https://www.doi.gov/document-library/secretary-order/so-3438-managing-federal-energy-resources-and-protecting.
[158] *See* FPA Sections 205 and 206; 16 U.S.C. §§ 824d, 824e.
[159] *Id*.
[160] *See* Order Terminating Rulemaking, 162 FERC ¶ 61,012, ¶ 16 (Jan. 8, 2018).
[161] *Id*.

attributes."[162] DOE's second attempt to manipulate the energy markets in favor of its preferred energy sources suffers from the same fatal flaws and its motives are contrary to the goals of the Federal Power Act.

b. The Report does not describe an "emergency" and cannot be used to justify future grid reliability interventions by DOE.

i. Common usage and regulation define "emergency" narrowly.

Section 202(c) is limited, by its own terms, to either "the continuance of any war in which the United States is engaged," or "whenever the Commission determines that an emergency exists *by reason of*" certain enumerated causes.[163] Those causes include: (1) "a *sudden* increase in the demand for electric energy," (2) "a shortage of electric energy or of facilities for the generation or transmission of electric energy," (3) a shortage of "fuel or water for generating facilities," and (4) "other causes."[164]

The relevant focus is therefore on the definition of "emergency." In 1930, just a few years before the Act's passage, Webster's New International Dictionary of the English Language defined "emergency" as a "sudden or unexpected appearance or occurrence… an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency." The year before the statute was last amended, Merriam-Webster's Dictionary and Thesaurus (2014) defined "emergency" as "an *unforeseen* event or condition requiring prompt action." Thus, at all relevant times "emergency" was defined as being unexpected or unforeseen and requiring some form of exigent response.

That limited reading of Section 202(c) is bolstered by the emergency provision's immediate statutory context. Section 202(c) is preceded by Section 202(b), which grants what is now the Federal Energy Regulatory Commission the authority to issue similar interconnection orders "*after* opportunity for hearing," indicating that Congress intended to place a temporal constraint upon the emergency authority in Section 202(c), limiting it to situations not amenable to public notice and hearing.[165]

DOE's regulations implementing Section 202(c) also suggest the provision's narrow applicability to only true emergencies. [166] DOE has provided that "actions under this authority are envisioned as meeting a specific inadequate power supply situation."[167] The regulations

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[162] *Id*.
[163] 16 U.S.C. § 824a(c)(1) (emphasis added).
[164] *Id.* (emphasis added). The catchall "other causes" must still be the "reason" that an emergency exists. *Id*. *See also* Rolsma, *The New Reliability Override,* 57 U. Conn. L. Rev. at 810-13.
[165] 16 U.S.C. § 824a(b); 42 U.S.C. § 7172(a)(1)(B).
[166] *See also* 46 Fed. Reg. 39987 (Aug. 6, 1981).
[167] 10 C.F.R. § 205.371.

further define applicable emergencies to include "an *unexpected* inadequate supply of electric energy," "*unforeseen* occurrences," or "a *sudden* increase in customer demand," echoing the.[168]

In guidelines for defining "inadequate utility system fuel inventory or energy supply," the regulations further specify that the threshold for such an emergency may be met "when, combined with other conditions, the projected energy deficiency upon the applicant's system *without emergency action by the DOE*, will equal or exceed 10 percent of the applicant's then normal daily net energy for load, or will cause the applicant to be unable to meet its normal peak load requirements *based upon use of all of its otherwise available resources* so that it is unable to supply adequate electric service to its ultimate customers."[169] This definition again narrows the circumstances in which DOE may exercise its 202(c) authority to those not redressable by other means, implicating only acute or imminent power shortages where no other recourse is available.[170]

ii. The report does not point to any sudden or unforeseen circumstances.

. DOE's report does not identify any region, except ERCOT, that currently fails to meet DOE's reliability targets.[171] DOE's flawed analysis points to a failure to meet reliability targets only in 2030. An expected increase in demand that can be projected over the next five years is not an energy emergency. Those shortfalls are not "unexpected" or "imminent" so as to justify a departure from normal planning procedures. The Report is squarely focused on 2030 and does not assess resource adequacy in any of the intervening years. According to the standard set out in *Otter Tail Power Co. v. Federal Power Com.*, 429 F.2d 232, 234 (8th Cir. 1970), the shortfalls predicted by the Report are at best policy crises "which [are] likely to develop in the foreseeable future but which [do] not necessitate immediate action." In other words, the concerns may be addressable using FPA § 202(b), but certainly not FPA § 202(c).

Significantly, DOE has never before issued a 202(c) order based on such a broad and speculative increase in load demand. On the contrary, prior to 2025, DOE had only used 202(c) to delay the retirement of generation facilities on three narrow occasions, as requested by the system operator or government body, and only for as long as necessary to address the imminent emergency.[172]

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[168] *Id.* (emphasis added).
[169] 10 C.F.R. § 205.375 (emphasis added).
[170] While the regulations also state that "[e]xtended periods of insufficient power supply as a result of inadequate planning or the failure to construct necessary facilities can result in an emergency … ," the definition crucially does not allow for *projections* of such circumstances to qualify or include any qualifying terms indicating similar intent. On the face of the regulation, and consistent with reasonable interpretations of the statute, such an eligible power shortage must be sufficiently imminent to avoid reducing the inherent limitation of the word "emergency" to an absurdity. 10 C.F.R.§ 205.371.
[171] Report at 7.
[172] *See* Benjamin Rolsma, *The New Reliability Override*, 57 U. Conn. L. Rev. 789, 843-46 (2025).

iii. Reliance on the Report to justify a Section 202(c) order would be contrary to law.

Based on EO 14262 and DOE's own statements, it is evident that the Department intends to rely upon the analysis and methodology in the Report to justify future Section 202(c) orders.[173] But the Report cannot lawfully be relied upon to justify the exercise of DOE's limited emergency authority. Doing so would be contrary to law.[174]

As discussed above, the Secretary of Energy's authority under Section 202(c) of the Federal Power Act is statutorily limited to wartime or certain "emergency" situations; otherwise, similar proceedings fall under the jurisdiction of the Federal Energy Regulatory Commission through a process of notice and hearing.[175] Even taking the Report at face value, its own conclusions fail to describe anything resembling an emergency in any part of the country besides ERCOT.[176] Any conclusion that an emergency exists is undermined by the arbitrary nature of the Report's analysis.[177]

Moreover, the Report's conclusions, on their face, fail to describe an "emergency". Conclusions about resource adequacy five years in the future, in 2030, fall outside of the temporal limits of an "emergency" and are exactly the type of concern that should be dealt with through usual planning processes.[178] Any attempt by DOE to bootstrap future Section 202(c) orders to the Report would be in direct contradiction to its statutory authority to issue such orders and its own regulations implementing that authority.[179]

c. DOE failed to consider an important aspect of the problem: existing reliability mechanisms.

Agency action is arbitrary and capricious under the APA if it "fails to consider an important aspect of the problem." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here, DOE has acted as if the Report exists on a blank slate of resource adequacy and reliability planning yet that could not be farther from the

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[173] *See* Report at vi; EO 14262 Sec. 3(c). In at least one Section 202(c) order issued after the publication of EO 14262 but before the release of the Report, the Department stated that it "plans to use this methodology to further evaluate" the generation units subject to that order. Order No. 202-25-4 ("Eddystone 202(c) Order") at 2 (May 30, 2025).

[174] *See* 16 U.S.C. § 824a(c); 10 C.F.R. §§ 205.370-371, 375.

[175] 16 U.S.C. §§ 824a(b)-(c); 42 U.S.C. §§ 7151(b), 7172(a)(1)(B).

[176] Report at 7 ("Analysis of the current system shows all regions except ERCOT have less than 2.4 hours of average load loss per year and less than 0.002% NUSE. This indicates relative reliability for most regions based on the average indicators of risk used in this study."); *see also* Ex. C, IPI Report at 29-31 ("Despite DOE's press statement asserting that the study's methodology can help guide [sic] 'guide Federal reliability interventions,' presumably to address the EO's [EO 14262] mandate that DOE find a way to routinize further 202(c) emergency orders, the study reports a fundamental limitation for doing so: It does not find any near-term reliability risk from current levels of resource adequacy." (footnotes omitted)).

[177] *See supra* Section 4.a.

[178] *See* Report at 8-9.

[179] 16 U.S.C. § 824a(c); 10 C.F.R. §§ 205.370-371, 375.

truth. As described above, a multilayered system of resource planning involving states and regional grid operators ensures adequate supplies and grid stability.[180]

The Report's conclusion that "absent intervention, it is impossible for the nation's bulk power system to meet the AI growth requirements while maintaining a reliable power grid and keeping energy costs low for our citizens," is undermined by this failure.[181] States across the nation are grappling with how to meet increased demand from AI data centers while maintaining grid reliability and distributing the costs of those changes in an equitable manner. Without an analysis of the existing framework for making such determinations, and ongoing efforts to adjust those systems to meet new challenges, there is no basis for DOE's conclusion that "intervention" – likely through 202(c) orders – is the only way to possibly reach those goals.[182]

d. As described in the EO, the report intrudes upon state authority.

EO 14262 directs the Secretary of Energy to rely upon the methodology disclosed in the Report to "identify current and anticipated regions with reserve margins below acceptable thresholds" and "identify which generation resources within a region are critical to system reliability."[183] The Executive Order also directs DOE to further develop a "protocol" for applying this analysis to "include all mechanisms available under applicable law, including section 202(c) of the Federal Power Act, to ensure any generation resource identified as critical within an at-risk region is appropriately retained as an available generation resource."[184] The Report is therefore foundational to the "protocol" that EO 14262 intends will direct emergency orders to override planned retirements. The Report thus directly intrudes on the States' lawful resource adequacy planning processes.

With respect to regulatory oversight for resource adequacy, section 201 of FPA, 16 U.S.C § 824(b)(1), reserves authority over generation facilities to the states. It states in pertinent part: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction*, except as specifically provided in this subchapter and subchapter III of this chapter, *over facilities used for the generation of electric energy* or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."[185]

The Federal Power Act is likewise clear that federal regulatory jurisdiction over the power sector "extend[s] only to those matters which are not subject to regulation by the States."[186] With the few and specific exceptions outlined elsewhere in the statute, this jurisdiction

[180] *See Supra,* Section 2.a.
[181] Report at 1.
[182] *Id*.
[183] Executive Order 14262, §§ 3(b)-(c).
[184] *Id.* at § 3(c).
[185] *Id*. (emphasis added).
[186] 16 U.S.C. § 824(a).

does *not* extend to "facilities used for the generation of electric energy … ."[187] This statutory language places the regulation of generation resource adequacy squarely in the ambit of the states, not the federal government.[188]

States have typically exercised this authority through a combination of individual state legislative and regulatory functions as well as engaging in multistate RTOs and ISOs. Some states have retained this authority over resource adequacy in its entirety,[189] while others have directed their utilities to join RTOS/ISOs that, through their tariffs, impose resource adequacy requirements. Those RTO/ISOs also generally establish markets that allow market participants to buy and sell capacity and thereby to facilitate market entry and exit decisions based on price signals. Resource adequacy requirements in RTO/ISO tariffs have been held to be practices affecting wholesale rates subject to the jurisdiction of FERC under sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d & 824e.[190]

Through these channels, states conduct the careful, calculated, long-term capacity planning that goes ignored in DOE's Report.[191] The Report utterly fails to recognize or properly account for the states' traditional and statutory role in resource adequacy planning, and as forecasted by EO 14262, the Report constitutes a central component of the federal government's proposed protocol to usurp the states' authority over this issue.

The use of emergency orders to illegally override state resource adequacy planning has been challenged on the same grounds by the Organization of MISO States, Inc. (OMS), in its Petition for Rehearing of DOE Order No. 202-25-3 (ordering continued operation of the J.H. Campbell coal-fired power plant). In its Petition, OMS noted among other points that "[t]his is the first time the DOE has invoked Section 202(c) outside a severe weather event or emergency, and for the first time, uses the power to suspend a retirement and interfere with established and vetted state and regional planning processes."[192] OMS' petition continues, "[t]his expansive use of emergency powers sets a troubling precedent, enabling interventions in routine, state-approved planning decisions without an actual crisis and risks establishing its use to circumvent normal utility, RTO, and states processes, and likely exposes ratepayers to costs that should not be borne."[193] In DOE's issuance of the Report pursuant to EO 14262, the federal government is

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[187] *Id.* § 824(b)(1).
[188] *See, e.g.*, Ashley J. Lawson, CONG. RESEARCH SERV., R47521, *Electricity: Overview and Issues for Congress*, at 7 (Feb. 14, 2025).
[189] *See Devon Power LLC et al.,* 109 FERC ¶ 61,154, P 47 (2004) ("Resource adequacy is a matter that has traditionally rested with the states, and it should continue to rest there. States have traditionally designated the entities that are responsible for procuring adequate capacity to serve loads within their respective jurisdictions.").
[190] *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009).
[191] *E.g.*, Report at 2-3, 5, 12-13 (relying solely on federal, EIA, and NERC estimates and failing to mention nuanced state, RTO, or ISO figures and actions).
[192] *See* Petition to Intervene and Request for Rehearing of the Organization of MISO States, Inc., Order No. 202-25-3 (filed June 23, 2025), https://www.energy.gov/sites/default/files/2025-07/Petition%20to%20Intervene%20and%20Request%20for%20Rehearing%20of%20the%20Organization%20of%20MISO%20States.pdf.
[193] *See id*. at 5; *see also id.* at 4 (challenging "Violation of the Federal Power Act and State Jurisdiction.").

attempting to establish its own rule for resource adequacy planning from which it can routinely issue illegal orders under the same flawed premise that OMS challenges in its Petition.

Lastly, Section 202(c) does not serve as a widespread grant of DOE jurisdiction over resource adequacy and capacity planning. "Congress … does not … hide elephants in mouseholes."[194] First, as described above in Part [3b], Congress assigned non-emergent questions of interconnection and transmission necessity amenable to public notice and hearing to FERC, not DOE.[195] Moreover, even this authority should not be seen as a substitute for the overarching reservation of regulatory jurisdiction over resource adequacy planning to the states.[196] No reasonable reading of the relevant statutory authorities could construe DOE's authority in 16 U.S.C. § 824a(c) as intruding on the explicit and traditional role of the states in regulating electricity generation and resource adequacy. However, all available indicators in the Report and EO 14262 evince a flawed understanding contrary to DOE's appropriate and limited role in this space, thus the Department should reconsider its findings and position on this authority.

e. DOE's Failure to Provide Public Notice and Comment on its New Standard and Methodology Violated the Administrative Procedure Act, 5 U.S.C. § 553.

Before adopting a final rule, the Administrative Procedure Act requires agencies to publish in the Federal Register a notice of proposed rulemaking and accept public comment.[197] An agency action that imposes legally binding obligations or prohibitions on regulated parties, substantially removes the agency's discretion, or would be the basis for an enforcement action for violations of those requirements, is a legislative rule that requires notice and comment.[198] Notice and comment is also required when agencies establish new standards that are not derived from an existing statute or regulation or when an agency relies on its statutorily delegated authority to establish policy.[199] Additionally, agency documents that adopt a "new position inconsistent with any of the [agency's] existing regulations" are subject to notice and comment.[200]

DOE's report creates a brand-new national standard and methodology for evaluating resource adequacy. This standard has concrete legal effects because DOE plans to enforce it via Section 202(c) emergency orders. It also is inconsistent with DOE's existing regulations, which direct DOE to issue emergency orders in very different circumstances based on different criteria than what DOE now proposes. Significantly, DOE acknowledges that its conclusions lack sufficient input from the entities responsible for operating the grid, but DOE nonetheless refused to submit the Report to notice and comment where the public could have tested DOE's assumptions and conclusions. Assuming DOE continues to comply with the Executive Order's

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[194] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).
[195] 16 U.S.C. § 824a(b); 42 U.S.C. § 7172(a)(1)(B).
[196] 16 U.S.C. §§ 824(a)-(b).
[197] 5 U.S.C. § 553(b)-(c).
[198] *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014).
[199] *See Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 622 (4th Cir. 2018).
[200] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99–100 (1995).

unlawful command to use this Report to support future Section 202(c) orders, the Report and any action relying on it must be set aside for failure to provide notice and comment.

i. DOE's standard is an exercise of assumed legislative authority, and it has concrete legal effects.

Pursuant to the Executive Order, DOE established a "uniform methodology" for assessing resource adequacy across the country.[201] That methodology adopts a new "resource adequacy standard" to measure the desired level of adequacy needed for the bulk power system.[202] DOE acknowledges that it is not using the "traditional . . . criterion" for measuring resource adequacy and is relying on metrics that are "not standardized in the U.S. today."[203] Instead, DOE unilaterally adopts new metrics to evaluate resource adequacy and establishes the reliability targets that should be obtained.[204] DOE's choice of metrics and the targets to be achieved are value judgments and should be informed by economic tradeoffs and other policy considerations about what level of system reliability should be achieved and at what cost to consumers, areas where public input is essential to sound decision making.[205]

DOE also fills its methodology with value-laden policy choices around the data inputs and assumptions that determine when DOE's reliability standard is achieved. As just one example, DOE includes projected future demand from potential new AI data centers as part of its calculation of future load.[206] Those data centers have not yet been built and some may never be.[207] And, as DOE recognized, grid operators are not likely to allow those large loads to connect if doing so threatens reliability.[208] Including those potential loads in DOE's determinations of system reliability thus inherently represents a policy choice: Should present-day consumers pay to keep retiring power plants online to ensure that potential data centers can be reliably served in the future?[209]

Even assuming *arguendo* that DOE has the statutory authority to set a uniform reliability standard, place risks of future large load growth on current consumers, or engage in long-term resource adequacy planning for the entire nation, it still must involve stakeholders through notice and comment in those legislative choices. "When an agency relies on expressly delegated authority to establish policy . . . courts generally treat the agency action as legislative [] rulemaking" and require notice and comment.[210] In other words, "when Congress leaves [] a policy choice to the agency, [courts] should lean toward finding that the agency's making of that

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[201] *See* Report at *vi* (explaining that the report is "delivering the required uniform methodology to identify at-risk region(s)"); Executive Order 14262 § 3(b).
[202] Report at 3.
[203] *Id*. 3-4.
[204] *See id*.
[205] *See* Ex. C, IPI Report at ii (criticizing DOE's choice of targets as not "appropriately justified based on a cost-benefit framework, and the use of a one-size-fits-all target for the entire country ignores regional differences").
[206] *See* Report at 1-3.
[207] *See, e.g*., Ex. E, London Economics International Report; Laila Kearney and Liz Hampton, *U.S. Power Stocks Plummet as DeepSeek Raises Data Center Demand Doubts*, Reuters (Jan. 27, 2025) https://www.reuters.com/business/energy/us-power-stocks-plummet-deepseek-raises-data-center-demand-doubts-2025-01-27/.
[208] *See* Report at 14.
[209] *See also supra* Section 4.a. (discussing other arbitrary assumptions in DOE's analysis).
[210] *Children's Hosp. of the King's Daughters, Inc.*, 896 F.3d at 622.

choice requires notice and comment.[211] "Otherwise, it would be difficult to imagine what regulations *would* require notice and comment procedures."[212]

DOE's standard also has concrete legal effects because, consistent with the Executive Order, DOE will use Section 202(c) emergency orders (or the threat of Section 202(c) orders) to ensure regions meet the new standard. The Executive Order directs DOE to use this standard to "establish . . . a protocol" to identify generation resources that are critical to system reliability.[213] DOE's "protocol shall additionally" use Section 202(c) of the Federal Power Act to "ensure" those resources are retained and prevent their retirement.[214] "Protocol" means "a set of rules to be followed . . ."[215] As DOE has made clear, DOE "plans to use" this new standard to evaluate retiring coal plants and potentially issue Section 202(c) emergency orders preventing their retirement.[216]

DOE's new standard, and protocol for enforcing it, removes DOE's discretion and is intended to provide the basis for enforcement actions via Section 202(c) orders.[217] The new standard is not derived from the Federal Power Act or, as explained further below, from DOE's existing regulations, but is an entirely new method of determining resource adequacy across the country. DOE must accordingly submit its new standard and methodology to public notice and comment.[218]

ii. DOE must provide notice and comment because its standard allegedly supports issuing emergency orders based on factors that conflict with existing regulations.

DOE's Report provides new bases for issuing emergency orders that conflict with DOE's existing regulations, but DOE cannot amend those standards without first providing notice and comment.[219] DOE promulgated regulations detailing how and when it issues Section 202(c) emergency orders following public notice and comment in 1981.[220] Under DOE's current regulations, emergency orders "are envisioned as meeting a *specific* inadequate power supply situation," occasioned by "acts of God[] or unforeseen occurrences not reasonably within the

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[211] *Id*.
[212] *Id*. (quoting *N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 70–71 (1st Cir. 2018)).
[213] Executive Order 14262 at § 3(c).
[214] *Id*.
[215] PROTOCOL, Black's Law Dictionary (12th ed. 2024).
[216] Order No. 202-25-4 at 2 (Eddystone Order). *See also* U.S. DEP'T OF ENERGY, *Fact Sheet: The Department of Energy's Resource Adequacy Report Affirms The Energy Emergency Facing The U.S. Power Grid* (2025), https://www.energy.gov/sites/default/files/2025-07/DOE_Fact_Sheet_Grid_Report_July_2025.pdf [https://perma.cc/YLX7-8G7T] (explaining that DOE's methodology will be used, pursuant to the executive order, "prevent [] generation resources from leaving the bulk-power system"); Press Release, U.S. Dep't of Energy, Department of Energy Releases Report on Evaluating U.S. Grid Reliability and Security (July 7, 2025), https://www.energy.gov/articles/department-energy-releases-report-evaluating-us-grid-reliability-and-security [https://perma.cc/8TEJ-AGH6]. (stating that its "methodology also informs the potential use of DOE's emergency authority under Section 202(c) of the Federal Power Act"); Report at *vi* (explaining that DOE's standard will be used to "guide reliability interventions"), 1 (emphasizing the need for DOE's "decisive intervention" in energy markets), 10 (analyzing ERCOT because "FPA Section 202(c) allows DOE to issue emergency orders to ERCOT").
[217] *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014).
[218] *See id*.; *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 622 (4th Cir. 2018).
[219] *See Shalala*, 514 U.S. at 99–100.
[220] *See Emergency Interconnection of Electric Facilities*, 46 Fed. Reg. 39,984 - 39,989 (Aug. 6, 1981).

power of the affected 'entity' to prevent."[221] DOE did not intend its emergency authority to replace long-term planning by utilities: "while a utility may rely upon these regulations for assistance during a period of unexpected inadequate supply of electricity, it must solve long-term problems itself."[222]

As DOE stated then, "[t]he factors that DOE will consider in determining whether an emergency exists are specified in § 205.373."[223] Section 205.373 requires applicants to submit detailed information on "daily peak load and energy requirements for each of the past 30 days and projections for each day of the expected duration of the emergency" and make a "showing that adequate electric service cannot be maintained without additional power transfers." Applicants must also describe what "conservation or load reduction actions have been implemented" before seeking emergency relief.[224] In sum, DOE's current regulations direct a case-by-case analysis of specific, temporary shortages in particular situations, based on detailed information from an applicant.

DOE's new standard and methodology is an unprecedent expansion of the bases upon which DOE will justify Section 202(c) emergency orders, but DOE has not offered public comment on that expansion. Rather than focusing on specific showings of an imminent threat to grid stability, the report rests on DOE's analysis of "the U.S. electric grid's ability to meet future demand through 2030."[225] Rather than consider the "daily peak load and energy requirements of the past 30 days and projections for each day of the [] emergency," 10 C.F.R. § 205.373, DOE now plans to base Section 202(c) decisions on speculation over the development of artificial intelligence, re-industrialization of the U.S. economy, and other uncertain developments over the next five years.[226] Rather than consider the "scheduled . . . deliveries" during the emergency period and needs of existing firm customers, § 205.373(d),(f), DOE now proposes to find an emergency based on potential load growth for customers who do not currently, and may never, exist.[227]

Rather than allowing utilities and grid operators to solve long-term planning issues themselves, DOE now seeks to intervene in those state- and FERC-regulated processes based on its own assumptions about future load growth and electricity supply. But unlike DOE's Report, the long-term resource adequacy plans developed by utilities and grid operators are transparent and publicly-accountable processes that involve relevant stakeholders and the public.[228] DOE, on the other hand, published its analysis without critical data or insights from the entities who actually operate and maintain the electric grid.[229]

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[221] 10 C.F.R. § 205.371 (emphasis added).
[222] 46 Fed. Reg. at 39,985; *see also* 10 C.F.R. § 205.371
[223] 46 Fed. Reg. at 39,985.
[224] *Id*.; *see also* 10 C.F.R. § 205.375 (defining an inadequate energy supply as when an applicant is "unable to meet its normal peak load requirements based upon use of all its otherwise available resources.").
[225] Report at 2.
[226] Report at 2; *see also supra* Section 4.a.
[227] *See, e.g*., Ex. E London Economics International Report; Laila Kearney and Liz Hampton, *U.S. Power Stocks Plummet as DeepSeek Raises Data Center Demand Doubts*, Reuters (Jan. 27, 2025) https://www.reuters.com/business/energy/us-power-stocks-plummet-deepseek-raises-data-center-demand-doubts-2025-01-27/.
[228] *See supra* Section 2.a.
[229] Report at *i.*

Rather than considering what other "conservation or load reduction actions have been implemented" before turning to emergency relief, 10 C.F.R. § 205.373, DOE's standard ignores those possibilities altogether. Instead, DOE adopts aggressive and likely overstated assumptions of load growth and ignores whether any of that future demand could be flexibly integrated into the grid, what measures state and local regulators are taking to mitigate the impact of new data center demand on grid reliability, or other factors influencing grid reliability over the long-term.[230] DOE appears to admit that its overstated potential load growth will not *actually* lead to any grid reliability emergency, as there is no "indication that reliability coordinators would allow this level of load growth to jeopardize the reliability of the system."[231]

DOE appropriately involved the public when it initially set out the process and factors to consider for Section 202(c) orders in its 1981 rulemaking. Yet now, DOE seeks to expand the bases for Section 202(c) orders in ways that intrude on state-regulated processes and the free market, without any input from stakeholders or the public who will ultimately pay for DOE's actions. Because the methodology and protocol effectively "expand[s] the footprint [of DOE's emergency authority] by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created" and is inconsistent with DOE's existing regulations, it is a "rule" under the APA and notice and comment is required.[232]

iii. DOE acknowledges the importance of involving the States and other actors yet fails to provide public notice and comment to test DOE's assumptions and conclusions.

DOE's failure to provide public notice and comment is prejudicial error. DOE admittedly lacks the "range of data and insights" to make robust reliability decisions that entities responsible for the maintenance and operation of the grid have access to.[233] Had the States been given adequate notice and an opportunity to comment, they could have provided more information to DOE on how existing mechanisms address grid reliability, issues with DOE's assumptions, chosen metrics, and choice of data, identified gaps in DOE's analysis and data, and other issues. Numerous grid experts have commented on shortfalls with DOE's report.[234] Given adequate notice and an opportunity to comment, the States could have obtained their own expert analysis and potentially raised even more issues with DOE's proposed standard and methodology than what time permitted the States to raise here.

DOE has previously acknowledged the importance of involving States and the public in these questions. When DOE initially established regulations governing how and when it would

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[230] *See, e.g.*, Ex. D, Nicholas Institute Report; Jason Plautz, *State lawmakers grapple with energy demand for data centers*, E&E News (Mar. 3, 2025) https://www.eenews.net/articles/state-lawmakers-grapple-with-energy-demand-for-data-centers/; Washington Office of the Governor, *Gov. Bob Ferguson Signs Executive Order Establishing a Data Center Workgroup* (Feb. 4, 2025) https://governor.wa.gov/news/2025/governor-bob-ferguson-signs-executive-order-establishing-data-center-workgroup.

[231] Report at 14.

[232] *Children's Health Care v. Centers for Medicare & Medicaid Servs.*, 900 F.3d 1022, 1025 (8th Cir. 2018); *see also Shalala*, 514 U.S. at 99–100.

[233] Report at *i*

[234] *See, e.g.*, Jeff St. John, *Critics fear Trump will use flawed DOE report to push pro-coal agenda*, Canary Media (July 14, 2025), https://www.canarymedia.com/articles/fossil-fuels/trump-doe-report-open-coal-plants; Matthias Fripp and Brendan Pierpont, Opinion, *Energy Department's flawed grid study props up expensive, zombie power plants*, UtilityDive, https://www.utilitydive.com/news/doe-grid-reliability-study-zombie-power-plants/753596/.

issue emergency orders, DOE consulted with the Federal Energy Regulatory Commission and state officials.[235] DOE also explained that "[t]he DOE intends to utilize any available State and local expertise in resolving an emergency."[236] Indeed, DOE's organizational statute *requires* it to consult with States "[w]henever any proposed action by the Department conflicts with the energy plan of any State."[237] And States are already taking actions to address reliability issues and load growth in their jurisdictions.[238] DOE's refusal to collaborate with States or meaningfully involve other stakeholders here is inexplicable, conflicts with DOE's organizational statute, and the APA.

V. Conclusion

The State's request for rehearing should be granted and DOE should withdraw or otherwise amend the subject Report following public vetting through notice and comment proceedings. In the meantime, DOE cannot rely on the challenged report to support the exercise of its 202(c) authority. Doing so would be arbitrary and capricious and otherwise contrary to law and impose significant harm on our States.

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[235] 46 Fed. Reg. at 39,985.
[236] *Id*.
[237] 42 U.S.C. § 7113; *see also* 16 U.S. Code § 824h (encouraging federal-state collaboration).
[238] Jason Plautz, *State lawmakers grapple with energy demand for data centers*, E&E News (Mar. 3, 2025) https://www.eenews.net/articles/state-lawmakers-grapple-with-energy-demand-for-data-centers/; Washington Office of the Governor, *Gov. Bob Ferguson Signs Executive Order Establishing a Data Center Workgroup* (Feb. 4, 2025) https://governor.wa.gov/news/2025/governor-bob-ferguson-signs-executive-order-establishing-data-center-workgroup.

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