UNITED STATES OF AMERICA
BEFORE THE
UNITED STATES DEPARTMENT OF ENERGY

Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid	

MOTION TO INTERVENE AND REQUEST FOR REHEARING OF THE MARYLAND OFFICE OF PEOPLE'S COUNSEL

Pursuant to section 313*l* of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*, and Rules 212, 214, and 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.214, and 385.713, the Maryland Office of People's Counsel ("MPC"): (1) moves to intervene in this proceeding and (2) requests that the Department of Energy ("Department" or "DOE") grant rehearing of the "Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid" published on July 7, 2025 (the "Report").

MOTION TO INTERVENE

The Maryland Office of People's Counsel ("MPC") is a state agency created by Maryland state law. MPC is authorized, in relevant part, to "appear before any federal or State [agency] to protect the interests of residential and non-commercial users [of utility services in Maryland]."[1] PJM Interconnection, LLC ("PJM") administers the facilities and markets in which Maryland participates. Implementation of the Report's

[1] Md. Code, Public Utilities Article, sec. 2-205(b) (2024).

methodology will affect the cost and level of service of electricity to consumers in Maryland. Accordingly, MPC moves to intervene in this proceeding with full rights as a party and files this request for rehearing in furtherance of its statutory charge "to protect the interests of" Maryland's residential and noncommercial electric consumers.

BACKGROUND

The Report is a response to Executive Order 14262, *Strengthening the Reliability & Security of the United States Elec. Grid*, 90 Fed. Reg. 15, 521 (April 14, 2025) ("EO 14262"). EO 14262 directs DOE to develop a "uniform methodology for analyzing current and anticipated reserve margins for all regions of the bulk power system regulated by the [FERC,] and [DOE] shall utilize this methodology to identify current and anticipated regions with reserve margins below acceptable levels as identified by the Secretary of Energy."[2] EO 14262 called for the methodology to be developed within thirty days of the order. This deadline was extended to July 7, 2025, the day on which the Report was published.

The Report implements a new "resource adequacy standard" over the power system to identify "at risk regions."[3] The methodology eschews "traditional . . . criterion" for measuring resource adequacy in favor of novel, non-standardized metrics.[4] DOE adopts these new metrics to evaluate resource adequacy and establish reliability targets in

[2] *Strengthening the Reliability & Security of the United States Elec. Grid*, 90 Fed. Reg. 15, 521 (April 14, 2025) ("EO 14262").
[3] *See* Report, Appendix C-3, EO 14262, at § 3(b); Report at *vi* (explaining that the report is "delivering the required uniform methodology to identify at-risk region(s)").
[4] Report at 3–4.

contravention of those already in place. The Report at its core manufacturers a data center problem into a resource adequacy problem.

Importantly, the Report's methodology lays a foundation for DOE to expand its emergency authority under section 202(c) of the Federal Power Act (the "FPA").[5] The methodology provides a post-hoc rationalization of several recently issued section 202(c) orders, such as Order 202-25-4, which requires the continued operation of Eddystone 3 & 4 until August 28, 2025.[6]

STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

As explained *infra*, MPC submits the following statement of issues and specification of error:

1. The Report is arbitrary and capricious and contrary to law because:
    a. The Report fails to present substantial evidence for its methodology for resource adequacy and fails to exercise reasoned decision-making by ignoring critical facts concerning the status of resource adequacy;[7]

[5] The Order refers (at 2) to DOE's development of a "methodology to identify current and anticipated reserve margins for all regions of the bulk-power system regulated by the Federal Energy Regulatory Commission[,]" and to use of that "methodology to further evaluate Eddystone Units 3 and 4."
[6] Order 202-25-4, DOE 202(c) Order Issued to PJM Interconnection (May 30, 2025).
[7] *See, e.g. Emera Maine v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017) (order under the Federal Power Act must reflect "a principled and reasoned decision supported by the evidentiary record" (quotation marks omitted)); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("[An] agency must make findings that support its decision, and those findings must be supported by substantial evidence.").

b. The Report intrudes on the authority of the states and other federal regulators to regulate resource adequacy.

c. The Report violates the major questions doctrine because it allows DOE to justify extended federal control over the energy market, absent clear congressional authorization depending on how the methodology is used.

2. The Report violates the Administrative Procedure Act because the methodology creates a new standard without an opportunity for public comment and notice.

ARGUMENT

I. DOE's methodology for determining energy reliability is arbitrary and capricious.

A. The methodology expands DOE's authority at the expense of the authority of the states and other federal regulators to regulate resource adequacy.

Federal regulatory jurisdiction over the power sector "extend[s] only to those matters which are not subject to regulation by the States."[8] This jurisdiction generally does not include regulation over "facilities used for the generation of electric energy."[9] For the PJM region, FERC approves rules that are designed to procure sufficient capacity to maintain resource adequacy. FERC also approves tariff provisions for PJM's transmission planning responsibilities, which are also critical to maintaining resource

[8] 16 U.S.C. § 824(a).
[9] *Id.* § 824(b)(1).

adequacy. Thus, while the states retain the regulatory jurisdiction of generation resource adequacy, the mechanisms used to maintain resource adequacy in PJM are regulated by FERC.

In contrast to the regional resource adequacy planning described above, DOE's action here is unilateral. DOE's methodology does not take into consideration the regional resource adequacy mechanisms, nor does it consider ratepayer costs or implement cost-benefit analysis of policy issues that are the lynchpin of reasoned decision-making. Indeed, the Report relies on federal, EIA, and NERC estimates, but ignores state, RTO, or ISO figures or actions.[10]

The Report thus undermines and ignores regional resource adequacy mechanisms implemented pursuant to FERC's authority under the FPA. Instead, DOE's methodology in the report supplants the existing processes and jurisdiction over generation resources in contravention of the Federal Power Act. DOE's failure to recognize this illegal expansion of its authority is therefore arbitrary and capricious.

B. The Report's methodology creates inconsistencies in energy reliability policy because it ignores the substantial evidence of existing resource adequacy schemes.

FPA Section 215, 16 USC § 824o establishes statutory guidelines for approval and modification of proposed and existing reliability standards, respectively, and empowers the Commission with jurisdiction over these reliability standards.[11] Reliability standards

[10] *E.g.*, Report at 2–3, 5, 12–13.
[11] 16 USC §824o (2025).

must be "just, reasonable, not unduly discriminatory or preferential, and in the public interest"[12] and are subject to Commission approval by rule or order.

Here, the Report's methodology circumvents the statutory process described in Section 215 of the FPA. The Report makes no attempt to reconcile its findings with the public interest, while DOE's adoption of the Report's methodology usurps the Federal Energy Regulatory Commission's statutory authority to determine these standards. The report is thus internally inconsistent with the federal regulatory framework established by law.

The Report's methodology also runs counter to PJM's resource adequacy framework. Resource adequacy within the PJM footprint is subject to an established, extensive, layered, framework of oversight and regulation—all of which has been approved by FERC under the FPA. The resource adequacy contribution of each PJM electric generating plant operating is subject to on-going, technical reviews by PJM, pursuant to its tariff, and in conformity within rules promulgated and periodic grid reliability reviews conducted by RFC and NERC, respectively.[13] NERC and RFC have adopted an exacting technical, probabilistic metric and criterion for determining resource adequacy, described as the "one day in 10 years" (or 1-in-10) criterion, which, in turn,

[12] *Id.*

[13] *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).

has been adopted by PJM in the oversight and planning of wholesale power supply within its area of service.[14] Determining compliance with this criterion requires a detailed assessment of available generation capacity, projected outage rates, load forecasts, the performance of demand response and other measures, and possible effects on load and plant performance of changes in weather, among other factors.[15]

PJM administers a process for the advance centralized procurement of capacity resources that incorporates criteria to ensure the commitment of sufficient generating resources to meet the reliability standards established by NERC.[16] The process is a market-based capacity auction intended to "procure the least-cost, competitively-priced combination of resources necessary to meet the region's reliability objectives."[17] PJM also plans, oversees and initiates measures to assure that the electric grid within its footprint adheres to rules for maintaining grid reliability established by RFC and

[14] RF, Standard BAL-502-RF-03, A.R1.1.1 (requiring each Planning Coordinator (here PJM) to conduct an annual Resource Adequacy analysis that requires calculating "a planning reserve margin that will result in the sum of probabilities for load of Load for the integrated peak for all days of each planning year analyzed... being equal to 0.1 (This is comparable to the 'one day in 10 year criterion.')"; PJM, *Manual 20A, Resource Adequacy Analysis* (2025), p. 8 ("This manual focuses on the criteria, studies, and methodologies employed to ensure resource adequacy of the PJM system effective with the 2025/2026 Delivery Year…. 1.3. Resource Adequacy Criteria. RTO-wide. The RTO-wide Resource Adequacy Criteria is a LOLE [loss of load expectation] criterion of 1 day in 10 years, or 0.1 days per year").

[15] *See* RF, Standard BAL-502-RF-03, *Planning Resource Adequacy Analysis, Assessment and Documentation*; PJM Manual 20A, *PJM Resource Adequacy Analysis*.

[16] *See Manual 18, PJM Capacity Market* (2025) ("The PJM Capacity Market is designed to ensure the adequate availability of necessary resources that can be called upon to ensure the reliability of the grid.") at 11; ("The Reliability Pricing Model is the PJM resource adequacy construct that ensures that adequate Capacity Resources, including planned and existing Generation Capacity Resources, Energy Efficiency Resources and planned and existing Demand Resources will be made available to provide reliable service to loads within the PJM Region.") at 14.

[17] *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 101 (3d Cir. 2014) (*citing PJM Interconnection, L.L.C., et al. v. PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, P 90 (2011) (subsequent history omitted)). Resource adequacy requirements in RTO/ISO tariffs constitute practices affecting rates subject to FERC regulation pursuant to FPA sections 205 and 206. *Conn. Dept. of Pub. Utils. v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009).

NERC.[18] Under this authority, if PJM finds that a plant retirement could cause a grid reliability violation, it can request that the power plant seeking retirement defer its request for deactivation and direct the construction of transmission projects to address the violations of grid reliability rules resulting from the plant retirement.

In contrast, DOE ignores the existence of these regulatory schemes altogether. DOE's methodology fails to account for the nuance in PJM's resource adequacy planning, neglects to consider mitigation tactics state regulators are employing, and ignores flexible grid integration of future demand. As a result, the Report ignores existing reliability mechanisms. DOE itself concedes the Report overstates potential load growth in acknowledging there is no "indication that reliability coordinators would allow this level of load growth to jeopardize the reliability of the system."[19] By creating new resource adequacy criteria that have not been established under the mechanisms established pursuant to the FPA, the Report could cause needless additional costs for consumers. Because DOE ignores the important aspect of existing reliability mechanisms, its acceptance of the methodology contained in the Report is arbitrary and capricious.

C. The Report and EO 14262 violate the major questions doctrine and Supreme Court precedent depending on how the methodology is used.

Section 202(c) of the FPA does not authorize EO 14262 mandate to implement the Report's methodology in furtherance of "expedit[ing] the Department of Energy's

[18] PJM OATT, Part V, sections 113-122; PJM, *Manual 14D, Generator Operational Requirements* (2025) at 91–95.
[19] Report at 14.

processes for issuing orders under section 202(c)" of the FPA.[20] DOE's authority to direct continued operation of power plants under FPA section 202(c) is bounded—it applies in and is limited to narrow "emergency" situations. It is intended to work in conjunction with the extensive, layered, and highly technical regulatory framework for assuring "resource adequacy" of the power grid. This framework includes tariff provisions administered by the RTOs, including PJM, subject to regulation by FERC, as well as reliability standards overseen by NERC and through delegations to regional electric reliability organizations—in PJM's case, RFC.[21] All of these entities devote enormous resources into ensuring resource adequacy and reliable system operation to prevent the emergency situations that would require an exercise of section 202(c).

The major questions doctrine prohibits federal agencies from exerting agency authority over "major questions" which would typically be left to congress to decide.[22] The following factors are considered when determining a major question: (1) the history of the exercise of the asserted regulatory power (i.e., whether the agency has used the power before), (2) the breadth of that power, (3) the "economic and political significance" of the power claimed, (4) the degree of impact on the national economy, (5) the degree to which Congress could have anticipated the agency's use of the power in

[20] EO 14262, Sec 3.
[21] NERC has defined resource adequacy as: "the ability of the electricity system to supply the aggregate electrical demand and energy requirements of the end-use customers at all times, taking into account scheduled and reasonably expected unscheduled outages of system elements" NERC, *Reliability Terminology* (2013). *See also* NERC, *Planning Resource Adequacy Analysis, Assessment and Documentation, BAL-5-2-RFC-02* (Definitions).
[22] *See West Virginia v. EPA*, 597 U.S. 697, 721 (2022).

question, (6) whether previous legislative efforts to delegate the asserted power failed, (7) whether the challenged exercise of executive branch authority would effect a "fundamental revision" of the statute, and (8) whether the agency acted outside its wheelhouse.[23]

Historically, DOE has been conservative in its issuance of section 202(c) orders. The orders are never long term and have never been issued to further a desired policy shift in types of generation resources. Until this year, DOE has narrowly applied the term "emergency." Indeed, it did not consider the oil embargo as an emergency and denied a request for a section 202(c) order in that instance.[24]

The electric power sector is among the largest in the U.S. economy, with links to every other sector.[25] Electricity is an "essential" and foundational element of modern life.[26] The impact it will have on the economy is tantamount to the impact the Clean Power Plan would have had in *West Virginia*. The Report anticipates using aging infrastructure, such as 40-year-old coal plants or 60-year-old nuclear plants subsidized by ratepayers to power data centers for companies with the largest market capitalizations in the world. Just one section 202(c) order for the Campbell plant in Michigan is expected to cost Michigan ratepayers alone $600 million.[27] This figure does not account for the fact that the Report anticipates long-term use of section 202(c) orders. In essence, the Report anticipates a restructuring of the electric power sector. DOE, much like the EPA in *West*

[23] *Id.*
[24] *See Richmond Power & Light of City of Richmond, Ind. v. FERC*, 574 F.2d 610 (D.C. Cir. 1978).
[25] *See West Virginia v. EPA*, 597 U.S. at 744 (Roberts, J., concurring) (internal citation omitted) (2022).
[26] *Id.* (citing *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1950 (2016)).
[27] Request for Rehearing by MI Att'y Gen. Dana Nessel, Dep't of Energy Order No. 202-25-3 at 3.

Virginia v. EPA, lacks the statutory authority to enact such a broad restructuring of a vital aspect of the U.S. economy.

Politically, Congress plays an active role in energy regulation. Had it intended long-term use of 202(c) orders, Congress would have authorized DOE to use section 202(c) authority for long-term emergencies with express language stating such. DOE also could have proposed a rule or policy statement for the Commission's consideration under 42 U.S.C. § 7173. It chose not to. DOE should thus not be permitted to short-circuit the dictates of Congress.

Moreover, the Report's proposed new use of section 202(c) orders would rewrite the language of section 202(c). But "Congress … does not … hide elephants in mouseholes."[28] The elephant here is an expansion of agency authority to prohibit the retirement of certain plants, often coal plants, in the absence of a true "emergency." The mousehole is the word "emergency" in section 202(c), a seldom used provision of the FPA. The expanded agency authority couched in the Report's methodology is designed to be transformative and embody a lasting policy, in derogation of Congress's narrowly tailored, short-term use of section 202(c).

Indeed, FERC is the agency with congressional authority over resource adequacy and capacity planning, not DOE.[29] The remaining regulatory authority over resource adequacy planning is then reserved to the states, as discussed above.[30] DOE's authority is

[28] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).
[29] 16 U.S.C. § 824a(b); 42 U.S.C. § 7172(a)(1)(B).
[30] 16 U.S.C. §§ 824(a)-(b).

thus limited and the plain meaning of section 202(c) does not grant DOE the authority to encroach on both FERC's jurisdiction and the states' explicit regulatory domain of electricity generation and resource adequacy. DOE should reconsider its findings and position on this authority.

Section 202(c) is a backstop authority to enable steps needed to avert concrete, present emergencies—not a means to implement policy preferences about long-term power procurement or generation technology choices. Analogous to how section 111(d) precluded shifting electricity generation to clean power in *West Virginia v. EPA*, the correct interpretation of section 202(c) prohibits generation shifting to resources at the end of their life. Section 202(c) "is aimed at situations in which demand for electricity exceeds supply and not at those in which supply is adequate but a means of fueling its production is in disfavor."[31] Under the FPA's cooperative federalism structure, choices about long-term resource mix fall to the states,[32] while PJM administers and FERC regulates capacity auctions to ensure resource adequacy in light of those choices.

[31] *Richmond Power and Light*, 574 F.2d at 615.

[32] 16 U.S.C. § 824(b)(1) ("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." (emphasis added)); *Hughes v. Talen Energy Mktg., LLC,* 578 U.S. 150, 154 (2016) (noting the "States' reserved authority . . . over in-state 'facilities used for the generation of electric energy'" (quoting 16 U.S.C. 824(b)(1)); *Citizens Action,* 125 F.4th at 238–39 ("[T]he States retain authority to choose their preferred mix of energy generation resources"); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) (upholding FERC's approval of capacity requirements because they do not interfere with the right of "[s]tate and municipal authorities . . . to require retirement of existing generators," to prefer "environmentally friendly units," or "to take any other action in their role as regulators of generation facilities without direct interference from the Commission"). *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.").

DOE's authority to direct continued operation of power plants under FPA section 202(c) applies in and is limited to narrow "emergency" situations. The statute, in relevant part, states:

> **(c) TEMPORARY CONNECTION AND EXCHANGE OF FACILITIES DURING EMERGENCY**
> **(1)** During the continuance of any war in which the United States is engaged, or whenever the Commission[33] determines that an *emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes*, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such *temporary connections* of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest.[34]

Though the Federal Power Act does not define the terms "emergency" or "sudden," the plain meaning of these terms indicates that Congress intended section 202(c) authority to be invoked rarely, in response to acute events that demand immediate response.[35] The text dictates that circumstances triggering a section 202(c) order are specific, unexpected, urgent, and temporary.[36] DOE's interpreting regulations and

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[33] Authority for administration of the statute is vested in the Secretary of Energy, pursuant to the sec. 301(b) of the 1977 Department of Energy Organization Act, 42 U.S.C. §7151. *See* Congressional Research Service ("CRS"), *Federal Power Act: The Department of Energy's Emergency Authority* (updated to May 22, 2025).

[34] 16 U.S.C. §824a(c) (emphasis supplied).

[35] The commonly understood definition of "emergency" in 1930 when Congress enacted the FPA was "a sudden or unexpected appearance or occurrence .... An unforeseen occurrence or combination of circumstances which call for immediate action or remedy." Webster's New International Dictionary of the English Language (1930).

[36] *See Richmond Power & Light v. FERC*, 574 F.2d 610, 615 (D.C. Cir. 1978) (stating that section 202(c) "speaks of 'temporary' emergencies, epitomized by wartime disturbances, and is aimed at situations in which demand for electricity exceeds supply"). *See also Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453 n.1 (1972) (relating section 202(c) to "the exigencies of 'war'"); *Duke Power Co. v. Fed.*

historical use of section 202(c) authority accord with the text's plain meaning. DOE defines an "emergency" as an "unexpected" supply shortage, which "may be the result of weather conditions, acts of God, or unforeseen occurrences not reasonably within the power of the affected 'entity' to prevent."[37] DOE's regulations further state that section 202(c) orders "are envisioned as meeting a specific inadequate power supply situation."

These definitions accord with the FPA's legislative history, in which section 202(c) is characterized as an authority to be used in response to "crises":

> This is a temporary power designed to avoid a repetition of the conditions during the last war, when a serious power shortage arose. Drought and other natural emergencies have created similar crises in certain sections of the country; such conditions should find a federal agency ready to do all that can be done in order to prevent a break-down in electric supply.

S. Rep. No. 74-621 at 49 (1935). Accordingly, DOE has rarely exercised its section 202(c) authority. Past emergency orders typically have responded to acute crises such as blackouts or severe storms.[38]

DOE's exercise of its narrow, emergency authority under section 202(c) is intended to backstop—not supplant, overrule, or interfere with—this careful jurisdictional balance and the extensive, existing framework for assuring resource adequacy, administered by the regional transmission operators (e.g., PJM, within the PJM

Power Comm'n, 401 F.2d 930, 944 (D.C. Cir. 1968) (stating that section 202(c) "relate[s] exclusively to temporary interconnections during national emergencies").

[37] 10 C.F.R. § 205.371 (other examples may include a "sudden" demand spike, a fuel shortage, "regulatory action" prohibiting the use of certain generators, or "[e]xtended periods of insufficient . . . supply" due to planning failures).

[38] *See generally*, B. Rolsma, *The New Reliability Override*, 57 CONN. L. REV. 789 (2025).

footprint), regulated by FERC, and subject to reliability standards overseen by NERC and through delegations to regional reliability organizations (in PJM's case, RFC). As the DOE said in its rulemaking to adopt regulations governing its section 202(c) practice: "The DOE does not intend these regulations to replace prudent utility planning and system expansion."[39] Yet, here, DOE's methodology broadens the scope of what an "emergency" is. Thus, if this methodology is used, it could result in unlawful use of DOE's section 202(c) authority to insert the agency into longer-term resource adequacy issues planned for and addressed by PJM, RFC and NERC.

II. The Report establishes a legislative rule without public notice and comment in violation of the Administrative Procedure Act.

The Administrative Procedure Act ("APA") requires public notice and comment for proposed rulemakings,[40] An agency action establishes a legislative rule requiring notice and comment when such action 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.[41] Moreover, agency

[39] *See Emergency Interconnection of Elec. Facilities and the Transfer of Elec. to Alleviate an Emergency Shortage of Elec. Power*, 46 Fed. Reg. 39984 at 39985-39986 (1981) ("The DOE does not intend these regulations to replace prudent utility planning and system expansion. This intent has been reinforced in the final rule by expanding the "Definition of Emergency" to indicate that, 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. The final regulations also recognize that power pools and electric utility contractual or coordination relationships are a basic element in resolving electric energy shortages."). *See also* CRS Report (2025), p. 1. ("The Section 202(c) emergency authority is primarily focused on short-term situations…. DOE's regulations emphasize the short-term nature of "emergencies" in this context.").
[40] 5 U.S.C. § 553(b)-(c) (2025).
[41] *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014).

publications also require notice and comment when the agency adopts a "new position inconsistent with any of the [agency's] existing regulations."[42]

The methodology in the report is an agency action that is legally binding. If implemented, specifically via section 202(c) orders, the process of section 202(c) order issuance and what defines an "emergency" is fundamentally changed. DOE's existing regulations utilize different criteria and contemplate different circumstances to issue section 202(c) orders than what the Report proposes. Moreover, the RTOs, ISOs and other parties involved in grid operation did not have an opportunity to provide input on the Report's methodology. Therefore, the Report violates the Administrative Procedure Act, and any subsequent action relying on its methodology must be set aside.

CONCLUSION

DOE should grant this request for rehearing regarding its Report. Doing so would ensure that DOE's actions are in line with the current regulatory and statutory frameworks regarding resource adequacy. Without rehearing, DOE's report is arbitrary and capricious and contrary to Supreme Court precedent. The Report expands DOE's authority at the expense of the regional resource adequacy mechanisms and FERC. The methodology also creates inconsistencies within the current resource adequacy regulatory framework. Moreover, the Report violates the mandate of *West Virginia v. EPA* because it runs afoul of the major questions doctrine. Finally, because DOE established a new standard when it issued the report but failed to hold a public notice and comment period,

[42] *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99–100 (1995).

the Report violates the APA. DOE should thus reconsider its position with respect to the Report to accord with the law.

[*signature page follows*]

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