

ORAL ARGUMENT NOT YET SCHEDULED
Case No. 25-1159 (consolidated with 25-1160 and 25-1162)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PEOPLE OF THE STATE OF MICHIGAN, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents.

MIDCONTINENT INDEPENDENT SYSTEM OPERATOR, INC.,
Intervenor-Respondent.

On Petitions for Review of Final Order of the
Department of Energy

**BRIEF OF ENERGY LAW SCHOLARS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. *Parties and Amici.* Except for the following, all parties and *amici curiae* appearing before this Court are listed or referenced in the Initial Opening Brief for State Petitioners, Doc. 2151373 (filed Dec. 19, 2025): Energy Law Scholars *Amici*.

B. *Rulings Under Review.* References to the rulings under review appear in the Initial Opening Brief for State Petitioners, Doc. 2151373.

C. *Related Cases.* A list of related cases appears in the Initial Opening Brief for State Petitioners, Doc. 2151373.

Dated: December 23, 2025

/s/ James P. Duffy
James P. Duffy

CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, counsel for Energy Law Scholars *Amici Curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

Dated: December 23, 2025

/s/ James P. Duffy
James P. Duffy

RULE 29 STATEMENTS

Counsel for Energy Law Scholars *Amici Curiae* certifies that the parties in these consolidated proceedings have been consulted, and that no party opposes the filing of this brief.

Pursuant to Fed. R. App. P. 29(a)(4), Counsel for Energy Law Scholars *Amici* states that no party or party's counsel authored this brief in whole or in part, and that no other person besides Energy Law Scholars *Amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

Pursuant to D.C. Cir. R. 29(d), Counsel for Energy Law Scholars *Amici* states that a separate brief is necessary to allow Energy Law Scholars *Amici* to set forth their specific perspective on the issues presented. These scholars are energy and utility law experts who have a strong interest in the sound development of energy law in federal courts. Counsel for Energy Law Scholars *Amici* understands that there are other *amici* in support of Petitioners but does not expect any anticipated *amici* to address these same issues on behalf of Petitioners.

Dated: December 23, 2025

/s/ James P. Duffy
James P. Duffy

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GLOSSARY

FPA	Federal Power Act
FERC	Federal Energy Regulatory Commission
MISO	Midcontinent Independent System Operator
NERC	North American Electric Reliability Corporation
RTO	Regional Transmission Organization

INTEREST OF *AMICI CURIAE*

Energy Law Scholars *Amici* are law professors who teach and write in the fields of energy law and policy and utility regulation. Energy Law Scholars are:

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Energy Law Scholars *Amici* have a strong interest in the sound development of energy law and utility regulation in the federal courts. They submit this brief to explain that the Department of Energy's invocation of its emergency authority here

is inconsistent with the Department's historic practice and will ultimately result in a less reliable grid. As leading scholars of energy law and utility regulation, Energy Law Scholars *Amici* are well-positioned to provide insights that may assist the Court in evaluating Petitioners' arguments concerning the Federal Power Act's narrow emergency authority provision.

INTRODUCTION

Long-term electric reliability is not preserved through ad hoc emergency orders compelling inefficient and aging power plants to operate; it is secured through coordinated, forward-looking planning and stable energy markets. Pursuant to the Federal Power Act ("FPA") and state law, states, grid operators, and the Federal Energy Regulatory Commission ("FERC") ensure that the bulk power system remains reliable over time by anticipating resource needs, managing retirements, and securing replacement capacity through orderly, prospective processes. The Department of Energy's emergency authority invoked here serves a different and far narrower role: addressing discrete, unexpected threats to the immediate availability of electricity when those ordinary mechanisms cannot respond in time.

This case challenges the Department's delay of the planned retirement of the J.H. Campbell Generating Plant ("Campbell Plant") premised on "emergency conditions" it claims will persist "in the near and long term." As Petitioners

explain, the facts belie the Department's contention that a near-term emergency exists. Pub. Interest Pet'rs Initial Opening Br. at 33–40, Doc. 2151437 (Dec. 19, 2025); State Pet'rs Initial Opening Br. at 37–47, Doc. 2151373 (Dec. 19, 2025). And long-term resource adequacy is simply not an emergency; rather, it is a critical aspect of the established reliability framework. By substituting rolling, plant-specific emergency mandates for stable, forward-looking planning, the Department's approach *undermines* that framework—distorting energy markets, degrading reliability planning, and propping up aging coal plants outside the system Congress created. That incongruence is underscored by history: until this case, the Department had never used its emergency authority to manage long-term resource adequacy or to delay planned retirements on an open-ended basis. The Department's use of its emergency authority here—and in a series of recent orders¹—disregards that critical distinction and undercuts the reliability and resource-adequacy mechanisms designed to address the very concerns it invokes.

¹ See, e.g., DOE Order Nos. 202-25-4 (May 30, 2025), 202-25-8 (Aug. 27, 2025), 202-25-10 (Nov. 25, 2025) (delaying retirement of Eddystone Generating Station); Centralia DOE Order No. 202-25-11 (Dec. 16, 2025) (delaying retirement of Centralia Generating Station).

ARGUMENT

I. Resource Adequacy Depends on Coordinated, Forward-Looking Planning, Which Is Undermined When Section 202(c) Is Used as a Substitute Rather Than an Emergency Backstop.

The Department issued the challenged emergency order under section 202(c) of the FPA to continue operation of the Campbell Plant in May based on allegations of “potential tight reserve margins” associated with projected retirements and summer demand. DOE Order No. 202-25-3, at 1–2 (May 23, 2025) (“Campbell Order”). It has since extended that order—twice—based on vague assertions that the emergency conditions that led to the issuance of the Campbell Order “continue, both in the near and long term.” DOE Order No. 202-25-7, at 2 (Aug. 20, 2025); *see also* DOE Order No. 202-25-9, at 3 (Nov. 18, 2025) (same).² At bottom, the Department’s 202(c) orders are founded on claims about resource adequacy, *i.e.*, whether the grid operator, the Midcontinent Independent System

² *But see* NERC, *2025–2026 Winter Reliability Assessment*, at 6 (Nov. 2025) (showing “normal risk”—the lowest level on the scale). Further, the Department has consistently concluded—across numerous recent export authorization orders—that the United States possesses sufficient domestic electric supply and electricity exports will not jeopardize regional or national reliability. In these orders, it repeatedly finds that “wholesale energy markets are sufficiently robust to make supplies available” and that “market mechanisms and reliability oversight protect against the possibility that [] exports would jeopardize domestic sufficiency of supply.” *See, e.g.*, DOE Order No. EA-518, at 4–6 (May 21, 2025); DOE Order No. EA-479-A, at 7–10 (July 11, 2025); DOE Order No. EA-284-G, at 6–8 (June 10, 2025); DOE Order No. EA-520, at 4–6 (June 10, 2025).

Operator (“MISO”), will have sufficient generating capacity above expected peak demand to maintain reliability during periods of highest system stress.

But under the FPA, future reserve margins, planned retirements, and system-wide long-term adequacy are not addressed through ad hoc emergency directives. They are addressed through a coordinated, forward-looking regulatory framework designed to ensure that sufficient resources will be available to meet peak demand with an adequate margin of safety over time. When the Department bypasses this process, it undermines the resource-adequacy framework that ensures electric reliability.

A. Resource Adequacy Is Governed by a Coordinated System of Institutions, Not the Department of Energy.

Ensuring electric reliability is a complex, round-the-clock task that combines planning, regulation, and market signals to secure adequate resources to meet demand. In the FPA, Congress assigned responsibility for electric reliability to a set of institutions that operate together, each with a defined role. Congress deliberately vested questions of resource adequacy in institutions and processes that emphasize advance planning, evidentiary development, cost consideration, and coordination across jurisdictions.

1. States.

Historically, the federal government had no oversight over the nation’s electric network, and the task of ensuring resource adequacy fell entirely to states.

Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 Harv. L. Rev. 1360, 1371 (2021). While the FPA established an important federal role in 1935, it preserved states' jurisdiction "over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). Each state determines the generation mix within its borders, including whether and when to build new resources or retire aging uneconomic ones, and has exclusive authority over siting new infrastructure. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 159, 165 (2016).

In many parts of the country, including the MISO region, states, utilities, and other load-serving entities—those responsible for delivering electricity to retail customers—conduct long-term planning for their own systems and identify the generation and grid investments necessary to provide reliable and affordable electricity. *See Synapse Energy Econs., Inc. & Lawrence Berkeley Nat'l Lab'y, Best Practices in Integrated Resource Planning*, at 1 (Nov. 2024) (hereinafter "Best Practices Report").

2. FERC and NERC.

At the federal level, FERC oversees wholesale electricity transactions and interstate electricity transmission. Under FPA sections 205 and 206, any change to a rate, term, condition, or practice affecting wholesale electricity must be filed with FERC, supported by substantial evidence, and subject to public notice,

opportunities for intervention, hearings, and judicial review. 16 U.S.C. §§ 824d–824e. Through these processes, FERC regulates wholesale markets to ensure that sufficient resources enter and remain available when needed to maintain system reliability. *See Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 484 (D.C. Cir. 2009). At the same time, the FPA expressly withholds from FERC authority over generation facilities and prohibits the Commission from “compel[ling] the enlargement of generation facilities.” 16 U.S.C. §§ 824, 824a(b); *see also* Christiansen & Macey, *supra*, at 1372.

Congress also directed FERC to designate an independent entity to develop and enforce mandatory reliability standards for the bulk power system. 16 U.S.C. § 824o(c). FERC designated the North American Electric Reliability Corporation (“NERC”), which sets technical reliability standards and conducts seasonal and long-term reliability assessments across North America. *See* Joshua C. Macey, Shelley Welton, & Hannah Wiseman, *Grid Reliability in the Electric Era*, 41 Yale J. on Regul. 164, 190, 199 (2024). Critically, NERC’s role is diagnostic and technical, not operational or regulatory: it assesses risks, identifies emerging reliability challenges, and informs regulators and grid operators, *see id.* at 194–96, 199, but it does not order specific generation to operate, approve or disapprove retirements, or override state and grid operators’ planning decisions, *see* 16 U.S.C. § 824o(i)(2) (FERC and NERC “not authorize[d]...to order the construction

of additional generation or transmission capacity or to set or enforce compliance with standards for adequacy or safety of electric facilities or services”). Its assessments are designed to feed into—rather than displace—the coordinated planning processes administered by states, grid operators, and FERC.

3. *Grid Operators.*

FERC also oversees non-profit grid operators, such as regional transmission organizations (“RTOs”),³ including MISO. These organizations oversee electricity transmission within their territories, administer competitive wholesale electricity markets, and establish mechanisms that ensure both short-term and long-term resource adequacy.

Each grid operator uses different tools to achieve resource adequacy, but they share the same basic objective: ensuring that enough generation is available and prepared to perform when the system is under the greatest stress. Some grid operators rely primarily on scarcity pricing—using higher prices during tight conditions to encourage new investment. *See* Elec. Reliability Council of Tex., *2024 Biennial ERCOT Report on the Operating Reserve Demand Curve*, at 7 (Nov. 1, 2024). Others operate capacity markets that compensate generators for being

³ An RTO is a grid operator that manages transmission and administers FERC-approved wholesale markets across multiple states, using transparent, market-based mechanisms—rather than plant-specific directives—to ensure system reliability.

available to generate electricity and impose penalties for non-performance during emergencies. *See, e.g.,* PJM Interconnection, *PJM Capacity Market: Promoting Future Reliability*, at 1 (Jan. 29, 2025). Still others rely on state-supervised planning that requires utilities to procure or operate sufficient resources directly. *See* Nat'l Ass'n of Regulatory Util. Comm'rs, *Resource Adequacy for State Utility Regulators: Current Practices and Emerging Reforms*, at 83 (Nov. 2023). Despite these differences, each approach is designed to ensure that enough capacity enters the market, that resources make investments to ensure that they are available during extreme weather events, and that generators can retire or enter the market in an orderly manner without compromising reliability.

MISO, which oversees the region in which the Campbell Plant sits, combines these approaches. It sets a regional resource-adequacy standard and requires utilities and other load-serving entities—under state oversight—to demonstrate compliance through a combination of long-term planning and market participation. *See* MISO, *Resource Adequacy Business Practices Manual* (BPM-011-R32) § 2 (Oct. 1, 2025) (hereinafter “MISO Business Practices Manual”). Load-serving entities do so through state-approved integrated resource plans and MISO-administered processes, including a planning resource auction that tests whether sufficient capacity is available to meet peak demand with an adequate margin of excess supply. *See id.* § 5.5; *see also* Best Practices Report, at 14–20.

4. *The Department's Limited Section 202(c) Role.*

Section 202(c) stands apart from, and in stark contrast to, this coordinated system. It authorizes the Secretary of Energy to act “with or without notice” when a true emergency exists—such as “a sudden increase in the demand for electric energy” or “a shortage” of energy or the facilities needed to produce or deliver it. 16 U.S.C. § 824a(c). Unlike FERC and state regulators, the Department’s authority pursuant to section 202(c) does not require it to determine whether the rates or costs resulting from its orders are just and reasonable, nor does it require notice, hearings, or evidentiary development to weigh the tradeoffs between reliability benefits and the costs imposed on consumers. Congress dispensed with hearings, consideration of cost, and examination of alternatives precisely because section 202(c) was intended for acute emergencies, where those processes would be too slow to address an immediate threat to electric service. *See Benjamin Rolsma, The New Reliability Override*, 57 Conn. L. Rev. 789, 811–12 (2025).

Consistent with that design, emergency authorities like section 202(c) are “narrow, as befits the nature of emergency response,” and function as “scalpels, designed to address particular exigencies of limited duration,” not substitutes for ordinary planning and regulation. Sharon Jacobs & Ari Peskoe, *Energy Emergencies vs. Manufactured Crises: The Limits of Federal Authority to Disrupt*

Power Markets, Harv. L. Sch. Env't & Energy L. Program, at 3, 10 (June 3, 2019).

The section's focused, streamlined structure is its defining feature.

B. Using Section 202(c) as a Substitute for Long-Term Planning Undermines the Resource-Adequacy Framework That Ensures Electric Reliability.

Perversely, the Department's misuse of section 202(c) does more than bypass the framework Congress created; it actively undermines the planning mechanisms relied upon to ensure resource adequacy and long-term reliability. Section 202(c) was not "intended to substitute for the comprehensive system of electricity market regulation, reliability oversight, and long-term planning"; it is a limited emergency authority designed to address exigencies of brief duration. *See Jacobs & Peskoe, supra*, at 10; *see also* 46 Fed. Reg. 39984, 39985–86 (Aug. 6, 1981) (the Department recognizing same). While a properly used emergency order may temporarily address a discrete and unexpected threat, using section 202(c) in lieu of established planning processes compromises—rather than protects—electric reliability.

Resource adequacy depends on coordinated, forward-looking decisions that assess the electric system as a whole. *See Best Practices Report*, at 14, 19. Utilities and other load-serving entities, state regulators, and grid operators must know years in advance which units will exist and what replacement resources must be procured to meet future peak demand. *See, e.g., MISO, Resource Adequacy*

Metrics and Criteria Roadmap, at 4, 8–11 (Dec. 2024) (hereinafter “MISO Resource Adequacy Report”). That predictability is essential to ensuring that sufficient resources are available when extreme conditions—such as winter storms or summer heat waves—place the greatest stress on the grid. *See Best Practices Report*, at 14. It is also essential for planning cost-effective maintenance and reliability upgrades. These long-term reliability mechanisms depend on stable expectations and sustained commitments; they cannot function when a resource’s continued operation turns on a ninety-day emergency order that may or may not be renewed.

1. 202(c) Orders Impose Significant Costs Without the Procedural Safeguards That Protect Consumers and Reliability.

Continued operation of an aging generating unit pursuant to a 202(c) order often requires major capital projects, increased operations and maintenance spending, higher fuel costs, and additional environmental compliance obligations. *See NERC, 2025 Summer Reliability Assessment*, at 7 (May 2025) (older generators can require “extensive overhauls” and unplanned maintenance); *Best Practices Report*, at 37 (environmental compliance costs often drive power plant retirement decisions). Under the FPA, utilities and grid operators operate within carefully regulated and scrutinized resource-adequacy processes. FERC overrules these processes as they impact wholesale markets, ensuring the resulting rates are just and reasonable—an inquiry that ensures not only that costs reflect prudent

decisions, but also that the system remains reliable through evidence-based planning. *See* 16 U.S.C. §§ 824d(a), 824e(a). The Campbell Order bypasses that framework entirely, imposing significant and recurring costs⁴ without the procedural safeguards that keep costs reasonable and without the predictability that allows other system planners to conduct long-term reliability planning and administer resource-adequacy markets.

Where a resource remains online in response to a 202(c) order, states cannot prudently approve significant maintenance or upgrade expenditures or determine whether and on what terms those costs should be recoverable from ratepayers. Nor can grid operators reliably plan for replacement resources when the continued availability of large generating units is uncertain and contingent on short-term emergency orders—even as the Department simultaneously suggests that those resources are expected to remain online over the long term.

2. State Integrated Resource Planning Relies on MISO's Resource-Adequacy Determinations—and Is Undermined When Emergency Orders Override Planned Retirements.

In the MISO region, coordinated decisions are made primarily through states' integrated resource planning processes. *See Midcontinental Indep. Sys. Operator*, 170 F.E.R.C. P61,215, 62,606 (Mar. 20, 2020). Utilities—subject to state

⁴ *See* Joe Barrett & Jennifer Hiller, *\$615,000 a Day: Order to Keep Coal Plant Open Ignites Debate in Michigan*, Wall St. J. (Nov. 3, 2025).

regulatory review—use integrated resource plans to evaluate how they will meet forecasted electricity demand over a multi-year horizon, including whether to build new resources, retain existing units, or retire aging plants. *See* Best Practices Report, at 1–2. Although states retain authority over these planning choices, utilities and states alike depend on regional assessments of system-wide reliability to ensure that individual utility plans align with broader grid needs. MISO Resource Adequacy Report, at 9–11, 19–20.

MISO supplies the technical foundation for those planning determinations by providing two core resource-adequacy inputs, discussed in detail below. First, MISO determines how much capacity the system needs to function reliably—enough to meet expected peak demand plus an additional reserve margin to provide a buffer against outages, forecasting errors, and extreme weather. *See id.* at 8–11. Second, MISO determines how much each existing and proposed resource can be relied upon to contribute to meeting that need, by accrediting resources based on their expected reliability performance. *See* MISO Business Practices Manual § 2.2. State regulators and utilities incorporate both determinations directly into their plans when evaluating resource portfolios, retirement schedules, and replacement procurement. *E.g.*, Mich. Comp. Laws § 460.6t(3); *see also* Case No. U-21775, *Capacity Demonstration Results Planning Year 2028/29*, at 3–4, 9 (Mich. Pub. Serv. Comm’n May 12, 2025).

The planned retirement of the Campbell Plant followed precisely this procedure. After a multi-year planning process involving contested modeling, public input, and oversight by the Michigan Public Service Commission, plant owner Consumers Energy determined that retiring three Campbell units—units that began service when John F. Kennedy was President—and replacing them with newer resources would maintain reliability while reducing costs. Case No. U-21090, *Order Approving Consumers Energy Company Settlement Agreement*, at 88–89 (Mich. Pub. Serv. Comm’n June 23, 2022). DOE’s subsequent use of section 202(c) upends that settled determination by making state-approved retirement decisions contingent and reversible at the eleventh hour—after the investments have been made and costs committed. In doing so, it transforms careful, forward-looking state and regional planning into a provisional exercise, undermining incentives for utilities and regulators to engage in the very long-term resource planning the FPA is designed to promote.

a. MISO’s Determination of Capacity Needs Depends on Stable Retirement and Replacement Assumptions.

MISO’s first core resource-adequacy function is determining how much capacity the system requires to remain reliable. MISO estimates peak demand and establishes a Planning Reserve Margin Requirement that obligates load-serving entities to maintain capacity above expected peak load to account for outages, extreme weather, and uncertainty. *See* MISO Resource Adequacy Report, at 8–10;

MISO Business Practices Manual §§ 2–3. These determinations are inherently forward-looking and assume that known retirements will occur as scheduled and that replacement resources will be procured in time. *See* MISO Resource Adequacy Report, at 9–11.

When the Department uses section 202(c) to reverse planned retirements after the fact, it risks disrupting the assumptions underlying MISO’s capacity-need determinations, thus weakening regional resource-adequacy planning. By forcing uneconomic generators to remain online, emergency orders could artificially inflate available capacity, suppressing market prices and weakening incentives for new entry and preparedness.

The Department’s own orders underscore the structural problem. In extending the Campbell Order, the Department directed that the Campbell Plant “shall not be considered a capacity resource,” even while compelling its continued operation. DOE Order No. 202-25-7, at 8 (Ordering ¶ G). That instruction is not grounded in section 202(c), which authorizes emergency operation but confers no authority on the Department to dictate how regional grid operators or planners classify resources for purposes of capacity accreditation or long-term planning. *See* 16 U.S.C. § 824a(c). By simultaneously forcing generation to remain online while attempting to wall it off from planning and market frameworks, the Department places grid operators and regulators in an untenable position—requiring them to

accommodate emergency directives that override, yet cannot coherently be integrated into, established planning processes. While such distortions may be tolerable in a genuine emergency, they are fundamentally incompatible with long-term reliability planning.

b. Resource Accreditation Requires Predictable Operations and Investment—Which Rolling 202(c) Orders Undermine.

MISO's second core resource-adequacy function is resource accreditation. Accreditation assigns a capacity value to each resource based on its expected contribution to reliability during periods of highest system risk. MISO, *Resource Accreditation White Paper Version 2.1*, at 2 (Mar. 2024) (hereinafter "MISO Accreditation Paper"). Thermal resources—dispatchable generating units such as coal, gas, or nuclear plants that produce electricity using heat, like the Campbell Plant—are accredited based on historical availability and forced-outage performance, while wind, solar, and other intermittent resources are accredited using methodologies that estimate how much dependable capacity those resources provide given the composition and performance of the rest of the fleet. *See* MISO Business Practices Manual § 2.2; MISO Accreditation Paper, at 9–10.

MISO accredits resources on an annual basis, establishing accreditation values in advance and using them as inputs to a planning resource auction, which tests whether capacity is sufficient to meet demand with an adequate margin of

excess supply, including all seasonal auctions conducted for that year. *See* MISO Business Practices Manual § 2.2. Accurate accreditation in MISO depends on the assumption that resources will continue to perform in a manner broadly consistent with their historical performance and stated operational characteristics. *See* MISO Accreditation Paper, at 4.

A resource whose continued operation depends on a rolling ninety-day emergency order cannot satisfy that assumption. Faced with uncertainty beyond the next extension, owners cannot rationally invest in major maintenance, reliability upgrades, or capital projects. As a result, future performance diverges from historical performance, rendering accreditation unreliable. If the resource is unable to invest in routine or scheduled maintenance, it is likely to be less reliable in the future than it was in the past.

The distortion does not stop with the unit subject to the 202(c) order. MISO recognizes that intermittent resources are less dispatchable and less predictable than thermal resources and therefore accredits them using conservative, probabilistic methodologies that estimate their expected contribution to reliability during periods of system stress. Because those methodologies depend on how intermittent resources interact with the rest of the fleet, degradation in the expected performance of thermal resources also skews the accreditation of intermittent resources. *See* MISO Resource Adequacy Report, at 9–10; *cf.* MISO, *MISO's*

Response to the Reliability Imperative, at 4–6 (Feb. 2024). This skewing fundamentally degrades the accreditation process and the resource adequacy it is intended to ensure.

c. Using Section 202(c) To Address Long-Term Reliability Concerns Produces Cascading Failures Across MISO's Planning and Market Structures.

The uncertainty regarding the unit subject to the 202(c) order then cascades throughout the system. Load-serving entities cannot accurately prepare or later rely on integrated resource plans when units approved for retirement are kept online through recurring emergency orders. Nor can MISO accurately model transmission needs or replacement resources when the Department may abruptly reintroduce retired units. And generators cannot commit to the costly investments that reliable operation requires. The core economics of resource adequacy—orderly entry, orderly exit, and preparedness—break down when market signals are unstable.

This Court has recognized as much in a case arising from the New England grid operator's resource-adequacy crisis, where FERC reluctantly approved Reliability Must-Run arrangements⁵ only as a temporary stopgap while market-

⁵ The relevant orders in these cases were “Reliability Must-Run” contracts, which are temporary, cost-based arrangements approved by FERC through transparent rate proceedings to address discrete reliability needs while longer-term solutions are developed, pursuant to FPA sections 205 and 206. *See Devon Power LLC*, 103 F.E.R.C. P61,082, *3, *5 (FERC Apr. 25, 2003). In this way, “Reliability Must-Run” orders are similar to 202(c) orders, authorizing the Department to issue short-term emergency orders without cost review or market coordination.

based capacity mechanisms were developed. In that context, both FERC and this Court emphasized that prolonged reliance on plant-specific emergency interventions distorts market signals and undermines long-term reliability planning, explaining that such measures:

suppress market-clearing prices, increase uplift payments, and make it difficult for new generators to profitably enter the market. . . . [E]xpensive generators under [Must-Run] contracts receive greater revenues than new entrants, who would receive lower revenues from the suppressed spot market price.

Me. Pub. Utils. Comm'n v. FERC, 520 F.3d 464, 468 (D.C. Cir. 2008)

(quoting *Devon Power LLC*, 103 F.E.R.C. P61,082, *19-20).

For precisely these reasons, the reliability concerns the Department invokes in the Campbell Order are properly addressed through established mechanisms used by states, utilities, and RTOs, including extreme-weather preparedness, accurate resource accreditation, procurement of firm capacity, and orderly retirement schedules—not through section 202(c). Section 202(c)'s absence of cost review, lack of evidentiary procedures, and generally short timeframes make it structurally incapable with supporting the planning, contracting, and investment that long-term reliability requires.

II. DOE's Invocation of Section 202(c) Here Is at Odds with Historical Uses of This Emergency Authority.

Not only does the Campbell Order upset the planning, regulatory, and market processes that ensure electric reliability, but it is also at odds with the

nearly 100 years of historic use of that authority to address discrete and unexpected events. The Department has *never* used its section 202(c) authority to require additional generation to address long-term resource-adequacy concerns; instead, it has always used that authority to address discrete and unexpected events that threaten immediate grid needs.

Prior to this year, the Department, like the Federal Power Commission before it, rarely used its section 202(c) authority outside of wartime. *See generally* Rolsma, *supra*, at 798–809. Between 1935, when Congress enacted the FPA, and World War II, the Federal Power Commission did not issue a single 202(c) order. *Id.* at 802–03. During World War II, the Commission issued twenty-two orders, supporting those orders by emphasizing the “sudden” nature of the energy emergency caused by the war. *See, e.g., In re Duke Power Co.*, 2 F.P.C. 992, 992 (June 27, 1941); *In re Fla. Power & Light Co.*, 2 F.P.C. 991, 991 (June 27, 1941).

Between the end of World War II and 1977, the Federal Power Commission issued 202(c) orders only seven times, in each case to order interconnections to the grid—not additional generation. *See* Rolsma, *supra*, at 843–44 tbl. 2. In 1977, the Federal Power Commission dissolved, and Congress transferred section 202(c) authority to the Department. *See* 42 U.S.C. § 7151(b). But the Department did not use that authority until 2000, when it issued a 202(c) order to alleviate an energy crisis in California. *See* DOE, *Order Pursuant to Section 202(c) of the Federal*

Power Act (Dec. 14, 2000) (hereinafter “2000 Order”). In 2000, market manipulation by Enron, drought conditions, unusually high temperatures, and an uptick in unplanned outages at older generating facilities combined to cause an unexpected and rapid increase in electricity and natural gas prices. *See* Rolsma, *supra*, at 805. The Department’s order in response was time-limited (lasting 1.5 months) and conditioned on the California grid operator determining that energy supply was inadequate. *See* 2000 Order, at 1, 2.

Between 2000 and 2025, the Department issued thirteen 202(c) orders mandating electricity generation.⁶ *See* Rolsma, *supra*, at 839–44 tbl. 1. Like the order responding to California’s energy crisis, in every case, the order was prompted by a discrete or unexpected event and was tailored to the immediate energy needs the emergency caused. *See id.* And every order was issued at the request of a generator, system operator, or both. *See id.* These orders can be grouped into two categories based on the unexpected event they responded to.

First, ten orders responded to extreme weather events. *See, e.g.*, DOE Order No. 202-22-4, at 1 (Dec. 24, 2022) (severe winter weather over Christmas resulting in operating difficulties of certain generating units); DOE Order No. 202-24-1, at 1–2 (Oct. 9, 2024) (imminent landfall of Hurricane Milton, which was expected to

⁶ The Department issued nineteen orders total during that time. *See* Rolsma, *supra*, at 839–44 tbl. 1.

cause “major power outages, damaging distribution and transmission infrastructure, and threaten several generation stations along the path”). Each of these 202(c) orders was cabined to the immediate energy needs caused by the extreme weather event. All were brief, most lasting only the few days or weeks necessary for the emergency to subside. *See, e.g.*, DOE Order No. 202-21-1, at 2 (Feb. 14, 2021) (5 days); DOE Order No. 202-22-2, at 4 (Sep. 4, 2022), Amendment No. 1 to Order No. 202-22-2, at 1–2 (Sep. 8, 2022) (5 days, with a 3-day extension due to continued stress on the grid resulting from sustained heat wave).⁷ In fact, many were further limited in scope to designated units and specific hours where energy use was particularly high. *See, e.g.*, DOE Order No. 202-23-1, at 4–5 (Sep. 7, 2023) (responding to unexpected heat wave by requiring specific sources to generate only between 5 pm and 9 pm and only if the grid operator determined that an emergency was ongoing); DOE Order No. 202-20-2, at 3 (Sep. 6, 2020) (similar).⁸

⁷ In the single instance where an order lasted longer than a few days or weeks, the Department ensured that the order was appropriately tailored to resolve the immediate energy shortage. *See* DOE Order No. 202-21-2, at 4, 5 (Sep. 10, 2021) (order extending 60 days upon a showing by the requesting grid operator in consultation with the State that doing so was necessary to meet projected demand shortfalls caused by sustained high temperatures, wildfires, and drought conditions, and tailoring the order to designated units and hours of the day).

⁸ NERC has a tiered system for assessing emergency energy needs, whereby grid operators can declare one of three levels of emergency based on the severity of the emergency. NERC, *Emergency Operations*, EOP-011-4, Attach. 1 (last updated

Second, the remaining three generation-mandating 202(c) orders required generators to delay retirement as a temporary bridge until replacement capacity could serve the grid. *See* DOE Order No. 202-05-3, at 9 (Dec. 20, 2005) (“DOE views this order not as a permanent solution to the . . . reliability issues, but rather as a bridge between the current untenable situation and a more permanent solution that must be crafted by appropriate parties, including [the utility], FERC, environmental regulatory authorities, and relevant private sector parties.”). Each of these orders addressed a similar fact pattern: the generating unit was shutting down due to noncompliance with the Clean Air Act’s standards, and projects that both complied with the environmental standards and provided long-term grid reliability were under construction but would not be complete prior to the at-issue generator’s retirement due to unforeseen circumstances. DOE Order No. 202-05-3, at 3 (construction permits of two new transmission lines to supply needed electricity had not yet been received); DOE Order No. 202-17-1, at 1 (Apr. 14, 2017) (two units unexpectedly unavailable due to lightning-caused fire at one and flooding at the other); DOE Order No. 202-17-2, at 1 (June 16, 2017) (construction of new transmission project delayed due to difficulties obtaining necessary permits).

Feb. 15, 2024). In past 202(c) orders, including as recently as June 2025, the Department has required there to be an Energy Emergency Alert 2 or 3 (the more severe levels) for the order’s generation mandate to deploy. *See, e.g.*, DOE Order No. 202-25-5, at 4 (June 24, 2025); DOE Order No. 202-23-1, at 4.

The Department tailored these three 202(c) orders to the at-issue emergency and extended the orders only as long as necessary for the replacement units to be brought online. DOE Order Nos. 202-05-3, at 10-11, 202-07-2, at 8 (Jan. 31, 2007) (authorized operation only when other transmission lines servicing the region experienced outages and only to produce necessary energy amounts; expired when new transmission lines built); DOE Order No. 202-17-1, at 2 (emergency extended three months or until at least one of the other two generating units was brought online, whichever was earlier, and only in the event the utility determined generation was necessary to maintain reliability); DOE Order Nos. 202-17-2, at 2, 202-18-6, at 2 (Dec. 6, 2018) (limited operation to instances where electricity demand exceeded certain levels so as to avoid reliability impacts and potential violations of NERC's standards; expired when new project complete).

The Campbell Order stands in stark contrast to the long history of 202(c) orders in every dimension. Importantly, while every prior order was issued in response to an unexpected, discrete event—war, extreme weather events, unexpected retirements, delays to replacement projects, or large-scale grid failures—the Department issued the Campbell Order in response to vague, purported concerns about long-term resource adequacy. DOE Order No. 202-25-3, at 2–4.

Additionally, while all previous orders were requested by entities responsible for maintaining electric reliability—the owner or operator of the generating unit, grid operator, or both—here the Department issued the order *sua sponte* contrary to the established position of Consumers Energy, which has been implementing a multi-year plan to retire the Campbell Plant under the Michigan Public Service Commission’s supervision. *See* State Pet’rs Initial Opening Br. at 8–9.

Finally, prior orders were tailored to the immediate energy needs created by the emergency, consistent with 16 U.S.C. § 824a(c)(1). Here, the Campbell Order expired after 90 days—the identified “emergency” was energy reliability concerns during summer 2025, so, presumably, the order need not last longer than the summer months. DOE Order No. 202-25-3, at 2. But the Department has since extended the order’s expiration two times, well beyond the summer, and now claims that *long-term* reliability concerns support an emergency. DOE Order No. 202-25-7, at 4 (“The evidence indicates that there is also a potential *longer term resource adequacy emergency* in MISO”) (emphasis added); DOE Order No. 202-25-9, at 8 (“[T]he emergency conditions . . . will continue in the near term and are also *likely to continue in subsequent years.*”) (emphasis added); DOE Order No. 202-25-3B at 14 (Sep. 8, 2025) (“DOE’s assessment reveals that . . . most regions .

. . will face unacceptable reliability risks *within five years.*”) (emphasis added).⁹

The Department is plainly attempting to utilize section 202(c) not as a response to a short-term emergency, as the provision has been used until this year, but rather as way to influence long-term resource adequacy.

III. Consistent with the FPA Scheme and Historic Use, This Court Should Interpret “Emergency” in Section 202(c) to Encompass Discrete, Identifiable Grid Crises That Are Acute and Unexpected, Requiring Temporary Tailored Interventions.

The Department urges that, “in section 202(c), Congress accorded the Secretary discretion to determine the existence of an emergency.” DOE Order No. 202-25-3B, at 6. That is true. But the discretion conferred must have limits or else the Department’s authority under section 202(c) would swallow the FPA’s statutory allocation of responsibility and undermine the very electric reliability that statutory scheme was created to ensure. *See supra* Arg. I.B. It makes little sense that Congress would have carefully constructed a reliability regime vesting questions of resource adequacy in institutions and processes that emphasize advance planning, evidentiary development, cost consideration, and coordination across jurisdictions, only to authorize the Department to bypass all of those safeguards to impose its preferred approach for long-term resource adequacy. Congress does not “hide

⁹ The Department also seems to believe that an Energy Emergency Alert 1 is sufficient to mandate emergency generation, contrary to its historic practice of cabining orders to circumstances where grid operators have declared Energy Emergency Alerts 2 or 3. DOE Order No. 202-25-3B, at 12; *supra* n.8.

elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

An unconstrained interpretation of “emergency” in section 202(c) also threatens core state functions. The FPA assigns primary responsibility for overseeing electricity generation to the states. *See supra* Arg. I.A. Indeed, “the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.” *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983). Such regulatory decisions, including the “[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.” *PG&E v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 205 (1983); *see also Conn. Dep’t of Pub. Util. Control*, 569 F.3d at 481. If the term “emergency” in section 202(c) includes long-term resource-adequacy needs, then it becomes a tool for the Department to second guess the manner in which states have carried out their traditional role. That traditional role should not be “superseded” “unless that was the clear and manifest purpose of Congress.” *PG&E*, 461 U.S. at 206.

Instead, this Court should interpret “emergency” in section 202(c) to encompass only discrete, identifiable grid crises that are acute and unexpected. This is consistent with the text of section 202(c). *See* Pub. Interest Pet’rs Initial Opening Br. 24–26. It is also consistent with this Court’s precedents, which

describe section 202(c) as a “limited exception[]” to Congress’s decision to make coordination of electric systems voluntary, *Cent. Iowa Power Coop. v. FERC*, 606 F.2d 1156, 1167-68 (D.C. Cir. 1979), which “speaks of ‘temporary’ emergencies, epitomized by wartime disturbances,” *Richmond Power & Light v. FERC*, 574 F.2d 610, 615 (D.C. Cir. 1978). And it is consistent with section 202(c)’s nearly 100-year history as a limited, gap-filling authority to address unanticipated events not addressed by the FPA’s long-range planning processes. *See supra* Arg. II. Finally, it supports and preserves the statutory scheme created in the FPA to ensure long-term resource adequacy through cooperation between states, FERC, NERC, and grid operators and which is founded on planning, regulation, and markets. *See supra* Arg. I.

CONCLUSION

For the reasons stated above and in Petitioners’ Opening Briefs, this Court should grant the petitions for review and vacate the Campbell Order. This Court should further conclude that the Department may issue 202(c) orders only in response to discrete, identifiable grid crises that are acute and unexpected.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations set forth in D.C. Cir. R. 32(e)(3) and Fed. R. App. P. 29(a)(5) because this brief contains 6416 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: December 23, 2025

/s/ James P. Duffy
James P. Duffy

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of December, 2025, I caused the foregoing Brief of Energy Law Scholars *Amici Curiae* in Support of Petitioners to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF

system, which constitutes service on all parties and parties' counsel who are registered ECF filers.

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