ORAL ARGUMENT NOT YET SCHEDULED
Case No. 25-1193 (consolidated with 25-1194, 25-1287, and 25-1288)

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

ILLINOIS OFFICE OF ATTORNEY GENERAL, *et al.*,
Petitioners,

v.

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

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 Joint Opening Brief of Public Interest Organization Petitioners and Consumer Advocates, Doc. 2172502 (filed May 8, 2026): Energy Law Scholars *Amici*.

B. *Rulings Under Review*. References to the rulings under review appear in the Initial Joint Opening Brief of Public Interest Organization Petitioners and Consumer Advocates, Doc. 2172502.

C. *Related Cases.* A list of related cases appears in the Initial Joint Opening Brief of Public Interest Organization Petitioners and Consumer Advocates, Doc. 2172502.

Dated: May 15, 2026

/s/ Melissa J. Lynch
Melissa J. Lynch

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: May 15, 2026

/s/ Melissa J. Lynch
Melissa J. Lynch

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: May 15, 2026

/s/ Melissa J. Lynch
Melissa J. Lynch

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GLOSSARY

FPA	Federal Power Act
FERC	Federal Energy Regulatory Commission
NERC	North American Electric Reliability Corporation
PJM	PJM Interconnection, LLC
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:

- Joshua C. Macey, Professor of Law, Yale Law School;
- Joel B. Eisen, Robert Merhige Faculty Research Scholar and Professor of Law, University of Richmond School of Law;
- Sharon B. Jacobs, Professor of Law, University of California, Berkeley School of Law;
- Alexandra B. Klass, James G. Degnan Professor of Law, University of Michigan Law School;
- Felix Mormann, Professor of Law, Texas A&M University School of Law;
- David Owen, Harry Sunderland ’61 Professor of Law, University of California College of the Law, San Francisco;
- Ari Peskoe, Director, Electricity Law Initiative, Harvard Law School;
- Shelley Welton, Presidential Distinguished Professor of Law and Energy Policy, University of Pennsylvania Carey Law School; and
- Hannah Wiseman, Professor of Law, Penn State Dickinson Law.

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 applicable statutory provisions and the Department’s historic practice. It will ultimately result in a *less* reliable electric 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 ("FPA") 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 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 FPA Section 202(c) emergency authority invoked here serves a different and far narrower role: addressing acute 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 Units 3 and 4 of the Eddystone Generating Station premised on "*potential* load stress" that "*could* exist within the service territory," and increasing reliability risk "in the coming years." DOE Order No. 202-25-4 at 1 (May 30, 2025) (emphasis added). While long-term resource adequacy is a genuine issue in the PJM

Interconnection ("PJM"), in which the Eddystone Units are located, such a concern should be addressed through 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 power plants outside the system Congress created. That incongruence is underscored by history: until last year, the Department had never used its emergency authority to manage long-term resource adequacy or to postpone planned retirements indefinitely. The Department's use of its emergency authority here, and in a series of recent similar orders,[1] disregards that critical distinction and undercuts the reliability and resource-adequacy mechanisms designed to address the very concerns it invokes.

ARGUMENT

I. Resource Adequacy Depends on Coordinated, Forward-Looking Planning and Market Mechanisms Governed by Multiple Institutions.

The Department issued the first of the challenged emergency orders on May 30, 2025, to forestall the retirement of the Eddystone Units planned for the following day. DOE Order No. 202-25-4 (May 30, 2025). It has since extended that

[1] *See, e.g.*, DOE Order Nos. 202-25-3 (May 23, 2025), 202-25-7 (Aug. 20, 2025), 202-25-9 (Nov. 18, 2025), 202-26-16 (Feb. 17, 2026) (delaying retirement of Michigan's J.H. Campbell Power Plant); DOE Order Nos. 202-25-11 (Dec. 16, 2025), 202-26-18 (Mar. 16, 2026) (delaying retirement of Washington's Centralia Generating Station).

order three times based on assertions that the emergency conditions that led to the issuance of the first order "continue, both in the near and long term." DOE Order Nos. 202-25-8 (Aug. 28, 2025), 202-25-10 (Nov. 25, 2025), 202-26-17 (Feb. 23, 2026) [hereinafter "Eddystone Orders"]. The Eddystone Orders are thus founded not on a discrete, imminent emergency, but on broader claims about future resource adequacy—namely whether the grid operator, PJM, will have sufficient generating capacity above expected peak demand to maintain reliability during periods of highest system stress in the coming years.

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. Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 Harv. L. Rev. 1360, 1371–73 (2021). Congress deliberately vested questions of resource adequacy in institutions and processes that emphasize advanced planning, evidentiary development, cost consideration, and coordination across jurisdictions. Issues such as future reserve margins, planned retirements, and system-wide long-term adequacy are not addressed through ad hoc emergency directives; rather, they are managed through a 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. *See* Alexandra B. Klass & Dave Owen, *The President and the Power Grid*, Mich. L. Rev. Online 23, 25 (forthcoming 2026), https://ssrn.com/abstract=6509640.

A. States Have Jurisdiction Over Their Own Generation Mix.

Historically, the federal government had no oversight over the nation's electric network, and the task of ensuring resource adequacy fell entirely to states. Christiansen & Macey, *supra*, at 1371. 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. Each state also 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, 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 Economics, Inc. & Lawrence Berkeley National Laboratory, *Best Practices in Integrated Resource Planning*, at 1 (Nov. 2024), https://perma.cc/NED2-CMGF.

B. FERC Regulates Wholesale Markets and Interstate Transmission.

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 limits federal jurisdiction 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. 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. Reg. 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 about developing threats to grid stability and resilience. *See id*. at 194–96, 199. It does not order specific generation to operate, approve or disapprove retirements, or override state and grid operators' planning decisions. Its assessments are designed to feed into—rather than displace—the coordinated planning processes administered by states, grid operators, and FERC. *See* 16 U.S.C. § 824o(i)(2) (FERC and NERC are "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").

C. Grid Operators Manage Transmission and Ensure Resource Adequacy.

FERC also oversees non-profit grid operators, such as regional transmission organizations ("RTOs"). These organizations oversee electricity transmission within their multi-state territories, administer FERC-approved competitive wholesale electricity markets, and establish mechanisms to 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 stress. Some operators rely primarily on scarcity pricing—using higher prices during tight conditions to

encourage new investment. *See* Electric Reliability Council of Texas, *2024 Biennial ERCOT Report on the Operating Reserve Demand Curve*, at 7 (Nov. 1, 2024). Others rely on state-supervised planning that requires utilities to procure or operate sufficient resources directly. *See* Nat'l Association of Regulatory Utility Comm'rs, *Resource Adequacy for State Utility Regulators: Current Practices and Emerging Reforms*, at 83 (Nov. 2023).

Still others, such as the PJM Interconnection in which the Eddystone Units are located, run capacity markets that compensate generators for being available to generate electricity and impose penalties for non-performance during emergencies. *See, e.g.*, PJM Interconnection, LLC, *PJM Capacity Market: Promoting Future Reliability*, at 1 (Jan. 29, 2025), https://perma.cc/7V26-W8ZQ [hereinafter *PJM Capacity Market*]. PJM's capacity market, the Reliability Pricing Model, is a forward auction that secures commitments from generators to be available to meet demand during a delivery year approximately three years into the future. *Id*.

While the mechanisms used by grid operators may differ, each approach is intended to ensure that enough new capacity enters the market, that existing resources make investments to maintain availability during extreme weather events, and that generators can retire or enter the market in an orderly manner without compromising reliability.

D. The Department of Energy Has a Limited Emergency Response 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).

II. 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 and market 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, deploying Section 202(c) in lieu of established planning and market processes is "deeply destabilizing" to decades of economic decision-making and orderly resource planning. Klass & Owen, *supra*, at 25. Such misuse ultimately compromises electric reliability, rather than protecting it.

Understanding why requires a brief account of how PJM's capacity market is designed to work. PJM procures the generation capacity needed to meet the region's reliability requirements through a forward auction—the Reliability Pricing Model—in which resources compete to provide power up to the projected reserve requirement and the auction clears at the last offer price. *See PJM Capacity*

Market, at 1. The auction clearing price is not merely an accounting mechanism; it is the primary signal through which the market communicates the value of new investment. High clearing prices tell developers that capacity is scarce and new entry is warranted; low prices signal that existing supply is adequate. *See* Ashley J. Lawson, Cong. Research Serv., R48553, *PJM's Electric Capacity Market: Background and Current Issues* 13 (2025). Because every cleared resource receives the same price regardless of its individual bid, *see PJM Capacity Market*, at 1, no participant benefits from strategic bidding—too high a bid risks not clearing at all, while too low a bid leaves money on the table. The market thus depends on competitive, transparent price formation to guide the orderly entry and exit of resources over time. When that process functions as designed, PJM does not need emergency orders to maintain reliability; the market itself attracts and sustains the capacity the region needs.

A well-functioning forward market also relies on a credible commitment that scarcity will be priced through the auction, not managed through ad hoc executive intervention. If that commitment is weakened, the market becomes a hybrid administrative regime in which prices are only partially informative, and investment decisions depend increasingly on political judgments about which resources might be prevented from retiring. That can erode the very rationale for the capacity market, because the system is no longer relying on decentralized entry

in response to price signals, but on discretionary retention of incumbent resources. *See* PJM Interconnection, LLC, *Powering Reliability Through Market Design*, at 16 (May 6, 2026), https://perma.cc/HNS2-B5YK [hereinafter PJM, *Market Design*]. Repeated 202(c) orders undermine the institutional mechanism designed to produce reliability in the first place.

If PJM needs more capacity, the solution is to allow competitive pricing to function or to reform the existing reliability mechanisms so that it can—and PJM is in the process of doing both. *See id*. at 24–25, 28. For example, in 2025, PJM received FERC approval to reform its Surplus Interconnection Service to maximize the operating efficiency of existing resources; FERC also approved PJM's Reliability Resource Initiative, which attracted proposals for 11,000 megawatts of capacity in shovel-ready generation projects. NERC, 2025 *Long-Term Reliability Assessment*, at 93 (Feb. 2026). These steps illustrate the FPA's framework functioning as designed: the grid operator responded to changing industry dynamics with rules approved by FERC as just and reasonable, supplementing the market's scarcity signals to draw in new resources and wring additional output from existing ones. While PJM's capacity market may still require significant reforms to cope with surging demand in the region, *see* PJM, *Market Design*, *supra*, at 4–7, repeated plant-specific Section 202(c) orders undermine that process

by preserving a retiring unit in place while suppressing the very price signal that would otherwise call forth replacement entry.

A. 202(c) Orders Suppress Capacity Market Price Signals and Deter Investment Needed for Long-Term Reliability.

When the Department uses Section 202(c) to compel a retiring unit to remain online, it effectively adds supply outside the auction construct. In a forward capacity market, added supply pushes the clearing price down, or at least reduces the scarcity premium that would otherwise emerge to call forth new entry or life extensions from existing resources. *See* PJM, *Market Design*, at 6. The market clearing price no longer reflects the true cost of meeting the region's reliability needs; rather it is artificially suppressed by units kept in service through mechanisms that bypass competitive pricing entirely.

The damage extends beyond any individual auction. Section 202(c) is designed as an emergency authority—limited, short-term, and discretionary—but the Department's repeated use of it outside any genuine emergency context, maintaining specific units through successive 90-day orders, converts this narrow tool into an ad hoc override of PJM's established market rules. That shift does not merely affect individual units or individual auctions; it undermines the capacity market's ability to perform its central function: attracting and sustaining the long-term investment commitments on which reliable operation depends. *See* PJM,

Market Design, at 40. A developer or lender evaluating whether to invest in new capacity must assess not only whether the market will clear at a price sufficient to justify that investment, but whether the market will be permitted to clear at all—or whether the Department will instead mandate that aging, uneconomic units remain online, suppressing the price signals on which new entry depends. *See id*. at 26. Even a credible threat of such intervention, falling short of an actual order, is sufficient to erode the expected returns that make new investment rational. *See* Michael Goggin, *The Cost of Federal Mandates to Retain Fossil-Burning Power Plants* at 4 (Aug. 2025), https://perma.cc/GS2L-CAVM.

That threat hangs over every investment decision in the PJM footprint. Whether a developer is evaluating a new peaker plant, a battery storage project, a demand-response platform, or a plant repowering decision, it must now consider a risk that has nothing to do with market efficiency: the possibility that the Department will intervene with a 202(c) order to keep an older unit in service on out-of-market terms. It matters not whether any particular intervention will actually occur. What matters is that the possibility is credible enough that rational developers must discount future market revenues accordingly, and credible enough that lenders must price that regulatory uncertainty into the cost of capital. *See* PJM, *Market Design*, at 31. The result is not a more reliable grid, but a less investable

market in which the ordinary mechanisms for securing long-term adequacy are steadily eroded by the prospect of discretionary federal override.

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 cases arising from the New England grid operator's resource-adequacy crises, where FERC reluctantly approved Reliability Must-Run arrangements[2] only as a temporary stopgap while market-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.

[2] 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 FERC ¶ 61,082, *3, *5 (Apr. 25, 2003). In this way, "Reliability Must-Run" orders are similar to Section 202(c) orders, issued under provisions authorizing the Department to issue short-term emergency orders without cost review or market coordination.

Me. Pub. Utils. Comm'n v. FERC, 520 F.3d 464, 468 (D.C. Cir. 2008) (quoting *Devon Power LLC,* 103 FERC ¶ 61,082, *19-20). As this Court has observed, resource adequacy interventions from outside the market must be carefully scrutinized to avoid undermining the incentives created by the market itself.

B. 202(c) Orders Undermine PJM's Capacity Market by Creating Opportunities for Regulatory Arbitrage.

Repeated use of Section 202(c) orders also bifurcates the market in ways that distort the incentives of individual participants. The Eddystone Orders illustrate the problem directly. DOE directed PJM to maintain the units' availability and employ economic dispatch while allowing rate recovery of associated costs. PJM and FERC then developed a tariff mechanism—the filed rate schedule governing how capacity is procured, priced, and committed—to allocate those costs across the region. *See PJM Interconnection, LLC*, 192 FERC ¶ 61,159 (Aug. 15, 2025). The result is that the Eddystone Units earn energy and capacity market revenues while simultaneously operating under an out-of-market federal retention regime, a combination unavailable to resources that compete solely through the Reliability Pricing Model. That combination does not merely result in an uneven playing field; it bifurcates the market itself, creating two distinct pathways to cost recovery where the capacity market was designed to have one, and in doing so supplying a structural incentive for generators to pursue out-of-market retention as a deliberate business strategy. *See* Goggin, *supra*, at 4.

When administrative retention becomes a viable alternative to competitive participation, the incentive to bid honestly weakens for any resource that believes it might qualify for an out-of-market order. No generator holds an entitlement to a 202(c) order, but repeated interventions generate something analogous to an option value: a rational expectation that a resource may exit the competitive process and obtain administrative retention with cost recovery. A generator can compare expected capacity market revenues against the expected value of administrative retention, and that comparison may favor the latter, particularly where cost recovery insulates the unit from competitive pressure entirely.[3]

Critically, as deployed in the past two years, a unit need not be genuinely reliability-critical, or even located in an area of demonstrated capacity stress, to pursue this strategy, meaning the arbitrage opportunity is available to a much wider set of resources than any legitimate reliability rationale could justify. The result is a market in which the threat of strategic exit, rather than competitive performance, becomes a viable path to cost recovery.

[3] Market monitors may refer to such practice of speculative retirement notification in hope of a more favorable cost-of-service contract as "Reliability Must Run fishing." *See* ISO New England, *2024 Annual Markets Report* at 22 (May 23, 2025), https://www.iso-ne.com/static-assets/documents/100023/2024-annual-markets-report.pdf. *See also ISO New England, Inc.*, 155 FERC ¶ 61,029, *63 (Apr. 12, 2016) (describing potential market impacts of an inflated retirement bid).

The market power implications compound these harms. Resources that expect to be infra-marginal in the capacity auction—unable to clear at competitive prices—may rationally pursue strategies designed to increase the probability of out-of-market retention: signaling retirement, withholding from the auction, or otherwise positioning themselves as difficult to replace. Such resources possess leverage that would be entirely unavailable in a fully competitive market. The capacity market cannot perform its resource adequacy function when participation in that market is optional for the resources most likely to test its limits—and when the alternative to competition is a federal retention order that guarantees cost recovery without requiring competitive justification.

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

Not only do the Eddystone Orders disrupt the market processes designed to ensure electric reliability in PJM, but they are also at odds with the nearly 100 years of historic use of that authority to address sudden and discrete events. *See* Klass & Owen, *supra*, at 16–18, 22 (including bar graph showing sharp break from historic uses of 202(c)). Prior to the current administration, the Department had *never* used Section 202(c) authority to favor one source of electricity generation over another in response to long-term resource-adequacy concerns. Instead, it used that authority only to address acute threats to immediate grid reliability or to require temporary interconnections that expanded grid connectivity. *Id*.

In the years following the 1935 enactment of the relevant FPA amendments, Section 202(c) authority was used to address an emergency increase in electricity demand for wartime defense production. *Id*. at 11. During World War II, the Federal Power Commission (a predecessor to the Department of Energy) issued twenty-two orders based on 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); *Fla. Power & Light Co.*, 2 F.P.C. 991, 991 (June 27, 1941) (interconnection necessary due to "a sudden increase in the demand for electric energy coupled with a shortage of electric energy").

Between the end of World War II and 1977, the Federal Power Commission issued 202(c) orders only seven times, in each case ordering 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 of Energy. *See* 42 U.S.C. § 7151(b). 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 a total of nineteen 202(c) orders, thirteen of which mandated electricity generation. *See* Rolsma, *supra*, at 839–44, tbl. 1. Like the order responding to California's energy crisis, in each of these cases, the order was prompted by a discrete or unanticipated 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 events to which they responded.

First, ten orders responded to requests for assistance in the face of 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 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).[4] 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).

Second, the remaining three generation-mandating 202(c) orders required generators to delay retirement only as a temporary bridge until identified 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

[4] 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).

[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).

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) (permitted 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 Eddystone Orders stand in stark contrast to the long history of 202(c) orders. Importantly, while every prior order was issued in response to a sudden, discrete event—war, extreme weather events, unexpected retirements, delays to replacement projects, or large-scale grid failures—the Department issued the first Eddystone Order in response to general future "resource adequacy concerns." DOE Order No. 202-25-4 at 1.

Additionally, prior orders were tailored to the immediate energy needs created by the emergency, consistent with Section 202(c)(1). Here, the first Eddystone Order expired after 90 days—purportedly to give the Department time to further evaluate the Eddystone Units. DOE Order No. 202-25-4 at 2. But the Department has since renewed the order three times, using this emergency power to keep the Eddystone Units operational for nearly a year past their planned retirement. DOE Order No. 202-26-17, at 9 (ordering the units to remain in operation through May 24, 2026, claiming that "the emergency conditions . . . supporting the issuance of Order Nos. 202-25-04, 202-25-08, and 202-25-10 will continue in the near term and are also likely to continue in subsequent years").

Contrary to the Department's rationale in the Eddystone Orders, PJM recently affirmed that it expects to have sufficient generation capacity to meet peak demand this summer, despite hotter-than-average forecast temperatures. Diana Giangi, *SPP, PJM, CAISO anticipate being able to meet power demand this summer*, Utility Dive (May 12, 2026), https://www.utilitydive.com/news/spp-pjm-caiso-summer-outlook-blackout/819957/. The Department is plainly attempting to utilize Section 202(c) not as a response to a short-term emergency, as this provision has been used prior to 2025, but rather as way to influence long-term resource adequacy.

IV. 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 Sudden, Requiring Temporary Tailored Interventions.

The Department urges that "Congress intended to grant the Secretary broad discretion in Section 202(c) to determine when his emergency powers should be applied." DOE Order No. 202-25-4B, at 7 (Jan. 10, 2026). While true, 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. 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 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 sudden and acute. This is consistent with the text of Section 202(c). *See* Joint Opening Brief of Petitioners at

38–48. 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 or wartime emergency events not addressed by the FPA's long-range planning processes. *See supra* Arg. III. Finally, such interpretation would prevent the misuse of 202(c) orders as ad hoc fixes for long-term resource adequacy issues—misuse that undermines the very market mechanisms PJM relies upon to drive addition of new capacity to the system. *See supra* Arg. II.

CONCLUSION

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

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Respectfully submitted,

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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 5,900 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: May 15, 2026

/s/ Melissa J. Lynch
Melissa J. Lynch

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of May, 2026, 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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