BEFORE THE UNITED STATES DEPARTMENT OF ENERGY

Resource Adequacy Protocol,	**)**
Evaluating the Reliability and Security	**)**
of the United States Electric Grid	**)**
	)
	)

REQUEST FOR REHEARING OF
THE CLEAN ENERGY ORGANIZATIONS

Pursuant to section 313(a) ("Section 313(a)") of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l* (2024), the American Clean Power Association ("ACP"),[1] Advanced Energy United ("United"),[2] and American Council on Renewable Energy ("ACORE")[3] (collectively, "Clean Energy Organizations") hereby submit this request for rehearing ("Rehearing Request") of the U.S. Department of Energy's ("DOE" or "the Department") July 7, 2025 Protocol on Resource Adequacy ("Protocol").[4]

The Clean Energy Organizations take the reliability of the electric grid, including maintaining resource adequacy across the country, extremely seriously – as befits one of the most significant issues in energy policy. Unfortunately, DOE's Protocol falls far short of a

[1] ACP is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind, solar, energy storage and electric transmission in the United States. The views and opinions expressed in this filing do not necessarily reflect the official position of each individual member of ACP.

[2] Advanced Energy United is a national association of businesses that are making the energy we use secure, clean, and affordable. Advanced Energy United is the only industry association in the United States that represents the full range of advanced energy technologies and services, both grid-scale and distributed. Advanced energy includes energy efficiency, demand response, energy storage, wind, solar, hydro, nuclear, electric vehicles, and more.

[3] ACORE is a national nonprofit organization that unites finance, policy and technology to accelerate the transition to a clean energy economy. ACORE's membership includes investors, developers, manufacturers, utilities, corporate buyers of clean power, and professional services firms.

[4] U.S. Dep't of Energy, *Evaluating the Reliability and Security of the United States Electric Grid* (July 2025) , https://www.energy.gov/sites/default/files/2025-07/DOE%20Final%20EO%20Report%20%28FINAL%20JULY%207%29.pdf.

serious assessment of reliability and resource adequacy. DOE's analysis in the Protocol fails to take account of (or simply mischaracterizes) major developments that will affect resource adequacy in the next half-decade and beyond, primarily the pace of new resource development, the retirement of existing resources, and the well-established regulatory and market mechanisms that connect these threads. The Protocol also excludes mention of President Trump's own policies aimed at making the headline outcomes of the Protocol highly unlikely. DOE's failure to account for these important aspects of the resource adequacy puzzle renders the Protocol arbitrary and capricious – which would also be the case for any subsequent action that relies upon them.

The clear purpose of the Resource Adequacy Protocol, based on the Executive Order directing its development, is to "guide reliability interventions" by DOE under section 202(c) of the Federal Power Act. But the Resource Adequacy Protocol does not establish an emergency within the meaning of that section. To the contrary, the Resource Adequacy Protocol affirmatively finds relative reliability across regions today. The Protocol's projections of capacity shortfalls in 2030, flawed as they are, do not provide a basis for DOE to use its emergency authority in the here and now.

Further, in practical effect the Resource Adequacy Protocol is a rule and is therefore subject to rehearing, despite being styled as a "Report." As detailed below, the Protocol bears the attributes of a rule that is and will be actively used in agency actions. The Clean Energy Organizations' arguments here should not be construed as a contention that all (or even most) analytical reports that might ultimately be used in a regulatory program constitute final agency action. Rather, DOE has issued what is *not* merely an analytical report but is instead a Protocol

guiding future actions under § 202(c) of the Federal Power Act, and an effective amendment to DOE's existing regulation governing 202(c).

The Clean Energy Organizations stand ready to work with DOE and other stakeholders on a serious and comprehensive effort to assure resource adequacy in a dynamic electricity system. To that end, DOE should grant rehearing as requested herein and address the significant errors in its Protocol.

I. MOTION TO INTERVENE AND BASIS OF APPLICATION FOR REHEARING

A. Standard for Seeking Rehearing

Section 313(a) of the FPA allows any party "aggrieved" by an order to apply for rehearing within 30 days.[5] Although this section most frequently applies to actions of the Federal Energy Regulatory Commission, parties have utilized it in proceedings that DOE has commenced under § 202(c) of the FPA[6] as well.[7] Courts have adopted a broad understanding of "aggrievement" for the purposes of § 313.[8] As detailed *infra*, DOE's Resource Adequacy Protocol serves to authorize specific actions that are likely to harm the Clean Energy Organizations and their members, and would be redressed by granting rehearing.

Judicial precedent firmly establishes that each of the Clean Energy Organizations is an aggrieved party within the meaning of the FPA. For instance, the U.S. Court of Appeals for the

[5] 16 U.S.C. § 825*l*.

[6] 16 U.S.C. § 824a(c).

[7] *See, e.g.* DOE Order No. 202-17-2, Sierra Club Pet'n for Rehearing (July 13, 2017); DOE Order No. 202-05-3, City of Alexandria and Virginia DEQ requests for rehearing (Jan. 20, 2006).

[8] *See, e.g. Louisiana Energy & Power Auth. v. FERC,* 141 F.3d 364, 366 (D.C. Cir. 1998) (holding that plaintiff party Louisiana Electric & Power Authority established aggrievement under the FPA after fulfilling both Constitutional and prudential requirements for standing, due to likely increase in prices from FERC action); *Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1113 (D.C. Cir. 2001); *Belmont Mun. Light Dep't v. FERC*, 38 F.4th 173, 185 (D.C. Cir. 2022); *City of Redding, Cal. v. FERC*, 693 F.3d 828, 835–36 (9th Cir. 2012) ("We agree with Petitioners that "[t]here would be something rather askew if standing principles prevented review of agency orders in the one forum where the agency that issued the orders and the parties most aggrieved by those orders can meet to have the agency's defense of its orders heard.").

District of Columbia Circuit noted when finding standing under comparable provisions of the Natural Gas Act, "We find here …that petitioners sufficiently establish their constitutional standing by showing that the challenged action authorizes allegedly illegal transactions that have the clear and immediate potential to compete with the petitioners' own sales. They need not wait for specific, allegedly illegal transactions to hurt them competitively."[9] The D.C. Circuit has also found that "The lost opportunity to purchase a desired product is a cognizable injury, even though [the customer] *can* purchase, and *has* purchased, wholesale power from another source;"[10] as detailed *infra,* the Protocol is likely to cause such injury to members of the Clean Energy Organizations. Accordingly, the Clean Energy Organizations submit this timely request for rehearing as aggrieved parties affected by DOE's Protocol.

B. Overview of Potential Harm to Clean Energy Organizations

As described below, the membership of the Clean Energy Organizations includes companies whose earnings and costs would be adversely impacted by government interference in the markets to ensure continued operation of existing thermal generators, as expressly contemplated in the Protocol, the associated materials issued by DOE, and the underlying Executive Order. These entities represent companies that invest in and develop billions of dollars of domestic projects. If implemented, such policies will likely displace clean energy projects or reduce their market revenue, and create financial challenges for companies of developing, owning, and operating these projects. Expected disruptions of energy and capacity revenues could adversely impact the financing of such energy. Utilities and corporate purchasers seeking to obtain clean energy – whether due to state policy requirements, internal goals, or

[9] *Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (emphasis in original).

[10] *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1078 (D.C. Cir. 2017)

simply because it represents a prudent resource addition based upon costs and specific needs – would find it more challenging, and in some instances (detailed *infra*) may be directed to keep resources online that would have retired.

In addition to these direct impacts of the intended application of the Protocol's findings, DOE's unproven assertion that the "recent focus on intermittent rather than dispatchable sources of energy" is contributing to a weakened energy outlook that is "jeopardizing U.S. economic and national security"[11] may cause the Clean Energy Organizations' members to be marginalized in future planning and rulemaking procedures, and is already being used to support policy changes at other federal agencies that directly impede clean energy development. For example, the Protocol has already been referenced in a Department of Interior Order directing DOI to "consider energy projects' capacity density in its decision-making," which could have a direct adverse impact on the permitting of projects owned, financed or contracted for by Clean Energy Organizations' members.[12] The Protocol's findings could also affect decisions in state-level procurements and FERC rulemakings in a way that materially disadvantages the Clean Energy Organizations' members.

C. Description of Clean Energy Organizations

1. American Clean Power Association

The American Clean Power Association ("ACP") has a diverse membership including manufacturers and construction companies, developers and owners/operators of clean energy

[11] Protocol at 1.

[12] U.S. Dep't of the Interior, *SO 3438 - Managing Federal Energy Resources and Protecting the Environment* (Aug. 1, 2025), https://www.doi.gov/document-library/secretary-order/so-3438-managing-federal-energy-resources-and-protecting.

projects, utilities, financial firms, and corporate purchasers.[13] The Resource Adequacy Protocol causes clear and legally cognizable harm to each of these industry areas.

2. Advanced Energy United

Advanced Energy United ("United") is a national industry association representing businesses that provide the full range of advanced energy solutions as well as large end use consumers. Lower market prices due to out-of-market interventions enabled by the Protocol will impact developers of new generation and storage resources, owners and operators of existing generation and storage resources, and providers of demand-side solutions. Continued reliance on resources that would otherwise retire also represents an opportunity cost for United's members, including developers and providers of existing and new grid-scale resources, demand-side solutions, and developers of grid-enhancing technologies and new transmission infrastructure. These actions will also impact the prices paid by end-use consumers within United's membership.

3. American Council on Renewable Energy

Members of the American Council on Renewable Energy ("ACORE") represent the full scope of the clean energy transaction space, including investors, developers, manufacturers, utilities, corporate buyers of clean power, and professional services firms.[14] As described *infra*, the Protocol could create market barriers to ACORE member-developed and financed projects, and also harm large power customers, who might be required to pay the costs incurred by conventional power plants that are kept online.

[13] *About American Clean Power*, last accessed Aug. 5, 2025, https://cleanpower.org/about/.

[14] About ACORE, https://acore.org/about/, last accessed Aug. 6, 2025,

II. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

Pursuant to 16 U.S.C. §825*l* the issues presented for consideration on rehearing are as follows:

1. DOE issued the Resource Adequacy Protocol without the required notice and comment proceedings. 5 U.S.C. § 553; *Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1205 (D.C. Cir. 2020) ("ordinarily an agency that promulgates a rule under § 553's auspices must use the same procedure to revoke that rule"); *Perez v. Mortgage Bankers Association*, 575 U.S. 10 (2015) (holding agencies must use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance); *City of Idaho Falls v FERC*, 629 F.3d 222, 227 (D.C. Cir. 2011); *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

2. The Resource Adequacy Protocol cannot serve its stated purpose to "guide reliability interventions" under section 202(c) of the Federal Power Act because it does not describe an emergency within the meaning of the Act. 16 U.S.C. 824a(c); 10 C.F.R. § 205.371; *Richmond Power and Light v. FERC,* 574 F.2d 610, 615 (D.C. Cir. 1978); *Otter Tail Power Co. v. Fed. Power Comm.,* 429 F.2d 232, 233-34 (1970).

3. As a basis to "guide reliability interventions under" section 202(c) of the Federal Power Act, the Resource Adequacy Protocol is contrary to law because it exceeds the Department's statutory authority. Regulatory authority over resource adequacy is reserved to States and to other federal regulators. 16 U.S.C. § 824(b)(1). Section 202(c) does not vest DOE with regulatory authority over resource adequacy, or the general authority to decide which power plants except temporarily and under emergency exists. The Department may not "discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority." *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 724–25, (2022) (quoting *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014))(internal quotations omitted).

4. DOE acted arbitrarily, capriciously and contrary to law in issuing a Resource Adequacy Protocol that contains multiple factual errors and analytical flaws, including:

    - The Protocol's assumptions of new generation and the resulting resource adequacy are implausibly low and internally inconsistent.
    - DOE overstates resource retirements, beyond those projected in the most recent Energy Information Administration data.
    - The protocol misrepresents expected load growth.
    - DOE ignores the real-world mechanisms that maintain resource adequacy by matching supply and demand through regulatory action or price signals
    - DOE mischaracterizes winter reliability risks, and omits potential vulnerabilities to the thermal generator fleet.
    - The Protocol fails to consider interregional transmission as a reliability solution at all, despite utilizing a data set specifically designed to evaluate prudent interregional transmission additions to support reliability.

    See 5 U.S.C. § 706(2)(A), (C), (E); *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) ("As we have often recognized, an agency ruling is "arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem.") (emphasis added); *Env't Def. Fund v. FERC*, 2 F.4th at 967–68 (D.C. Cir. 2021) (under the arbitrary and capricious standard "an action by the Commission may be set aside 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'") (citation omitted).

III. BACKGROUND

On April 8, 2025, President Donald Trump signed an Executive Order entitled *Strengthening the Reliability and Security of the United States Electric Grid*.[15] In it, he directed DOE to establish a "uniform methodology" to identify regions with reserve margins "below acceptable thresholds," including an accreditation of generation resources, and to do so within 30 days, and publish the methodology and resulting analysis within 90 days. According to the Executive Order, the methodology and "a protocol to identify which generation resources within a region are critical to system reliability" are intended "guide federal reliability interventions, including emergency action under Section 202(c) of the Federal Power Act", specifically to prevent generation resource retirements.[16]

On July 7, 2025 (90 days after issuance of Executive Order 14262), DOE issued the Resource Adequacy Protocol. In releasing the Protocol, DOE claimed that its analysis showed that resource retirements, based on its assessment, would "increase the risk of power outages by 100 times in 2030"[17] DOE also stated that its "methodology also informs the potential use of DOE's emergency authority under Section 202(c) of the Federal Power Act."[18] DOE and other agencies have already begun to use the Protocol in a range of contexts. For example, following issuance of Executive Order 14262, but prior to the release of the Protocol, DOE indicated in its issuance of a 202(c) order for the Eddystone generator in Pennsylvania that the Resource

[15] *Strengthening the Reliability and Security of the United States Electric Grid,* Executive Order 14262, 90 FR 15521 (2025) (signed Apr. 8, 2025; published Apr. 14, 2025) ("Executive Order 14262"), https://www.federalregister.gov/documents/2025/04/14/2025-06381/strengthening-the-reliability-and-security-of-the-united-states-electric-grid.

[16] *Id., §* 3.

[17] U.S. Dep't of Energy, *Department of Energy Releases Report on Evaluating U.S. Grid Reliability and Security* (Jul. 7, 2025), https://www.energy.gov/articles/department-energy-releases-report-evaluating-us-grid-reliability-and-security

[18] *Id.*

Adequacy Protocol would inform its subsequent actions for those units.[19] On August 1, the Department of the Interior referenced the DOE Protocol in issuing new restrictions based upon the capacity density of different resources.

IV. REQUEST FOR REHEARING

A. The Resource Adequacy Protocol is a rule under the APA and therefore an Order under section 313 of the Federal Power Act

The Administrative Procedure Act ("APA") requires courts to set aside agency decisions that are arbitrary, capricious, or an abuse of discretion,[20] or are unsupported by substantial evidence.[21] The Supreme Court has interpreted the 'arbitrary and capricious' standard to mean that:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[22]

Courts have vacated and remanded DOE decisions that fail to meet the APA's requirements.[23] As described below, multiple aspects of DOE's methods and conclusions in the Resource Adequacy Protocol are contrary to law, not based on substantial evidence,[24] and/or do

[19] DOE Order No. 202-25-4 (May 30, 2025) ("Pursuant to Executive Order 14262, Strengthening the Reliability and Security of the United States Electric Grid (EO 14262), DOE is developing a methodology to identify current and anticipated reserve margins for all regions of the bulk-power system regulated by the Federal Energy Regulatory Commission. EO 14262 requires this methodology to be published by July 7, 2025, and be used to establish a protocol to identify which generation resources within a region are critical to system reliability and prevent identified generation resources from leaving the bulkpower [sic] system. DOE plans to use this methodology to further evaluate Eddystone Units 3 and 4."), https://www.energy.gov/sites/default/files/2025-05/Federal%20Power%20Act%20Section%20202%28c%29%20PJM%20Interconnection.pdf.

[20] 5 U.S.C. § 706(2)(A) (2024).

[21] 5 U.S.C. § 706(2)(E).

[22] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 at 43 (1983).

[23] *See, e.g. Am. Pub. Gas Ass'n v. United States Dep't of Energy*, 72 F.4th 1324 (D.C. Cir. 2023).

[24] *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d at 1309 (D.C. Cir, 2015) (citation omitted).

not flow rationally from the facts in the record.[25] These errors, individually and collectively, render the Protocol, and any further agency action utilizing it, arbitrary and capricious.

As explained herein, the Resource Adequacy Protocol functions as a final rule as that term is defined by the APA and is, therefore, an Order under section 313 of the FPA. Yet, DOE has failed to comply with its procedural obligations for issuing rules.

While styled as a "report," the Protocol issued on July 7 by DOE is properly considered a rule under the APA. Section 551 of the APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[26] The Protocol, taken as a whole, clearly meets this definition. As explicitly *required* by the Executive Order that led to its development, it establishes generally applicable interpretations and criteria by which DOE will act, in the future, in exercising its authority under section 202(c) of the Federal Power Act. And it does so by, in practical effect, superseding the interpretations and criteria established by DOE in its 1981 rulemaking establishing its section 202(c) implementing regulations, codified at 10 C.F.R. § 205.370 *et seq*.[27]

[25] *See Env't Def. Fund v. FERC,* 2 F.4th 953, 967-68 (D.C. Cir. 2021*)*; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

[26] 5 U.S.C. § 551(4).

[27] Emergency Interconnection of Electric Facilities and the Transfer of Electricity to Alleviate an Emergency Shortage of Electric Power [Section 202(c) Regulations], 46 Fed. Reg. 39,984 (Aug. 6, 1981).

Because DOE's Protocol is a rule, as defined by the APA, in which DOE is implementing section 202(c) of the FPA,[28] it is also, therefore an Order as that term is used in section 313 of the FPA.[29] As a result, DOE's Protocol is properly subject to this rehearing request.[30]

1. The Protocol establishes how DOE will exercise its section 202(c) authority

While purporting to be primarily an analysis of resource adequacy in regions across the United States, the Protocol is more than merely a report designed to passively inform potential future actions. Rather, taken as a whole and in context of DOE's intended use, the document issued on July 7 has the purpose of directing the use of DOE's purported authority under section 202(c) of the FPA to order generating units to forestall retirement. The Protocol does so on its face, by plainly stating that it constitutes DOE's "uniform methodology to identify at-risk region(s) and guide reliability interventions. "[31] Moreover, in the Protocol, the Department restated this point again when it observed that it was including a section on ERCOT because "FPA Section 202(c) allows DOE to issue emergency orders to ERCOT."[32]

The type of intervention and authority by which DOE will make such interventions are also made clear in the Protocol and DOE's accompanying release materials. On its website hosting the Protocol, DOE states that the document was responsive to Executive Order 14262,

[28] Section 202(c) was initially a power vested in the Federal Power Commission (FPC). However, this function was transferred to the Department of Energy as the successor to the FPC in the Department of Energy Organization Act. 42 U.S.C. § 7151(b).

[29] *See City of Idaho Falls v FERC*, 629 F.3d 222, 231 (D.C. Cir. 2011) (reviewing claims that FERC failed to provide notice and comment under section 313 of the FPA). [Additional caselaw]

[30] The rehearing and judicial review provisions of section 313 apply to DOE as the successor to the Federal Power Commission. *See* 42 U.S.C. § 7192(a); *Ctr. for Biological Diversity* v. *Dep't of Energy,* No. CV 08-168AHM(MANX), 2008 WL 4602721, at *5-6 (C.D. Cal. Oct. 16, 2008); *Pa. Pub. Util. Comm'n* v. *Bodman,* No. CIV. 1:CV-07-2002, 2008 WL 3925840, at *3-5 (M.D. Pa. Aug. 21, 2008).

[31] Protocol at vi.

[32] *Protocol* at 10.

Strengthening the Reliability and Security of the United States Electric Grid, directing DOE to establish a methodology to "guide federal reliability interventions, including emergency action under Section 202(c) of the Federal Power Act." [33] DOE then goes further than the language in the Executive Order, stating in issuing the Protocol that "this methodology equips DOE and its partners with a powerful tool to identify at-risk regions and guide federal interventions to prevent power outages."[34] In fact, the Protocol includes not only a resource adequacy methodology and analysis, but also attaches and incorporates Executive Order 14262 itself.[35] This includes the operative terms of the Executive Order, including the criteria by which DOE will exercise its section 202(c) authority. Namely, DOE will use "all mechanisms available under applicable law, including section 202(c) of the Federal Power Act, to ensure any generation resource identified as critical within an at-risk region is appropriately retained as an available generation resource within the at-risk region" and will "prevent . . . an identified generation resource in excess of 50 megawatts of nameplate capacity from leaving the bulk power system or converting the source of fuel of such generation resource if such conversion would result in a net reduction in accredited generation capacity, as determined by the reserve margin methodology" that is also included in the Protocol.[36] In other words, the Protocol, including the attached and incorporated Executive Order, establishes criteria and circumstance for DOE's issuance of section 202(c) orders: the prevention of retirement of specific resources (those larger than 50MW) in specific regions (those identified as at-risk under the methodology).

[33] U.S. Dep't of Energy, *Reliability* https://www.energy.gov/topics/reliability (last accessed July 29, 2025)

[34] *Id.*

[35] *Id* at C-3.

[36] *Id.* at C-3 (incorporating section 3(c)(i),(ii) of Executive Order 14262).

In fact, DOE has already made clear its intent to use the Protocol to determine under what circumstances to issue an order directing the continued operation of a generating facility pursuant to section 202(c). On May 30, 2025, DOE issued an emergency order pursuant to section 202(c) to PJM Interconnection and Constellation Energy, which directed that Units 3 and 4 of the Eddystone Generating Station in Pennsylvania, which were slated to retire on May 31, 2025, take all measures necessary to continue to operate past that retirement date.[37] DOE's order was issued for the maximum allowable time under the statute, 90 days.[38] However, such orders are subject to renewal for additional periods of up to 90 days so long as emergency conditions and the public interest warrant.[39] The May 30 Order was issued prior to release of the Protocol and was predicated on broad statements by PJM about future resource adequacy concerns to justify the purported existence of an emergency warranting use of section 202(c) authority. However, the Order also made clear DOE's intention to use the Protocol as the basis for evaluating whether to extend operations beyond the initial 90-day period.[40] In other words, DOE's use of the Protocol as the basis for determining when to exercise section 202(c) authority, including what circumstances constitute an "emergency" under section 202(c), is far from hypothetical.

[37] DOE Order No. 202-25-4 (May 30, 2025), https://www.energy.gov/sites/default/files/2025-05/Federal%20Power%20Act%20Section%20202%28c%29%20PJM%20Interconnection.pdf.

[38] *Id.* at 3 (Ordering Paragraph G); FPA § 202(c)(4)(A), 16 U.S.C. § 824a(c)(4)(A).

[39] FPA § 202(c)(4)(B), 16 U.S.C. § 824a(c)(4)(B).

[40] DOE Order No. 202-25-4 (May 30, 2025) ("Pursuant to Executive Order 14262, Strengthening the Reliability and Security of the United States Electric Grid (EO 14262), DOE is developing a methodology to identify current and anticipated reserve margins for all regions of the bulk-power system regulated by the Federal Energy Regulatory Commission. EO 14262 requires this methodology to be published by July 7, 2025, and be used to establish a protocol to identify which generation resources within a region are critical to system reliability and prevent identified generation resources from leaving the bulkpower [sic] system. DOE plans to use this methodology to further evaluate Eddystone Units 3 and 4.")

2. The Resource Adequacy Protocol Effectively Revises DOE's 1981 Regulations for Issuing Section 202(c) Orders

The Protocol is not the first time DOE has established criteria for agency action pursuant to section 202(c), or the first time DOE has determined what kinds of circumstances constitute an "emergency" as that term is used in section 202(c). In 1981, DOE issued regulations implementing section 202(c) at 10 C.F.R. § 205.370 *et seq.*[41] Among other things, these regulations define the term "emergency," which serves as a predicate for when DOE may act pursuant to section 202(c), as well as criteria for determining when DOE action is in the public interest. Yet, the Protocol would, in effect, establish revised or contrary definitions and criteria.

> DOE's existing regulations establish a definition of "emergency" as:
> an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power. Such events may be the result of weather conditions, acts of God, or unforeseen occurrences not reasonably within the power of the affected entity' to prevent. An emergency also can result from a sudden increase in customer demand, an inability to obtain adequate amounts of the necessary fuels to generate electricity, or a regulatory action which prohibits the use of certain electric power supply facilities. Actions under this authority are envisioned as meeting a specific inadequate power supply situation.[42]

When issuing these regulations, DOE made clear that the type of emergency envisioned is not the failure of long-term planning, and such actions are not a replacement for resource adequacy planning or tools. Specifically, DOE stated that it "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

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[41] Emergency Interconnection of Electric Facilities and the Transfer of Electricity to Alleviate an Emergency Shortage of Electric Power [Section 202(c) Regulations], 46 Fed. Reg. 39,984 (Aug. 6, 1981). These regulations superseded earlier regulations, established by the Federal Power Commission, regarding its exercise of section 202(c) authority. Federal Power Commission, Order No. 141, *Adopting and Promulgating Codification and reissuance of General Rules, Including Rules of Practice and Procedure*, 12 Fed. Reg. 8461, 8467 (Dec. 19, 1947). DOE's regulations have not been revised since 1981.

[42] *See* 10 C.F.R. § 205.371.

upon these regulations for assistance during a period of unexpected inadequate supply of electricity, it must solve long-term problems itself."[43] In response to a comment raising concerns about emergencies that are of a long-term, rather than short-term nature, DOE clarified that the "'Definition of Emergency' was modified to indicate that the DOE expects a power system experiencing an extended period of inadequate power supply to take appropriate actions to resolve the problems."[44]

Yet, the Protocol establishes, by implication, a contrary definition of emergency that effectively modifies or supersedes the existing regulatory limits on DOE's discretion embedded in that definition. Namely, the Protocol is wholly concerned with the sufficiency of resource adequacy and of existing utility planning and system expansion to meet expected demand. The methodology and analysis included in the Protocol makes this clear in numerous ways, including by regularly referring to whether the status quo is producing sufficient "resource adequacy" (a term used 30 times in the Protocol, starting with the title "Resource Adequacy Report"); and by analyzing resource adequacy over an extended utility planning horizon (with a planning year of 2030[45]) rather than in an immediate operational or emergency response time horizon.[46]

The Protocol, and in particular the Executive Order that is incorporated by reference, makes clear that DOE will issue section 202(c) orders on the basis of an "emergency" primarily determined based on a region's performance in this resource adequacy analysis in 2030, rather than based on the definition adopted by the 1981 regulations. Section 3(c)(i) of the Executive Order specifies that DOE will exercise "all mechanisms available under applicable law,

[43] § 202(c) Regulations, 46 Fed. Reg. at 39985.

[44] 46 Fed. Reg. at 39985.

[45] Protocol at 15.

[46] Protocol at 1 (providing all "Key Takeaways" based on the sufficiency of resources in 2030).

including section 202(c) of the Federal Power Act" in order to retain generation resources in regions identified by the analysis as "at-risk" based on lack of available generating capacity in the long-run.[47] Section 3(c)(ii) of the Executive Order also specifies that DOE's issuance of section 202(c) orders will be for the purpose of preventing generation from retiring "if such conversion would result in a net reduction in accredited generating capacity, as determined by the reserve margin methodology" in the Protocol.[48] In other words, the Protocol establishes a set of criteria for section 202(c) that go well beyond the need to address energy shortages caused by imminent, unexpected events and extends to action intended to supplant utility resource planning over the long term for specific resources.

Putting aside whether such "emergencies" fall within the statutory scope of section 202(c) (which they do not), it is incontrovertible that, to the extent the Protocol is used as the basis for an "emergency" declaration under section 202(c)—as is DOE's clear intent and purpose, as described above—such "emergency" is wholly inconsistent with how that term is defined in 10 CFR § 205.371 and what DOE intended when promulgating its 1981 regulations. In other words, in the Protocol, DOE has amended its previous regulatory definition—which sets binding criteria on the use of its section 202(c) authority—*sub silentio.*

[47] Protocol at C-4.

[48] *Id.*

B. DOE Failed to comply with the APA's notice and comment procedural obligations in issuing the Resource Adequacy Protocol

For the reasons described above, DOE's July 7 Protocol is a rule pursuant to section 551 of the Administrative Procedure Act. And yet, DOE issued the Protocol without any prior notice or opportunity for public comment. This violated the procedural requirements of the APA.[49] By, in effect, establishing a definition of "emergency" and criteria for the use of section 202(c), DOE has constrained its discretion and issued a regulation for which notice and comment is required.

Moreover, the 1981 regulations were codified in the Code of Federal Regulations[50] and established through notice and comment rulemaking.[51] As a result, DOE was obligated to use the same procedures it used to establish its regulations when revising them (discussed further *infra)*. Given that, in its 1981 regulations, DOE previously rejected the very interpretation of "emergency" and the expansive criteria for use of section 202(c) that it now tries to establish in the Protocol, allowing DOE to proceed in adopting such interpretation and criteria now *without* notice and comment, "would allow [DOE] to detach [its 1981 Regulation] from the public rulemaking that produced it, undermining the values of public participation, fairness, and informed agency decision-making that the notice-and-comment process is designed to foster."[52]

Moreover, DOE would have benefited from public input on the methodology and assumptions used in the Protocol. For all the reasons outlined below, the Protocol includes faulty

[49] 5 U.S.C. § 553.

[50] *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)

("If the answer to any of these questions is affirmative, we have a legislative . .. rule": " (2) whether the agency has published the rule in the Code of Federal Regulations").

[51] *See* 46 Fed. Reg. at 39984-86 (describing comments received in response to proposed rule).

[52] City of Idaho Falls, Idaho v. FERC, 629 F.3d 222, 229 (D.C. Cir. 2011).

assumptions and methodological choices.[53] With additional public input, such as a notice and comment process, DOE could have revised the Protocol to avoid such issues. The Protocol itself readily admits that its analysis "could benefit greatly from the in-depth engineering assessments which occur at the regional and utility level" and that "entities responsible for the maintenance and operation of the grid have access to a range of data and insights that could further enhance the robustness of reliability decisions, including resource adequacy, operational reliability, and resilience."[54] And DOE had ample opportunity to do so. The Protocol primarily evaluates risks to resource adequacy in 2030, yet DOE developed the Protocol without public input.[55] Public comment now is particularly critical because DOE is operating under a directive from EO 14626 to issue section 202(c) orders relying on the methodology and analysis in the Protocol, and can (and likely will) do so without prior notice or opportunity for comment.[56]

C. The Resource Adequacy Protocol Ignores the Limits on DOE's Authority Under Section 202(c)

As explained above, when the Protocol describes its purpose as guiding "reliability interventions," the only reasonable conclusion is that DOE intends for it to guide the exercise of DOE's discretion under section 202(c).

Section 202(c) empowers DOE to act only in cases of war or other emergencies. But the Resource Adequacy Protocol provides no evidence that an emergency exists anywhere on the grid today. To the contrary, it affirmatively finds relative reliability across regions in its "current system" case. To the extent it purports to identify capacity shortfalls, the Protocol does so for the

[53] *See* Section IV.F, *infra.*

[54] Protocol at Acknowledgments.

[55] *Id.* at 1.

[56] FPA § 202(c), 16 U.S.C. § 824a(c)(1) ("the Commission shall have authority, either *upon its own motion* or upon complaint, *with or without notice*, hearing, or report, to require by order") (emphasis added).

year 2030, a timeline that falls far outside any reasonable definition of an emergency (and, as explained below, only through a string of illogical and unsupported assumptions).

The only way to reconcile the Protocol's focus on resource adequacy in 2030 with its evident purpose of guiding the Department's present-day interventions under section 202(c) in 2025 is to infer that the Department believes that it may use its emergency authority under section 202(c) for the purpose of achieving long-term resource adequacy objectives. But section 202(c) gives the Department no such authority. Regulatory authority over resource adequacy lies with the states and, where states have chosen to authorize or direct utilities to join Regional Transmission Organizations or Independent System Operators (RTO/ISOs), with FERC under sections 205 and 206 of the Federal Power Act.

D. The Resource Adequacy Protocol Does Not Establish that an Emergency Exists within the Meaning of Section 202(c) of the Federal Power Act

1. Under the plain language of the FPA, existing DOE regulations, judicial construction, and legislative history, an "emergency" is something that is sudden, unexpected, and demanding of immediate attention.

Section 202(c) authorizes the Department to act only "[d]uring the continuance of any war in which the United States is engaged, or whenever the Commission 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." While the Act allows flexibility in what types of events may cause the emergency by including "other causes" beyond those listed, it nonetheless requires that any such event—including a "shortage of electric energy"—must constitute a genuine "emergency."

The Act does not define "emergency." Webster's New International Dictionary of the English Language (1930), published not long before enactment, defined "emergency" as a

"sudden or unexpected appearance or occurrence . . . . An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency." This definition accords with current dictionaries, which continue to define "emergency" to refer to a circumstance that is "unexpectedly arising, and urgently demanding immediate attention."[57]

The legislative history of the Federal Power Act, which characterized section 202(c) as an authority to be used in response to "crises," reinforces the plain text reading of the word "emergency":

> 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.[58]

Judicial interpretations of "emergency" in section 202(c) have also concluded that the term is of limited reach and that it should not be stretched so far as to create a pretext for addressing long-term issues affecting the electric power sector. The D.C. Circuit, in *Richmond Power and Light v. FERC*, upheld the Commission's determination that the dependence on foreign oil caused by the 1973 oil embargo was not an "emergency" under the Act. The court emphasized that section 202(c) "speaks of 'temporary' emergencies, epitomized by wartime disturbances."[59]

Likewise, the U.S. Court of Appeals for the Eighth Circuit, in *Otter Tail Power Co. v. Fed. Power Comm'n,* characterized section 202(c) as empowering the Federal Power

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[57] *See Acuity Ins. Co. v. McDonald's Towing & Rescue, Inc.*, 747 F. App'x 377, 380–81 (6th Cir. 2018) (addressing a statute that leaves "emergency" undefined and quoting 7 Oxford English Dictionary 231 (2012) among others to supply a definition).

[58] S. Rep. No. 74-621 at 49 (1935).

[59] 574 F.2d 610, 615 (D.C. Cir. 1978).

Commission to "react to a war or natural disaster." Significantly, the Eighth Circuit contrasted section 202(c) with section 202(b). Section 202(b) also empowers the Commission to order interconnections, but only after a hearing – a fact the court emphasized. In contrast to section 202(c), which "enables the Commission to proceed without notice or hearing" to address immediate crises, the court explained that section 202(b) "applies to a crisis which is likely to develop in the foreseeable future but which does not necessitate immediate action on the part of the Commission."[60]

As explained above, the Department itself has also defined "emergency" to mean only circumstances that arise suddenly and unexpectedly, and affirmatively not a longer-run circumstance that would be appropriately addressed through prudent utility planning.

The Department's past practice implementing section 202(c) also supports an understanding that an emergency is a sudden and unexpected circumstance demanding immediate attention. Overwhelmingly, the Department has used section 202(c) in response to natural disasters and extreme weather events, typically for short periods of time.[61] Prior to the directive in EO 14262, the Department had used section 202(c) to delay the retirement of generators on only three occasions.[62] In each instance, the order came at the request of a system

[60] 429 F.2d 232, 234 (8th Cir. 1970).

[61] *See e.g*, DOE Order No. 202-24-1 (Oct. 9, 2024) (Hurricane Milton); DOE Order No. 202-22-4 (Dec. 24, 2022)(extreme cold); DOE Order No. 202-22-3 (Dec. 23, 2022)(extreme cold); DOE Order No. 202-21-2 (responding to extreme heat, wildfires and drought in California); DOE Order No. 202-21-1 (Feb. 14, 2021)(extreme cold); DOE Order No. 202-20-2 (Sept. 6, 2020) (responding to extreme heat in California); DOE Order No. 202-20-1 (Aug. 27, 2020) (Hurricane Laura); DOE Order No. 202-08-1 (Sept. 14, 2008) (Hurricane Ike); DOE Order Nos. 202-05-1 & -2 (Sept. 28, 2005) (Hurricane Rita).

[62] DOE Order No. 202-17-2 (Yorktown)(June 16, 2017); DOE Order No. 202-17-1(April 14, 2017) (Grand River Dam Authority); DOE Order No. 202-05-3 (Dec. 20, 2005)(Mirant).

operator or governmental body because continued operation of the plant was needed to prevent a concrete and particularized emergency threatening an imminent loss of load.[63]

2. The Resource Adequacy Protocol affirmatively concludes that there is no emergency under current system conditions

The Protocol demonstrates clearly that there is no current emergency in any region of the United States that would justify the exercise of DOE's authority under section 202(c) of the Federal Power Act. The Protocol includes a "current system" case for which it reports results expressed in loss of load hours (LOLH) and normalized unserved energy (NUSE). At the national level, the Protocol finds that the current system has a NUSE of 0.0005%, or roughly 75% below the identified threshold of 0.002%.[64] The Protocol also finds that the current system has a LOLH of 8.1 over 12 weather years, which, averaged per year, falls well below the stated annual threshold of 2.4 LOLH.

Using the current system model, the Protocol also does not find emergencies in the individual regions. The Protocol states:

> Analysis of the current system shows all regions except ERCOT have less than 2.4 hours of average loss of load per year and less than 0.002% NUSE. This indicates relative reliability for most regions based on the average indicators of risk used in this study. In the current system case, ERCOT would be expected to experience on average 3.8 LOLH annually going forward and a NUSE of 0.0032%.[65]

The individual regional assessments confirm this finding.[66] Even for the ERCOT region, the current system model only slightly exceeds the identified thresholds for LOLH and NUSE.

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[63] *Id*.

[64] Protocol at 7.

[65] *Id*.

[66] *Id*. at 20 (MISO: "In the current system model . . . MISO did not experience shortfall events."); *id*. at 23 (ISO-NE: "In the current system model . . . ISO-NE did not experience shortfall events."); *id*. at 25 (NYISO: "In both the current system model and the No Plant Closures case, NYISO maintained reliability and did not exceed any shortfall

Moreover, the Protocol's findings for ERCOT are predicated primarily on a single weather event, Winter Storm Uri, that was assumed by the Protocol to have an equal probability of occurring as any of the 12-weather years evaluated. In reality, this winter storm was anomalous, and the second coldest event in the last forty years.[67] The ERCOT assessment describes these findings as indicators of "stress" on the ERCOT system,[68] a characterization that falls well short of what would be required to substantiate an emergency finding.

3. The Report's projections regarding capacity shortfalls in 2030 do not present an "emergency" as that term is used in section 202(c)

The Protocol focuses on projected outcomes for the year 2030. As explained in detail below, many of these projected outcomes are the product of unrealistic assumptions. But even if these projections for 2030 were based on reasonable assumptions, they do not describe a current emergency for purposes of section 202(c) of the Federal Power Act. Rather, these projections describe a potential challenge that states, utilities, and grid operators have clear authority, ample tools, and adequate time to address.

Capacity shortfalls that a simple model projects will arise five years in advance are by definition neither "sudden" nor "unexpected." These are issues that can and should be addressed

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thresholds"); *id* at 27 (PJM: "In the current system model, PJM experienced shortfalls, but they were below the required threshold"); *id*. at 30 (SERC: reporting LOLH of 0.3 in current system and NUSE of 0.0001 and stating "In the current system model . . . SERC maintained overall adequacy, though some subregions— particularly SERC-East—faced emerging winter reliability risks."); *id*. at 32 (SPP: stating "In the current system model, SPP experienced shortfalls, but they were below the required threshold" and reporting LOLH of 1.7 and NUSE of 0.0002%); *id*. at 35 (CAISO+: "In the current system and No Plant Closures cases, CAISO+ did not experience major reliability issues, though adequacy was often maintained through significant imports during tight conditions"); *id*. at 37 (West Non-CAISO: "In both the current system and No Plant Closures cases, the West Non-CAISO region maintained adequacy on average").

[67] North American Electric Reliability Corporation, *TPL-008-1 Benchmark Temperature Events,* April 2025, https://www.nerc.com/pa/Stand/Project202307ModtoTPL00151TransSystPlanPerfReqExWe/TPL-008-1_Events.pdf.

[68] *Id*. at 40.

by existing resource adequacy mechanisms—the very circumstance DOE has previously and correctly stated does not constitute an "emergency" under section 202(c)—not by the exercise of extraordinary, emergency powers.

Indeed, where there are legitimate concerns over resource adequacy in 2030, that timeline is well within the planning horizon through which states, utilities, and RTO/ISOs can act. Five years is sufficient time to deploy the full suite of tools for addressing resource adequacy, including the construction of new generation and storage resources transmission upgrades, efficiency measures, and demand response and load flexibility measures. In vertically integrated utility service territories integrated resource plans have already identified capacity needs and utilities are seeking commission approval for new resources to meet growing demand and to replace retirements. In regions with wholesale capacity markets, prices have already increased, providing a financial signal in the market to incent new capacity.

Capacity shortfalls that are expected to occur in 2030 also could not form the basis of an order under section 202(c) that is limited to 90 days.[69] The rationale supporting an order under section 202(c) must relate to the period over which the order applies. While the Department may extend 202(c) orders for successive 90-day periods, each such order must comply with the statute. To preserve a generating unit from August 2025 through to the beginning of 2030 would require 18 successive 90-day orders. The Department may not seek to string together successive 90-day orders for the purpose of avoiding a capacity shortfall that will not manifest for years to come.

[69] Any order under section 202(c) that "may result in a conflict with a requirement of any Federal, State, or local environmental law . . . shall expire not later than 90 days after it is issued." 16 U.S.C. § 824a(c)(4)(A). Of course, any order that would prevent the retirement of a fossil generation unit over an extended period of time would trigger this time limitation – and indeed DOE has never issued an order delaying the retirement of a power plant that lasted more than 90 days. *See* DOE Order No. 202-17-2 (and extension orders) (June 16, 2017); DOE Order No. 202-17-1(April 14, 2017) (and extension orders); DOE Order No. 202-05-3 (Dec. 20, 2005) (and extension orders).

E. Section 202(c) of the FPA does not give DOE authority to Regulate Resource Adequacy

1. Resource adequacy is regulated by the states and by FERC

Section 201 of the FPA[70] reserves authority over generation facilities to the states. That section provides: "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

Many states have retained this authority and remain the principal regulators of resource adequacy within their territory.[71] These states typically empower public utility commissions to ensure that jurisdictional utilities have adequately planned to meet future loads. Many states have either permitted or directed their utilities to participate in RTO/ISOs that impose resource adequacy requirements through their tariffs. Generally, those RTO/ISOs establish markets that allow utilities, independent power producers, and others to buy and sell capacity, and thereby to facilitate market entry and exit decisions based on price signals. Resource adequacy requirements in RTO/ISO tariffs have been held to be practices affecting wholesale rates subject to the jurisdiction of FERC under sections 205 and 206 of the Federal Power Act.[72]

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[70] 16 U.S.C. § 824(b)(1).

[71] *See Devon Power LLC et al.,* 109 FERC ¶ 61,154, P 47 (2004) ("Resource adequacy is a matter that has traditionally rested with the states, and it should continue to rest there. States have traditionally designated the entities that are responsible for procuring adequate capacity to serve loads within their respective jurisdictions.").

[72] *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009).

Whether at the state level or through FERC, existing means of regulating resource adequacy share two essential features. First, given the broad range of stakeholder interests, changes to resource adequacy policy are made with notice and opportunity for public comment. This is true for changes to RTO/ISO tariffs made pursuant to sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d & 824e, and for state-level integrated resource plan proceedings. Second, resource adequacy policies pay careful attention to cost – both in determining how much of a reserve margin to procure, and in ensuring that resource adequacy is maintained at a just and reasonable cost to ratepayers.[73]

2. Section 202(c) does not empower DOE to regulate resource adequacy

Nothing in section 202(c) gives DOE the vast regulatory authority over resource adequacy that it appears to claim in the Protocol. Section 202(c) says only that DOE may "require by order . . . such generation . . . of electric energy as in its judgment will best meet the emergency and serve the public interest." Had Congress intended to empower DOE to decide which power plants may retire everywhere across the country it would have stated so clearly, and would not have attached the word "emergency" to a responsibility that inherently involves long-term system planning. Moreover, had Congress intended to give DOE the authority to regulate power plant retirements nationwide—a power with significant consequences for rates, state authority, and numerous stakeholder interests—it would be illogical for Congress to have done so through perhaps the only Federal Power Act provision that allows regulatory action *without* first evaluating impacts on ratepayers or providing an opportunity for public comment and participation of affected entities, and one of the few provisions that applies to utilities normally

[73] *See generally*, National Association of Regulatory Utility Commissioners, *Resource Adequacy for State Utility Regulators: Current Practices and Emerging Reforms* (2023), https://pubs.naruc.org/pub/0CC6285D-A813-1819-5337-BC750CD704E3.

outside federal jurisdiction, such as public power entities and those in ERCOT. Moreover, even if Section 202(c) were ambiguous as to whether DOE has general authority to regulate power plant retirements (which it is not), the United States Supreme Court has soundly rejected statutory interpretations through which an agency "claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority."[74] That is precisely the type of expansive and lawless interpretation of Section 202(c) that the Department appears to rely upon here.

F. The Resource Adequacy Protocol Contains Numerous Errors, Rendering the Protocol Itself and Any Subsequent Agency Action Based Upon it Arbitrary and Capricious

1. The Protocol's assumptions of new generation and the resulting resource adequacy are implausibly low and internally inconsistent

The findings of the Protocol's resource adequacy analysis are driven in large part by the assumption that very little new generation will come online in the next five years to meet the significant increase in demand that DOE also predicts. The Protocol uses an extremely low, static input for the amount of generation additions in its modeling, assuming that only "projects that are very mature in the pipeline (such as those with a signed interconnection agreement) will be built."[75] DOE recognizes that "this results in minimal capacity additions beyond 2026."[76] That outcome is inconsistent with historical trends and not supported by available data; the assertion that the industry's response to rapidly growing demand will be to slow down, rather than accelerate, completion of resources in development defies logic and ignores ample evidence to

[74] *W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 724–25, (2022) (quoting *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014))(internal quotations omitted).

[75] Protocol at 12.

[76] *Id*. at A-5

the contrary. DOE's failure to include any scenario that assumes additional resources may come online by 2030 renders the Protocol's findings incomplete and unrealistic, and should disqualify the Protocol as a tool to direct actions, such as issuance of 202(c) orders.

i. The Protocol's reliance on Tier 1 resources, and exclusion of all other queued resources, is unrealistic

The Protocol's misleading view of the future generation additions results from its inclusion of only "Tier 1"[77] projects, and exclusion of all other projects, including "Tier 2"[78] projects already progressing through interconnection queues. Using only Tier 1 provides a snapshot of current, imminent additions, but fails to capture the broader pipeline of viable capacity resources progressing through interconnection queues. Tier 2 projects, which can demonstrate clear commercial progression through the interconnection process, represent a crucial part of the future generation mix and should be considered in any resource adequacy analysis, even if only a portion of these resources are assumed to come online in the study period. DOE's use of a single resource addition scenario means that there is no yardstick against which to measure the impact of relatively higher/faster or lower/shorter completion rates on resource adequacy outcomes. Such scenario-based analysis would provide helpful information to inform regulators and grid operators about the role that new resource additions can play in meeting load growth needs. By contrast, NERC's 2024 Interregional Transfer Capability Study, which DOE expressly acknowledges it utilized in developing the Protocol, includes "Tier 1-

[77] NERC in its 2024 Long Term Reliability Assessment defines a Tier 1 capacity resource as being under construction, having a signed interconnection service agreement, signed purchase power agreement, or included in an integrated resource plan of a vertically integrated entity. *See* NERC 2024 Long-Term Reliability Assessment at 137 (Dec. 2024, updated Jul. 15, 2025) https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_Long%20Term%20Reliability%20Assessment_2024.pdf ("2024 LTRA").

[78] NERC in its 2024 Long Term Reliability Assessment defines a Tier 2 capacity resource as having signed or approved a completed feasibility study, system impact study, or facilities study; requested an interconnection service agreement or included in an integrated resource plan in an RTO/ISO environment. *See id.*

Only" as a single resource mix sensitivity to explore the impact of having "significantly fewer resources" to serve load. Even in that scenario, NERC included a portion of additional Tier 2 resources to replace retiring capacity.[79] DOE took this single sensitivity, made it even more extreme by removing all Tier 2 resources, and then used it as the *only* resource addition scenario across all the cases studied.

Even within the highly certain Tier 1 category, DOE appears to have ignored high-profile announcements of resource additions such as the Palisades Nuclear Facility and Three Mile Island, two mothballed nuclear generating units that are in the process of being brought back online on an expedited basis. Palisades is currently targeting commercial operation as soon as the end of 2025, while Three Mile Island's projected commercial operation date is 2027—both well ahead of the 2030 study timeframe.[80] Palisades and Three Mile Island would each add an additional 800 MW in MISO and PJM, respectively, yet DOE's results show 0 MW of new nuclear capacity in both MISO and PJM in 2030.[81]

As a result of these conservative assumptions and omissions, although the Protocol assessment purportedly extends its analysis to 2030, DOE only includes 209 GW of new generation, with very few new interconnecting resources beyond 2026.[82] DOE states that 20 GW of this will come from natural gas, 31 GW from 4-hour batteries, 124 GW from solar, and 32

[79] North American Electric Reliability Corp., *Interregional Transfer Capability Study Final Report* (2024) at 106, https://www.nerc.com/pa/RAPA/Documents/ITCS_Final_Report.pdf ("ITCS" or "NERC ITCS").

[80] Canary Media, Eric Wesoff, "A retired nuclear plant in Michigan is about to restart, a first for US" (July 29, 2025), available at https://www.canarymedia.com/articles/nuclear/holtec-palisades-restart-federal-approval; Reuters, Laila Kearney, "Three Mile Island nuclear plant reboot fast-tracked to 2027 (June 26, 2025), available at https://www.reuters.com/sustainability/climate-energy/shut-three-mile-island-nuclear-plant-may-restart-2027-owner-says-2025-06-25/.

[81] Protocol at 22, 29.

[82] Protocol at 5.

GW from wind.[83] In contrast, DOE's own Energy Information Administration (EIA), in its most recent publication of data from its Form 860, shows 262 GW of currently planned generation, of which almost 40 GW is natural gas-fired resources and 66 GW is battery storage.[84] EIA only includes projects that are under or have completed construction but have not started commercial operation, meaning that the numbers reported by EIA are, like DOE's Tier 1 data, almost certainly a significant underestimate of all resources that will be brought online by 2030.

To meet rising demand, it is much more likely that greater amounts of generation will be developed by 2030 than are currently under construction as of August 2025. Across the country, there are nearly 2,000 GW of projects currently in interconnection queues.[85] Based on historical trends, it is very safe to assume that at least some percentage of these projects will come online by 2030; potentially a sizeable percentage, accounting for significant accredited capacity additions. Given that it takes on average roughly 55 months (four and half years) for a project to progress from the initial interconnection request to commercial operation,[86] even resources that have recently begun the interconnection process can be reasonably expected to be fully operational by 2030. Moreover, Tier 2 includes projects that are already far along in the interconnection process, including projects having requested an interconnection agreement. Tier 2 projects are reaching commercial milestones, such as feasibility and system impact studies. In addition, they have made financial obligations in the form of study deposits, milestone payments, and demonstrating site control.

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[83] *Id.*

[84] Analysis of data from U.S. Energy Information Administration, *Table 6.5. Planned U.S. Electric Generating Unit Additions* (July 24, 2025), https://www.eia.gov/electricity/monthly/xls/table_6_06.xlsx.

[85] See *Total capacity active in queue by generation type, over time*, Interconnection.fyi, last accessed Aug. 6, 2025

[86] Rand, Joseph, et al, Lawrence Berkely National Lab "Queued Up: 2024 Edition, Characteristics of Power Plants Seeking Transmission Interconnection as the End of 2023," at 41 (2024), https://eta-publications.lbl.gov/sites/default/files/queued_up_2024_edition_r2.pdf.

The assumption that *no* Tier 2 projects will come online by 2030 is not only inconsistent with historical trends, but also ignores important developments that should give increased confidence going forward that a *greater* portion of Tier 2 projects will come online in a timely manner relative to historical completion rates. First, as discussed further below, the other assumptions in the Protocol indicate a very tight resource adequacy environment in which there will be enormous commercial and regulatory interest in ensuring efficient entry of new resources. A *slowing* of new entry relative to recent trends is internally inconsistent with the future the Protocol projects. As detailed *infra,* the Protocol fails to account for state resource planning and market signals that will lead to the development of more generation resources. In states with Integrated Resource Plans, utilities must match supply and demand – so if load grows and existing resources retire, as DOE expects, state regulators would necessarily have to require further resource additions – even if those additions are not Tier 1 as of the Protocol's publication. And in regions with capacity and energy markets, these markets send price signals based upon scarcity. As demand increases, basic economic theory and market experience dictates that capacity and energy prices would rise, providing a strong incentive for new resources to enter. DOE could, perhaps, have developed data-driven conclusions regarding the extent to which state regulation and market signals would yield new generation. But instead, it ignored these mechanisms entirely when it chose to exclude any resource additions beyond Tier 1.

Second, in many regions of the country that have been experiencing backlogged interconnection queues, grid operators have already made reforms to the generator interconnection process that will apply to projects currently in the Tier 2 category. For example, in both MISO and PJM, milestone obligations have already been increased significantly in an effort to reduce the number of projects in interconnection queues, which should provide more

certainty that a greater share of these projects will ultimately reach commercial operation than in the past, under old interconnection rules that had less onerous requirements for projects seeking to enter and proceed through interconnection queues. For example, in MISO all projects in the 2023 and 2025 Definitive Planning Phase ("DPP") clusters are subject to higher milestone payments, site control requirements, and withdrawal penalties than projects in the MISO region had previously been required to meet.[87] RTOs and utilities are likewise working to speed up the interconnection process. For example, reforms approved for PJM in 2022 are close to being fully implemented, and PJM reports that when it opens its first queue cycle under its improved interconnection process in spring of 2026, developers will have "the certainty of a one- to two-year turnaround," meaning that projects not yet even in the interconnection queue in PJM could reach an interconnection agreement by mid-2027 or 2028.[88]

Third, the Protocol ignores additional measures that states, utilities, and grid operators have taken, or may plausibly take, to further accelerate deployment of new resources to meet growing demand. For example, PJM is implementing reforms to its Surplus Interconnection Service ("SIS"), approved by FERC in February 2025, that will facilitate a fast-track process to add new resources at the site of existing resources. In particular, PJM's reforms to SIS will allow new battery storage resources to be added to existing wind and solar generation, enabling new dispatchable capacity resources to participate when needed most to support resource adequacy. The Protocol likewise ignored PJM's Reliability Resource Initiative ("RRI"), which FERC

[87] *See generally Midcontinent Independent System Operator, Inc.,* 186 FERC ¶ 61,054 at P1 (2024)("In this order, we accept MISO's proposed Tariff revisions in Docket No. ER24-340-000 to increase milestone payments, adopt an automatic withdrawal penalty, revise certain withdrawal penalty provisions, and expand site control requirements for interconnection facilities…").

[88] PJM Inside Lines, "PJM Generation Interconnection Reforms Continue to Produce Results" (June 4, 2025), available at https://insidelines.pjm.com/pjm-generation-interconnection-reforms-continue-to-produce-results/.

approved in February 2025.[89] PJM announced the projects selected in the RRI on May 2, well before finalization of the Protocol. PJM's announcement identifies that the RRI will expedite the interconnection of over 9,300 MW of uprates and new generation, with 90% of this additional capacity expected to come online by 2030 and the remainder coming online by 2031.[90] In addition, the RTO/ISOs are continuing to streamline their interconnection processes, including through the use of AI and other automation tools.[91] These developments demonstrate that new generation, beyond that considered in the Protocol, will be built before 2030 – simply because these improved processes and fast-tracked resources are not applicable to Tier 1.

ii. The Protocol's exclusion of resources beyond Tier 1 ignores the capacity potential of solar, wind, and storage projects currently in interconnection queues

Grid operators across the country are relying on capacity contributions from wind, solar, and storage resources, both operational and planned. In contrast, the Protocol appears to discount the resource adequacy value of new generation that is less mature and that is not classified as "firm baseload generation sources."[92] While the Protocol itself never defines the terms "firm" or "dispatchable," it implicitly excludes storage and hybrid resources from this definition, along with wind and solar, because it asserts that "only 22 GW would come from firm baseload

[89] *See generally PJM Interconnection, L.L.C*, 190 FERC ¶ 61,084 (Feb. 2025)

[90] *PJM Chooses 51 Generation Resource Projects To Address Near-Term Electricity Demand Growth (May 2, 2025),* https://insidelines.pjm.com/pjm-chooses-51-generation-resource-projects-to-address-near-term-electricity-demand-growth/

[91] See *PJM Generation Interconnection Reforms Continue to Produce Results* (June 4, 2025), https://insidelines.pjm.com/pjm-generation-interconnection-reforms-continue-to-produce-results/; SPP Partners with Hitachi to Develop Advanced AI Solution (June 5, 2025), https://spp.org/news-list/spp-partners-with-hitachi-to-develop-advanced-ai-solution/; *MISO's Benchmarking of Pearl Street SUGAR* at 3 (April 15, 2025) (Finding "massive engineering time savings" and "increased productivity), https://cdn.misoenergy.org/20250422%20IPWG%20Item%2003c%20MISOs%20Benchmarking%20of%20Pearl%20Street%20SUGAR691554.pdf

[92] Protocol at 1.

generation sources" despite including 31 GW of batteries.[93] Although all different resource types face risks, and can also provide positive contributions to resource adequacy that must be taken into account in any system-wide assessment, DOE mischaracterizes its analysis as finding that "the accelerated retirement of existing generation capacity and the insufficient pace of firm, dispatchable generation additions (partly due to a recent focus on intermittent rather than dispatchable sources of energy) undermine this energy outlook."[94]

However, grid operators routinely conduct such analyses of the reliability contributions of different resources, and uniformly report that while renewable resources and 4- or 6-hour battery storage generally provide a lower resource adequacy value *relative to their nameplate capacity,* these resources are nonetheless contributing to meeting resource adequacy needs. Given the volume of such resources in interconnection queues across the country, they offer significant resource adequacy value in the 2030 timeframe that should not be ignored, and are often the fastest and cheapest option to meet resource adequacy and energy needs. When accounting for the accredited value of these resources, it is clear that interconnection queues are rich in resource adequacy potential. Looking at just two regions, PJM and MISO, there is roughly 140 GW of *accredited* capacity value available from battery storage, solar, wind, and hybrid resources alone.[95] As discussed *infra*, the determination of which resource is "best" to

[93] Protocol at 1, 5.

[94] Protocol at 1.

[95] Based on queue data available at interconnection.fyi ("Current active in queue capacity by power market and generation type," accessed Aug. 4, 2025, available at interconnection.fyi) and accreditation values from MISO (indicative DLOL values for Planning Year 2025-2026, available at https://cdn.misoenergy.org/Indicative%20DLOL%20Results%20PY%202025-2026667100.pdf?utm_source=chatgpt.com), and PJM (ELCC Class Ratings for the 2026/2027 Base Residual Auction, available at https://www.pjm.com/-/media/DotCom/planning/res-adeq/elcc/2026-27-bra-elcc-class-ratings.pdf). Some simplifying assumptions were made, namely: (1) equal weighting of seasons (for MISO), (2) hybrids are comprised of 75% solar-battery and 25% wind-battery projects, and (3) hybrid resources are assigned the same accredited value as the non-battery resource (a conservative estimate), and (4) where multiple values were available (i.e., fixed tilt vs. tracking solar), the analysis picked the lower accredited value.

meet a need is a question for state regulators and market forces, but ignoring the resource adequacy potential of these currently queued projects would be leaving valuable chips on the table in a time of projected scarcity.

The Protocol also ignores the essential contribution of wind and solar to the reliability of the grid. Inverter Based Resources (IBRs), such as wind, solar, and storage use power electronics to interface with the grid which enables them to be more flexible. NERC includes among the features of IBRs their ability to provide "very fast and flexible ramping" and "very fast frequency control."[96] Synchronous resources, which include coal and natural gas-fired generation, are characterized by both slower ramping and responses to frequency changes.[97] In a recent paper, R Street pointed out that distinguishing generation as "dispatchable" or "non-dispatchable" on the basis of fuel type "is inaccurate and dismisses key reliability initiatives designed to make all fuel classes dispatchable, even weather-dependent renewables."[98] In recognition of the capabilities of wind and solar resources, both MISO and SPP specifically recognize in their tariffs categories of "Dispatchable Intermittent Resources"[99] and "Dispatchable Variable Energy Resources"[100] respectively, and the NYISO has published technical guidelines for the bidding and dispatch of wind and solar resources.[101]

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[96] North American Electric Reliability Corporation, An Introduction To Inverter-Based Resources on the Bulk Power System (June 2023) at 4, https://www.nerc.com/pa/Documents/2023_NERC_Guide_Inverter-Based-Resources.pdf

[97] *Id*.

[98] Devin Hartman, Kent Chandler, Beth Garza, R Street Institute, Twelve Policy Priorities to Secure Bulk Electric Reliability (May 2025), https://www.rstreet.org/wp-content/uploads/2025/05/FINAL-r-street-policy-study-no-322.pdf

[99] MISO FERC Electric Tariff, Module A (Last updated on July 28, 2025), https://docs.misoenergy.org/miso12-legalcontent/Module_A_-_Common_Tariff_Provisions.pdf

[100] SPP Glossary, https://www.spp.org/glossary/?term=Dispatchable%20Variable%20Energy%20Resource

[101] NYISO, Subject: Wind and Solar Resource Bidding, Scheduling, Dispatch, and Settlement, Technical Bulletin, (Recertified May 20, 2025), https://www.nyiso.com/documents/20142/2931465/tb_154.pdf/9b1fb750-a698-c596-de0a-38071af33ad0

iii. DOE further exacerbates its errors in accounting for new resources by using overstated resource adequacy targets

While ignoring new resource development and the reliability value of clean energy undermine the validity of the Protocol, DOE explains that it "adds hypothetical perfect capacity (which is idealized capacity that has no outages or profile) until a Normalized Unserved Energy (NUSE) target of 0.002% is realized in each region."[102]

While the use of "perfect capacity" is a reasonable method to establish a baseline against which appropriately accredited capacity could be measured, in this analysis DOE brings on more hypothetical capacity than needed for its chosen resource adequacy target, resulting in an inaccurate measurement of future reliability needs. Specifically, DOE's analysis achieves .0003% a NUSE of in PJM; a 0.0002% in SERC and SPP, and 0.0008% in ERCOT.[103] As an analysis by the Institute for Policy Integrity points out, "these overestimated capacity levels could result in overpaying to achieve a different resource adequacy target than selected."[104]

DOE's inaccurate assessment of the future resource mix and the resulting resource adequacy presents an incomplete and overly conservative assessment of future reliability needs. As a result, an emergency declaration under this incomplete analysis would not be grounded in complete and factual evidence.

[102] Protocol Table 8 at 27; Table 10 at 30; Table 12 at 32; Table 18 at 40.

[103] See Jennifer Danis; Christoph Graf, Ph.D.; Matthew Lifson, Institute for Policy Integrity, New York University School of Law, *Enough Energy – A Review of DOE's Resource Adequacy Methodology* at 27 (July 2025).

[104] *Id*. at 28

2. DOE overstates resource retirements, beyond those projected in the most recent Energy Information Administration data

DOE explains the analysis was conducted for three scenarios: "Plant Closures," "No Plant Closures" and "Required Build."[105] But as discussed in the prior section, DOE did not conduct this study in accordance with the common practice for scenario analyses where different scenarios are used to demonstrate a range of outcomes. Instead, DOE uses only a single scenario – Plant Closures – to reach the conclusion of the Protocol. For example, DOE states that: "Absent decisive intervention, the Nation's power grid will be unable to meet projected demand for manufacturing, re-industrialization, and data centers driving artificial intelligence (AI) innovation."[106] This finding is based only on the Plant Closures scenario, which as detailed below, itself represents the long tail of potential retirements. By using only a single exaggerated data point for the Plant Closures scenario, and then using that as the only scenario on which to base the conclusions, DOE is departing from reasonable practices for resource adequacy assessments.[107]

Even more problematic than the departure from standard scenario analysis is that the Plant Closures scenario does not accurately reflect data from the North American Electric Reliability Corporation (NERC) and the Energy Information Administration (EIA). Specifically, DOE states that the analysis "assumes 104 GW of announced retirements based on NERC

[105] Protocol at 4.

[106] *Id.* at 1.

[107] See for example, NERC ITCS at 21 where among the "Study Lessons" NERC states: "Adding scenarios and probabilistic energy analysis can provide more robust results, introducing different sets of resource and demand assumptions. *Assessing the results of various scenarios* can provide a range of options and highlight areas of greatest need." (emphasis added).

estimates including approximately 71 GW of coal and 25 GW of natural gas, which closely align with retirement numbers in EIA's 2025 Annual Energy Outlook."[108]

However, NERC reports in the 2024 Long Term Reliability Assessment (LTRA) that "over 79 GW of fossil-fired and nuclear generating capacity is being retired over this assessment period."[109] Not only is this less than the 96 GW of fossil-fuel resource retirements projected by DOE, but NERC's *10-year assessment period runs through 2034*. Figure 14 in the LTRA shows approximately 50 GW of confirmed retirements by 2030.[110] These retirement data roughly match those collected from the EIA Form 860, showing that planned retirements through 2030 total 51.5 GW of Nameplate Capacity and 46.5 GW of Net Summer Capacity, removing a small amount of solar and wind retirements.[111] This means that DOE is assuming almost twice as much retiring capacity by 2030 than both NERC and EIA do, and more retiring capacity *by 2030* than NERC predicts *by 2035*.

A key difference between DOE's projected retirements and the NERC and EIA data is that the Protocol includes *announced* retirements, which it explains are "generators that have publicly stated retirement plans that have not formally notified system operators and initiated the retirement process."[112] Such announcements are inherently uncertain. DOE's chosen approach of including *all* potential retirements in the only scenario runs directly opposite to DOE's

[108] Protocol at 5

[109] NERC 2024 LTRA at 27.

[110] *Id.*

[111] Analysis of data from US Energy Information Administration, Preliminary Monthly Electric Generator Inventory (based on Form EIA-860M as a supplement to Form EIA-860), June 2025, https://www.eia.gov/electricity/data/eia860m/.

[112] Protocol at 12.

projections of capacity *additions* - where only the most certain Tier 1 additions are included in the analysis, as discussed previously.

Announced but not formally confirmed retirements can be reversed in response to market signals and resource adequacy needs. There are several recent examples where previously planned retirements have been postponed, including Georgia Power's decision to continue to operate the Scherer and Bowen coal plants,[113] and Louisiana Gas & Electric and Kentucky Utilities' agreement to extend the life of the Mill Creek coal plant.[114] A recent analysis identified 22 coal plant retirements or natural gas conversations that have been delayed.[115] Failing to recognize the potential for such actions results in unrealistic retirement assumptions.

3. The Protocol mischaracterizes expected load growth

The Protocol assumes an increase in load of 101 GW by 2030, comprised of 50 GW of data center load and 51 GW of non-data center load.[116] DOE readily admits that reliability coordinators would not actually allow load growth to jeopardize system reliability. Thus, the Protocol itself does not support the conclusion of a reliability emergency warranting immediate top-down government intervention.

While load growth is a clear resource adequacy challenge, the Protocol's failure to consider opportunities to mitigate the impact of the increased electric demand from data centers

[113] *See Georgia Power's new IRP keeps coal plants online to serve data centers*, Robert Walton, Utility Dive (July 16, 2025), https://www.utilitydive.com/news/georgia-power-irp-coal-gas-plants-data-centers/753170/;

[114] *LG&E to extend use of Louisville coal unit, citing demand from data centers, other sources*, Connor Giffin, Louisville Courier Journal (July 29, 2025), https://www.courier-journal.com/story/news/local/2025/07/29/lge-extends-use-of-louisville-coal-unit-cites-surging-power-need-data-centers/85430708007/.

[115] Stan Kaplan, *Coal plant retirements: A slowdown? And will it matter?,* Power Engineering Factor This (April 23, 2025), https://www.power-eng.com/coal/coal-plant-retirements-a-slowdown-and-will-it-matter/

[116] Protocol at pp. 16, 18 (50GW of data center growth and 51 GW of other load increases)

and artificial intelligence ignores not only academic research,[117] but recent regulatory developments and policy priorities of the current Presidential Administration. In its *Artificial Intelligence Action Plan,* just released in July, the White House stated "the United States should investigate new and novel ways for large power consumers to manage their power consumption during critical grid periods to enhance reliability and unlock additional power on the system."[118] The Action Plan also recommends prioritizing interconnection, new grid technologies and reforming power markets to ensure investment in new generation.[119] The resulting actions could significantly change both the demand side of the reliability equation as well as the supply side. Regarding the former, data center owners would develop ways to reduce consumption at peak times (such as by drawing upon backup generation) while on the supply side, placing a focus on interconnecting new generation where it is needed.

Some states and RTO/ISOs are already working on developing and implementing relevant solutions. For example, Texas recently passed legislation aimed at accommodating the rapid growth of new large loads while also maintaining reliability for all customers. Among other provisions, the law requires that new large loads disclose information about any on-site back-up generation and allows ERCOT to direct curtailment (or utilization of backup generation) in emergency conditions.[120] Likewise, the Southwest Power Pool (SPP) has introduced a proposal to "Integrate and Operate High Impact Large Loads."[121] While still in development, it is SPP's

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[117] Norris et al., *Rethinking Load Growth: Assessing the Potential for Integration of Large Flexible Loads in US Power Systems* (Feb. 2025), https://nicholasinstitute.duke.edu/publications/rethinking-load-growth.

[118] Whitehouse.gov, "*Winning the Race, America's AI Action Plan"* at p. 15 (July 2025), https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.

[119] *Id* at 16.

[120] S.B. No. 6, 89th Leg., R.S. (Tex. 2025).

[121] *See generally* Southwest Power Pool, *SPP's High Impact Large Load Interconnection Solutions* (accessed Aug. 5, 2025), https://www.spp.org/markets-operations/high-impact-large-load-hill-integration/.

intent to fast track this proposal, which would create options to quickly interconnect large loads with non-firm, curtailable service that would be upgraded to firm service within five years; and to quickly study and bring online both new generation and new load.[122] Failure to consider these types of regulatory or legislative solutions renders the findings of the Protocol arbitrary and capricious.

DOE also assumes a static environment and fails to consider the important role of price signals on consumer behavior. Higher demand that drives prices up will result in increased investment in both supply and demand side resources. The NERC Interregional Transfer Capability Study utilized by the DOE is a deterministic study that was explicitly designed to be reliability-focused without incorporating economic considerations.[123] A more robust assessment would rely on dynamic probabilistic models to evaluate behavioral changes of consumers and generation owners.[124] The lack of consideration of a demand side response to high prices and tightening resource adequacy contradicts the planning that is utilized by RTOs/ISOs. For example, ISO-NE incorporates the impacts of energy-efficiency and DER forecasts into its load forecasts.[125] The California ISO has a number of programs that encourage both emergency and economic load reduction to benefit the system.[126] The Protocol cannot analyze complex energy markets in a vacuum, assuming market signals will not affect the behavior of participants.

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[122] Southwest Power Pool Revision Request No. 696 (last updated Aug. 5, 2025), https://www.spp.org/Documents/74204/RR696.zip.

[123] NERC ITCS at 11-12

[124] It should be noted the DOE states it used the Energy Information Administration's 2022 energy forecast (at page 3 of the Protocol). The EIA uses the National Energy Modeling System which is also a deterministic model that projects energy production, consumption and price based on a specific set of assumptions and scenarios.

[125] ISO-New England, *Load Forecast,* https://www.iso-ne.com/system-planning/system-forecasting/load-forecast (accessed Aug. 5, 2025).

[126] Powers, Jill, *How California Benefits from Demand Response*, California ISO Consumer Liaison Group (March 6, 2024). https://www.iso-ne.com/static-assets/documents/100008/clg_meeting_powers_keynote_presentation_03_06_2024.pdf

Wholesale energy markets are dynamic environments where participants respond to price signals. Such dynamic responses could include a large load customer installing a distributed energy resource ("DER") such as rooftop solar and battery storage to reduce dependence on the grid, or it could be a state developing Virtual Power Plant ("VPP") programs in response to rising prices and tightening supply. A proper analysis must take into account that increases in demand and low supply will cause policy and regulatory interventions as well as investments and/or behavioral changes by end use customers to mitigate the costs borne by these market signals.

Irrespective of the level of load projected, the Protocol implicitly acknowledges that this demand growth does not actually threaten reliability. When discussing Unserved Energy ("USE"), the Protocol explains, "USE is not an indication that reliability coordinators would allow this level of load growth to jeopardize the reliability of the system."[127] The Protocol further explains that USE instead "represents the unrealizable AI and data center load growth under the given assumptions for generator build outs by 2030, generator retirements by 2030, reserve requirements, and potential load growth."[128] Thus, the Protocol identifies that the results of its analysis should be interpreted as identifying an *economic development opportunity cost*, and that they should explicitly not be interpreted as reflecting a prediction of *future reliability risk*.

However, the Executive Order directing the development of the Protocol did not task DOE with undertaking an analysis of the potential lost opportunity of not meeting demand from AI and data center loads, but with identifying reserve margin shortfalls that warrant emergency intervention. In that context, DOE's load growth assumptions cause a false sense of alarm regarding future resource adequacy needs, which will directly lead to unnecessary and

[127] Protocol at 14.

[128] Id.

unjustified actions, including DOE intervention utilizing the Section 202(c) emergency powers to require uneconomic and inefficient generating plants to continue operations beyond their useful life. Such interventions will actually undermine the response the Protocol purports here to support. The Protocol concludes, "[t]hese numbers are used as indicators to determine where it may be beneficial to encourage increased generation and transmission capacity to meet an expected need."[129] Yet 202(c) orders directing retention of costly existing resources can delay or prevent new, efficient, low-cost generation from proceeding through interconnection queues, increasing costs for end use customers.

Finally, as highlighted throughout, the load growth assumptions in the report are internally inconsistent with the other input assumptions. In an environment of rapidly rising demand, it is unrealistic to assume that resource additions will slow down, retirements will speed up, and that those responsible for maintaining resource adequacy will do nothing in response. Indeed, regulators, utilities, grid operators, developers, and customers are all already taking a range of actions to mitigate the impact of new large loads on the grid and to prepare for the additional demand that large loads and other load growth will bring, as discussed *infra*.

4. DOE ignores the real-world mechanisms that maintain resource adequacy by matching supply and demand through regulatory action or price signals

In the DOE Protocol, the agency's analysis also falls short, by failing to account for the specific means by which new capacity comes online in different regions of the country. In particular, it does not appropriately consider either existing Integrated Resource Planning ("IRP") or capacity market processes. These omissions, coupled with the unsupported high load growth and retirement figures and the indefensibly low generation and storage interconnection

[129] *Id*.

figures through 2030 discussed *supra*, lead to its erroneous conclusion that the country is already facing a reliability crisis that will necessarily accrue over the next half-decade.

As discussed previously, DOE's faulty analysis overstates retirements and understating new resource development. As discussed *supra,* DOE's faulty analysis overstates retirements and mischaracterizes load growth, while understating new resource interconnection. While the expansion of new resources essentially ends in 2026 in DOE's framework, retirements extend through 2030. This approach is both internally incoherent and willfully divorced from actual capacity procurement mechanisms. In the real world, every region has methods to procure capacity; if demand grows and older supply resources retire as DOE predicts, those mechanisms must be accounted for. The DOE's forecasting approach instead completely fails to account for the existing processes used by both vertically integrated utilities and RTO/ISOs to make sweeping claims of a reliability gap.

First, many states with vertically integrated utilities conduct Integrated Resource Plan (IRP) processes, in which state regulators ensure that utilities have plans to meet forecasted demand and avoid any gaps in reliability.[130] IRPs are created using feedback from stakeholders and communities to perform modeling and analyses to ensure resource adequacy and reliability, which are then synthesized and submitted to state regulators for review.[131] Ideally, this outcome benefits both the utility and the public while demonstrating the utility's plans to meet the region's forecasted needs for new generation and demand-side programs for multi-year periods. [132] IRP horizons typically evaluate supply and demand changes over a 20+ year horizon and are typically

[130] Bruce Biewald et al., *Best Practices in Integrated Resources Planning*, at ii (Synapse & Berkeley Lab, 2024), https://www.energy.gov/sites/default/files/2024-12/best_practices_irp_nov_2024_final_optimized.pdf.

[131] *Id.* at 2.

[132] *Id.*

used to inform procurement decisions over the next five years. The IRP framework is designed to ensure that supply and demand are appropriately balanced. DOE's methodology ignores IRPs – which already provide future planning by utilities, states and communities to match retirements with incoming energy development to meet future electricity demand.[133] By doing so, the DOE Protocol creates the illusion that new resources cannot satisfy new load.

In other parts of the country, states and grid operators use capacity auctions rather than IRPs. These auctions aim to incent new resources to enter the market via price signals. DOE again ignores this framework, and its interaction with the Protocol's core assumptions. Basic economic theory suggests that the price increases from growing demand will also lead to new generation and storage development. For instance, in PJM Interconnection's most recent capacity auction, prices reached a $329.17/MW-day price cap, representing a 22% increase from last year and over 1000% higher than the price from two-years prior for most of PJM.[134] Furthermore, for the next 12-month period, PJM is expecting "record-high capacity prices."[135] Such high prices demonstrate the potential for stable, long-term revenue, thus encouraging developers to invest in building generation. For instance, due to these record-high prices, this latest PJM auction

[133] *See e.g.* Colorado Springs Utilities, *2020 Electric Integrated Resource Plan*, at 75-76 (2020), https://www.wapa.gov/wp-content/uploads/2023/04/EIRP-Report-10.14.21.pdf (demonstrating Colorado Springs Utilities considers reliability in decision-making in their IRP because retirements of energy projects are matched with replacement resources); NIPSCO, *Integrated Resource Plan: NIPSCO 2024 Summary*, at 2 (2024), https://www.in.gov/iurc/files/NIPSCO-2024-Integrated-Resource-Plan-Document.pdf (exhibiting utilities like NIPSCO are obligated to plan for replacements for retiring generation for the next 20 years in their IRP); CAL. PUB. UTILS. COMM'N, *Proposed Decision of Commissioner ALJ Fitch*, at 44 (proposed decision, R.20-05-003, May 21, 2021), https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M389/K155/389155856.PDF (showing the goals of Public Utilities Commissions like the California Public Utilities Commission (CPUC) are to match requirements and additions, given the CPUC ordered 2,500 MW of resources to come online specifically to replace 2,200 MW of retiring generation).

[134] Ethan Howland, Utility Dive, *PJM capacity prices set another record with 22% jump* (Jul. 23, 2025), https://www.utilitydive.com/news/pjm-interconnection-capacity-auction-prices/753798/ (explaining that the increased prices at PJM's annual auction naturally caused demand response participants to add new generation due to market signals).

[135] *Id*.

resulted in 2,669 MW of new generation.[136] Additionally, at MISO's 2025 annual capacity auction there was a sharp increase in capacity prices. For instance, capacity prices for the summer increased from $30/MW-day last year to $666.50/MW-day for the summer period across the MISO footprint.[137] Given this sharp price increase, demand responded accordingly, as an additional 4.2 GW of solar (from 4.9 GW to 9.1 GW) and 0.8 GW of wind (from 5.2 GW to 6 GW) from last year cleared the auction.[138] Grid operators can and do use price signals to not only ensure resource adequacy amid demand growth as well as retirements, but to encourage investment in new generation.

By ignoring the important role of IRPs and capacity markets in bringing new generation online before 2030, DOE has outlined an implausible reliability crisis (and, by implication, impeded the Administration's own AI Action Plan) by hard-wiring high retirements, inflexible demand and low interconnection rates into the Protocol, treating them as exogenous variables. But in fact, if one were to presume that DOE's generation interconnection assumptions are correct, this would also have a substantial impact on the interconnection of new load. If interconnections ceased in 2026, fewer new demand-side projects would materialize, as there might not be new supply to power them. This disconnect represents more than only a planning inefficiency; it would be a direct bottleneck on economic growth. However, IRP processes and market price signals allow states, utilities, and grid operators to handle such an economic gap in coordination with new large loads as appropriate. To assume, as DOE has effectively done, that these mechanisms *do not exist* cannot constitute reasoned decisionmaking.

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[136] *Id.*

[137] Ethan Howland, Utility Dive, *MISO summer capacity prices jump to $666.50/MW-day as power supplies shrink* (Apr. 29, 2025), https://www.utilitydive.com/news/miso-capacity-auction/746576/ (exhibiting MISO's increase in capacity prices for the summer season reinforced the need to increase capacity alongside growing demand)

[138] *Id.*

5. DOE mischaracterizes winter reliability risks, and omits potential vulnerabilities to the thermal generator fleet

The specific historical approach used in the DOE Protocol also "entirely fail[s] to consider an important aspect of the problem, [and] offer[s] an explanation for its decision that runs counter to the evidence before the agency"[139] due to its treatment of the extreme weather conditions within the data set. In particular, DOE has noted circumstances in its data set where grid reliability has fallen short, but does not actually account for major elements of these outages. However, DOE fails to examine the specific problems with particular classes of generation resources that *actually* contributed to these outages.

DOE's deterministic (backward-looking) methodology uses historical data from 2019-2023[140] and spans 12 weather years.[141] Based upon this data, DOE contends that ERCOT, SPP, and PJM in particular have already experienced outages that exceed DOE's 3-hours-per-year metric[142] within the dataset, specifically due to the deadly winter storms Uri and Elliott (which occurred in 2021 and 2022, respectively); however, SPP and PJM achieve DOE's criteria on average across the 12-year data set.

In Winter Storm Uri, significant parts of the electric grid – most notably in ERCOT, but also in SPP and MISO - failed in extreme cold in February 2021.[143] In Winter Storm Elliott, a

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[139] *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[140] Protocol at 3.

[141] *Id.* at 11.

[142] *Id*. at 14 ("PJM, ERCOT,12 and SPP experienced significant loss of load events during 2021 and 2022 winter storms Uri and Elliot which translated into more than 20 hours of lost load").

[143] *See* Federal Energy Regulatory Comm'n, *The February 2021 Cold Weather Outages in Texas and the South Central United States* (Nov. 16, 2021), https://www.ferc.gov/media/february-2021-cold-weather-outages-texas-and-south-central-united-states-ferc-nerc-and ("Uri Report")

severe cold snap affected the central U.S. and Northeast in December 2022.[144] The after-event reports on storms Uri and Elliott – each conducted by the Federal Energy Regulatory Commission, the North American Reliability Corporation, and regional reliability entities in collaboration – identified specific problems with generator unavailability in those extreme circumstances. In each case, thermal generation (most notably gas, but also coal) made up the vast majority of unavailable resources.

In the case of Winter Storm Uri, the report noted that "in the wake of massive natural gas production declines, and to a lesser extent, declines in natural gas processing, the natural gas fuel supply struggled to meet both residential heating load and generating unit demand for natural gas, exacerbated by the increasing reliance by generating units on natural gas."[145] The gas failures in Uri were comprehensive, from the wellhead downstream to generating units:

> Unplanned outages of natural gas wellheads due to freeze-related issues, loss of power and facility shut-ins to prevent imminent freezing issues, beginning on approximately February 7, as well as unplanned outages of natural gas gathering and processing facilities, resulted in a decline of natural gas available for supply and transportation to many natural gas-fired generating units in the South Central U.S. Once natural gas supply outages began at the wellhead, they rippled throughout the natural gas and electric infrastructure, causing processing outages and reductions, pipeline declarations of Operational Flow Order (OFO)s and force majeure, and outages and derates of natural gas-fired generating units. U.S. natural gas production in February 2021 experienced the largest monthly decline on record. Between February 8 and 17, the total natural gas production in the U.S. Lower 48 fell by 28 percent.[146]

[144] *See* Federal Energy Regulatory Comm'n, *Winter Storm Elliott Report: Inquiry into Bulk-Power System Operations During December 2022* (Nov. 7, 2023) ("Elliott Report").

[145] Uri Report at 11-12.

[146] *Id.* at 13.

Roughly 75% of the megawatts of capacity that were unavailable in Uri were thermal or nuclear units.[147]In Winter Storm Elliott, broadly similar gas issues occurred. Once again, equipment at natural gas wellheads froze, leading to significant decreases in gas production.[148]

> During the Event, natural gas supply shortages began with freezing issues and weather-related access issues associated with production facilities and equipment, which rippled throughout the natural gas infrastructure system. Natural gas pipelines faced decreased supply flowing into the pipelines at the same time that shippers requested increased volumes of gas, with some shippers taking volumes of gas in excess of their entitlement. The reduced supply relative to higher volumes of delivered gas (a situation known as a draft condition) resulted in lower line pressures and reduced line pack. Pipeline system operators faced not only draft conditions but also freezing issues that affected important equipment like compressor stations. While they deployed line pack and storage, and dispatched personnel to respond to these conditions, most pipelines also needed to issue critical notices and Operational Flow Orders (OFOs), and some issued force majeures (which curtail even firm transportation). Eventually pressures on some pipelines reached reliability-threatening levels… On the electric grid, natural gas production declines reduced the supply available for natural gas-fired generating units. Many natural gas-fired generating units either do not contract for firm gas supply or transportation, or contract for only a portion of the firm supply or transportation needed to meet their winter peak needs. They are then unable to obtain natural gas when natural gas supply and available pipeline capacity become scarce-to-unobtainable in extreme cold weather.[149]

In Elliott, roughly 90% of the unavailable capacity (on a megawatt basis) was from thermal or nuclear units.[150]

A serious analysis of resource accreditation, and the need to maintain reliability with growing demand, needs to grapple with the actual causes of outages – and the associated risks – that the data actually show. In the Protocol, DOE asserts that "avoiding announced retirements improves grid reliability, but shortfalls persist in PJM, SPP, ERCOT, and SERC, particularly in winter."[151] However, DOE has instead ignored the very real risk to winter reliability of

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[147] *Id.* at 16

[148] Elliott Report at 9.

[149] *Id.* at 21

[150] *Id.* at 17, Fig. 6b.

[151] Protocol at 9

overreliance on the particular resource types it concludes must be preserved, *despite the clear, authoritative determinations regarding the specific reliability events within its data set*. Instead, DOE states that "Baseload, dispatchable power, such as from coal, oil and gas, and nuclear, is essential in grid planning," and specifically refers to these resources as "firm and reliable."[152] The post-incident reports for Winter Storms Uri and Elliott show categorically that overreliance on these resources has had catastrophic consequences in the recent past, but the DOE Protocol does not meaningfully attempt to grapple with how to avoid these occurrences in the future. Accordingly, the Protocol – and any further agency action that relies upon it to putatively reduce reliability risks – cannot be considered reasoned decisionmaking that is based upon substantial evidence.

6. The Protocol fails to consider interregional transmission as a reliability solution at all, despite utilizing a data set specifically designed to evaluate prudent interregional transmission additions to support reliability

DOE utilizes NERC's Interregional Transfer Capability Study ("ITCS")[153] throughout the Protocol analysis, but fails to make any use whatsoever of NERC's recommendations in its evaluation of transmission capability. FERC Order No. 1000 recognized that transmission planning "must provide for the identification and joint evaluation by neighboring transmission planning regions of interregional transmission facilities to determine if there are more efficient or cost-effective interregional transmission solutions that regional solutions identified in by the neighboring transmission planning regions."[154] Transferring power across regions is a solution to

[152] DOE Fact Sheet at 2, (July 2025), https://www.energy.gov/sites/default/files/2025-07/DOE_Fact_Sheet_Grid_Report_July_2025.pdf.

[153] Protocol at 2.

[154] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), order on reh'g, Order No. 1000-A, 139 FERC ¶ 61,132, order on reh'g and

some of the reliability problems raised in the Protocol, yet its role in mitigating resource adequacy shortfalls is entirely ignored. The DOE's own National Transmission Planning Study found that coordinating planning across regions could lower system costs by $170 to $380 billion through 2050.[155] In the ITCS, NERC found that an additional 35 GW of transfer capability would be "technically prudent" and would "demonstrably strengthen reliability."[156] In comments before FERC in response to the ITCS, DOE supported pursuing solutions to increase interregional transfer capability, including grid-enhancing technologies to increase grid capacity by as much as 30%.[157] Given the significant role that interregional transfer capability can play in avoiding outages, especially during extreme weather events, as supported by the NERC ITCS and reiterated by FERC and the DOE, the Protocol's lack of consideration of this tool is an unexplained outlier and a significant gap in the analysis. Any evaluation of future resource adequacy risk must include some consideration of future transmission planning that will include increased interregional transmission capacity. DOE's failure to consider the role of increased interregional transmission capacity in bringing additional reliability and resiliency to adjoining grids renders the Protocol arbitrary and capricious, and stands as one more reason the Protocol must not be relied upon as justification for any further actions taken by the DOE.

clarification, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014).

[155] U.S. Department of Energy, Grid Deployment Office, *The National Transmission Planning Study*, Chapter 2 (2024) at xi. https://www.energy.gov/gdo/national-transmission-planning-study

[156] NERC ITCS at 7.

[157] *Comments of the United States Department of Energy* FERC Docket No. AD25-4-000 at pp. 20-21. (January 17, 2025)

G. In Publishing the Resource Adequacy Protocol, DOE Failed to Comply with the Information Quality Act

Congress enacted the Information Quality Act for the purpose of "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies."[158] The Information Quality Act is implemented through guidelines: OMB guidelines that direct action by the federal agencies,[159] and the Department of Energy's own guidelines that govern the data and analysis that it publishes.[160]

Under DOE's guidelines, the Resource Adequacy Protocol is unquestionably "information" that DOE has "disseminated."[161] It also must be considered "influential" information. Information is influential if, *inter alia*, it forms "the basis for a DOE action that may result in an annual effect on the economy of $100 million or more."[162] Given that DOE has stated that it will use the Resource Adequacy Protocol to guide its exercise of section 202(c) of the Federal Power Act across the nation, there can little doubt that it clears this threshold.

Under OMB and DOE guidelines, "influential" information must meet the highest standards of quality and transparency and must be capable of reproduction by qualified individuals outside the agency.[163] Yet, when it issued the Resource Adequacy Protocol on July 7,

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[158] *See* Pub. L. 106-554 Sec. 515, 114 Stat. 2763A-153.

[159] *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies* (67 Fed. Reg. 8452, Feb. 22, 2002).

[160] Department of Energy, *Final Report Implementing Updates to the Department of Energy's Information Quality Act Guidelines* (2019) ("DOE IQA Guidelines 2019 Update"), https://www.energy.gov/cio/articles/2019-final-updated-version-doe-information-quality-guidelines.

[161] *Id*. at 11 -12.

[162] *Id*. at 7.

[163] *Id.*

DOE appeared to have taken none of the necessary measures to ensure that it meets the highest standards of quality and transparency:

- *No Peer Review*. DOE's Information Quality Act guidelines state that "DOE complies with OMB's Final Information Quality Bulletin for Peer Review, which states that 'peer review typically evaluates the clarity of hypotheses, the validity of the research design, the quality of data collection procedures, the robustness of the methods employed, the appropriateness of the methods for the hypotheses being tested, the extent to which the conclusions follow from the analysis, and the strengths and limitations of the overall product.'"[164] The OMB Peer Review Bulletin further explains that "Peer review is one of the important procedures used to ensure that the quality of published information meets the standards of the scientific and technical community. It is a form of deliberation involving an exchange of judgments about the appropriateness of methods and the strength of the author's inferences." The Resource Adequacy Protocol gives no indication it was subject to peer review, and we must therefore conclude that it was not. Peer review likely would have identified many of the substantive flaws in the Resource Adequacy Protocol described above.
- *No Public Comment*. Public comment is another practice that federal agencies may use to ensure the quality and transparency of information they publish. As noted above, DOE failed to seek public comment with respect to the Resource Adequacy Protocol.
- *No Measures to Ensure the Analysis is Reproducible*. Under OMB and DOE guidelines, influential information must be "capable of reproduction by a qualified individual outside

[164] *Id.* at 8 (citing 70 Fed. Reg. 2664-2665 (Jan. 14, 2005)).

of the agency."[165] The Resource Adequacy Protocol does not appear to have made any effort to ensure that its results are capable of reproduction.

- *No Effort to Ensure Analysis Based on the Best Possible Data*. At the outset of the Resource Adequacy Protocol, DOE notes that its analysis would have benefitted greatly from "from the in-depth engineering assessments which occur at the regional and utility level."[166] DOE then goes not to note that EIA had previously collected data that would have been useful to the analysis.[167] While we appreciate the Department's candor, this concession simply underscores that DOE should have taken the time to conduct this analysis properly with the requisite data.

Whether or not the Information Quality Act is judicially enforceable in its own right, it is still the law. And for good reason. The measures set out above are intended to guard against federal agencies failing to take the basic steps necessary to ensure the analysis that they publish is sound. DOE failed to take those steps here and the consequences are self-evident: a highly flawed Protocol that cannot reasonably be relied upon for its intended purpose.

[165] *Id.* at 7.

[166] Protocol at i.

[167] *Id.*

V. CONCLUSION

For the reasons noted *supra,* Clean Energy Organizations request that DOE grant this Rehearing Request, and withdraw the Resource Adequacy Protocol or otherwise address the errors contained in it. As a result of the identified legal and factual errors in the Protocol, it (and any subsequent actions taken utilizing it) are likely to be found arbitrary and capricious. The Clean Energy Organizations urge DOE to address these significant flaws, and stand ready to work with DOE and other stakeholders to ensure affordable, reliable electricity throughout the country.

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