Nos. 25-1159, *et al.* (Consolidated)

In the United States Court of Appeals for the District of Columbia Circuit

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONERS

v.

U.S. DEPARTMENT OF ENERGY & CHRIS WRIGHT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF ENERGY,
RESPONDENTS

ON PETITIONS FOR REVIEW OF UNITED STATES DEPARTMENT OF ENERGY ORDER NO. 202-25-3

BRIEF OF THE NISKANEN CENTER, PROFESSOR PAUL L. JOSKOW, & PROFESSOR RICHARD SCHMALENSEE AS *AMICI CURIAE* IN FAVOR OF PETITIONERS

ZACHARY NORRIS
Niskanen Center
1201 New York Ave. NW
Washington, DC 20005
(443) 850-8328
znorris@niskanencenter.org

NICHOLAS M. GLADD
JOHN B. KENNEY
RACHEL NEUBURGER
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street NW
Washington, DC 20006
(202) 973-8800
ngladd@wsgr.com

Counsel for Amici Curiae, *The Niskanen Center, Professor Paul L. Joskow, Professor Richard Schmalensee*

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Amici Curiae The Niskanen Center, Professor Paul L. Joskow, and Professor Richard Schmalensee certify the following:

(A) Parties, Intervenors, and Amici Curiae.

Petitioners' Briefs accurately list the parties, intervenors, and *amici* in these appeals. The Niskanen Center, Professor Paul L. Joskow, and Professor Richard Schmalensee are moving for leave to appear as *amici* in support of Petitioner.

(B) Rulings under Review.

Petitioners' Opening Briefs accurately set forth the orders under review.

(C) Related Cases.

Petitioners' Opening Briefs accurately describe the related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(c), *amicus curiae* The Niskanen Center discloses that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

STATEMENT REGARDING PERMISSION TO FILE, SEPARATE BRIEFING, AND AUTHORSHIP

Pursuant to Circuit Rule 29(d), *amici* certify that they have filed a Motion for Leave to Participate as Amici Curiae.

Amici also certify that this separate brief will assist the Court because it reflects a specific perspective on this case that is distinct from the briefing to this point. As discussed below, *amici* are experts on the Midcontinent Independent System Operator's resource planning processes and competitive markets that ensure a reliable and affordable domestic energy supply, and thus bring unique experience and dedicated interest to the Court's consideration of this appeal. Given the unique expertise of *amici* and their particular viewpoint, *amici* certify that further collaboration with other *amici* was not feasible.

This brief was not authored, in whole or in part, by counsel for any party, and no person other than *amici* contributed money that was intended to fund preparing or submitting the brief.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Administrative and Executive Materials

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

The Niskanen Center is a nonprofit, nonpartisan public policy think tank advocating for the rule of law, responsive governance, and well-functioning markets that protect both individual liberty and societal well-being. The Center develops practical, empirically grounded solutions to some of the country's most complex public policy challenges, including those arising in the energy and electricity sectors. The Center draws its name from economist William (Bill) Niskanen—former member of President Reagan's Council of Economic Advisers and long-time chairman of the Cato Institute.

Niskanen has a strong interest in ensuring that the Court has a complete understanding of the capabilities of existing electricity markets, the rigor of the associated planning processes, and the consequences of undermining them. The Niskanen Center has, for years, advocated for market-based policy tools as essential to ensuring a reliable and affordable domestic energy supply. We believe markets function best when they are allowed to operate under minimal necessary intervention and are informed by accurate price signals, and remain open to new

entrants that are able to solve emerging challenges at the least cost to consumers.

Professor Paul L. Joskow is the Elizabeth and James Killian Professor Emeritus of Economics at the Massachusetts Institute of Technology and former Director of the MIT Center for Energy and Environmental Policy Research. He is a leading authority on electricity market design, regulation, and resource adequacy. His scholarship has informed regulators, courts, and policymakers on the structure and performance of wholesale electricity markets and the respective roles of the Federal Energy Regulatory Commission, regional transmission organizations, and market participants. Given his expertise in this area, Professor Joskow has an interest in ensuring that the Court is fully informed on relevant context when resolving these appeals.

Professor Richard Schmalensee is the Howard W. Johnson Professor of Management Emeritus and Professor of Economics Emeritus and Management at the Massachusetts Institute of Technology and former Dean of the MIT Sloan School of Management. He previously served on President George H.W. Bush's Council of Economic Advisers and has written extensively on the economics of regulation, competition,

and market performance in network industries, including electric power markets. Given his expertise in this area, Professor Schmalensee has an interest in ensuring that the Court is fully informed on relevant context when resolving these appeals.

INTRODUCTION

Electric grid planning is an iterative process that carefully balances engineering and economic principles to maintain reliability and affordability. State, regional, and federal actors all participate in regulating and overseeing these planning processes, with roles and mechanisms that vary based on region and market structure. That arrangement is grounded in the longstanding principle that States and markets are ordinarily in the best position to calibrate what will best promote reliability and affordability, and that direct federal intervention should be sharply limited.

This case arises from the Department of Energy's decision to upset that balance by invoking the emergency authority of Section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c), to keep the Campbell coal-fired power plant open—despite the absence of any emergency. The challenged Order claims that the Campbell Plant must remain

operational because the Midcontinent Independent System Operator ("MISO") faces emergency conditions resulting from increasing demand and accelerated retirements of generation facilities in the near term (i.e., 2025 through 2026). Order No. 202-25-3 at 1; Order No. 202-25-3B at 11. Subsequent orders assert that this emergency extends into "subsequent years." Order No. 202-25-7 at 5; Order No. 202-25-9 at 5. But there is no capacity or energy emergency in MISO owing to a "sudden increase in the demand for electric energy," "a shortage of electric energy," "a shortage of . . . facilities for the generation or transmission of electric energy," or any "other cause[]" under Section 202(c). 16 U.S.C. § 824a(c)(1). To the contrary, MISO's well-established resource adequacy regime, which is grounded on the best available forecast data, and wholesale power markets are actively and successfully ensuring near and long-term reliability and affordability in its footprint. Empirical evidence in the form of market results conclusively demonstrates that MISO has sufficient resources, with a buffer that exceeds regulatory standards.

Amici write to provide a detailed economic and engineering background to explain the full context of the MISO resource adequacy regime and the implications of the Order therein. *Amici* agree that

Section 202(c) orders are a limited, narrow, and temporary measure for addressing unexpected, short-term emergencies. DOE's use of Section 202(c) for the Campbell Plant is inconsistent with that role and at odds with the existing multi-year planning processes and markets that already ensure reliability. By supplanting those established economic and engineering processes, the challenged Order disrupts and undermines the resource adequacy mechanisms that enable system reliability.

BACKGROUND

I. MISO has well-established processes for ensuring reliability and resource adequacy.

A. MISO's capacity reserves for Planning Year 2025-2026 exceed the amount needed to meet expected peak demand plus a margin of safety.

MISO is an independent, non-profit organization that operates the electric grid across all or part of 15 states in the Midwest and South and the Canadian province of Manitoba. One of MISO's cornerstone responsibilities is ensuring the reliability of its electric grid. As part of that responsibility, MISO works with States and utilities in its footprint to ensure "resource adequacy," a term that means sufficient resources are available over a particular time horizon to meet electricity demand

during real-time operations. *See* MISO, Resource Adequacy Metrics and Criteria Roadmap 4 (Dec. 2024).[1] Resource adequacy specifically accounts for the inevitability of shocks to demand (*e.g.*, from extreme weather) and supply (*e.g.*, from a generator unexpectedly going offline). *See id.*

Both at the time of DOE's Order and today, MISO has determined that its footprint is resource adequate *without* keeping the Campbell Plant online, meaning that it has sufficient capacity for the foreseeable future. For each season of MISO's ongoing Planning Year, which lasts from June 1, 2025 through May 31, 2026, MISO's capacity reserves—the megawatts of power it has available to meet load—exceed the amount of capacity it expects to need to meet the region's forecasted peak electricity demand *plus* its Federal Energy Regulatory Commission ("FERC")-mandated buffer known as the "Planning Reserve Margin." *See* MISO, Planning Resource Auction: Results for Planning Year 2025-26 (Corrections) 5 (May 29, 2025) ("2025-2026 Planning Resource Auction"

[1] https://cdn.misoenergy.org/Resource%20Adequacy%20Metrics%20and%20Criteria%20Roadmap667168.pdf

Results)[2]; *see also* North American Electric Reliability Corporation, 2025-2026 Winter Reliability Assessment 17 (Nov. 2025) ("MISO expects limited risk in the 2025-26 Winter season as MISO was able to procure 6.1% more resources through the annual planning reserve auction than required by its minimum resource adequacy target. A further 3.3 [gigawatts] of resources were available but not chosen to be committed for the winter season.").[3] Figure 1 summarizes these results and shows that this is true for all sub-regions within MISO, including Zone 7, where the Campbell Plant is located. Those reserve margins are the product of multiple, self-reinforcing layers of planning and market-based processes that have been carefully designed—and scrutinized by state and federal regulators—to ensure that MISO has adequate electricity to serve customers' needs at rates that they can afford.

[2] https://cdn.misoenergy.org/2025%20PRA%20Results%20Posting%20250529_Corrections694160.pdf

[3] https://www.nerc.com/globalassets/our-work/assessments/nerc_wra_2025.pdf

Figure 1. 2025-2026 Planning Year

	Planning Reserve Margin Requirement	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7
Summer June 1, 2025 – August 31, 2025	Targeted	18,459.4	13,190.2	10,889.2	9,237.6	8,281.3	18,484.8	21,228.0
	Final	18,843.5	13,464.4	11,116.0	9,430.1	8,453.5	18,868.9	21,669.2
Fall September 1, 2025 – November 30, 2025	Targeted	17,290.4	12,086.4	10,179.1	8,950.4	7,898.3	17,939.5	20,493.9
	Final	17,811.9	12,450.7	10,486.0	9,220.4	8,136.0	18,480.2	21,111.9
Winter December 1, 2025 – February 28, 2026	Targeted	17,823.8	10,789.8	9,889.1	8,549.5	7,954.8	17,939.1	16,123.6
	Final	18,565.8	11,238.7	10,300.9	8,905.1	8,285.9	18,685.7	16,794.7
Spring March 1, 2026 – May 31, 2026	Targeted	17,866.7	12,149.2	10,152.2	8,304.0	7,707.9	17,858.6	19,853.2
	Final	18,174.5	12,358.6	10,327.0	8,447.2	7,841.0	18,166.7	20,195.5

Analysis by Michigan Public Service Commission staff of resource adequacy over the next three Planning Years projects that Zone 7 will have a surplus of capacity compared to the zone-wide capacity obligation each year. *See In re Capacity Demonstrations for the 2028/2029 Planning Year*, Case No. U-21775, Order at 12-13 (Mich. Pub. Serv. Comm'n Aug. 21, 2025).

B. MISO's Loss of Load Expectation analysis evaluates the amount of capacity needed to meet expected peak demand plus a margin of safety each year.

MISO exemplifies the iterative grid-planning process—involving state, regional, and federal actors—that ensures energy reliability and affordability by carefully balancing engineering and economic principles. In MISO, grid planning begins with an engineering analysis called the Loss of Load Expectation (or LOLE) study. The Loss of Load Expectation

study evaluates the region's capacity needs over a one-year timeframe, identifying the amount of capacity the region needs to provide an adequate margin over expected peak demand. The margin is calibrated so that there should be no more than one loss of load event—*i.e.*, an energy shortfall—every ten years. MISO, Planning Year 2025-2026 Loss of Load Expectation Study Report 8 (Apr. 2025).[4] Electric utilities and grid planners across the country have measured reliability by that "one-in-ten" criterion for decades. *See Plan. Res. Adequacy Assessment & Reliability Standard*, Order No. 747, 134 FERC ¶61,212, at ¶31 & n.32 (2011); *see, e.g.*, *Entergy Operating Cos.*, 87 FERC ¶61,156 (1999). This criterion is designed to ensure reliability without compromising cost efficiency, as procuring more capacity than is necessary to maintain that level of reliability raises rates without providing meaningful benefits. *See Midcontinent Indep. Sys. Operator, Inc.*, 187 FERC ¶61,202, at ¶89 (2024); *N.Y. Indep. Sys. Operator, Inc.*, 179 FERC ¶61,102, at ¶¶39-41 (2022).

[4] https://cdn.misoenergy.org/PY%202025-2026%20LOLE%20Study%20Report685316.pdf

The Loss of Load Expectation study considers an exhaustive list of inputs, including demand forecasts (with associated risks and uncertainties), the expected availability and performance of existing power plants and the regional transmission network, and an assessment of the power reserves *above* the system's expected peak demand needed to achieve reliability standards. Based on these inputs, the study identifies the generating capacity needed to meet the one-in-ten reliability criterion both regionally and for each subregional zone. After determining the necessary level of generating capacity, MISO assigns to each company that serves end-use customers (i.e, each "load-serving entity," or LSE) a *pro rata* share of the need that it identifies in its Loss of Load Expectation study. Load-serving entities must demonstrate compliance with those capacity obligations each year.

C. MISO's resource adequacy analysis incorporates the results of integrated resource plans, through which states in the MISO footprint ensure that regional capacity obligations will be met over short and long-term time horizons.

The inputs to MISO's Loss of Load Expectation analysis reflect state-driven integrated resource plans (or IRPs) by accounting for generation additions, suspensions, and retirements, and other integrated

resource plan outputs. Integrated resource plans are cost-effective portfolios of resources that a load-serving entity has or will build to meet forecasted energy demand, plus an adequate margin of safety, over short and long-term planning horizons, developed with the objective of minimizing customers' utility bills. State public utility commissions drive the process of compiling, vetting, and completing these integrated resource plans, holding utilities accountable to the standards they set. An integrated resource plan is developed in connection with a series of extensive technical analyses that identify electricity system needs and rigorously compare generation technologies and other options for meeting those needs. *See, e.g.*, Mich. Comp. Laws §§ 460.6t(1), (3), (5), (7)-(8). It is expected that an integrated resource plan "should include both a meaningful stakeholder process and oversight from an engaged public utilities commission" with the goal of "minimizing customers' bills" by proposing cost-effective solutions to serve load. *See* Rachel Wilson & Bruce Biewald, Synapse Energy Economics, Best Practices in Electric Utility Integrated Resource Planning 2, 5 (June 2013).[5] In MISO,

[5] https://www.synapse-energy.com/sites/default/files/SynapseReport.2013-06.RAP_.Best-Practices-in-IRP.13-038.pdf

integrated resource plans are the foundation for ensuring electric reliability and resource adequacy.

One solution an integrated resource plan can identify is a power purchase agreement. Owners and developers of generation resources compete with each other in the marketplace, on price and other terms, to win the opportunity to enter into those power purchase agreements with load-serving entities (subject to state regulatory oversight). In one prominent example, the 800-megawatt Palisades Nuclear Plant in Covert Township, Michigan is being returned to service by its owner with the support of power purchase agreements with load-serving entities. In this way, state integrated resource plans harness competitive market forces to procure adequate resources at reasonable prices for consumers.

In Michigan, load-serving entities file proposed integrated resource plans with the Michigan Public Service Commission every five years for its review and approval. Michigan Public Service Commission, Issue Brief: Integrated Resource Planning (Dec. 20, 2017).[6] Load-serving

[6] https://www.michigan.gov/mpsc/-/media/Project/Websites/mpsc/consumer/info/briefs/IRP_Issue_Brief_V2_12-20-17.pdf?rev=9942f24ea61640979d82d416e012d574&hash=D1838B8B6EA807F51A2622C5EEFAA9B0

entities must also make annual filings demonstrating compliance with their expected capacity needs for the upcoming four years. Mich. Comp. Laws § 460.6w(8). The decision to retire the Campbell Plant was made through the Michigan integrated resource planning process. *See In re Application of Consumers Energy Company for Approval of its Integrated Resource Plan*, Case No. U-21090, Order at 8 n.1 (Mich. Pub. Serv. Comm'n June 23, 2022) (noting that the evidentiary record in the integrated resource planning proceeding resulting in the Campbell Plant retirement decision included 4,094 pages of transcript and over 500 exhibits). MISO accounts for integrated resource plan results—*including* planned power plant retirements—in developing its need analysis. Its engineering analysis is therefore already predicated on a least-cost economic perspective.

D. MISO's markets ensure the availability of capacity and energy and incentivize new investment.

Once operational, power plants in MISO can sell electricity (including forward commitments to provide electricity) to load-serving entities through a series of different markets. First, MISO has a market mechanism for procuring capacity. Capacity markets compensate generators for a commitment to be *available* at some point in the future,

while energy markets (discussed in the next paragraph) compensate generators for the actual sale of electricity. Generators that are awarded capacity contracts but then fail to fulfill them face stiff financial penalties, designed to ensure that they take necessary measures to be available when called on. *See* MISO, FERC Electric Tariff, Module E-1, § 69A.3.1.h.b (version 42.0.0). Failing to fulfill a capacity contract can result in other potential consequences, too, including forfeiture of capacity payments, exclusion from markets, and enforcement actions by FERC. *See, e.g.*, *Big Rivers Elec. Corp.*, 188 FERC ¶61,155 (2024). In addition to ensuring that sufficient resources are available, capacity markets enhance resource adequacy by sending price signals on the need for new generation. When capacity runs low, capacity market prices rise—incentivizing the development of new capacity to meet generation needs, or allowing older, less economical generators that otherwise might retire to stay online.

Second, MISO also administers organized energy markets. In the day-ahead energy market, generators sell their expected energy output to load-serving entities looking to meet their expected energy needs for the next day. The day-ahead market "clears" when the amount of energy

offered matches the amount demanded, and generators are paid this market clearing price per megawatt hour of power generated. Ordinarily, generators that cannot profitably sell electricity at the market-clearing price will not be called upon to serve load. *See* FERC, An Introductory Guide to Electricity Markets Regulated by the Federal Energy Regulatory Commission (Apr. 3, 2025).[7] The purpose of the day-ahead market is to ensure that resources are online, operating, and prepared to meet expected demand the next day.

The real-time energy market complements day-ahead markets by accommodating system changes that arise with little warning. Specifically, the real-time market provides a mechanism for generators to be paid to produce more power than planned (if they can do so) to accommodate sudden changes in the supply, demand, or delivery of electricity. Real-time markets thus prevent brownouts and blackouts by ensuring that supply is sufficient to meet demand in unforeseen system circumstances—such as when another generator fails—or when demand

[7] https://www.ferc.gov/introductory-guide-electricity-markets-regulated-federal-energy-regulatory-commission

is just higher than expected—*e.g.*, because the temperature was warmer than forecasted, increasing demand for air conditioning. *See id.*[8]

MISO's markets further resource adequacy and affordability in two crucial respects. First, markets dispatch energy and procure the capacity needed to serve consumers at lower prices, which benefits customers directly by lowering the prices they pay. *See id.* Second, markets provide price signals to drive investment. *Id.* Developers that can build new, less expensive generation have clear signals to do so. On the flip side, if a relatively expensive power plant cannot win—or only rarely wins—energy or capacity bids, it may not be worthwhile for its owner to maintain the plant. In MISO, these market results feed into integrated resource planning processes, as states scrutinize the results to ensure that non-competitive power plants are retired and replaced with more economic generation capacity. Ultimately, that process best minimizes costs to consumers.

The resource adequacy regime is thus a rigorous system that involves regional transmission organization, state, and utility planning

[8] https://www.ferc.gov/introductory-guide-electricity-markets-regulated-federal-energy-regulatory-commission

as well as market forces, and responds in the normal course to forecasted "shortfalls" like the long-term trends that the Order cites. When the resource adequacy regime detects a potential shortfall—whether through the Loss of Load Expectation study process, integrated resource planning process, capacity market results, or other means—it responds. For example, in response to lower levels of supply relative to demand, capacity prices will rise, incentivizing producers to increase available capacity. Rational producers will thus invest in new power plants, retain power plants that would otherwise retire, or expand the transmission system to access other power plants. All of these actions are informed by and depend on the planning and market processes described above. A disruption to those processes is, therefore, a disruption to how resource adequacy operates to the benefit of consumers.

ARGUMENT

I. The Order exceeds DOE's statutory authority under Section 202(c), and so risks upsetting the Federal Power Act's balanced approach to energy regulation.

A. DOE's authority under Section 202(c) is limited to specific emergencies and does not empower DOE to supersede and disrupt processes for maintaining resource adequacy.

We "start where we always do: with the text of the statute." *Van Buren v. United States*, 593 U.S. 374, 381 (2021). Section 202(c) authorizes the government to order the production of power to respond to specific emergencies, including "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." 16 U.S.C. § 824a(c)(1). As that text conveys, Section 202(c) is a narrow grant of authority that does not give the federal government general control over energy production.

First, Section 202(c) requires an "emergency." An "emergency" is a "sudden" and "unforeseen" event involving "exigency." Webster's New International Dictionary of the English Language 716 (1930); *see also*

Black's Law Dictionary (4th rev. ed. 1968) (same); The Random House Dictionary of the English Language 467 (unabridged ed. 1971) ("a sudden, urgent, usually unforeseen circumstance or occasion requiring immediate action"). The specific grants of authority under Section 202(c) thus carry that meaning of emergency: a "sudden," "unforeseen" exigency will qualify, while an expected event or an exigency far off in the future will not.

Second, the statute itself confirms that interpretation by limiting the government's authority to a specific set of emergencies, such as a "sudden increase in the demand for electric energy." 16 U.S.C. § 824a(c)(1). If one of those emergencies does not exist, then the government cannot invoke Section 202(c). Any other interpretation would violate the "elementary canon" that "a statute should be interpreted so as not to render one part inoperative," *Colautti v. Franklin*, 439 U.S. 379, 392 (1979), because the provision's limitations would be meaningless.

Third, any purported "other causes" under the statute must still involve "sudden" or "unforeseen" events requiring immediate action. That requirement is imposed directly by the text, which says that an

emergency must exist "by reason of" those "other causes." 16 U.S.C. § 824a(c)(1). It is also confirmed by "the ejusdem generis canon," which "instructs courts to interpret a 'general or collective term' at the end of a list of specific items in light of any 'common attribute[s]' shared by the specific items." *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (quoting *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008)). Here the phrase "other causes" follows a specific list of serious and emergent circumstances including war, "a *sudden* increase in the demand for electric energy," or—in the present tense—"shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities." 16 U.S.C. § 824a(c)(1) (emphasis added). That list shares the "common attributes" of an immediate and drastic emergency.

Section 202(c)'s limits matter. In Section 202(c), Congress reasonably chose to authorize emergency responses to fast-breaking changes on the ground, where the Executive's "dispatch" is most needed. *Seila Law LLC v. CFPB*, 591 U.S. 197, 223-24 (2020) (quoting The Federalist No. 70 at 472 (J. Cooke ed. 1961) (A. Hamilton)). Underscoring that decision, Congress amended the Federal Power Act in 2015 to limit

the duration of Section 202(c) orders to 90 days—reflecting its judgment that such interventions must be discrete and respond to unexpected, transitory circumstances. *See* Pub. L. 114-94 § 61002, 129 Stat. 1772 (2015). By contrast, long-term, prospective issues are reserved for ordinary regulatory authorities, state regulation, the markets, and Congress itself.

Here, the fact that the government has *claimed* there is an emergency does not mean that, factually or legally, there is an "emergency," much less the kind of emergency provided for in the statute. Rather, the conditions identified in the Order arise in the ordinary course for energy markets, and are adequately addressed by existing planning process and market mechanisms. As explained below, the challenged orders are thus unlawful under Section 202(c).

B. The Federal Power Act preserves state authority to regulate power generation with a limited role for the federal government.

The government's interpretation is also inconsistent with the broader statutory scheme. DOE suggests that Section 202(c) allows it to declare an emergency in any region that it deems should add or maintain additional generating capacity over any timeframe, and then, as

evidenced by this proceeding, directly regulate—and, indeed, veto—the retirement of any power plant in that region. The government's interpretation would thus turn the "emergency" authority of Section 202(c) into a general grant of jurisdiction to superintend resource adequacy across the country. That power is fundamentally unlike any other role that the Federal Power Act contemplates for the federal government when it comes to resource decision-making. For that reason, the government's interpretation of its limited "emergency" authority "ultimately founder[s] upon th[e] principle" that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Federal Power Act generally preserves exclusive state authority to regulate generation facilities. *Hughes v. Talen Energy Mktg.*, 578 U.S. 150, 154 (2016) ("The States' reserved authority includes control over in-state 'facilities used for the generation of electric energy'" (quoting 16 U.S.C. § 824(b)(1))). State authority over generation facilities is preempted only where specifically provided. *See* 16 U.S.C. § 824(b)(1) (providing that federal agencies exercising authority under the Federal Power Act "shall not have jurisdiction, except as specifically provided in

[subchapter II] and subchapter III of this chapter, over facilities used for the generation of electric energy").

The rest of the Federal Power Act aligns with that jurisdictional balance, preserving states' authority to regulate generation facilities, subject to only limited carveouts. For example, Sections 205 and 206, the heart of FERC's authority to regulate electric service, apply only to rates and practices related to "the transmission or sale of electric energy subject to the jurisdiction of the Commission." 16 U.S.C. § 824d(a); *id.* § 824e(a) (similar). When FERC exercises this authority in a way that affects resource adequacy, it does so to ensure that rates for wholesale sales are just and reasonable where those rates are the mechanism used to ensure resource adequacy—not to pick winners among potential resource adequacy options, or due to a general grant of jurisdiction over resource adequacy itself. *Muns. of Groton v. FERC*, 587 F.2d 1296, 1301-02 (D.C. Cir. 1978) (finding that FERC had jurisdiction under Sections 205 and 206 to regulate deficiency charges assessed against load-serving entities for failure to obtain sufficient capacity, even though the purpose of the charges was to encourage adding new capacity); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-83 (D.C. Cir. 2009). Similarly,

Section 215, which gives FERC and the North American Electric Reliability Organization authority to promulgate and enforce standards providing for an "adequate level of reliability of the bulk-power system," 16 U.S.C. §§ 824o(c)-(e), includes a savings provision that precludes either entity from ordering the construction of additional generation capacity, *id.* § 824o(i)(2).

The challenged Order would upend that statutory structure. If upheld, DOE's interpretation would transform Section 202(c)'s narrow grant of emergency authority into a sweeping (and unreviewable) font of jurisdiction to directly control which generators operate across the country. That concern is not hypothetical: the challenged Order and its successor orders have kept a power plant open 270 days past its retirement date, against the plans and wishes of the plant's owners and state regulator, by citing an emergency lasting either through summer 2025 or through 2030 (depending on where one looks in the Order and subsequent orders). The orders would therefore replace the carefully balanced resource adequacy regime described above with one based entirely on the fiat of the Secretary of Energy. But Congress "does not alter the fundamental details of a regulatory scheme in vague terms or

ancillary provisions," *Whitman*, 531 U.S. at 468, and nothing in Section 202(c) evinces an intent to displace the Federal Power Act's consistent division of power among state and federal actors. Accordingly, DOE's novel interpretation cannot withstand scrutiny.

C. Resource adequacy in MISO is governed by an intricate and robust planning process bolstered by markets; conditions that occur in the normal course of that process cannot qualify as an "emergency."

DOE's actions would also subvert the multiple, overlapping processes (described above) by which MISO and its member states and utilities ensure resource adequacy. Like resource adequacy regimes across the county, those processes are designed to produce the appropriate amount of capacity to meet forecasted energy needs with a margin to account for contingences, such as severe and unpredictable weather patterns and unplanned generation or transmission outages. Hitting the appropriate level is important, because there are costs on both sides. Just as underbuilding capacity could result in shortages, overbuilding or retaining too much capacity could result in unjust and unreasonable rates by forcing customers to pay more than they should for a reliable system. *See Midcontinent Indep. Sys. Operator, Inc.*, 187 FERC ¶61,202, at ¶89 (2024) (finding that the structure of the MISO

capacity auction does not require overbuilding of capacity, even though it procures capacity above the applicable Planning Reserve Margin target if the reliability benefit is greater than the cost of procuring it). For proof, look no further than the effects of DOE's actions to date: ratepayers in eleven MISO states will pay $80 million in Campbell Plant operating costs that exceeded market revenues between May 30 and September 30. *See* CMS Energy Corp. & Consumers Energy Co., Quarterly Report (Form 10-Q) at 62 (Oct. 30, 2025). Those net operating costs will only continue to accrue as the Campbell Plant stays online past its planned retirement date.

And, as also described above, those processes produce and depend on price signals. In response to signals that demand for electricity is rising, including demand from new hyperscale data centers, planners in MISO states have already begun to plan, develop, and procure new generation resources (and other responsive measures, like payments for energy conservation), in their integrated resource plans. *See, e.g.*, *In re Xcel Energy's 2024-2040 Upper Midwest Integrated Resource Plan*, Case No. RP-24-67, Order at 6-7, (Minn. Pub. Utils. Comm'n Apr. 21, 2025). Similarly, market-based capacity prices are rising, *see* MISO, 2025-2026

Planning Resource Auction Results at 2-3, sending price signals to bring new generation online or retain existing generation that would otherwise be uneconomic, including through the integrated resource planning process. The factors the Order identifies as an "emergency" are thus conditions that MISO's resource adequacy regime encounters and addresses in the normal course. Those signals are the impetus for the market and the private sector, under the supervision of *state* regulators, to develop the resources necessary to ensure resource adequacy.

Conversely, those conditions are not a basis for "emergency" intervention. Emergency powers "are an 'unusual response' to 'exceptional circumstances.'" *In re Int'l Chem. Workers Union*, 830 F.2d 369, 371 (D.C. Cir. 1987) (quoting *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1155 (D.C. Cir. 1983)). When Congress conveys that kind of "'extraordinary power,'" it is meant to be "'delicately exercised' in only certain 'limited situations.'" *Id.* at 370 (quoting *Pub. Citizen*, 702 F.2d at 1155). Here, those "limited situations" cannot be reasonably construed to include the ordinary mechanisms through which markets and state regulators respond to long-term energy challenges.

Allowing DOE's interpretation to stand would turn Section 202(c)'s exception into the rule.

II. The Order is arbitrary and capricious and unsupported by substantial evidence.

A. The evidence cited in the Order in fact reinforces the ability of existing MISO planning and market mechanisms to address resource adequacy challenges.

DOE's Order cites a hodgepodge of different pieces of evidence that purportedly justify its conclusion that there is "a shortage of electric energy" or "a shortage of facilities for the generation of electric energy." But the evidence cited does not support the conclusion reached. To uphold an agency action, courts require that the agency's factual findings be based on substantial evidence and that the agency articulate a rational basis between the facts it found and the decisions it made. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C. §§ 706(2)(A), (E). As detailed above, there is no resource adequacy emergency in MISO during Planning Year 2025-2026. To the contrary, MISO has met and exceeded its Planning Reserve Margins through the current Planning Year.

In the challenged Order and subsequent Section 202(c) orders for the Campbell Plant, DOE also cites evidence suggesting that it seeks to

address challenges arising in the future. But even when given more time to bolster its case, the government has still failed to put forward evidence of an actual emergency. Below, we discuss the government's evidence and why, when viewed in the appropriate context, including the resource adequacy regimes described above, it does not support, much less justify, DOE's emergency finding.

First, DOE cites congressional testimony from MISO leadership discussing MISO's *long-term* challenges due to a changing generation fleet, retirement of coal- and gas-fired power plants, inadequate transmission system infrastructure, increasing extreme weather, and rapid load growth. Order No. 202-25-3B at ¶41 (citing *Keeping the Lights On: Examining the State of Regional Grid Reliability: Hearing Before the Subcomm. On Energy of the H. Comm. On Energy & Com.,* 119th Cong. (2025) (testimony of Jennifer Curan, Senior Vice President, MISO) ("Curran Test."). But Ms. Curran's testimony in fact underlined the importance of the very resource adequacy regime described above. *See* Curran Test. at 6-8 (recommending a "multi-faceted and coordinated approach" that includes regular MISO studies that "provide the basis for long-term transmission planning efforts and help inform the electric

resource planning decisions, which are the purview of the states and utilities in the MISO region"; "[i]mproving existing markets and operations processes"; maximizing electric flows on existing transmission lines; constructing new generation and high-voltage and interregional transmission; and, "letting local reliability requirements determine the pace of retirements of existing power plants."); *id.* at 7 (noting that "no single electric generating resource . . . will solve all our challenges").

Second, in its more recent orders, DOE asserts that there is "a potential longer term resource adequacy emergency in MISO," Order No. 202-25-7 at 4; Order No. 202-25-9 at 4, based on various longer-term projections, including a survey conducted by MISO and the states in MISO's footprint as part of its normal planning process, MISO's Attributes Roadmap report, and DOE's Resource Adequacy Report. Order No. 202-25-7 at 4-6; Order No. 202-25-9 at 5-7. But none of those sources identify a resource adequacy problem before *2027 at the earliest*. Nor do they address, much less refute, the contrary evidence indicating that MISO has adequate capacity for the foreseeable future. For that reason, they do not show that there is a Section 202(c) emergency today or at any time during the application of the DOE order. If DOE believes

the evidence supports extraordinary government interventions to commandeer the planning process in anticipation of potential conditions multiple years in the future, it must seek more power from Congress. It cannot frame those speculative future conditions as a Section 202(c) emergency.

Third, DOE also now cites an article reporting that Consumers Energy will be serving a planned 1 gigawatt hyperscale data center and has a pipeline of future data center growth. Order No. 202-25-7 at 6; Order No. 202-25-9 at 6-7. But the article itself notes that "the new data center load will increase into the 2030s, providing the utility with time to plan for any new capacity that may be needed to power the data center." Zachary Skidmore, *Michigan utility Consumers Energy to provide 1GW of power to new hyperscale data center*, Data Center Dynamics (Aug. 5, 2025).[9] DOE cannot cite that fact as supporting an "emergency," when it in fact depicts the non-emergent functioning of utilities' and states' long-term planning.

[9] https://www.datacenterdynamics.com/en/news/michigan-utility-consumers-energy-to-provide-1gw-of-power-to-new-hyperscale-data-center/

Fourth, DOE now cites its own Resource Adequacy Report as showing "the myriad challenges affecting the Nation's energy outlook" that supposedly require "decisive intervention." Order No. 202-25-7 at 6; Order No. 202-25-9 at 6. But an unsupported reference to "challenges" affecting the national energy outlook does not show that there is a Section 202(c) emergency afflicting a subset of the Midwestern energy markets. DOE's Resource Adequacy Report is also not a substitute for the detailed economic and engineering analyses conducted by grid planners in MISO and elsewhere, as the report itself acknowledges. *See* DOE, Resource Adequacy Report Evaluating the Reliability and Security of the United States Electric Grid, at *i* (July 2025) ("DOE acknowledges that the resource adequacy analysis that was performed in support of this study could benefit greatly from the in-depth engineering assessments which occur at the regional and utility level … 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.").

Fifth, DOE now invokes a statement in the 2023 MISO Attributes Roadmap that resource adequacy risks are rising in non-summer seasons. Order No. 202-25-7 at 4 (citing MISO Attributes Roadmap at 11); Order No. 202-25-9 at 3-4 (same). But that statement is pulled from a section explaining that reforms MISO had already developed would *address* those shifting seasonal risks by crediting resources for their capacity contributions accordingly. MISO, Attributes Roadmap, at 9-11 (Dec. 2023).

In short, each piece of evidence DOE cites actually reinforces the ability of existing MISO planning and market mechanisms to address resource adequacy challenges. None is a plea to a central planner to apply brute force methods with no analytical support to override those processes.

Finally, the challenged Order asserts twice that there is an emergency due to "other causes," Order No. 202-25-3 at 1, but never identifies or explains how its purported "other causes" involve "sudden" or "unforeseen" events requiring immediate action. Indeed, DOE has not explained—at all, or with any level of detail—what those other causes are, what evidence supports them, and how they amount to an

emergency. Those references to "other causes" are archetypal "conclusory determinations" that cannot overcome the evidence that existing MISO planning and market mechanisms sufficiently address resource adequacy. *Am. Radio Relay League v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008) (citing *State Farm*, 463 U.S. at 42-43; *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001)); *Am. Pub. Gas Ass'n v. Dep't of Energy*, 22 F.4th 1018, 1024-25 (D.C. Cir. 2022).

B. The Order will not "best meet" the emergency it purports to identify.

Even if there were an emergency, DOE's determination that the Order "will best meet the emergency and serve the public interest" is again arbitrary, capricious, and unsupported by substantial evidence. Rather than enhancing resource adequacy, the Order will impair it by generating uncertainty and stifling investment in new capacity. And the Order will also harm the public interest, rather than serve it, because it will raise already-high utility bills without providing commensurate benefits.

Ensuring resource adequacy—particularly long-term resource adequacy—requires investor confidence and reliable price signals. Because the Order injects arbitrary out-of-market factors and

undermines price signals, rather than "meet[ing] the emergency," the Order will exacerbate the challenges it identifies.

As detailed above, whether to build or retire power plants are complex decisions informed by technological, market, and regulatory contexts, including processes for weighing uncertainties and adapting to new information. MISO's wholesale markets are structured to signal when and where new supply is needed and to allow competitive entrants to respond. Federal intervention forcing a power plant to remain online after its owner chose to retire it, with approval from its regulator, disrupts the marketplace. That disruption prevents markets from functioning as intended to meet reliability needs at least cost, and overturns investor expectations. It also runs counter to the extensive least-cost analysis for meeting demand and the MISO capacity obligations that Consumers Energy undertook. It means either maintaining an asset that is uncompetitive in the wholesale market it bids into, suppressing investment signals that would spur lower-cost and more reliable new assets to come online, or both. Regardless, it impairs the market mechanisms that the region relies on to ensure resource adequacy over the long term.

From a planning perspective, if this Order were upheld, utilities and state regulators would be unable to predict which of their decisions may be reversed by a Section 202(c) order or when. This uncertainty may dissuade them from taking otherwise efficient actions to ensure reliability, like authorizing investments in new, cheaper, more modern capacity, particularly if they expect that ratepayers will be stuck paying for resources like the Campbell Plant regardless. Likewise, unpredictable shifts in the status of major power plants critically endanger the integrity of MISO's interconnection and planning studies, which underly billions of dollars of investment. Indeed, although DOE expresses concern that MISO's generator interconnection process does not bring power plants online quickly enough, Order No. 202-25-7 at 5, arbitrarily retaining resources that are due to be retired exacerbates a central cause of interconnection delays by injecting uncertainty into interconnection study results and network upgrade cost estimates. *Improvements to Generator Interconnection Procs. & Agreements*, Order No. 2023, 184 FERC ¶61,054, at ¶37 (2023).

***

As we have outlined above, existing multi-year planning processes and markets already ensure reliability and affordability in MISO and throughout our electric grid. The government's Order would interfere with those economic and engineering processes, without evidence justifying that intervention. Ultimately, that intervention would undermine system reliability and hurt consumers.

CONCLUSION

This Court should hold unlawful and set aside the Order.

Respectfully submitted,

/s/ *Nicholas M. Gladd*

NICHOLAS M. GLADD
JOHN B. KENNEY
RACHEL NEUBURGER
Wilson Sonsini Goodrich & Rosati, P.C.
1700 K Street NW
Washington, DC 20006
(202) 973-8800
ngladd@wsgr.com

ZACHARY NORRIS
Niskanen Center
1201 New York Ave. NW
Washington, D.C. 20005
(202) 899-1166
znorris@niskanencenter.org

Counsel for Amici Curiae, *The Niskanen Center, Professor Paul L. Joskow, Professor Richard Schmalensee*

DECEMBER 23, 2025

CERTIFICATE OF COMPLIANCE

This brief complies with the word limits of Federal Rule of Appellate Procedure 29(a)(5), because it contains 6,497 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: DECEMBER 23, 2025

/s/ *Nicholas M. Gladd*
NICHOLAS M. GLADD
Counsel for Amici Curiae, *The Niskanen Center, Professor Paul L. Joskow, Professor Richard Schmalensee*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on December 23, 2025. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: DECEMBER 23, 2025

/s/ *Nicholas M. Gladd*
NICHOLAS M. GLADD
Counsel for Amici Curiae*, The Niskanen Center, Professor Paul L. Joskow, Professor Richard Schmalensee*