UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF ENERGY

In re Craig Order No. 202-26-49	)	Order No. 202-26-49
	)	

REQUEST FOR REHEARING OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION AND PLATTE RIVER POWER AUTHORITY

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Pursuant to Section 313(a) of the Federal Power Act (FPA),[1] and Rule 713 of the Rules and Regulations of the Federal Energy Regulatory Commission (FERC or Commission),[2] and the applicable rules of practice and procedure,[3] Tri-State Generation and Transmission Association, Inc. (Tri-State) and Platte River Power Authority (Platte River) (together, Petitioners) file this Request for Rehearing of Order No. 202-26-49, dated September 25, 2026 (the Order or Current Order) requiring Petitioners and their co-owners to keep coal-fired Unit 1 of the Craig Generating Station (Craig Station) in Craig, Colorado (Craig Unit 1) open and available to operate notwithstanding its long-planned retirement. Craig Unit 1 was originally scheduled to shut down by December 31, 2025.[4]

SUMMARY

Section 202(c) provides that "during" an emergency caused by "a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes," the U.S. Department of Energy (DOE) may take remedial action. 16 U.S.C. § 824a(c). But, as the D.C. Circuit recently held, "an

[1] 16 U.S.C. § 825l.

[2] 18 C.F.R. § 385.713 (2026).

[3] U.S. Dep't of Energy, DOE Rehearing Procedures, https://www.energy.gov/ceser/doe-202c-order-rehearing-procedures (last visited Jan. 15, 2026); *see also* 18 C.F.R. §§ 385.214 (2026), 385.713.

[4] Petitioners are co-owners of Craig Unit 1, and named recipients of the Order. Under the Commission's rules and regulations they are parties to this proceeding. However, if necessary to give them party status, out of an abundance of caution, Petitioners ask that this filing also be treated as a motion to intervene under Rule 214 of the Commission's Rules and Regulations. Petitioners' position on the Order and the nature of their interest are set forth in detail in this filing.

emergency under [FPA S]ection 202(c) refers to an electricity shortage that is or will in the future be acute and is not being timely addressed by planning for resource adequacy by the state, its utilities, or a regional transmission organization (RTO). Those circumstances require immediate, essentially last-resort action by DOE ***outside the ordinary reliability planning process***." *Michigan v. U.S. Dep't of Energy*, --- F.4th ---, 2026 WL 2671756 at *16 (D.C. Cir. Sept. 11, 2026) (emphasis added) (hereinafter "*Michigan v. DOE*").

Thus, analyzing a Section 202(c) order applicable to a Michigan coal-fired power station, the D.C. Circuit held that "longer-term reliability and resource adequacy concerns[,]" in the form of "unacceptable reliability risks [occurring] within five years" was a rationale that "[fell] even farther outside the meaning of 'emergency' under section 202(c) than" predicted Summer 2025 reliability issues. 2026 WL 2671756 at *17. The court confirmed the validity of Petitioners' now-repeated exhortations to DOE in prior requests for rehearing, that "[l]ong-term resource adequacy risks generally do not necessitate immediate action by DOE." *Id.*

Yet, the Current Order—issued weeks after the D.C. Circuit's decision, once again without any notice or a hearing before its issuance as required by the U.S. Constitution—asserts that an "emergency" exists based on (1) short-term resource-adequacy issues that can be (and were) resolved through normal resource-management procedures; and (2) potential energy shortages that are not likely to occur, if ever, until ***2034***, more than seven years—or ***twenty-nine*** 90-day Section

202(c) renewal cycles—in the future. These are categorically not the kinds of "emergency" to which Section 202(c) applies.

In any event, reliability concerns cannot be solved by forcing Craig Unit 1, a more than 45-year-old coal plant, to continue operating today. They cannot be reasonably addressed by allowing dispatch of Craig Unit 1 during the period of the Current Order. Petitioners raised many of these and other concerns in their requests for rehearing and clarification responding to DOE's initial, second, and third Section 202(c) orders targeting Craig Unit 1.[5] Despite these prior requests, and despite the D.C. Circuit's dispositive ruling, DOE made essentially no substantive changes from Order No. 202-26-31 (the prior order) to the Current Order.

Petitioners again request rehearing to bring to DOE's attention the myriad constitutional, procedural, and evidentiary defects of the Current Order, and to preserve their right to appeal. The Current Order fails to articulate a valid emergency, and its chosen remedy—keeping Craig Unit 1 open and available for dispatch—does not respond to the emergency it purports to identify. Because the contemplated "emergency" does not occur until 2034—and despite having now issued

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[5] *In re Craig Order No. 202-25-14*, Request for Clarification and for Rehearing of Tri-State Generation and Transmission Association and Platte River Power Authority (Jan. 29, 2026), https://www.energy.gov/documents/request-clarification-and-rehearing-tri-state-generation-and-transmission-association-and (the First Rehearing Request); *In re Craig Order No. 202-26-21* Request for Clarification and for Rehearing of Tri-State Generation and Transmission Association and Platte River Power Authority (April 29, 2026), https://www.energy.gov/documents/request-rehearing-tri-state-generation-and-transmission-association-and-platte-river (the Second Rehearing Request); *In re Craig Order No. 202-26-31* Request for Clarification and for Rehearing of Tri-State Generation and Transmission Association and Platte River Power Authority (July 24, 2026), https://www.energy.gov/documents/request-rehearing-tri-state-generation-and-transmission-association-and-platte-river-0 (the Third Rehearing Request).

four orders on this point without the required pre-deprivation notice and hearing—the Order fails to provide constitutionally adequate due process. Similarly, the Current Order is procedurally defective. By failing to identify the agency consulted, it fails to adequately incorporate statutorily mandated consultation between DOE and other agencies. Likewise, it neglects to consider any alternatives to its proposed plan or the consequences of continuing with the present course of action. Finally, the Current Order does not align with the statutory objectives of the FPA, and DOE never explains how it could.

Even if the Current Order were to somehow survive reasoned reconsideration in light of *Michigan v. DOE*, it still effects an uncompensated physical and regulatory taking of Petitioners' property interests in Craig Unit 1 and associated water, fuel, and transmission resources. This taking does not come with just compensation, because (1) the processes by which Petitioners could potentially obtain recovery are insufficient and unclear; and (2) these processes fail to provide *compensation* from the taking party—the federal government—rather than facilitating potential compensation from private third parties (including Petitioners).

Petitioners seek to work with all levels of government to provide consumers with reliable and affordable electricity. But Petitioners cannot fulfill this mission when agencies impede years of concerted planning and mandate disruptive and costly changes that do not promote reliability or affordability, especially when agency orders are categorically unlawful.

STATEMENT OF ISSUES

Pursuant to FPA Section 313(a), Petitioners request rehearing based on the following issues:

1. In light of the D.C. Circuit's decision in *Michigan v. DOE*, the Current Order fails to establish the existence of an emergency permitting DOE's intervention under Section 202(c). *See Michigan v. U.S. Dep't of Energy*, --- F.4th ---, 2026 WL 2671756 (D.C. Cir. Sept. 11, 2026). It is, therefore, contrary to law, arbitrary and capricious, and in excess of jurisdiction.

2. Because of the temporal, geographic, and practical disconnect between the energy reliability and resource-adequacy concerns described by the Current Order and the means DOE directs for addressing those concerns as compared to alternatives, DOE failed to establish that the purported "emergency" here is addressed by the continued operation and dispatch of Craig Unit 1 or that the Current Order "best meet[s] the emergency and serve[s] the public interest." 16 U.S.C. § 824a(c); 10 C.F.R. § 205.373 (2026). It is, therefore, contrary to law and arbitrary and capricious.

3. DOE predicated the Current Order on long-term concerns, and not an existing emergency, and reissued the Current Order notwithstanding the due-process objections Petitioners raised in their prior requests for rehearing. Therefore, Petitioners were denied any meaningful opportunity to be heard. This violates the Due Process Clause of the Fifth Amendment and is contrary to the procedural protections contemplated by the Administrative Procedure Act and the FPA. *Pa. Gas & Water Co. v. FPC*, 427 F.2d 568, 576 (D.C. Cir. 1970); *S. Allegheny Pittsburgh Restaurant Enterprises, LLC v. City of Pittsburgh*, 806 F. App'x 134, 139–41 (3d Cir. 2020).

4. The Current Order fails to adequately comply with the statutorily required consultation between DOE and the agency "with expertise in the environmental interest protected by" the laws or regulations waived by a renewed order. 16 U.S.C. § 824a(c)(4)(B). It is, therefore, contrary to law and arbitrary and capricious.

5. The Current Order does not align with the statutory objectives of the FPA, because it requires the operation and availability for dispatch of an uneconomic resource, and disrupts ordinary and orderly planning, development, and investment in generation resources. It is, therefore, contrary to law and arbitrary and capricious.

6. By mandating Craig Unit 1's availability to operate and the terms under which it shall operate, and requiring related changes to Petitioners' physical property, the Current Order constitutes both a physical and regulatory taking. Because the Current Order does not provide "just compensation" from the government, this is an uncompensated taking in violation of the Fifth Amendment to the United States Constitution. *United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951); *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984).

BACKGROUND

A. The Petitioners

Tri-State is a wholesale generation and transmission cooperative operating on a not-for-profit basis with its principal place of business in Westminster, Colorado. Organized and existing pursuant to the Colorado Cooperative Act,[6] Tri-State is a public utility subject to FERC jurisdiction under Part II of the FPA.[7] Tri-State is wholly owned by its electric distribution cooperative and public power district members (Utility Members) and three non-Utility Members (Non-Utility Members)[8] and was formed by its Utility Members for the purpose of providing the Utility Members with transmission services and wholesale power for resale to their retail customers.

[6] COLO. REV. STAT. § 7-55-101 *et seq.* (2019) (Cooperatives- General); Articles of Incorporation (2020).

[7] Tri-State Generation and Transmission Ass'n, 170 FERC ¶ 61,221, at P 37 (2020).

[8] Tri-State's Non-Utility Members are: (i) MIECO, Inc., a wholesale supplier of natural gas in the United States; (ii) Olson's Greenhouses of Colorado, LLC, a grower/distributor of plants throughout the western United States that has a contract to purchase thermal energy from Tri-State; and (iii) Ellgen Ranch Company, which leases property from a Tri-State subsidiary.

Tri-State has 11 Utility Members with retail customers located in New Mexico and three Utility Members with retail customers in Nebraska,[9] all of which are outside the 2025 Western Electricity Coordinating Council (WECC) Rocky Mountain region that DOE identified as the region experiencing an emergency in the Order. The retail service territories of Tri-State's Utility Members cover approximately 182,000 square miles and their customers include rural residences, farms and ranches, and large and small businesses and industries, serving approximately 522,000 retail electric meters. Tri-State's Utility Members are the sole state-certificated providers of electric service to retail (residential and business) customers within their designated service territories.

Tri-State owns, directly or indirectly, or controls the output of, various power generation facilities, and purchases wholesale power within both the Western and Eastern Interconnections. Among other generation facilities, Tri-State is a partial owner of Craig Unit 1, with a 24% ownership share. Tri-State's generating facilities are included in the Western Power Pool reserve sharing program. This program facilitates sharing of generation reserves to be activated during a system emergency, such as loss of a generating unit or transmission line. Tri-State began participating in the Southwest Power Pool's (SPP) expanded RTO in the Western Interconnection in April 2026.[10]

[9] Tri-State has six Utility Members that maintain headquarters in Nebraska, three of which operate outside the emergency assessment area.

[10] As used herein, SPP refers to the SPP RTO's western expansion. It does not include SPP Markets+.

Platte River is a not-for-profit, municipally-owned power utility and joint action agency that generates reliable, financially sustainable, and environmentally responsible electricity for its owner communities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado. Platte River is a political subdivision of the State of Colorado and a government-owned utility under FPA Section 201(f), 16 U.S.C. § 824(f). Headquartered in Fort Collins, Colorado, Platte River furnishes cost-of-service wholesale electrical power and energy to its four owner communities.

Platte River is a partial owner of Craig Units 1 and 2, with an 18% ownership share in the Craig units. Platte River's share of the total net capacity from both Craig units is 151 MW. Platte River also owns and operates an integrated transmission system of high-voltage aerial and underground power lines that deliver electricity to the electric utilities of Platte River's owner communities in Northern Colorado. Like Tri-State, Platte River began participating in SPP's expanded RTO in April 2026.

B. The Craig Generating Station

Craig Generating Station is a three-unit, coal-fired power plant located in Craig, Colorado. Craig Units 1 and 2 were built and are jointly owned by several utilities through what is known as the Yampa Project. Tri-State operates those two units on behalf of all the co-owners, including Platte River, PacifiCorp, Public Service Company of Colorado (PSCo), and the Salt River Project Agricultural Improvement and Power District. Tri-State separately owns and operates Craig Unit 3. In April 2026, the owners of Craig Units 2 and 3 became market participants in SPP—the culmination of a multi-year planning process—and began to bid those units into SPP's

market. Craig Unit 1 is currently participating as a resource in SPP solely because of the Order.

As a result of changed market conditions and regulatory requirements, the retirement of the Craig units has been planned, reviewed, and integrated into state-approved resource portfolios, and the owners have planned for their closure for nearly a decade—beginning with Craig Unit 1 by December 31, 2025, followed by Craig Unit 3 by January 1, 2028, and Craig Unit 2 by September 30, 2028. Colorado Air Quality Control Commission Regulation No. 23 on Regional Haze Limits now specifies a retirement date for each Craig unit.[11] Unit 1's retirement date was adopted in 2016, in a revision of what was then Colorado Air Quality Control Commission Regulation No. 3, which was approved by the Environmental Protection Agency (EPA) in 2018.[12] Retirement dates for Craig units were later codified into Regulation No. 23.

The Craig units have been fueled primarily by coal from the nearby Colowyo and Trapper mines. The Colowyo Mine has ceased active mining and transitioned to full reclamation, with two pits in final reclamation and the third transitioned to reclamation on October 15, 2025. Similarly, the Trapper Mine ceased active mining on September 30, 2026 and converted to site remediation on October 1. Before the

[11] COLO. CODE REGS. 1001-27.

[12] *See* Approval and Promulgation of Implementation Plans; Colorado; Regional Haze 5-Year Progress Report State Implementation Plan, 84 Fed. Reg. 47884 (Sept. 11, 2019); Co. Air Pollution Control Div., Colorado Visibility and Regional Haze State Implementation Plan for the Twelve Mandatory Class I Federal Areas in Colorado (Dec. 15, 2016), https://oitco.hylandcloud.com/POP/DocPop/DocPop.aspx?docid=3303135.

closure of the Colowyo Mine, Tri-State stockpiled sufficient coal to meet Tri-State's projected demand for Craig Units 2 and 3 through their respective planned retirement dates. Before the Trapper Mine closed, Platte River stockpiled sufficient coal to meet its projected demand for Craig Unit 2 through its planned retirement date. Because of the generation at Craig Unit 1 under Section 202(c) orders that was not anticipated in the implementation plan, this stockpile of coal may no longer meet the needs of Craig Units 2 and 3 through their scheduled dates of closure.

As part of its multi-year resource plan, which incorporated the long-planned retirement of Craig Unit 1, Tri-State has placed into service the 145-MW Axial Basin generating facility. This facility, approximately 26 miles from the Craig facility, relies on much of the same transmission infrastructure. Absent the retirement of Craig Unit 1, the interconnection of the Axial Basin facility faces transmission constraints such that, when Craig Unit 1 remains interconnected and available to operate, Tri-State may be required to curtail output from Axial Basin (particularly when all facilities are generating at or near full output) due to limited transmission capacity.

Continued operation of Craig 1 during severe drought conditions also imposes unplanned demands on scarce water supplies and could reduce the resilience of Craig Units 2 and 3 in future years. Craig Station, including Unit 1, is supplied by water from the Yampa River. The Yampa River is experiencing severe drought conditions, with portions of the upper basin elevated to "Exceptional Drought" by the U.S.

Drought Monitor, its most extreme drought class, late this spring.[13] The reduced flows in the Yampa River present significant challenges to water managers, reducing physical and legal water availability, requiring the release of more water from storage, and reducing the certainty that reservoirs can be refilled following releases, threatening water security in future years if drought continues.

Craig Station relies on direct flow water rights that are relatively junior in priority; these direct flow rights are subject to administrative water rights "calls" from senior irrigation water rights downstream. These diversions are also subject to physical availability constraints—intake pumps need adequate streamflows passing Craig Station's raw water for intake.

Currently, the additional water needed for Craig Unit 1 is supported by voluntary partial forbearance by downstream senior irrigation water rights and voluntary releases from upstream reservoirs. There is no guarantee that these voluntary practices will continue, and in fact, these practices may not be sustainable for the duration of the irrigation season. The magnitude and duration of any impacts would ultimately depend on actual operating, hydrologic, and river administration conditions.

In the immediate term, water needs for Craig Station may be met through releases from storage. Partly in anticipation of Craig Unit 1's closure, the owners of

[13] *See Drought Conditions for Moffat County, CO*, National Integrated Drought Information System (last visited Oct. 23, 2026), https://www.drought.gov/states/colorado/county/moffat; *Drought Conditions for Routt County, CO*, National Integrated Drought Information System (last visited Oct. 23, 2026), https://www.drought.gov/states/colorado/county/routt.

Craig Station prudently decided not to renew a storage contract for water from Stagecoach Reservoir, and to rely instead exclusively on their water storage rights in Elkhead Reservoir.[14] A mandate to operate Craig Unit 1, without this backup leased reservoir supply, places additional stress on the remaining storage supplies. This stress, exacerbated by higher-than-anticipated water demand and worse-than-anticipated drought, is increasingly likely to become a critical problem.

Further, for every incremental water release from Elkhead Reservoir, an equal amount must be stored before the following water year to restore water security to Craig Station, and that storage has no guarantee if the drought persists. A mandate to operate Craig Unit 1 leaves Tri-State's ability to refill its storage at Craig Station in doubt, reducing water security and imperiling the ability to operate any, or even all, of the Craig Units in the future.

C. Craig Unit 1

Craig Unit 1 can produce up to 427 MW of electricity and has been operational since 1980. Over the last ten years, the operations and maintenance cost (without consideration of coal cost or depreciation expense) to run Craig Unit 1 has totaled millions of dollars annually. By the standards of an older coal plant, Craig Unit 1 has generally provided reliable performance when called upon. However, in the last three years (due primarily to economic factors and some unplanned outages), Craig Unit 1

[14] The Colorado River District recently began releasing water from Elkhead Reservoir to mitigate the impacts of extreme drought and critically low streamflows in the Yampa River Valley. See Strategic Reservoir Releases Begin to Protect Yampa River Water Users and River Flows, Colorado River District (Jul. 16, 2026) https://www.coloradoriverdistrict.org/press-release-strategic-reservoir-releases-begin-to-protect-yampa-river-water-users-and-river-flows/.

has run at well below half of its maximum output, and this has not impaired Petitioners' ability to meet their total generation demands reliably.

Operation and maintenance of Craig Unit 1 have been undertaken prudently to reflect the scheduled 2025 retirement. Since 2019, the Craig Unit 1 owners scheduled and performed only that maintenance appropriate for a unit that planned to cease operation at the close of 2025. On December 19, 2025, the unit suffered a valve failure that rendered Craig Unit 1 inoperable, although the unit was made available following repairs.[15] A second unplanned outage occurred during the period covered by the third DOE Order, when Craig Unit 1 was unavailable due to the failure of the seal air frame in the 1B air heater. Both of these unplanned outages were promptly reported to DOE in compliance with the reporting requirements of the applicable DOE Order (*i.e.*, the requirement to submit a report shortly after issuance of the applicable DOE Order and via the daily reporting requirement), providing DOE with ample notice of the two unplanned outages prior to issuance of the instant DOE Order. These issues have since been resolved. Additionally, Tri-State has identified the need to replace a deteriorating mill carbon monoxide monitoring system due to obsolescence and the unavailability of replacement components from the original equipment manufacturer, which presents a reliability risk to continuous system functionality. The new system installation is currently in progress.

[15] Tri-State Generation & Transmission Ass'n, Inc., *U.S. DOE Orders Tri-State to Keep Craig Generating Station Unit Operating Next 90 Days*, Tri-State (Dec. 31, 2025), https://tristate.coop/us-doe-orders-tri-state-keep-craig-generating-station-unit-operating-next-90-days.

D. DOE Order No. 202-25-14

On December 30, 2025, DOE issued Order No. 202-25-14, declaring that "an emergency exists within the [WECC-NW] assessment area due to a shortage of electric energy, a shortage of facilities for the generation of electric energy, and other causes." DOE Order No. 202-25-14 at 1 (Dec. 30, 2025). Petitioners sought rehearing and clarification of Order No. 202-25-14, raising multiple legal issues, including DOE's denial of Petitioners' constitutionally protected due process rights, the lack of an appropriate mechanism for just compensation, and DOE's failure to consider alternatives for what the order itself recognized was not an immediate, time-sensitive emergency. DOE denied the First Rehearing Request by operation of law pursuant to 16 U.S.C. § 825l(a) by failing to substantively respond to the request within 30 days, and issued a notice to this effect on March 2, 2026. On June 24, 2026, DOE issued Order No. 202-25-14B, which modified the discussion in Order No. 202-25-14 but reached the same result.

This initial order expired on March 30, 2026.

E. DOE Order No. 202-26-21

On March 30, 2026, DOE issued Order No. 202-26-21, continuing the terms of Order 202-25-14. DOE did not provide any notice to Petitioners that this renewal order would issue, or provide any opportunity to be heard before it went into effect.

The second order declared that "an emergency exists within the Western Electricity Coordinating Council (WECC) Rocky Mountain assessment area due to a shortage of electric energy, a shortage of facilities for the generation of electricity, and other causes." DOE Order No. 202-26-21 at 1 (Mar. 30, 2026). The order further

declared that "[t]he availability of electricity from Craig Unit 1 will continue to be critical to maintain reliability in the WECC Rocky Mountain assessment area." *Id.* at 3. Its emergency was predicated on (1) "increasing demand" and (2) "shortage from accelerated retirement of generation facilities [that] will continue in the near term and are also likely to continue in subsequent years." *Id.* at 6. DOE stated, "[t]his could lead to the loss of power to homes, and businesses in the areas that may be affected by curtailments or power outages, presenting a risk to public health and safety." *Id.*

DOE predicated its energy reliability concerns on the 2025 Long-Term Reliability Assessment (2025 LTRA) from the North American Electric Reliability Corporation (NERC) for the WECC-Rocky Mountain assessment area, which does not anticipate any shortfalls in supply before Summer 2034. *Id.* at 3. DOE also pointed to the 2025 WECC Western Assessment of Resource Adequacy. The concerns included (1) projected regional load growth; (2) planned retirement of generation facilities fueled by coal and natural gas; and (3) the "prolific growth of data centers" constituting a "new and unexpected source of load growth." *Id.* at 3–5.[16]

This second order expired on June 28, 2026.

[16] Order No. 202-26-21 placed these concerns in the broader context of Executive Orders 14156 and 14262. Executive Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025) (*Declaring a National Energy Emergency*), https://www.federalregister.gov/documents/2025/01/29/2025-02003/declaring-a-national-energy-emergency; Executive Order No. 14262, 90 Fed. Reg. 15521 (Apr. 8, 2025) (*Strengthening the Reliability and Security of the United States Electric Grid*), https://www.federalregister.gov/documents/2025/04/14/2025-06381/strengthening-the-reliability-and-security-of-the-united-states-electric-grid.

F. DOE Order No. 202-26-31

On June 26, 2026, DOE issued Order No. 202-26-31, continuing Orders 202-25-14 and 202-26-21. Once again, DOE did not provide any notice to Petitioners that this order would issue, or provide any opportunity to be heard before it went into effect.

The third order was similar to Order No. 202-26-21, although not identical.[17] In its discussion of the claimed "Continuing Emergency Conditions," the order includes a discussion of NERC's 2026 Summer Reliability Assessment.[18] The order acknowledges that NERC's evaluation is that, within the WECC-Rocky Mountain region, reserve margins are expected to remain above reference levels for summer 2026.[19] The order also refers to an April 20 memorandum issued by President Trump.[20] As part of its daily reporting requirements under that order, Tri-State

[17] Order No. 202-26-31 contained a substantial number of small adjustments in the terminology it uses to describe both the DOE's determinations and Petitioners' obligations. For example, Order No. 202-26-21 stated on page 2 that the Secretary "determined that the continued **availability** of Craig Unit 1 would provide additional generation capacity, which would help prevent the loss of power to homes and businesses that would otherwise pose a risk to public health and safety." Order No. 202-26-31, however, stated that the Secretary "determined that the continued **operation** of Craig Unit 1" would have the same impacts. Similarly, in the "Order" section of these documents, where the first and second iterations of these orders described a "shortage from **accelerated** retirement" of generation, the most third order described a "shortage from **premature** retirement" of generation. Petitioners do not understand these and similar unexplained variances to be material. To the extent changes of this and similar kinds are meant to convey a materially different meaning in Order No. 202-26-31 and subsequent orders as compared to earlier, substantially similar ones, this intent is unclear from Order No. 202-26-31 itself, and that absence of clarity renders it and the most recent order arbitrary and capricious.

[18] *See* Current Order at 5.

[19] *Id.*

[20] *Id.* at 5–6.

informed DOE that Craig Unit 1 was again on unplanned outage during the period covered by this order.

This third order expired on September 26, 2026.

G. *Michigan v. DOE*

DOE Orders No. 202-25-14, 202-26-21 and 202-26-31 were not the first Section 202(c) orders issued by DOE under similar theories. The first such DOE order, Order No. 202-25-3, concerned the J.H. Campbell Generating Plant (Campbell) in Michigan. This order and subsequent orders applicable to the same facility were eventually appealed to the D.C. Circuit, which granted the appellants' petitions and vacated the order on September 11, 2026.

In its decision, the D.C. Circuit described the plant at issue as "an aging coal-fired power plant in Michigan" much like Craig Unit 1. *Michigan v. DOE*, 2026 WL 2671756 at *8. Like Craig Unit 1, Campbell had been scheduled to close under a state regulator-approved settlement incorporated into regional resource planning. Id. at *8–10. As with Craig Unit 1, though, shortly before Campbell closed in May 2025, DOE issued a Section 202(c) order requiring the plant's owner to keep it open and running. Id. at *10. Like the evidence cited in support of Order No. 202-25-14, DOE cited (1) a 2024 NERC report stating that MISO is "at elevated risk of operational reserve shortfalls during periods of high demand or low resource output" and (2) stray statements describing MISO's planning resource auction results in negative terms. Id. Both affected state governments (including Michigan) and various public interest organizations (PIOs) sought rehearing and later judicial review from the D.C. Circuit. Id. at *10–11.

On appeal, the D.C. Circuit roundly rejected DOE's expansive interpretation of its statutory authority. Rather than allowing DOE to take broad and unilateral remedial action under any situation it believes to be an emergency, the D.C. Circuit defined a Section 202(c) emergency as "a grid-reliability risk that calls for an immediate response *by DOE in particular*." 2026 WL 2671756 at *12 (emphasis added). To show this, the court held that DOE must make a finding that "the state has not and will not timely take steps that must be taken immediately to avert unacceptable risk to reliability[,]" and thus "immediate action" is needed. *Id.* Whether such immediate action is needed "outside the ordinary process" for assuring reliability is the "key consideration" in determining whether a situation amounts to an emergency. *Id.* The court viewed this kind of finding as rare, and the use of Section 202(c) as a "narrow, last-resort backstop[,]" because the FPA was drafted to "preserve the primacy of state authority over electricity generation." *Id.* at *13–14. Rather, the court recognized that "[i]f generation shortfalls or other reliability risks are anticipated, states, generators, and regional entities have every incentive and tool to make plans to procure replacement resources or prevent scheduled retirements." *Id.* at *14. This is true "even for imminent or unforeseen shortfalls." *Id.*

Given the adequacy and importance of these existing tools, the court noted that:

> When DOE exercises its section 202(c) authority to compel generation other than as a last resort, including by reversing a generator's long and carefully planned retirement as it did with Consumers Energy's Campbell unit, the results are disruptive. Unjustified use of section 202(c) upends existing resource-adequacy decisions made based on years

> of planning with intensive expert input and broad stakeholder participation.

2026 WL 2671756 at *14. Thus, according to the court, "[DOE's] reading of 'emergency' invites frequent federal interventions that are unsupported by the statute and threaten the stability of the energy market." *Id.*

Finding that the text, structure, purpose, and practical history of Section 202(c) argued against DOE's expansive interpretation of "emergency" in favor of the court's narrower reading, the court then turned to evaluate the "emergency" justifying the disputed Campbell order. 2026 WL 2671756 at *15. The court rejected DOE's argument that the asserted "potential for electricity supply shortfalls" constituted an emergency in the absence of "specifics about its potential severity, timing, location, or likelihood" or reason that DOE—rather than utilities and state regulators normally tasked with handling generation—had to get involved. *Id.* at *16.

Turning to the longer-term concerns asserted by DOE—that "most regions . . . will face unacceptable reliability risks within five years"—the court held that this "added rationale falls even farther outside the meaning of 'emergency' under section 202(c)" as "[l]ong-term resource adequacy risks generally do not necessitate immediate action by DOE[, but are instead] routinely resolved through coordinated, forward-looking decision making within the ordinary resource adequacy system." 2026 WL 2671756 at *17. As the court held, "[t]he federal government generally lacks statutory authority to address long-term reliability risks; much less is DOE empowered to make unauthorized use of section 202(c) emergency authority as a partial substitute for and disruption to the states' planning processes." *Id.*

Several hours after the D.C. Circuit issued its decision, DOE issued Order No. 202-26-44, another Section 202(c) order concerning the Centralia Generating Station in Washington State, which renewed a series of orders directed to that facility. Likewise, on September 18, 2026, DOE issued Orders No. 202-26-46 and 202-26-47, concerning the R.M. Schahfer Generating Station and F.B. Culley Generating Station respectively, both in Indiana. Both orders renewed similar series of Section 202(c) orders. DOE did not acknowledge *Michigan v. DOE* in any of these orders.

H. DOE Order No. 202-26-49

On September 25, 2026, DOE issued Order No. 202-26-49 (Current Order), continuing Orders 202-25-14, 202-26-21, and 202-26-31. Once again, DOE did not provide any notice to Petitioners that the Current Order would issue, or provide any opportunity to be heard before it went into effect.

The Current Order does not acknowledge or otherwise address the *Michigan v. DOE* decision issued weeks prior. The Current Order contains a handful of changes from Order No. 202-26-31, namely determining that an emergency existed "***due to 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, and other causes." Order at 1 (emphasis added for new language). The Current Order specifically cites the 2025 LTRA, noting "that the WECC–Rocky Mountain region *faces challenges from an aging thermal resource fleet, which can lead to unplanned outages*, exacerbated by supply chain issues, and vendor availability. Current Order at 3 (citations omitted) (emphasis added). The only evidence cited for this new justification was the occurrence of three Energy Emergency Alerts (EEAs) during

July and August 2026 that by the terms of related DOE orders were addressed through normal resource-management procedures (namely allowing certain resources to exceed normal operating limits and permitting the deployment of onsite backup resources at data centers and commercial-industrial facilities). *See* Current Order at 6 (citing DOE Order Nos. 202-26-36, 202-26-37, and 202-26-37A). As discussed *supra*, Craig Unit 1 experienced an outage during the period covered by DOE Order Nos. 202-26-31. The Current Order does not address how an older thermal unit long slated for retirement, which has faced unplanned outages since the issuance of the first order, can address an "emergency" that allegedly arises out of "an aging thermal resource fleet, which can lead to unplanned outages."

The Current Order also stated that "[p]ursuant to section 202(c)(4)(B) of the FPA, DOE has consulted with the primary Federal agency with expertise in the environmental interest protected by the laws or regulations that may conflict with this Order. The agency did not submit additional conditions for inclusion in this Order." Current Order at 7. The Current Order does not identify which agency DOE consulted with or what the scope or contents of that consultation were, nor does it acknowledge that Orders 202-26-21 and 202-26-31 were also bound by this requirement, despite Petitioners raising this issue in the Second and Third Rehearing Requests.

The Current Order requires Tri-State and the other co-owners of Craig Unit 1 to:

1. Take all measures necessary to ensure that Craig Unit 1 is available to operate at the direction of the Southwest Power Pool (SPP);

2. Limit operation of Craig Unit 1 to the times and within certain parameters to minimize adverse environmental impacts;
3. Provide daily notification to DOE reporting whether Craig Unit 1 has operated in compliance with the Order;
4. Comply with applicable environmental requirements including, but not limited to, monitoring, reporting, and recordkeeping requirements, to the maximum extent feasible while operating consistent with the emergency conditions;
5. Update DOE on measures taken or planned to ensure operational availability of Craig Unit 1 by October 10, 2026; and
6. File with the FERC Tariff revisions or waivers to effectuate the Order with rate recovery available pursuant to 16 U.S.C. § 824a(c).

Tri-State has already taken and will continue to take steps to comply with the Current Order. In coordination with the other co-owners of Unit 1, it timely submitted its update to DOE on October 10, 2026, describing the measures it has taken and plans to take to ensure operational availability of Craig Unit 1. Tri-State has submitted and continues to submit daily notification to DOE as required by the Current Order.

ARGUMENT

Petitioners seek rehearing on two fronts. *First*, the Current Order does not meet either the Constitution's or Section 202(c)'s requirements for a reasoned, procedurally adequate finding of a valid emergency that compels operation of Craig Unit 1. *Second*, the Current Order effectuates a taking of Petitioners' property under the Fifth Amendment to the United States Constitution without an adequate process to obtain constitutionally required compensation.

I. THE CURRENT ORDER FAILS TO ASSERT A VALID EMERGENCY, DISRUPTS PETITIONERS' RELIABILITY PLANNING, AND FAILS TO ACCOUNT FOR VIABLE ALTERNATIVES

The D.C. Circuit's decision in *Michigan v. DOE* leaves little doubt that the Order exceeds DOE's authority under Section 202(c). Yet, even after that decision, DOE continues to assert emergency authority based on the same types of long-term reliability and resource-adequacy concerns that the court held do not constitute a qualifying emergency.

First, the Current Order fails to identify an emergency that meets the requirements of Section 202(c), or that is addressable by keeping Craig Unit 1 open. As the D.C. Circuit held in *Michigan v. DOE*, the "emergency" posited by DOE is not an emergency under Section 202(c). Moreover, the issues articulated by the Current Order are fundamentally mismatched—temporally, geographically, and practically—with the authorities granted by Section 202(c) and invoked by the Current Order. Forcing Craig Unit 1 to remain open is not only unlawful but counterproductive to DOE's stated purpose, disrupting a considered resource planning effort aimed at addressing the very resource-adequacy and reliability concerns DOE raises in the Order. This failure renders the Current Order arbitrary and capricious and in excess of DOE's statutory authority.

Second, the rote invocation of an "emergency" does not waive Petitioners' constitutional due process rights to pre-deprivation notice and a hearing. The materials relied upon in the Current Order demonstrate that the alleged resource-adequacy concerns are largely not sudden or unforeseen but instead involve long-term conditions projected to arise years in the future. And where, as here, DOE

has had ample time to deliberate for each of its four orders, the asserted need to address an "emergency" does not excuse DOE's failure to provide notice and an opportunity for Petitioners to be heard before imposing the Order. This violation is especially severe given *Michigan v. DOE*, which categorically rejects DOE's "emergency" framing. This is also the parties' fourth Section 202(c) order, with Petitioners requesting notice and a hearing before another order issues in the First, Second, and Third Rehearing Requests. DOE lacks any excuse for its failure to provide a pre-deprivation hearing.

Third, the Current Order does not meet the requirements of Section 202(c). It does not limit its remedy to what is necessary to address the emergency, and it does not consider reasonable alternatives as required by Section 202(c) (including Petitioners' carefully calibrated reliability planning, using both thermal and renewable resources based on findings supported by objective, industry-leading forecasting methods). And *fourth*, the Current Order is inconsistent with the FPA's objectives. The Current Order is, therefore, contrary to law and arbitrary and capricious.[21]

[21] As DOE is aware, Petitioners have already taken and will continue to take steps to comply with the Current Order. This includes incurring compensable costs and expenses. Although the Current Order is improper under Section 202(c), Petitioners are nonetheless entitled to cost recovery under Section 202(c) and as a compensable taking. Petitioners note that Section 202(c) is an emergency provision, and, for that reason, recovery pursuant to its terms should not turn on an ultimate determination of the lawfulness of the Current Order. Further, the Current Order (and prior substantially similar orders) provided notice to all potential ratepayers that rights to recovery would accrue to Petitioners (and the other co-owners) beginning on December 30, 2025. To bar Petitioners from recovering these already-incurred costs would be inconsistent with Section 202(c)'s purpose to respond to emergency conditions and would violate constitutional protections. Petitioners' position is based on currently available facts and information. Petitioners reserve all rights.

A. The Current Order's Expanded Conception of Emergency is Foreclosed by *Michigan v. DOE*

The Current Order adopts a materially broader definition of the purported emergency than DOE relied upon in prior orders. Rather than identifying a specific shortage of electric energy or generation facilities, DOE now asserts an emergency based on "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, and other causes."[22] The revised formulation significantly expands the scope of the asserted emergency, sweeping within Section 202(c) a broad range of demand-growth, reliability, and resource-planning concerns that *Michigan v. DOE* makes clear are not qualifying emergencies.

Michigan v. DOE is dispositive: the Current Order is invalid. The "emergency" asserted by the Current Order is predicated on the same kinds of concerns—short-term resource-adequacy concerns dealt with through RTOs' and states' normal resource-management processes, and theoretical long-term resource-adequacy concerns—that the D.C. Circuit rejected as a basis for a Section 202(c) order. As the 2025 LTRA expressly provides—and DOE acknowledges—there is no elevated risk for energy shortfalls over the next five years, with actual reserve margin and planning reserve margin above the reference margin level through 2033. Likewise,

[22] DOE's invocation of a catch-all "other causes" criteria to justify its purported "emergency" without identifying the nature and scope of those "other causes" is itself improper. If a generic invocation of "other causes" can encompass any anticipated reliability challenge, then DOE's authority would no longer be limited to emergencies at all. This stands against the D.C. Circuit's holding in *Michigan v. DOE* as well as the core tenets of statutory interpretation.

NERC anticipates ***no*** loss-of-load hours (LOLH) through 2029 for the WECC-Rocky Mountain region.[23] These distant, speculative concerns fall far outside the meaning of "emergency" under Section 202(c) that DOE lacks authority to address.

Michigan v. DOE also forecloses the DOE's reliance on SPP's initiation of EEA procedures in the summer of 2026 to justify the Current Order. As explained by the D.C. Circuit, an RTO's invocation of its ordinary reliability toolkit is proof that the "state regulators, transmission organizations, and load-serving entities have other mechanisms to address shortages" that do not require or justify the DOE's unlawful application of Section 202(c) here. 2026 WL 2671756 at *17. SPP's issuance of EEAs shows the market responding through established reliability procedures, not a breakdown requiring DOE to seize the reins through an involuntary Section 202(c) order. And even if the EEAs demonstrate a short-term issue in July or August, DOE has not explained why those events justify another 90-day order extending into December 2026.

The mere fact that Craig Unit 1, which was never intended to be an SPP resource, was available to SPP during the time period covered by DOE's third unlawful order, as a result of the DOE's first and second unlawful orders, does not

[23] WECC's analysis indicates that if 85% of planned generation is built, there will be only four LOLHs in the Rocky Mountain region in the next 10 years (20 LOLHs below DOE's threshold). Even in a scenario where only 67% of currently planned generation is built, it is not until 2032 that WECC projects a possibility of more than 2.4 LOLHs in a single year. *See 2025 Western Assessment Supplemental Information*, WECC [https://feature.wecc.org/warasupplemental/index.html] (last visited Oct. 23, 2026); U.S. Dep't of Energy, Resource Adequacy Report: Evaluating the Reliability and Security of the United States Electric Grid 4 (July 2025), https://www.energy.gov/ sites/default/files/2025-07/DOE%20Final%20EO%20Report%20%28FINAL%20JULY %207%29.pdf.

establish that DOE's now-fourth unlawful Order is appropriate under Section 202(c). Instead, it is proof that the Current Order relies on the same kind of "indeterminate assertions" of potential or past reliability concerns that do not satisfy Section 202(c). Finally, Craig Unit 1 was only available during the period covered by Order No. 202-26-31 because DOE issued an unlawful and unjustified order to begin with. Had Order No. 202-25-14 never gone into effect, Craig Unit 1 would have closed and been unavailable.

DOE did not acknowledge *Michigan v. DOE* in the Current Order, let alone properly revise its scope in light of the D.C. Circuit's statement of what the law is under Section 202(c). The Current Order is arbitrary and capricious and exceeding its jurisdiction, and Petitioners hope DOE reconsiders its course.

B. Keeping Craig Unit 1 Open Does Not Address the Issues Articulated in the Current Order

As shown by *Michigan v. DOE*, the text of the statute and DOE's implementing regulations demonstrate that the Current Order's asserted "emergency" cannot be addressed by its required actions.

DOE's regulations define an emergency as an "unexpected inadequate supply of electric energy" and envision use of Section 202(c) to address a "specific inadequate power supply situation." 10 C.F.R. § 205.371 (2026). These regulations acknowledge that "inadequate planning or the failure to construct necessary facilities" may lead to an emergency—but also indicate that 202(c)'s role is to provide short-term relief. As DOE explained in its rulemaking:

> The DOE does not intend these regulations to replace prudent utility planning and system expansion. This intent has been reinforced in the

> final rule by expanding the "Definition of Emergency" to indicate that, while a utility may rely upon these regulations for assistance during a period of unexpected inadequate supply of electricity, it must solve long-term problems itself.

As DOE admits, Section 202(c) is focused on short-term problems with specific solutions. *Accord* 10 C.F.R. § 205.371 (where inadequate planning causes an emergency, DOE states that "the impacted 'entity' will be expected to make firm arrangements to resolve the problem until new facilities become available, so that a continuing emergency order is not needed"). DOE's longstanding regulations confirm that Section 202(c) authority is not intended as a substitute for long-term planning or resource development, but as a temporary tool to address unexpected shortfalls that cannot be addressed through normal reliability planning and resource-management efforts—the opposite of the long-horizon concerns cited in the Current Order.

Concerning DOE's longer-term concerns, a speculative "emergency" occurring eight years or more in the future is not a "specific inadequate power supply situation" as required by DOE's regulations for a Section 202(c) order, nor is it an example of a "sudden increase in the demand for electric energy." Structural changes in electricity markets are precisely the kind of issue addressed by long-term collaborative planning by utilities, communities, and state governments. And while the Current Order alludes to potential future shortages in the WECC–Rocky Mountain region, it fails to specify where within the WECC–Rocky Mountain area a shortage is expected to arise, how Craig Unit 1's output would resolve those shortages, or why existing reserves, imports, or market mechanisms would be inadequate to address the risk. Finally, the

Current Order does nothing to explain why Craig Unit 1's ostensible availability was beneficial, let alone necessary, to respond to the EEAs and events like them.

These analytical failures are particularly egregious given both the demonstrable effect on the reliability of Craig Station's facilities and broader impacts on Colorado communities caused by the consumption of finite water and fuel resources. The Current Order is therefore contrary to law and arbitrary and capricious.

1. Keeping Craig Unit 1 Open Does Not Address Long-Term Concerns

As with previous orders, DOE continues to rest the Current Order largely on long-term resource-adequacy concerns that may not materialize for many years, if at all. Although DOE now points to the July and August 2026 EEAs, current demand-growth projections, and Craig Unit 1's operation during 2026, the Current Order still relies heavily on the same long-term planning documents previously cited by DOE, including: (1) NERC's 2025 LTRA; (2) the 2025 WECC Western Assessment of Resource Adequacy; (3) expressions of concern by two Colorado Public Utilities Commissioners regarding the ability of a separate utility, PSCo, to meet summer 2026 loads; and (4) the 2026 NERC Summer Reliability Assessment. Current Order at 2–6. None of these justifications rationally support the Current Order, let alone establish that requiring Craig Unit 1 to operate now will address the asserted emergency.

As discussed *supra*, the WECC-Rocky Mountain Region is expected to meet DOE's reliability benchmark for years to come without Craig 1. The region is

projected to add sufficient generating capacity to meet demand, and NERC does not expect any hours—now or in the next several years—when there will not be enough electricity to serve customers. The evidence DOE relies upon confirms that no resource adequacy concerns are likely to appear in the region until well into the 2030s. Keeping Craig Unit 1 online ***now*** simply does not meet the terms of an emergency predicated on potential resource adequacy issues eight or more years in the future, particularly given that as Craig Unit 1's operations are further extended past its intended lifespan, it is likely to experience more and longer periods of outage. Moreover, given that operating Craig Unit 1 ***now*** depletes the fuel stockpile for Craig Units 2 and 3, the Current Order's actions today may ***create*** reliability concerns that would not exist were Craig Unit 1 to shut down as originally scheduled.

DOE also predicates its emergency in part on the WECC-Rocky Mountain subregion's alleged "challenges from an aging thermal resource fleet, which can lead to unplanned outages, exacerbated by supply chain issues, and vendor availability." Order at 3 (citation omitted). Apart from being wrong—the 2025 LTRA does not cite the age of the subregion's thermal fleet as an operational and planning issue—forcing Craig Unit 1 to continue operating only exacerbates concerns about reliance on aging resources. In the present, the faulty logic of relying on these resources for backup power is amply demonstrated by Craig Unit 1's own recurring unplanned outages, discussed herein. Craig Unit 1 cannot address projected shortfalls in 2034, when it would be 54 years old and likely to only have more unplanned outages and similar problems than now. DOE's attempt to address "reliance on an aging thermal fleet" by

artificially extending the operational life of elements of that aging thermal fleet, especially—as here—in ways that actively interfere with efforts to reduce reliance on old thermal resources, is arbitrary and capricious.

NERC's 2026 Summer Reliability Assessment, which addresses near-term considerations, also provides no support for the Current Order. NERC's assessment is that reserves in the WECC-Rocky Mountain region are adequate to meet the sub-region's needs.[24] According to NERC, the greatest risk to reliability in Summer 2026 for WECC-Rocky Mountain comes from wildfires.[25]

2. Keeping Craig Unit 1 Open Does Not Best Address Concerns in DOE's Targeted Regions

The Order also cites reliability concerns specifically for the WECC Basin and Northwest subregions on one hand, and for the United States as a whole on the other. Order at 3–5. Even if those speculative future conditions could constitute an "emergency" under Section 202(c)—they cannot—the emergency assessment area in the Order is identified as the WECC-Rocky Mountain region, and the purported emergency in other regions do not support the finding of an "emergency" in a separate region.[26] As noted, over a dozen of Tri-State's rate-paying Utility Members in New Mexico and Nebraska are located outside of the WECC-Rocky Mountain emergency

[24] *See NERC 2026 Summer Reliability Assessment,* at 37 (May 2026), https://www.nerc.com/globalassets/our-work/assessments/nerc_sra_2026.pdf.

[25] *Id.*

[26] DOE's failure to bridge this gap is especially problematic given that the Current Order as well as the second and third orders altered the geographic framing of the asserted emergency from the DOE's initial order.

area, but as owners of Tri-State remain obligated to pay for the costs of compliance despite no emergency being identified in the regions they serve.

And while the Order alludes to potential future shortages in the WECC–Rocky Mountain region, it fails to specify where within the WECC–Rocky Mountain area a shortage is expected to arise or why existing reserves, imports, or market mechanisms would be inadequate to address the risk. This is particularly egregious given both the demonstrable effect on the reliability of Craig Station's facilities and broader impacts on Colorado communities caused by the consumption of finite water and fuel resources.

3. Keeping Craig Unit 1 Open Does Not Best Address SPP's Periodic Need for Additional Generation Capacity

Finally, the Current Order cites SPP's July and August 2026 EEAs and related DOE orders, Orders Nos. 202-26-36, 202-26-37, and 202-26-37A. These DOE orders allegedly authorized SPP to "dispatch specified generation resources and use backup generation resources to maintain reliability and avoid loss of firm load." Current Order at 6. These EEA orders were short in duration, requested by SPP, and related to both SPP's rollout of a new market with associated startup and operational issues and a period of unusually hot weather. Craig Unit 1, which at this point was mandated to operate under Order No. 202-26-31 and was thus "in the mix" of available generation sources, was one of 44 facilities specified for use, many burning multiple types of fuel. Order No. 202-26-37, Ex. A.

The Current Order does not elaborate on how Craig Unit 1's continued operation would address these concerns, saying only that "SPP West's resource

adequacy concerns were recently demonstrated" by the EEAs and related DOE orders. Order at 6. The Current Order does not explain why invoking Section 202(c) to involuntarily keep Craig Unit 1 from shutting down is necessary or even helpful to address the concerns raised by the EEAs. SPP specified 44 facilities in its list of generation resources to be covered by an order allowing them to exceed operating limits; DOE made no finding that omitting Craig Unit 1 and relying on the other 43 facilities would meaningfully change SPP's response to these conditions. In fact, when the EEAs were called and existing generators other than Craig Unit 1 were allowed to exceed normal operating limitations, generators sought to sell so much additional electricity onto SPP's market that prices plummeted. This indicates that there was no shortage of energy and that market mechanisms were adequate to provide reliability.[27] DOE's invocation of Section 202(c) was and continues to be wholly unnecessary in light of existing and effective market mechanisms.

SPP's invocation of its ordinary reliability toolkit demonstrates the ***adequacy*** of these normal procedures, not that the unsolicited DOE intervention is needed or wanted. And further, nothing in the Current Order justifies yet another 90-day order. A few days of heightened demand in a newly formed market over a hot summer, addressed without the assistance of Craig Unit 1, is not grounds to keep Craig Unit 1 open indefinitely.

[27] *See generally* SPP, Integrated Marketplace SPP East Hub and Interface Prices, https://portal.spp.org/pages/integrated-marketplace-hub-and-interface-prices.

Finally, DOE's old and new justifications for both Order No. 202-26-31 and the Current Order rest on a fundamentally rotten foundation. As Petitioners argued in the First Rehearing Request (and as effectively confirmed by the D.C. Circuit in *Michigan v. DOE*), Order No. 202-25-14 was fatally flawed on both procedural and substantive grounds. Had Order No. 202-25-14 not been issued or DOE listened to Petitioners, Craig Unit 1 would have closed in a timely manner, and would have been unavailable for DOE's now-perpetual cycle of 90-day "emergency" orders. This taints latter orders, especially where they rest on a shifting mix of justifications.

C. The Current Order is Procedurally Inadequate on Both Constitutional and Statutory Grounds

Agencies must abide by both constitutional and statutory procedural safeguards before they act. The Fifth Amendment's Due Process Clause guarantees that no person shall be "deprived of life, liberty or property" by the federal government "without due process of law." U.S. Const. amend. V. At its core, due process requires notice and an opportunity to be heard before the government takes action affecting protected interests. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 19 (1978). This principle applies across regulatory regimes where hearings are generally required before agencies impose obligations or alter rights. Similarly, where a statute creates specific procedural requirements before it can take action, failure to follow these requirements renders the agency action arbitrary and capricious. *See Safari Club International v. Zinke*, 878 F.3d 316, 325 (D.C. Cir. 2017) ("A disputed action also may be set aside as arbitrary and capricious if the agency

has acted 'without observance of procedure required by law.'") (citing 5 U.S.C. § 706(2)(D)).

The Current Order violates both constitutional due process and the procedural requirements of Section 202(c)(4)(B)'s consultation and condition-incorporation requirements. These procedural failings render the Current Order unlawful.

1. The Current Order Violates Petitioners' Constitutional Due Process Rights

Under the FPA, most Commission (*i.e.*, FERC or DOE) actions—such as rate changes or interconnection orders—cannot take effect without a prior hearing. *See generally* 16 U.S.C. §§ 824a(b), 824a(e), 824a-1(a), 824a-3(f), 824a-4, 824b(a)(4), 824c(b), 824d, 824e, 824f, 824i(b), 824j, 824j-1, 824k, 824m, 824o, and 824p. Section 202(c) orders are unusual in that they ***may*** be issued without any prior hearing, reflecting their purpose as a short-term emergency tool meant to address fast-moving and unexpected situations. *See Fuentes v. Shevin*, 407 U.S. 67, 90–91 (1972) (holding that to justify postponing notice and opportunity for a hearing before deprivation of a property interest on basis of an "extraordinary situation," the situation must be "truly unusual."). When there is no emergency, as here (in light of *Michigan v. DOE* and the facts as set forth *supra*), this emergency exception does not apply. *See South Allegheny Pittsburgh Restaurant Enterprises, LLC v. City of Pittsburgh*, 806 Fed. Appx. 134, 139–40 (3d Cir. 2020) (holding that the manifest lack of a qualifying emergency meant that order shutting down under-21 nightclub violated plaintiff's procedural due process rights); *Propert v. D.C.*, 948 F.2d 1327, 1331 (D.C. Cir. 1991) (holding that the Due Process Clause "requires, at minimum, that the government

provide notice and some kind of hearing before final deprivation of a property interest.")

Yet even assuming there is an emergency, "[t]here is a relation between the kind of emergency and nature of the solution." *Pa. Gas & Water Co.*, 427 F.2d at 577. Where a hearing is feasible, its absence deprives Petitioners of due process. *See South Allegheny Pittsburgh Restaurant Enterprises*, 806 Fed. Appx. at 139–41; *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1989) (suspension of daycare employees' licenses without pre-deprivation process because of asserted categorical emergency violated procedural due process rights); *Miller v. Campbell Cnty.*, 945 F.2d 348, 353 (10th Cir. 1991) (finding emergency insufficient to avoid need for pre-deprivation hearing when two months elapsed between notice that plaintiff's homes were uninhabitable and date of planned evacuation, but concluding that sufficient pre-deprivation hearing opportunities had occurred).

The Current Order's emergency does not rest on an urgent and immediate need for additional generation to address a specific incident or event such as unusually extreme weather. Indeed, given that the Current Order is DOE's fourth "emergency" order based on essentially the same factual premises, any supposed emergency related to the WECC–Rocky Mountain assessment area or Craig Unit 1 is at least 270 days old. The Current Order's purported emergency is based on broader concerns about the sufficiency of generation capacity and reliability in the WECC–Rocky Mountain assessment area over time and in the future. Because the Current Order does not demonstrate an immediate crisis, it cannot justify dispensing with the pre-

deprivation hearing requirement. Petitioners, however, have received no such process. Thus, they were deprived of their constitutional right to notice and a hearing before the Current Order came into effect.

Petitioners identified this Constitutional deficiency in their prior requests for rehearing. But rather than afford Petitioners due process, DOE simply issued this new Order with no additional process and with no explanation for why no process was required. Even if the initial order could be defended as emergent, the second, third, and now fourth orders cannot. This Order's failure to provide due process is particularly egregious, because after the D.C. Circuit decision in *Michigan v. DOE*, DOE was on notice that the premise of its asserted emergency authority was legally suspect. Yet DOE again compelled operation of Craig Unit 1 without first providing Petitioners notice, a hearing, or any meaningful opportunity to contest the existence of a qualifying emergency.

Having received notice of the due-process defect and having had ample time to address it, DOE's decision to reissue a materially identical (and legally shaky) order without any procedural safeguard constitutes a discrete constitutional violation and is itself arbitrary and capricious.

2. DOE's Failure to Engage with the EPA Renders the Current Order Invalid

Section 202(c)(4)(B) mandates that DOE "consult with the primary Federal agency with expertise in the environmental interest protected by" the laws or regulations waived by a renewed order and include any conditions mandated by that agency in the order, which must be "made available to the public." 16 U.S.C.

§ 824a(c)(4)(B). Similarly, while DOE "may exclude such a condition from the renewed or reissued order if it determines that such condition would prevent the order from adequately addressing the emergency necessitating such order[,]" DOE must provide a public explanation of this lack of condition in the order. *Id.*

This consultation requirement is both mandatory and substantive. After all, Congress empowered DOE to take extraordinary action by extending a Section 202(c) order only *after* DOE has been made aware of the environmental impacts of renewing an order. *Cf. Center for Biological Diversity v. Zeldin*, 171 F.4th 356, 381–83 (D.C. Cir. Mar. 27, 2026) (holding that programmatic consultation did not alleviate burden of EPA to directly consult with National Marine Fisheries Service under Endangered Species Act because planned action could affect species under NMFS's jurisdiction). The FPA's direction to "consult" with relevant stakeholders obligates DOE to engage in a "meaningful exchange of information[.]" *California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1086 (9th Cir. 2011) (finding DOE failed to "consult" with the states as required by FPA Section 216).[28]

In the Current Order, DOE pays lip service to its responsibility to engage in this consultation procedure with a generic claim that "[p]ursuant to section 202(c)(4)(B) of the FPA, DOE has consulted with the primary Federal agency with expertise in the environmental interest protected by the laws or regulations that may

[28] The District Court for the District of Columbia recently held that a "late Friday afternoon, three-sentence email exchange between staffers" was insufficient to qualify as "consulting" another agency. *Miot v. Trump*, No. 25-cv-02471 (ACR), 2026 WL 266413, at *22 (D.D.C. Feb. 2, 2026), *cert. granted before judgment*, No. 25-1084, 2026 WL 731087 (U.S. Mar. 16, 2026).

conflict with this Order[,]" and representing that this unnamed agency "did not submit additional conditions for inclusion in this Order."[29] Order at 7. But this "consultation" fails to meet the basic criteria for a valid consultation. DOE does not identify ***any*** agency it consulted in promulgating the Order. For an agency to have engaged in procedurally adequate consultation, regulated parties (and, eventually, judges engaged in judicial review) must be able to independently understand the basic scope and content of that consultation, rather than defer to and adopt the "self-serving" representations of the agency in questions. *See Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 120 n.14 (1st Cir. 2002).

This defect is not just procedural. Meaningful consultation with the EPA, for instance, would inform DOE about the incompatibility of keeping Craig Unit 1 open with Colorado's federally approved emissions plans and the impact of regulatory uncertainty on utilities' long-term planning around the country, as well as inform how DOE balances different options, and may help identify the best alternative as required by Section 202(c). DOE's rote restatement of the terms of the statute without identifying whom it consulted, let alone what was asked and discussed, is not meaningful consultation that meets the statute's substantive demand.

[29] In Orders No. 202-26-21 and 202-26-31, DOE failed to acknowledge its obligation to engage in this consultation procedure, nor did DOE acknowledge or justify its failure to do so in its denials of Petitioners' Second and Third Rehearing Requests. That DOE does so *now* is essentially a concession that it is bound by this requirement.

D. The Current Order Failed to Limit Emergency Relief to What Is Necessary to Address the Asserted Emergency and Did Not Consider Reasonable Alternatives

Section 202(c) authorizes only those extraordinary measures that are necessary to resolve the emergency at hand, and it requires the Secretary to exercise judgment in selecting the course of action that will best meet that emergency and serve the public interest. 16 U.S.C. § 824a(c)(1)–(2). Those requirements impose meaningful limits on DOE's authority, including an obligation to confine any order to what is actually required to address the asserted emergency. The Current Order fails this threshold requirement. Rather than identifying a specific, imminent reliability problem that necessitates continued operation of Craig Unit 1, DOE imposes a sweeping mandate—of significant scope, duration, and operational rigidity—without explaining why that measure is necessary to address the conditions it cites. By failing to limit emergency relief to what is demonstrably required, the Current Order exceeds the narrow authority Section 202(c) confers and is arbitrary and capricious.

Lack of necessity is confirmed by DOE's failure to consider reasonable alternatives. Section 202(c) requires the Secretary to exercise "judgment" and select only those measures that "will *best* meet the emergency and serve the public interest." 16 U.S.C. § 824a(c)(1) (emphasis added). Implicit in this mandate is the recognition that alternatives be considered and ruled out. Having been on notice—both in Petitioners' prior rehearing requests and in the intervening months—that alternatives existed, DOE's failure to evaluate them in issuing the Current Order independently renders the decision arbitrary and capricious.

DOE should have conducted and disclosed an analysis showing why the path selected is the "best" course forward, particularly in light of (1) the potential 2034 time-horizon of the asserted "emergency" and (2) the myriad other specified resources in the July and August 2026 EEA orders. *See Michigan v. EPA*, 576 U.S. 743, 753 (2015) (holding that "reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions"). This is consistent with the emergency nature of the powers contained in Section 202(c), which should not be exercised where "alternatives offered a more confined solution" to the emergency at issue.[30] *Pa. Gas & Water Co.*, 427 F.2d at 577 (considering analogous powers under the Natural Gas Act); *see also Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1511 (D.C. Cir. 1984) ("It is well established that an agency has a duty to consider reasonable alternatives to its chosen policy, and to give a reasoned explanation for its rejection of such alternatives.") (citation and footnote omitted).

As with DOE's first, second, and third orders, this fourth order reflects no consideration of alternatives, let alone justification for mandating that Craig Unit 1 remain active over other options, and is thus contrary to law and arbitrary and capricious. This failure is especially indefensible here because Petitioners have

[30] DOE regulations for utilities applying for a Section 202(c) order to override environmental regulations require the utility to provide extensive information related to operations and alternative courses of action. *See* 10 C.F.R. § 205.373(g)–(i) (mandating that applicants provide information concerning "conservation or load reduction actions," "efforts . . . to obtain additional power through voluntary means," and "[a] listing of proposed sources and amounts of power necessary from each source to alleviate the emergency and a listing of any other 'entities' that may be directly affected by the requested order.").

repeatedly and specifically identified alternative approaches in their prior requests for rehearing.[31]

Moreover, an "emergency" occurring eight or more years from now, or normal reliability concerns resolved using existing tools, can be—and, in the case of the July and August 2026 EEAs, are—solved by any number of means: more generation, more efficient use of existing generation, load flexibility, etc. DOE nevertheless re-reissued a materially identical order nine months after the initial order without assessing those alternatives or explaining why they were inadequate. Whatever urgency DOE might initially claim, it cannot excuse repeatedly reissuing a materially identical order without engaging with the alternative approaches identified by Petitioners and explaining why mandating that Craig Unit 1 remain active is the "best" measure to address this long-term reliability concern across the region described in the Current Order.[32]

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[31] First Rehearing Request at 31; Second Rehearing Request at 37; Third Rehearing Request at 44–45. Petitioners identified the possible alternatives of: (1) DOE and/or FERC "proceeding through the rulemaking process pursuant to section 403 of the Department of Energy Organization Act, 42 U.S.C. § 7173, to devise a plan to ensure reliability through a more fulsome, consultative process[;]" and (2) DOE "evaluat[ing] whether it had authority to take proactive action to insure that 'new resources' in the region are not 'significantly delayed.'"

[32] That Craig Unit 1 has been dispatched since Order No. 202-25-14 was issued and generated some amount of electricity during the first six months of 2026 does not demonstrate that keeping it in operation and available for dispatch either responds to DOE's asserted "emergency" in any way, or that it is the *best* such response when alternatives are considered (none were). SPP's decision to call on the tools in its toolbox is unrelated to whether DOE's decision to mandate that Petitioners place the tool in its toolbox is reasonable or justified by the Current Order. At most, this shows that Craig Unit 1 was dispatched and produced electricity, not that continued operation was necessary.

The long-term nature of the "emergency" articulated by DOE also reinforces the need to consider alternatives and broadens the scope of what must be considered. *See Michigan v. DOE*, 2026 WL 2671756 at *14 ("For virtually all risks of energy shortages, alternatives to DOE intercession suffice."). While the "menu" of emergency responses to a sudden and unexpected crisis caused by natural disaster may be limited, the menu of policy options to address long-term reliability concerns is not.

Similarly, DOE's need to consider alternatives is particularly important given Craig Unit 1's status. Craig Unit 1 is an older, uneconomic unit. Due to its long-planned retirement, Craig Unit 1 has experienced years of prudently deferred maintenance and therefore faces particularly high costs to restore and maintain operations compared to possible alternatives, as well as more frequent unplanned outages, as made clear by the two significant repairs that have already been required to restore operability at Craig Unit 1, with a third underway. It is irrational for DOE to point to the risk of "unplanned outages" of "aging" coal plants as evidence of an emergency, but then rely on an aging coal plant (with a history of unplanned outages in the past year that was reported to DOE) as the remedy for that emergency, particularly without comparing that course of action to alternatives.

Further, the Current Order fails to consider the counterproductive effects of mandating Craig Unit 1's continued operation. The facility is consuming finite water and fuel resources needed for Craig Units 2 and 3, and maintaining operations inhibits Petitioners' ability to invest in or use other, more economic generation capacity. For instance, the nearby Axial Basin generating facility relies on the same

transmission infrastructure as the Craig units. That infrastructure is already congested; when all three Craig units are operating, Craig Unit 1's continued operation could interfere with the ability of new alternatives like Axial Basin to provide economic power to the grid. These problems undermine the very ends that the Order purports to advance.

In the absence of any consideration of alternatives, and disclosure of a valid rationale, Petitioners and the public "cannot weigh the merits of an agency decision nor compare it to other alternative actions[.]" *Rocky Mountain Wild v. Bernhardt*, 506 F. Supp. 3d 1169, 1187 (D. Utah 2020). The Current Order does not discuss why Craig Unit 1's continued operation was selected as the "best" solution to the described conditions, or if alternatives were considered, what those alternatives were, and why any considered alternatives were discarded. Particularly in light of the *Michigan v. DOE* Court's discussion of the preferred alternatives and the extremely narrow circumstances in which a Section 202(c) order should be used—"unless DOE's involvement is needed in response to a genuine emergency as defined by section 202(c), it must be avoided[,]", 2026 WL 2671756 at *14 —this failure to consider alternatives is fatally contrary to law and an arbitrary and capricious exercise of agency authority.

E. The Current Order Improperly Usurps the Role of State and Local Governments, Utilities, and Markets in Resource Adequacy Planning

Keeping an aging coal plant online, 90 days at a time, cannot resolve resource shortfalls eight years from now. Indeed it can frustrate such efforts to address shortfalls by injecting uncertainty into the resource planning process, diverting

resources from other projects, and potentially blocking more modern generating resources from accessing the transmission system. But developing and implementing a plan to build more generation, and executing on that plan, can. This is what Petitioners—along with other utilities and state and local regulators—aim to do, and are doing.

Yet, the Current Order interferes with these efforts: DOE's approach disrupts a complex legislated and regulated system that includes utility-led resource planning and various layers of supervision and market mechanisms. The Current Order disrupts these processes and makes determining and proceeding with the most efficient and effective solutions for resolving anticipated resource needs more difficult. The D.C. Circuit recognized this problem in its recent decision—"[u]njustified use of section 202(c) upends existing resource-adequacy decisions made based on years of planning with intensive expert input and broad stakeholder participation." *Michigan v. DOE*, 2026 WL 2671756 at *14.

The FPA thus imposes an express jurisdictional limit on the exercise of Section 202(c). FPA Section 201(b)(1), 16 U.S.C.A. § 824(b)(1), states that FERC—and, here, DOE exercising FERC's authority—has no jurisdiction "over facilities used for the generation of electric energy" unless such jurisdiction is specifically provided for. The "States' reserved authority[,]" *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150 (2016), includes the "[n]eed for new power facilities, their economic feasibility, and rates and services," all of which "are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res.*

Conservation & Dev. Comm'n, 461 U.S. 190, 205 (1983); *see also Michigan v. DOE*, 2026 WL 2671756 at *14 (holding that "the complexity of state planning processes helps to explain why the [FPA] leaves resource adequacy to be managed by states, utilities, and their RTOs.").[33]

Under this framework, the decision of whether Craig Unit 1 should remain operational belongs to Craig Unit 1's owners, subject to oversight by state governmental units. This framework reflects, among other things, the unique privileges and obligations of public utilities. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) ("The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body.").

Utilities maintain the lead role in planning and constructing systems that ensure resource adequacy: both Tri-State and Platte River engage in reliability planning that balances system operational needs, cost and regulatory requirements.[34]

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[33] "Recognizing the careful balance that the FPA strikes between federal and state regulation" FERC has found that "states retain exclusive authority over . . . the generation mix." *PJM Interconnection, L.L.C.*, 193 FERC ¶ 61217, at P165 (2025). Long-term economic and planning decisions regarding Tri-State's resource mix had been approved by the State of Colorado through the 2020 and 2023 Energy Resource Plans. This jurisdictional division of responsibility and federal respect for state policymaking is also a policy of the FPA. *See Sierra Club v. FERC*, 145 F.4th 74, 81 (D.C. Cir. 2024) (respecting the role of state regulators); *NextEra Energy Res., LLC v. FERC*, 118 F.4th 361, 365 (D.C. Cir. 2024) ("[FERC] may regulate the transmission, but not the generation, of electricity[.]").

[34] Colorado's state government also addresses shorter-term concerns. *See*, *e.g.*, Colo. Energy Office, Colorado Energy Assurance Emergency Plan (https://energyoffice.colorado.gov/climate-energy/colorado-energy-assurance-emergency-plan (last visited Apr. 29, 2026). The Colorado Energy Office shares responsibility for energy

In Colorado, the Colorado Public Utilities Commission (PUC) oversees resource adequacy planning for utilities under its jurisdiction, among other regulation and coordination of the electrical-generation sector.[35] Finally, other entities play a critical role in both coordination and oversight. SPP, for instance, requires load-serving entities to maintain a certain level of Planning Reserve Margin capacity or face financial penalties, which discourages utilities from free-riding on other participants' efforts to maintain adequate generation capacity.[36]

For nearly a decade, Petitioners along with other co-owners have planned to retire Craig Unit 1 in line with resource adequacy planning. The Current Order attempts to supplant this process by substituting DOE's judgment for the utilities' and Colorado's long-term resource planning decisions—all to address an "emergency" so diffuse that its existence (or nonexistence) years from now is impossible to anticipate or cure. DOE's regulations recognize the distinction between the need to conduct planning and the existence of an emergency that results from inadequate

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assurance in the state with the Colorado PUC and state Division of Homeland Security and Emergency Management, with the PUC "primarily responsible for electric and natural gas energy emergencies." *Id.* To the extent the "emergency" is premised on shorter-term concerns, it arbitrarily fails to recognize the efforts made by utilities and state and local government to address them,

[35] *See generally* Colo. Dep't of Regulatory Agencies, PUC, Electric Resource Plans / Clean Energy Plan https://puc.colorado.gov/puc-home/energy-and-water/electric-resource-plans/clean-energy-plan (last visited April 29, 2026). The Colorado Energy Office also tracks resource adequacy in the state of Colorado. *See* C.R.S. 40-43-101 (requiring resource adequacy reports from Colorado utilities). The other states in which Tri-State operates also exercise varying degrees of oversight concerning Tri-State resources.

[36] SPP Open Access Transmission Tariff, Att. AA, § 14, https://www.spp.org/spp-documents-filings/?id=18162. SPP will begin imposing financial penalties for the western portion of the RTO in 2027.

planning. *See* 10 C.F.R. § 205.371 (an emergency may result "inadequate planning or the failure to construct necessary facilities" but such an emergency can be resolved through "firm arrangements"). The failure to distinguish between the two renders the Order contrary to law and arbitrary and capricious.

F. The Current Order is Inconsistent with the FPA's Statutory Objectives

Courts reject agency action as arbitrary and capricious if it is "inconsistent with the statutory mandate" or "frustrate[s] the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). The FPA was passed to advance various policy goals, including protecting consumers from "excessive rates and charges," *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (citation omitted)); "maintaining competition to the maximum extent possible[,]" *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); and encouraging the "orderly development of plentiful supplies of electricity . . . at reasonable prices." *NAACP v. FPC*, 425 U.S. 662, 670 (1976).

By compelling an uneconomic unit to remain operational well beyond its planned retirement, particularly where the owners planned their systems and made substantial reliability investments on the reasonable belief the unit would be retired, the Current Order upends the Petitioners' ability to plan their systems and act with confidence in a competitive marketplace. Because the Current Order is at odds with

the statutory objectives of the FPA, it is contrary to law and arbitrary and capricious.[37]

II. THE CURRENT ORDER CONSTITUTES AN UNCOMPENSATED TAKING OF PETITIONERS' PROPERTY INTERESTS

Petitioners chose to close Craig Unit 1 to meet reliability targets and achieve regulatory goals, and have taken numerous steps over the years to prepare for its closure. The Current Order nevertheless requires Tri-State to operate the facility beyond that planned retirement date, effecting an uncompensated taking of Petitioners' property in violation of the Fifth Amendment of the United States Constitution. By compelling continued operational availability of Craig Unit 1, DOE took effective control over the facility itself and mandated changes to Petitioners' infrastructure and business operations, constituting both a *per se* physical and regulatory taking.

The Current Order's taking comes with no constitutionally adequate avenue for just compensation. FERC cost recovery shifts compensation onto ratepayers (including Tri-State and PRPA in their roles as ratepayers); it does not assure compensation *from the government*. And, due in part to the broad scope of the declared energy emergency, FERC cost recovery related to the Current Order will be procedurally and substantively novel and could leave material costs unrecovered from the Current Order's putative beneficiaries.

[37] As discussed *supra*, the Current Order similarly contradicts President Trump's pledge to protect ratepayers from the effects of increased electric generation needs. *See* Proclamation No. 11014.

A. The Current Order Constitutes a Physical Taking

The Fifth Amendment provides, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021) (citation omitted).

Physical takings can take various forms, including intermittent or limited-value intrusions. *Id.* at 149–55; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Moreover, "[i]f government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 26 (2012). This is true even when the government has not seized title to property but rather directed it to operate in a particular way. Temporary seizures of property to operate are takings "in as complete a sense as if the [g]overnment held full title and ownership." *See Pewee Coal Co.*, 341 U.S. at 116 (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 285–86 (1947)). A physical taking can occur even without the literal physical occupation of physical assets by the government: instead, a physical taking occurs when the government assumes "ultimate control" of physical property, even if existing management ends up responsible for "conduct[ing] operations" on the government's behalf. *See Pewee Coal Co.*, 341 U.S. at 116.

The Current Order operates as a physical taking in two interrelated ways. *First*, by directing Petitioners to maintain and operate Craig Unit 1, on a prolonged basis, and in clear departure from Petitioners' own planned retirement of the facility,

the Order falls within a near-century-old tradition of classifying mandatory operations—even under wartime and emergency authorities—as takings requiring compensation. *Second*, the Current Order constitutes a physical taking by compelling Petitioners to make material physical changes to the plant, such as repairing out-of-service equipment like feedwater heater tubes, ash blowers, and side stream filter pumps; requiring additional staff onsite; and physically diverting water and coal allocated for Craig Units 2 and/or 3 to fuel Craig Unit 1. Reduction of these stockpiled reserves requires Petitioners to rely on finite, stored reserves of water earmarked for Units 2 and 3, or acquire it from uncertain sources and at uncertain future prices (if it can be acquired at all), creating an additional uncompensated cost. It similarly requires Petitioners to obtain replacement coal that will be compatible for use in Units 2 and 3, from uncertain sources and at uncertain future prices, creating an additional uncompensated cost. And because of physical transmission constraints, Craig Unit 1's operations could limit the circumstances where SPP can dispatch the nearby Axial Basin generating facility.

1. The Current Order's Direction of Prolonged Operations at Craig Unit 1 Contrary to Petitioners' Plan to Retire the Facility Constitutes a Physical Taking

Section 202(c) was enacted to address energy shortages that occurred during the First World War,[38] making it particularly suitable for analysis under post-war interpretations of the Takings Clause. These cases show that, even in the context of

[38] Benjamin Rolsma, *The New Reliability Override*, 57 Conn. L. Rev. 789, 789–846, 800–02 (2024) ("Rolsma (2024)").

an emergency, where the government takes control of part or all of a business's facilities to use and operate for the government's purposes, a compensable taking occurs, *see*, *e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945) (government seizure of part of leased warehouse space for military purposes was a compensable taking). Similarly, where the government requires a private business to operate in the public interest, this too constitutes a *per se* physical taking. *Pewee Coal Co.*, 341 U.S. at 116 (taking occurred when government responded to work stoppages and strikes at coal mines by directly operating them or arranging for their continued operation). This includes a scenario where non-government actors, such as existing management and ownership, are delegated responsibility for effecting the government's orders: the key question is whether the government took and "retained ultimate control" over operations. *United Mine Workers of Am.*, 330 U.S. at 288. These cases illustrate that a taking is particularly likely to occur where the imposition of government control extends over a lengthy period of time. *See Gen. Motors Corp.*, 323 U.S. at 375 (warehouse seized for more than a year); *Pewee Coal Co.*, 341 U.S. at 115 (government-directed operation of coal mine continued for more than 160 days).[39] Ultimately, the core question is "whether the government has

[39] Indeed, the federal government recently recognized that where the government appropriates the right to control operation of a facility and deprives owners of their freedom to dispose of their property, a taking has occurred. *See* EPA-R08-OAR-2024-0607-0067, Regional Haze Round 2 at 19–21 (Jan 9, 2026), https://www.regulations.gov/document/EPA-R08-OAR-2024-0607-0067 (describing how the "unconsented closure" of a coal-fired power station constituted a per se taking of the facility owner's property) (citing *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) and *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015)). DOE has not explained here how the "unconsented" availability of a coal-fired power station is not also a per se taking of the facility owner's property.

physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Cedar Point Nursery*, 594 U.S. at 149.

In that light, the Current Order constitutes a taking of Petitioners' property. The Current Order requires Petitioners to, in relevant part: (1) take all measures necessary to ensure that Craig Unit 1 is available to operate; (2) limit operation of Craig Unit 1 to certain times and parameters; and (3) make Craig Unit 1 available for dispatch at the direction of SPP, a non-governmental actor. Although Petitioners' existing personnel are responsible for carrying out these requirements, the DOE retains and is exercising ultimate control over events at Craig Unit 1. Compliance with these requirements has compelled Petitioners to take significant steps they would not otherwise take for a prolonged period of time—nearly a full year by the time the Order expires. Nothing in the Current Order or in DOE's conduct under Section 202(c) suggests this control will be temporary rather than renewed through successive cookie-cutter "emergency" declarations. This closely resembles the mandate to operate that the *Pewee Coal* Court held was a taking.[40] By requiring Petitioners to involuntarily keep Craig Unit 1 available for operations according to SPP's instructions—for not hours or days but months—DOE enacts a taking.

[40] The *Pewee Coal* Court did not enjoin the government's actions—the wartime emergency justified the government's effort to keep coal mines operational in 1943, the heat of the war. The fact of a justified emergency, however, did nothing to abate the Takings Clause requirement that the government compensate the plaintiff. *See Pewee Coal Co.*, 341 U.S. at 118 (holding that government is "entitled to the benefits and subject to the liabilities" of operating a facility it takes over).

2. The Order Mandates Physical Changes to Petitioners' Property That Constitute a Physical Taking

The physical changes to Petitioners' property mandated by the Current Order also constitute a *per se* physical taking of Petitioners' property rights in Craig Unit 1 and other related property, such as water and fuel. *First*, continued operation of Unit 1 requires water and fuel, which compels Petitioners to use the Craig facility's limited water and fuel reserves intended exclusively for Craig Units 2 and/or 3; these reserves were acquired and measured for the anticipated operation of those two specific coal units and based on the assumption that Craig Unit 1 would retire at the end of 2025. Because the Current Order forces Petitioners to surrender water and coal inventory for the government's chosen public purpose—water and coal that Petitioners acquired, allocated, and reserved for other units—it effects a *per se* physical taking of that property. *Second*, transmission capacity limitations for Petitioners' facilities at and near Craig Unit 1—the other Craig units and Axial Basin—mean that requiring Craig Unit 1 to remain interconnected and possibly operating constrain the ability of these resources to fully access the grid. And *third*, mandating that Petitioners make Craig Unit 1 ready for operations has compelled Petitioners to make material physical changes to Craig Unit 1, including repairing out-of-service equipment that would otherwise remain unused.

a. The Craig Facility's Water Reserve

All three Craig Units were designed to run on water obtained from the Yampa River, backstopped by the Elkhead Reservoir and, before Craig Unit 1's expected retirement, the Stagecoach Reservoir, which is unavailable for Craig Station's use as

of July 14, 2020. Before giving up rights in the Stagecoach Reservoir, Tri-State determined that the Elkhead reserves were sufficient to operate Craig Units 2 and 3 until their respective retirements. The only readily available source of water for Craig Unit 1 to maintain readiness, and use for dispatch, is the water acquired and allocated for Craig Units 2 and 3.[41] These water reserves have been depleted by the combination of recent hot, dry weather exceeding historically normal conditions and by the additional demands placed on Craig Station by the Current Order.

This too constitutes a taking. *See Horne v. Dep't of Agric.*, 576 U.S. 351, 357–65 (2015) (USDA requirement that a percentage of a grower's crop be set aside for public use constituted a *per se* physical taking); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1288–97 (Fed. Cir. 2008) (where the government required construction of a fish ladder and compelled water subject to plaintiff's water rights to be rerouted to the fish ladder, a physical taking had taken place). Just as the government effected a *per se* taking by requiring raisin growers to surrender a specific, identifiable portion of their crop for public use as in *Horne*, or by taking the right to waterflow for public infrastructure as in *Casitas*, by mandating that Petitioners consume water reserves purchased and reserved for Craig Units 2 and/or 3, DOE appropriates that property for a public objective.

[41] Diverting this water will require Petitioners to purchase replacement water at uncertain cost, imposing an additional, uncompensated expenditure that independently constitutes a taking. Meanwhile, using more water than anticipated in a drought year could further harm water security for Tri-State, agricultural interests and Colorado communities in future years. In a worst-case scenario, water may simply be unavailable, rendering one or more units of Craig Station inoperable under any conditions and disrupting the reliable generation capacity that Craig Units 2 and 3 currently provide.

Under *Horne*'s reasoning, forced depletion of a utility's water reserves—no less than forced surrender of raisins—constitutes a physical taking of personal property requiring just compensation. This remains the case even if no government actor ever takes title to or assumes possession of the depleted water reserves: a physical taking can occur without the government "taking actual possession" of the property. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). It is the "taking's purpose, and not its mechanics," that creates the need to provide just compensation. *Id.*

b. The Craig Facility's Fuel Reserve

All three Craig Units were designed to run on coal obtained from the now-shuttered Colowyo Mine and the recently shuttered Trapper Mine. Before closing the Colowyo Mine, Tri-State stockpiled reserves sufficient to operate its share of the Craig Units until their respective retirements. The only readily available source of fuel for Craig Unit 1 to maintain readiness, and to make use of in the event of a dispatch, is the reserves acquired and allocated for Craig Units 2 and 3. Just as with the Craig Station's water reserves, depletion of the coal reserves constitutes a taking. Under the same reasoning, forced depletion of a utility's fuel reserves constitutes a physical taking of personal property requiring just compensation, regardless of whether the government ever takes title to the coal reserves burned.[42]

[42] As with diversion of water resources, diverting this coal will require Petitioners to purchase replacement fuel at uncertain cost, imposing an additional, uncompensated expenditure that independently constitutes a taking. Use of an alternative source of supply not only results in additional costs, but also requires Petitioners to negotiate new contracts and alter operations at the Craig facility to account for variances between the physical qualities of different coal supplies. Meanwhile, using coal with different physical qualities could also require expensive and time-consuming modification of one or more Craig Units to allow such coal to be burned.

c. Axial Basin

By requiring Tri-State to transmit electricity to the SPP-controlled grid, the Current Order constitutes appropriation of Tri-State's transmission infrastructure (including transmission infrastructure allocated to Axial Basin), a clear physical intrusion. Even such intermittent intrusion on Petitioners' transmission capacity constitutes a taking. *See Cedar Point Nursery*, 594 U.S. at 153–54 (citing *United States v. Causby*, 328 U.S. 256, 259 (1946)) ("*Causby* held that overflights of private property effected a taking, even though they occurred on only 4% of takeoffs and 7% of landings at the nearby airport.").

Further, the 145-MW Axial Basin generating facility, located near the Craig Generating Station, relies on much of the same transmission infrastructure as the Craig facility. There is insufficient transmission capacity to move electricity generated by all three Craig units and Axial Basin to the broader power grid at the same time. This transmission limitation may trigger additional physical intrusion, as ensuring sufficient transmission capacity for Craig Unit 1's compliance with the Current Order may require curtailment of one or more other generation facilities (especially when the transmission system is operating near capacity).

d. Physical Changes to Craig Unit 1

Ongoing operations at Craig Unit 1 will require continual maintenance and staffing readiness, with further equipment failures requiring repair and staffing (including overtime). Compelling a property owner to make improvements to their property constitutes a physical taking when the mandated improvement benefits others—particularly the public at large—but does not benefit the property owner.

"Put in general terms, government may not force a landowner to make an improvement that, while valuable to others, is useless to him" without it constituting a compensable taking. *Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986) (discussing *Norwood v. Baker*, 172 U.S. 269 (1898) and *Myles Salt Co. v. Bd. of Comm'rs*, 239 U.S. 478 (1916)), *abrogated on other grounds, Cumbre Inc. v. State Compensation Ins. Fund*, 403 F. App'x 272 (9th Cir. 2010). The Current Order requires Petitioners to continue to maintain and operate Craig Unit 1, and to replace equipment and material, even though they had planned to imminently retire the unit for good and Unit 1 is not needed to serve the reliability needs of their respective systems. This is the kind of physical taking described in *Furey*.[43]

B. The Current Order Constitutes a Regulatory Taking

In addition to being a *per se* physical taking, the Current Order constitutes a regulatory taking. Regulatory takings occur where the government "imposes regulations that restrict an owner's ability to use his own property" but goes too far. *Cedar Point Nursery*, 594 U.S. at 148. The property rights implicated by the Takings Clause can include contract rights, *see Lynch v. United States*, 292 U.S. 571, 579 (1934), and government-created entitlements with economic value, *Ruckelshaus*, 467

[43] This is also a fundamentally different issue than that presented by *Union Bridge Co. v. United States*, 204 U.S. 364 (1907). *Union Bridge* involved a property owner who was compelled to take steps to modify a structure that had been determined to obstruct navigation, *i.e.*, requiring a property owner to stop causing a public nuisance or harm. *Id.* at 400–01. But DOE is not demanding that Petitioners cease engaging in harmful conduct: Petitioners instead are required to continue operating, maintaining, and fueling a facility. *Union Bridge Co.*, which predates modern takings jurisprudence, has no bearing on the scenario presented here.

U.S. at 1001–04 (trade secrets constituted property for takings purposes). When evaluating whether a regulatory burden constitutes a taking, courts look to the test established in *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978), which evaluates regulatory takings based on: (1) the regulation's economic impact; (2) its interference with reasonable investment-backed expectations; and (3) the character of the government action. The Current Order constitutes a regulatory taking under this analysis.

1. Economic Impact

By requiring Petitioners to "take all measures necessary to ensure that Craig Unit 1 is available to operate," the Current Order places a heavy economic burden on Petitioners. Petitioners incur various operations and maintenance costs to ensure Craig Unit 1 is ready and able to operate at SPP's direction. Moreover, because of limited capacity over common transmission facilities, dispatching Craig Unit 1 while the other Craig Units are operating can impede SPP's ability to dispatch the nearby Axial Basin generating facility. This, in turn, prevents Petitioners from gaining the benefit of a margin on more economic resources, including renewable energy credits (which themselves have tangible economic value).

2. Investment-Backed Expectations

"[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [investment-backed] expectations." *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring). Where a change in regulation dramatically disrupts the economic basis for a property owner's choices, it constitutes unreasonable interference with

reasonable investment-backed expectations. *See Petworth Holdings, LLC v. Bowser*, 308 F. Supp. 3d 347, 356–58 (D.C. Cir. 2018). An explicit government guarantee forms the basis of a reasonable investment-backed expectation. *See Ruckelshaus*, 467 U.S. at 1011.

The Order disrupts Petitioners' reasonable investment-backed expectations on several fronts. DOE's use of Section 202(c) authority to address potential long-term shortages or grid reliability problems is a substantial and novel change to prior uses of Section 202(c) emergency authority.[44] The Current Order fundamentally alters DOE's longstanding approach in an untested way that could not be predicted from DOE's previous actions, and certainly not when Petitioners decided a decade ago to retire Craig Unit 1 in 2025. Petitioners could not have fairly anticipated DOE's novel approach to Section 202(c) when it engaged in business planning and made investment decisions; thus, the Current Order upsets Petitioners' reasonable expectations.[45] That the D.C. Circuit decisively rejected DOE's interpretation of

[44] *Rolsma* (2024) at 802–09, 839–46 (discussing paucity of involuntary Section 202(c) orders since World War Two).

[45] These considerations help explain why *AT&T Corp. v. City of Toledo*, 351 F. Supp. 2d 744 (N.D. Ohio 2005) is inapposite. *AT&T Corp.* concerned a utility's ongoing use of an easement granted by a municipality, and the ongoing exercise of typical regulatory oversight of those operations. *Id.* at 747–49. Petitioners, like all entities operating in the energy markets, are routinely asked to comply with typical regulatory burdens like those at issue in *AT&T Corp.* A case involving the ordinary and expected regulation of utility operations does not in any way address the issue presented here: whether the government can compel an owner to continue operating a facility it has decided to retire after years of planning and regulatory approval. Moreover, as *Michigan v. DOE* held, DOE's invocation of Section 202(c) for "emergencies" like the one raised in the Current Order and its predecessors was an unusual and extraordinary intervention, not typical oversight of the kind reasonably anticipated by Petitioners and firms like them.

Section 202(c) only emphasizes the abrupt and shocking change to the regulatory environment.

Diverting water and coal to Craig Unit 1 to comply with the Current Order, moreover, depletes Craig Unit 2 and 3's water and fuel reserves and hinders Petitioners' right and ability to freely use those facilities consistent with their investment-backed expectations.[46]

Finally, the electrical generation and transmission industry operates on a long time horizon. Craig Unit 1's planned closure was announced a decade ago, and numerous steps to execute that plan, such as deferring maintenance, reducing staffing, right-sizing water and coal reserves, and redirecting capital expenditures, have been undertaken since. Such actions have long been—and according to the D.C. Circuit, are still—within the purview of utilities, RTOs and state regulators to address generation planning. *See Michigan v. DOE*, 2026 WL 2671756 at *14–16. Disruption of these long-term plans upsets Petitioners' reasonable investment-backed expectations. The seizure of a facility eight years in advance of a potential emergency upsets a reasonable expectation that long-term resource planning will be the mechanism by which utilities address resource adequacy needs.

[46] The Current Order also upsets Petitioners' delicate contractual relationships. Even if Section 202(c) provides protection from enforcement action by Colorado under "environmental" laws, disruption to these longstanding relationships disturbs Petitioners' ability to manage risk, engage in long-term planning, and maintain their reputations as reliable counterparties. Petitioners have made commitments to stakeholders and planned their businesses around complying with existing environmental laws, which form part of their reasonable investment-backed expectations.

3. Character of the Taking

The character of a governmental action is defined by "the purpose and importance of the public interest underlying [the] regulatory imposition, by obligating the court to inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented." *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003) (internal quotation and citation omitted). "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent.*, 438 U.S. at 124 (citations omitted).

The character of the Current Order's action further aligns with a regulatory taking. As discussed above in Section (I)(A), the Current Order effectively commandeers Craig Unit 1, its water and fuel, the potential dispatch of the nearby Axial Basin facility, the inability to market Craig Unit 1 as a capacity resource, and related infrastructure owned by Petitioners. It places Craig Unit 1 under the control of SPP, a non-governmental actor, and requires Petitioners to comply with "all orders" that SPP issues "related to the availability and dispatch of Craig Unit 1." Current Order at 7. The Current Order does not merely adjust the benefits and burdens of economic life, but rather directs operational control for a public reliability aim that could—and should—be solved through other means, and by other electrical utilities.

C. Just Compensation

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Whether compensation is "just" is measured by relation "both to an owner whose property is taken and to the public that must pay the bill[.]" *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). "The owner's loss is measured by the extent to which governmental action has deprived him of an interest in property." *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987). Petitioners cannot obtain constitutionally sufficient compensation for the costs the Current Order imposes for several reasons.

First, SPP's existing market structures do not assure Petitioners they can recover both their variable and fixed costs of continued operation of Craig Unit 1. Under SPP's existing market structure, generators like Petitioners participate by bidding their output into SPP's real-time and day-ahead energy and ancillary services market. SPP's markets assure generators recovery of only their marginal, variable costs—not fixed costs.[47] As a long lead-time reliability resource, Craig Unit 1 is offered for selection within a multi-day resource assessment. If SPP selects the resource for reliability purposes, the resource is compensated for energy costs. SPP does not operate a mandatory all-resource capacity market, a mechanism by which

[47] *See* Market Protocols—SPP Integrated Marketplace, at 39 ("SPP committed Resources are assured recovery of their Start-Up Offer, No-Load Offer and actual incremental Energy costs as defined in the Energy Offer Curve subject to certain eligibility criteria[.]").

generators recover their non-variable (fixed) costs.[48] And, in any event, the Current Order instructs that Craig Unit 1 "shall not be considered a capacity resource[,]" Current Order at 8.

Second, while Section 202(c) and its implementing regulations suggest recovery may be possible through FERC rate-making processes, that suggestion is not a promise of constitutional recovery.[49] The scope of the purported emergency, covering the entire WECC–Rocky Mountain region, is broader than just SPP's market. PSCo's Balancing Authority Area, for example, falls within the WECC–Rocky Mountain region identified as experiencing the "emergency" and thus PSCo presumably benefits from Craig Unit 1's continued operations, but PSCo does not participate in SPP, the mechanism for potential compensation identified in the Current Order. DOE sets forth no mechanism for navigating these complexities, much less an assurance of just recovery notwithstanding these issues; at minimum DOE should clarify the entities from which it intends to provide Petitioners the right to seek recovery.[50] Indeed, the difficulty of such cost recovery is evinced by FERC's

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[48] *See* Federal Energy Regulatory Commission, Office of Energy Policy and Innovation, *Energy Primer: A Handbook for Energy Market* Basics 72 https://www.ferc.gov/sites/default/files/2024-01/24_Energy-Markets-Primer_0117_DIGITAL_0.pdf ("[C]apacity markets are intended to provide more certainty for investment in new capacity resources while including an opportunity for all resources to recover their fixed costs over time.").

[49] The terms of the Current Order, moreover, could have substantive impact on Tri-State's ability to make energy sales at market-based rates through authority granted to it by FERC. *See, e.g.*, *Tri-State Generation and Transmission Ass'n,* 170 FERC ¶ 61,220, at PP 1, 22 and ordering para. (A) (2020) (generally providing Tri-State with authorization to transact at market-based rates).

[50] Petitioners therefore again request clarification of which "ratepayers" DOE is referring to in the Current Order, such as SPP ratepayers, all ratepayers within the WECC–

recent issuance of two orders rejecting a utility's proposed Section 202(c) cost allocation methodology in the WECC-Northwest region (the same region covered by Order No. 202-25-14).[51] And conflating recovery from SPP with constitutional just compensation is particularly inappropriate here because recovery from SPP, of which Petitioners are a part, means that "cost recovery" would in significant part come from the pockets of *Petitioners themselves*.[52] The Takings Clause does not permit the federal government to appropriate control and use of property while leaving the owner without a mechanism to obtain just compensation from the government itself.

Petitioners raised these problems in their First, Second, and Third Rehearing Requests, but the Current Order (again) fails to resolve them. It remains the case that the altered geographic framing of the asserted emergency over the course of the DOE's orders creates uncertainty as to how Petitioners can seek recovery. Despite

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Rocky Mountain region, or ratepayers for all co-owners of Craig Unit 1. Petitioners have repeatedly made this request but have received no response.

[51] *See* Jim DiPeso, *FERC Rejects Second TransAlta Cost-Recovery Request*, NEWSDATA (Oct. 19, 2026), https://www.newsdata.com/clearing_up/clearing_it_up/ferc-rejects-second-transalta-cost-recovery-request/article_cbbc45eb-bd2b-4a9c-8876-3446a136eaf2.html.

[52] For example, Tri-State comprises approximately 52% of the SPP West load but owns only 24% of Craig Unit 1. Additionally, there are co-owners of Craig Unit 1 that are not participants in SPP, who will bear costs without any apparent mechanism of recovery through SPP. If costs are allocated in proportion to load, and recovery in proportion to ownership, Tri-State and other co-owners who do not participate in SPP stand to lose. Routing recovery through SPP may obligate these co-owners to fund more than half of the costs imposed by the Order, effectively compelling them to subsidize purported reliability benefits for others. *See* Tri-State 2026 Resource Adequacy Annual Report (2026), https://tristate.coop/sites/default/files/PDF/resourceplan/Resource%20Adequacy_2026.pdf (showing excess resources in Tri-State's footprint through 2035); Platte River Power Authority Resource Adequacy Report 2025 (2025), https://prpa.org/wp-content/uploads/2025/04/PRPA_RA2025_-signed.pdf (showing excess resources in Platte River's footprint through 2030).

this continued uncertainty, if Petitioners must continue to dispatch Craig Unit 1 for the entire emergency period until 2034, costs could exceed millions in operating and maintenance costs, exclusive of fuel costs.

Moreover, even if Petitioners can and do recover some costs through this process, it is still not *just compensation* within the meaning of the Takings Clause. "[O]nce the government executes a taking, the Constitution does not permit it to shift the public's burden of just compensation to third parties. When property is taken for public use under the Fifth Amendment, the public—and not specific individuals or groups at the order of the government—must pay." *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 831 (9th Cir. 2004) (O'Scannlain, J., concurring); *see also U.S. Bank, Nat'l Assoc. v. SFR Invests. Pool 1, LLC*, Case No. 15-cv-00287-APG-GWF, 2016 WL 1248704, at *5 (D. Nev. Mar. 28, 2016) ("[A] takings claim requires just compensation from the government, not from a private third party."); *Baker v. City of McKinney*, 608 F. Supp. 3d 457, 465–67 (E.D. Tex. 2022) (plaintiff was entitled to full compensation for a taking by police even though she obtained additional money from donations). Accordingly, first and foremost, Petitioners' right to just compensation cannot be satisfied by reference to Section 202(c)'s cost recovery authorization.

Second, the inadequacy of this provision is particularly acute where, as here, at least some of Petitioners' relief will come from Tri-State's members and Platte

River's ratepayers, even if FERC orders some level of cost recovery.[53] DOE cannot simply transfer the constitutional obligation to provide just compensation onto private parties—including, here, rural communities and the residents of four small Colorado municipalities—through regulatory mandates without satisfying its own Takings Clause obligations.

CONCLUSION

"It is the states—informed by federal, regional, and load-serving entities' assessments of available supply and reliability needs—that bear the responsibility to plan for and avert reliability risks on an ongoing basis." *Michigan v. DOE*, 2026 WL 2671756 at *2. This is how Petitioners have operated for decades, and operated in choosing to wind down operations at Craig Unit 1, engaged in rational and thoughtful long-term planning to support their committing to providing reliable and affordable electricity to communities across Colorado and the Mountain West. Petitioners seek to work constructively with DOE and other agencies to advance shared reliability and affordability goals. Actions that unsettle long-standing, state-approved planning processes, however, risk undermining those objectives, interfering with the

[53] As noted in the Current Order, a significant driver of the growth in the demand for energy nationwide is data center demand. *See* Current Order at 5. To the extent the alleged emergency has been caused by the demands of data centers, shifting the costs of Craig Unit 1 onto Petitioners and their ratepayers is contrary to President Trump's pledge to protect ratepayers from these effects. *See* Ratepayer Protection Pledge, Proclamation No. 11014, 91 F.R. 11439 (Mar. 4, 2026). Moreover, on August 14, 2026, before the Current Order was issued, FERC approved Tri-State's High Impact Load Tariff, subject to further compliance on other issues, finding that "Tri-State's proposal will ensure that Tri-State adheres to the reliability metrics in its ERP as required by the Colorado Commission, the criterion is clearly defined in the Tariff." In other words, Tri-State has already developed—and FERC has already approved—a methodology for managing the reliability risks of data center demand. *Tri-State Generation & Transmission Ass'n*, 196 FERC ¶ 61,127 at P 74 (2026).

operations of the entire Craig Station through overconsumption of water and fuel resources, and imposing unnecessary costs on the very consumers the processes are designed to protect.

For these reasons, the Current Order cannot stand. It effects an uncompensated taking of Petitioners' property, denies them due process, and fails to meet Section 202(c)'s statutory requirements, including that DOE articulate a valid emergency and that DOE's chosen mandate "best meet" the stated emergency. Moreover, the Current Order does not address the points raised in Petitioners' three previous rehearing requests. Petitioners urge DOE to reconsider the Current Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties below. Dated at Washington, D.C., this 23rd day of October 2026.

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