

**UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF ENERGY**

In re Craig Order No. 202-26-21

) Order No. 202-26-21
)

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

TABLE OF CONTENTS

SUMMARY.....	1
STATEMENT OF ISSUES.....	3
BACKGROUND.....	4
A. The Petitioners	4
B. The Craig Generating Station	7
C. Craig Unit 1.....	9
D. DOE Order No. 202-25-14.....	9
E. DOE Order No. 202-26-21.....	10
ARGUMENT.....	12
I. THE ORDER CONSTITUTES AN UNCOMPENSATED TAKING OF PETITIONERS’ PROPERTY INTERESTS	12
A. The Order Constitutes a Physical Taking.....	13
1. The Order’s Direction of Prolonged Operations at Craig Unit 1 Contrary to Petitioners’ Plan to Retire the Facility Constitutes a Physical Taking	15
2. The Order Mandates Physical Changes to Petitioners’ Property That Constitute a Physical Taking.....	16
B. The Order Constitutes a Regulatory Taking	19
1. Economic Impact.....	20
2. Investment-Backed Expectations	20
3. Character of the Taking	22
C. Just Compensation.....	23
II. THE ORDER DISRUPTS PETITIONERS’ RELIABILITY PLAN AND FAILS TO ACCOUNT FOR VIABLE ALTERNATIVES	27
A. The Order Describes Speculative Energy Shortfalls in 2034, and Therefore Does Not Establish the Existence of an Emergency Addressed by Requiring Continued Operation and Dispatch of Craig Unit 1	29
1. Keeping Craig Unit 1 Open Does Not Address Long-Term Concerns.....	30
2. Keeping Craig Unit 1 Open Does Not Best Address Concerns in DOE’s Targeted Regions.....	32
B. The Order is Procedurally Inadequate on Both Constitutional and Statutory Grounds.....	33

1.	The Order Violates Petitioners’ Constitutional Due Process Rights	34
2.	DOE’s Failure to Engage with the EPA Renders the Order Invalid	36
C.	The Order Failed to Limit Emergency Relief to What Is Necessary to Address the Asserted Emergency and Did Not Consider Reasonable Alternatives	37
D.	The Order Improperly Usurps the Role of State and Local Governments, Utilities, and Markets in Resource Adequacy Planning	41
E.	The Order is Inconsistent with the FPA’s Statutory Objectives	44
	Conclusion	45

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. 202-26-21 dated March 30, 2026 (the Order) requiring Petitioners and their co-owners to keep coal-fired Unit 1 of the Craig Generating 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, the U.S. Department of Energy (DOE) is authorized to require extraordinary steps be taken to serve the public interest. 16 U.S.C. § 824a(c)(1). The Order finds that such an emergency exists—but indicates that the claimed energy shortages DOE has identified are not likely to occur, if ever, until **2034**—more than seven years—or **thirty-one** 90-day

¹ 16 U.S.C. § 8251.

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.

Section 202(c) renewal cycles in the future. That emergency, should it ever come to pass, cannot be solved by requiring that Craig Unit 1, a more than 45-year-old coal plant, continue operating today. It cannot be solved by allowing dispatch of Craig Unit 1 during the period of the current Order. While Petitioners raised many of these and other concerns in their request for rehearing and clarification responding to DOE's initial Section 202(c) order targeting Craig Unit 1,⁵ this second Order provides little response.

Petitioners again request rehearing to bring to DOE's attention the myriad constitutional, procedural, and evidentiary defects of the Order. Regardless of whether the Order survives such scrutiny, it effects an uncompensated physical and regulatory taking of Petitioners' property interests in Craig Unit 1 and associated 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; (2) and these processes fail to provide *compensation* from the taking party—the federal government—rather than facilitating potential compensation from private third parties (including Petitioners).

The Order is also defective on the merits. It 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

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).

contemplated “emergency” does not occur until 2034, the Order fails to provide constitutionally adequate due process before deprivation of Petitioners’ property interests. Similarly, the Order is procedurally defective; it fails to incorporate statutorily mandated consultation between DOE and other agencies and neglects to consider any alternatives to its proposed plan. Finally, the Order does not align with the statutory objectives of the Federal Power Act (FPA), and DOE never explains how it could.

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. This is not what Section 202(c) was intended for. Petitioners urge DOE to reconsider its approach.

STATEMENT OF ISSUES

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

1. 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 Order constitutes both a physical and regulatory taking. Because the 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).
2. Because DOE failed to establish the existence of an emergency, and, because of the temporal and geographic disconnect between the energy reliability concerns described by the 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 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. Because DOE predicated the Order on long-term concerns, and not an existing emergency, and reissued the Order notwithstanding the due-process objections Petitioners raised in their prior request for rehearing, Petitioners were denied any meaningful opportunity to be heard, notwithstanding time and notice permitting such process. 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 Order fails to incorporate any 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 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.

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

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).

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.

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

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.

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

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 regional transmission organization (RTO) in the Western Interconnection in April 2026.¹⁰

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.

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

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 by 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, and Salt River Project. 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

¹¹ COLO. CODE REGS. 1001-27.

(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 is scheduled to cease active mining and convert to site remediation in calendar year 2026. Before the 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 closes, Platte River will have stockpiled sufficient coal to meet its projected demand for Craig Unit 2 through its planned retirement date.

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, this interconnection faces transmission constraints such that, when Craig Unit 1 remains interconnected and available to operate, Tri-State may be required to

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>.

curtail output from Axial Basin (particularly when all facilities are generating at or near full output) due to limited transmission capacity.

C. Craig Unit 1

Craig Unit 1 can produce up to 427 MW of electricity and has been running 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 in the 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 forced outages), Craig Unit 1 has run well below half of its capacity for Petitioners, without compromising Petitioners' ability to meet their 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 is now available to operate following repairs.¹³

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

¹³ 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>.

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.

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 Order 202-25-14. The 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 3–5.¹⁴

The Order requires Petitioners and the other co-owners of Craig Unit 1 to:

1. From March 31, 2026, take all measures necessary to ensure that Craig Unit 1 is available to operate at the direction of either Western Area Power Administration (WAPA)—Rocky Mountain Region, Western Area Colorado Missouri (WACM), in its role as Balancing Authority, or SPP West in its role as the Reliability Coordinator, as applicable.
2. From April 1, 2026, take all measures necessary to ensure that Craig Unit 1 is available to operate, with SPP directed to take every step to employ economic dispatch of Craig Unit 1 to minimize costs to ratepayers, with Tri-State and the co-owners directed to comply with all orders from SPP related to the availability and dispatch of Craig Unit 1.
3. Limit operation of Craig Unit 1 to the times and within the parameters established *supra* in order to minimize adverse environmental impacts, and to provide a daily notification to the Department 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

¹⁴ The Order 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>.

maximum extent feasible while operating consistent with the emergency conditions.

5. By April 14, 2026, provide DOE with information concerning the measures each has taken and is planning to take to ensure the operational availability of Craig Unit 1 consistent with the Order, as well as additional information regarding the environmental and operational impacts of the Order and its compliance with the conditions of the Order, in each case as requested by DOE.
6. File tariff revisions or waivers with FERC to effectuate the Order, as needed.

The Order is effective from March 31 through June 28, 2026. Tri-State has submitted and continues to submit daily notifications to DOE as the Order requires.

ARGUMENT

Petitioners seek rehearing on two fronts. *First*, the 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. *Second*, the 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.

I. THE 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 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 Order's taking comes with no constitutionally adequate avenue for just compensation. FERC cost recovery shifts compensation onto 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 Order will be procedurally and substantively novel and could leave material costs unrecovered from the Order's putative beneficiaries.

A. The 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 Government 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)).

The 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 Order constitutes a physical taking by compelling Petitioners to make material physical changes to the plant, including repairing out-of-service equipment like feedwater heater tubes, ash blowers, and side stream filter pumps, for example, requiring additional staff onsite, and physically diverting coal allocated for Craig Units 2 and/or 3 to fuel Craig Unit 1. Reduction of these stockpiled reserves 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 transmission constraints, Craig Unit 1’s operations could limit the circumstances where SPP can dispatch the nearby Axial Basin generating facility.

1. The 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,¹⁵ making it particularly suitable for analysis under post-war interpretations of the Takings Clause. These cases show that, even in the context of 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). Finally, 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).¹⁶

¹⁵ Benjamin Rolsma, *The New Reliability Override*, 57 Conn. L. Rev. 789, 789–846, 800–02 (2024) (“Rolsma (2024)”).

¹⁶ 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

In that light, the Order constitutes a taking of Petitioners' property. The 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. Compliance with these requirements has compelled Petitioners to take significant steps, steps they would not otherwise take, for a prolonged period of time. DOE's renewed Order extends the period of compelled availability to roughly six months, and nothing in the Order suggests this control will be temporary rather than renewed through successive emergency declarations. This closely resembles the mandate to operate that the *Pewee Coal* Court held was a taking.¹⁷ 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.

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

The physical changes to Petitioners' property mandated by the Order also constitute a *per se* physical taking of Petitioners' property rights in Craig Unit 1 and other related property, such as fuel. *First*, operations require fuel, which compels

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)).

¹⁷ 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).

Petitioners to make use of the Craig facility's limited fuel reserves intended exclusively for Craig Units 2 and/or 3 as operations at Unit 1 continue; these reserves were acquired and measured for the anticipated operation of two specific coal units and based on the assumption that Craig Unit 1 would retire at the end of 2025. Because the Order forces Petitioners to surrender coal inventory for the government's chosen public purpose—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 Fuel Reserve

All three Craig Units were designed to run on coal obtained from the now-shuttered Colowyo Mine and the soon-to-be-shuttered Trapper Mine.¹⁸ 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

¹⁸ Tri-State believes that co-owners supply their share of Craig Units 1 and 2 through Trapper or other mines.

fuel for Craig Unit 1 to maintain readiness, and to make use of in the event of a dispatch, are the reserves acquired and allocated for Craig Units 2 and 3.¹⁹

This too constitutes a taking. *See Horne*, 576 U.S. at 357–65 (USDA requirement that a percentage of a grower’s crop be set aside for public use constituted a *per se* physical taking). Just as the government in *Horne* effected a *per se* taking by requiring raisin growers to surrender a specific, identifiable portion of their crop for public use, by mandating that Petitioners consume coal inventory purchased and reserved for Craig Units 2 and/or 3, DOE appropriates that property for a public objective. Under *Horne*’s reasoning, forced depletion of a utility’s fuel reserves—no less than forced surrender of raisins—constitutes a physical taking of personal property requiring just compensation.

b. Axial Basin

The 145 MW Axial Basin generating facility, located near the Craig Generating Station, relies on much of the same transmission infrastructure. There is insufficient transmission capacity to move all electricity generated by the three Craig units and Axial Basin to the broader power grid. The Order thus constitutes appropriation of Tri-State’s transmission infrastructure (including transmission infrastructure allocated to Axial Basin), a clear physical intrusion. This transmission limitation may

¹⁹ 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.

trigger additional physical intrusion, as ensuring sufficient transmission capacity for Craig Unit 1's compliance with the Order may require curtailment of one or more other generation facilities (especially when the system is operating near capacity).

c. 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 do 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 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*.

B. The Order Constitutes a Regulatory Taking

In addition to being a *per se* physical taking, the 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 U.S. at 1001–1004 (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 Order constitutes a regulatory taking under this analysis.

1. Economic Impact

In requiring Petitioners to “take all measures necessary to ensure that Craig Unit 1 is available to operate,” the 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.²⁰ The Order fundamentally alters DOE’s longstanding approach in a novel, 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 Order upsets Petitioners’ reasonable expectations. Diverting coal from Craig Unit 1 to comply with the Order, moreover, depletes Craig Unit 2 and 3’s fuel reserves and hinders Petitioners’ right and ability to freely use those facilities consistent with their investment-backed expectations.²¹

²⁰ *Rolsma* (2024) at 802–09, 839–46 (discussing paucity of involuntary Section 202(c) orders since WW2).

²¹ The 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,

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, such as deferring maintenance, reducing staffing, and redirecting capital expenditures, have been undertaken since. 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.

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).

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.

The character of the Order’s action further aligns with a regulatory taking. As discussed above in Section (I)(A), the Order effectively commandeers Craig Unit 1, its fuel, the potential dispatch of the nearby Axial Basin facility, 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.” Order at 7. The 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 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.²² As a long lead-time reliability resource, Craig Unit 1 is offered for selection within a multi-day resource assessment. In the event 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 generators recover their non-variable (fixed) costs.²³ And, in any event, the Order instructs that Craig Unit 1 “shall not be considered a capacity resource[.]” Order at 7.

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.²⁴ The scope of the purported emergency, covering the entire WECC–Rocky Mountain region, is broader than just SPP’s market. Public Service Company of Colorado’s (PSCO) Balancing Authority Area, for example, falls within the WECC–Rocky Mountain region identified as experiencing

²² 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[.]”).

²³ See Federal Energy Regulatory Commission, Office of Energy Policy and Innovation, *Energy Primer: A Handbook for Energy Market Basics* 72 (“[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.”).

²⁴ The terms of the 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). The circumstances are analogous for Platte River. Platte River also makes energy sales at market rates, but, as a government utility exempt under FPA Section 201(f), Platte River does not need market-based rate authority from FERC.

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 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.²⁵ 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*.²⁶ 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.

²⁵ As such, Petitioners request clarification of which “ratepayers” DOE is referring to in the Order, such as SPP ratepayers, all ratepayers within the WECC–Rocky Mountain region, or ratepayers for all co-owners of Craig Unit 1.

²⁶ 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 without any showing that Craig Unit 1’s co-owners required the Unit’s continued operation to address any identified resource shortfall. 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).

Petitioners raised these problems in their initial request for rehearing but the Order fails to resolve them. DOE’s refusal to bridge this gap is especially problematic given that the renewed Order altered the geographic framing of the asserted emergency. Having adjusted the relevant assessment area and introduced new evidence, DOE had ample opportunity to explain how Petitioners could obtain just compensation or to offer just compensation. DOE failed to do so. This is no small matter. If Petitioners must continue to dispatch Craig Unit 1, as the unit has in the past, 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).

This is particularly true 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.²⁷ 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.

II. THE ORDER DISRUPTS PETITIONERS' RELIABILITY PLAN AND FAILS TO ACCOUNT FOR VIABLE ALTERNATIVES

Separate from whether DOE must compensate Petitioners for the impact of the Order on their property and operations, the Order suffers from statutory and constitutional defects.

First, the Order fails to identify an emergency that meets the requirements of Section 202(c), or that is addressable by keeping Craig Unit 1 open. The issues articulated by the Order are fundamentally mismatched—temporally and geographically—with the Order's methods. Forcing Craig Unit 1 to remain open is counterproductive, disrupting a considered resource planning effort aimed at addressing the very concerns DOE raises in the Order. This analytical failure renders the Order arbitrary and capricious.

²⁷ As noted in the Order, a significant driver of the growth in the demand for energy nationwide is data center demand. *See* 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).

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 Order demonstrate that the alleged resource-adequacy concerns are not sudden or unforeseen but instead involve long-term conditions projected to arise years in the future. And where, as here, DOE had ample time to deliberate—and was already informed in Petitioners’ prior rehearing request that its proposed action raised serious due process concerns—the asserted need to address an emergency eight years in the future does not excuse DOE’s failure to provide notice and an opportunity for Petitioners to be heard before imposing the Order.

Third, the Order does not meet the requirements of Section 202(c). It does not limit the Orders to a remedy 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 Order is inconsistent with the FPA’s objectives. The Order is, therefore, contrary to law and arbitrary and capricious.²⁸

²⁸ As DOE is aware, Petitioners have already taken and will continue to take steps to comply with the Order. This includes incurring compensable costs and expenses. Although the 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 Order. Further, the Order 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 Order Describes Speculative Energy Shortfalls in 2034, and Therefore Does Not Establish the Existence of an Emergency Addressed by Requiring Continued Operation and Dispatch of Craig Unit 1

Section 202(c)(1) provides that DOE may issue an order when it determines “an emergency exists,” and that the emergency was 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[.]” 16 U.S.C. § 824a(c)(1). 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.²⁹

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 expects that “the impacted ‘entity’ will be expected to make firm arrangements to resolve the problem until new facilities become available, so that a

²⁹ Emergency Interconnection of Electric Facilities and the Transfer of Electricity to Alleviate an Emergency Shortage of Electric Power, 46 Fed. Reg. 39984 (Aug. 6, 1981).

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—the opposite of the long-horizon concerns cited in the Order.³⁰

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 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 be deliverable to the locations of concern, or why existing reserves, imports, or market mechanisms would be inadequate to address the risk. The Order is therefore contrary to law and arbitrary and capricious.

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

DOE rests the Order on concerns that, as mentioned *supra*, are predicted to occur at least 31 90-day renewal cycles in the future, yet the Order requires Petitioners to take action now. To justify the Order, DOE relies principally on: (1) NERC’s 2025 LTRA; (2) the 2025 WECC Western Assessment of Resource

³⁰ Notably, DOE has not attempted to update these definitions to conform the agency’s defined causes of an “emergency” with the novel approach of its Section 202(c) orders.

Adequacy; and (3) expressions of concern by two Colorado Public Utilities Commissioners concerning the ability of a separate utility, PSCo, to meet summer 2026 loads. Order at 4–5. None of these justifications rationally support the Order, let alone establish that requiring Craig Unit 1 to operate now will address the asserted emergency.

The 2025 LTRA expressly provides—and DOE acknowledges—that there is no elevated risk for energy shortfalls over the next five years. As the LTRA shows, actual reserve margin and planning reserve margin are above the reference margin level through 2033, and NERC anticipates *no* loss-of-load hours (LOLH) through 2029 for the WECC-Rocky Mountain region. To the contrary, the materials DOE relies on show that in the WECC-Rocky Mountain subregion, the number of projected LOLHs will remain comfortably below DOE’s benchmark for reliability over the next decade (so long as planned resource additions roughly approximate current expectations).³¹ Indeed, even if actual resource additions fall *well* below projections, it will be more than six years until the number of LOLH hours in a year *may* exceed DOE’s own standards.³² Put plainly, the WECC-Rocky Mountain Region is expected to meet

³¹ WECC’s analysis indicates that if 85% of planned generation is built, there will be only four LOLH hours in the Rocky Mountain region in the next 10 years (20 LOLHs below DOE’s threshold). See *2025 Western Assessment Supplemental Information*, WECC [<https://feature.wecc.org/warasupplemental/index.html>] (last visited April 29, 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>.

³² 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 LOLH hours in a single year. See *2025 Western Assessment Supplemental Information*, WECC [<https://feature.wecc.org/warasupplemental/index.html>] (last visited April 29, 2026).

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 Order's actions today may *create* reliability concerns that would not exist were Craig Unit 1 to shut down as originally scheduled.³³

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

³³ 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). DOE's citation, however, is incorrect: the 2025 LTRA does not cite the age of the subregion's thermal fleet as an operational and planning issue. Rather, the LTRA identifies supply chain issues, unplanned discovery work, and vendor availability for repairs at both thermal and hydropower sites as a concern for the region. 2025 LTRA at 161. Moreover, forcing Craig Unit 1 to continue operating to address projected shortfalls in 2034, when it would be 54 years old, only exacerbates concerns about reliance on aging resources.

“emergency” under Section 202(c)—they cannot—Craig Unit 1 is located in the WECC-Rocky Mountain region, and its continued operations cannot reasonably be expected to resolve reliability concerns (also years away) in far-flung locations. 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 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.

DOE’s failure to bridge this gap is especially problematic given that the renewed Order altered the geographic framing of the asserted emergency. Having adjusted the relevant assessment area, DOE had ample opportunity to explain how Craig Unit 1 is best suited to address locations of concern, yet it did not.

B. The 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 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 Order unlawful.

1. The 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.”).

However, “[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, LLC v. City of Pittsburgh*, 806 Fed. Appx. 134, 139–41 (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); *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 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. Rather, the 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 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 Order came into effect.

Petitioners identified this Constitutional deficiency in their prior request for rehearing. But rather than accord 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 cannot.

Having received notice of the due-process defect and having had ample time to address it, DOE’s decision to reissue a materially identical 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 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*, --- F.4th ---, 2026 WL 850257, at *17–18 (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).³⁴

DOE does not identify **any** agency it consulted in promulgating the Order. At the very least, EPA, the entity that administers the Clean Air Act and other statutes most directly relevant to Craig Unit 1 and which approved Colorado’s Regional Haze State Implementation Plan (of which the closure of Craig Unit 1 was a part), should have been consulted. The Order, however, does not describe any consultation with EPA and thus contains no indication that DOE complied with an explicit statutory element of a lawfully renewed Section 202(c) order. That alone renders it unlawful. And the defect is not just procedural, but substantive. 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 help identify the best alternative as required by Section 202(c).

C. The 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

³⁴ 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).

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 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 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 request and in the intervening months—that alternatives existed, DOE’s failure to evaluate them in reissuing the 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 the potential 2034 time-horizon of the asserted emergency. *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.³⁵ *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 order, the 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 specifically identified alternative approaches in their prior request for rehearing.³⁶ And an “emergency” occurring eight or more years from now can be solved by any number of means: more generation, more efficient use of existing generation, load flexibility, etc. DOE nevertheless

³⁵ 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.”).

³⁶ Request for Clarification and Rehearing of Order No. 202-25-14 at 31. 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.’”

reissued a materially identical order months later without assessing those alternatives or explaining why they were inadequate. Whatever urgency DOE might initially claim, it cannot excuse 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 Order.³⁷

Moreover, the long-term nature of the “emergency” articulated by DOE reinforces the need to consider alternatives and broadens the scope of what must be considered. 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 reliability concerns eight years in the future 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. The Order further fails to consider how mandating Craig Unit 1’s continued operation interferes with Petitioners’ ability to invest in or use other, more economic generation capacity and therefore undermines the very ends that it purports to advance. As previously discussed, the Axial Basin

³⁷ That Craig Unit 1 has been dispatched since Order No. 202-25-14 was issued 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 its Order.

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.

In the absence of such consideration, 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 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. Thus, it is contrary to law and an arbitrary and capricious exercise of agency authority.

D. The 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. 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 Order interferes with these efforts: DOE's approach disrupts a complex ecosystem that includes utility-led resource planning and various layers of supervision and market mechanisms. The Order disrupts this process and makes determining and proceeding with the most efficient and effective solution more difficult.

The FPA 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).³⁸

Under this framework, deciding whether Craig Unit 1 should remain operational belongs to its owners and subject to oversight by state governmental units. This 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.”).

³⁸ “Recognizing the careful balance that the FPA strikes between federal and state regulation” FERC recently 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[.]”).

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.³⁹ 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.⁴⁰ Finally, other entities play a critical role. SPP, for instance, requires load-serving entities to maintain a certain level of Planning Reserve Margin capacity or face financial penalties, discouraging utilities from free-riding on other participants' efforts.⁴¹

For nearly a decade, Petitioners along with other co-owners have planned to retire Craig Unit 1 in line with resource adequacy planning. The Order attempts to supplant this process by substituting DOE's judgment for utilities' and Colorado's long-term resource planning decisions—all to address an “emergency” so diffuse that

³⁹ Colorado's state government also plans around addressing 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 (CEO) shares responsibility for energy 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,

⁴⁰ *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.

⁴¹ SPP Open Access Transmission Tariff, Att. AA, § 14, <https://www.spp.org/spp-documents-filings/?id=18162>. SPP will begin imposing financial penalties in 2027.

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 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 Order's failure to do so renders it contrary to law and arbitrary and capricious.

E. The 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).

The Order, by compelling an uneconomic, aging unit to remain operational well beyond its planned retirement, upends Petitioners' ability to plan their systems and act with confidence in a competitive marketplace. Because the Order is at odds with

the statutory objectives of the FPA, it is contrary to law and arbitrary and capricious.⁴²

CONCLUSION

Petitioners are committed to providing reliable and affordable electricity to communities across Colorado and the Mountain West, and have planned accordingly by developing a resilient portfolio of generation resources. 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 and imposing unnecessary costs on the very consumers these processes are designed to protect.

For these reasons the 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 Order does not address the points raised in Petitioners' first rehearing request. Petitioners urge DOE to reconsider the Order.

⁴² As discussed *supra*, the Order similarly contradicts President Trump's pledge to protect ratepayers from the effects of DOE's Section 202(c) orders. See Proclamation No. 11014.

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 29th day of April 2026.

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