May 7, 2018

Via Electronic Mail

The Honorable James Richard Perry
Secretary of Energy
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Secretary Perry:

On behalf of Advanced Energy Economy, the American Petroleum Institute, the American Wind Energy Association, the Electric Power Supply Association, the Interstate Natural Gas Association of America, and the Natural Gas Supply Association, we write to oppose any action by the United States Department of Energy (DOE or the Department) that would use any of its emergency authorities as a means to provide economic support to a favored class of power plants. Power plant retirements are a normal, healthy feature of electricity markets. There is no emergency or threat to the national defense on which the Department could lawfully base the exercise of its emergency authorities.

I. Introduction

In October 2017, the Department used its authority under Section 403 of the Department of Energy Organization Act to propose a rule to be implemented by the Federal Energy Regulatory Commission (FERC or the Commission). DOE asserted that wholesale power markets do not adequately price the resiliency attributes of "fuel-secure" power plants. DOE defined fuel-secure power plants as those that maintain 90 days of fuel on site – a requirement that only coal and nuclear plants generally satisfy. DOE proposed that any such plants that are located within organized electric markets and that are not subject to cost-of-service rate regulation by any State or local authority (*i.e.* "merchant" plants) should receive full cost recovery along with a return on equity.

In January 2018, the Commission rejected DOE's proposal unanimously.[1] The Commission emphasized its historic commitment to both reliability and markets, observing that it "has been able to focus on both without compromising its commitment to either."[2] The Commission rejected the notion that the retirement of certain generators in regional transmission organization and independent system operator (RTO/ISO) markets meant that the prices in those markets were unjust and unreasonable.[3] The Commission also concluded that DOE failed to establish that its own proposal was just and reasonable. The Commission observed that DOE's proposal would have extended cost recovery to all eligible units "regardless of need or cost to the system" and that the 90-day criterion would have unduly discriminated against other resources with resilience attributes.[4]

Although the Commission rejected DOE's proposal, terminating the proceeding, it did not ignore the issue DOE raised. FERC instead initiated a new proceeding dedicated to (1) developing a common understanding of resilience, (2) identifying how RTOs/ISOs assess threats to resilience, and (3) examining how RTOs/ISOs mitigate threats to resilience within a market context.[5] In short, the Commission stayed true to its long-standing commitment to promote both markets and reliability "without compromising its commitment to either."

Though DOE's proposal was not adopted by FERC, there is no question that it was directed at the correct agency. DOE rightly identified FERC as the agency with which to raise concerns about the adequacy of wholesale electricity prices and Sections 205 and 206 of the Federal Power Act as the statutory provisions under which those concerns must be evaluated. In the months following FERC's rejection of the DOE NOPR, however, those urging above-market prices for coal and nuclear plants have moved on to other legal theories in the hopes of achieving the same result by other means.

On March 29, FirstEnergy Solutions and its affiliates (collectively, FirstEnergy) petitioned the Department to use its emergency authority under Section 202(c) of the Federal Power Act to issue an order that would give all merchant coal and nuclear plants in PJM a guaranteed return on equity for four years. On April 18, Senator Manchin wrote to President Trump urging him to invoke the Defense Production Act to support coal and nuclear plants. Senator Manchin followed that letter with a similar request to Secretaries Perry and Mattis on April 25. In the weeks that followed, others have suggested yet another authority, Section 215A of the Federal Power Act, which was enacted as part of the FAST Act of 2015.

These other authorities do not do what their proponents claim. All three rely on a finding that the retirement of certain coal and nuclear plants constitutes either an "emergency" or a threat to the national defense. No such finding can credibly be made. In addition, because these authorities are intended for emergency circumstances and threats to the national defense, they afford narrow

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[1] *Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures*, 162 FERC ¶ 61,012 (Jan. 8, 2018).
[2] *Id*. at P 11.
[3] *Id*. at P 15.
[4] *Id*. at P 16.
[5] *See* FERC Docket No. AD18-7.

relief to address those circumstances. They do not empower the Department to provide the long-term out-of-market price support that the coal and nuclear plant owners seek. That authority lies with the Commission, which reviews rate proposals pursuant to Sections 205 and 206 of the Federal Power Act to ensure that they are just and reasonable and not unduly discriminatory or preferential.

II. The Orderly Retirement of Inefficient Generators Does Not Pose an Emergency

The question of whether additional market reforms should be pursued to mitigate fuel supply risks should not be conflated with the question of whether an emergency exists today. The former question is receiving active attention through the appropriate channels. FERC, as noted above, has initiated a proceeding on how resilience can be promoted within RTO/ISO markets. PJM (along with the other RTOs/ISOs) is part of that proceeding and has initiated a number of processes to consider market structure improvements that address potential future resilience challenges in its markets.[6] The intention of those processes, we hope, is to develop analytically sound measures of resilience and a technology-neutral market-based approach that mitigates resilience risks at the lowest cost to ratepayers. But, while FERC and the RTOs/ISOs are taking the concepts of resilience and fuel security seriously, none of them accept the idea that the orderly retirement of uneconomic power plants constitutes an emergency.

FirstEnergy's claim that an emergency exists rests entirely on the observation that some coal and nuclear plants —most importantly those owned by FirstEnergy — are losing money and are therefore likely to retire in the coming years. That is not an emergency. The retirements FirstEnergy complains about will unfold over a period of years and will be carefully planned. FirstEnergy's three nuclear plants would not deactivate until 2021, and very few of the merchant generators FirstEnergy lists in Attachment A to its application have indicated any intention to retire in the near-term. If PJM determines that the retirement of any of these units would compromise system reliability, it can offer those units cost of service compensation under a "Reliability Must Run" contract that would keep those plants online until the reliability issue is resolved. In this case, PJM has completed its 30-day analysis of the deactivation notice from FirstEnergy regarding the retirement of three units (in 2020 and 2021) and found "the deactivation of these generating units is not expected to adversely affect the reliability of the PJM Transmission System due to a combination of remedial measures . . . .With these measures, the PJM Transmission system will remain reliable, and therefore the generating units listed above may plan to deactivate as scheduled."[7]

The retirements FirstEnergy complains of come in the context of an oversupplied capacity market and flat or declining demand. PJM's most recent capacity auction yielded a 23.9% reserve margin, which well exceeds its target of 16.6%. Reserve margins have grown because new and diverse

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[6] *See, e.g.,* PJM, *Valuing Fuel Security* (April 30, 2018); *see also*, ISO New England, *Operational Fuel-Security Analysis* (Jan. 17, 2018), https://www.iso-ne.com/static-assets/documents/2018/01/20180117_operational_fuel-security_analysis.pdf.

[7] PJM, Letter re First Energy Solutions, Corp. Request for Emergency Order Pursuant to Federal Power Act Section 202(c) Submitted March 29, 2018, (April 30, 2018), http://www.pjm.com/-/media/documents/other-fed-state/20180430-motion-to-intervene.ashx

generation resources have come online faster than older units have retired,[8] and because peak loads continue to decline.[9] For these reasons, PJM has emphasized repeatedly that there is no emergency. PJM's spokesperson put it succinctly:

> There is no immediate emergency. Diversity of the fuel supply is important, but the PJM system has adequate power supplies and healthy reserves in operation today, and resources are more diverse than they have ever been. Nothing we have seen to date indicates that an emergency would result from the generator retirements.[10]

The performance of the PJM electric grid during the 2018 Bomb Cyclone further demonstrates that no emergency exists. During the eleven-day period of extreme cold, the system performed well. PJM has explained that "[e]ven during peak demand, PJM had excess reserves and capacity."[11] Moreover, from the perspective of system resilience, PJM showed improvement as measured against the 2014 Polar Vortex. Total forced outages were 40,200 MW during the 2014 Polar Vortex, but declined to 23,751 MW in the 2018 Bomb Cyclone. While higher temperatures explain some of this difference, PJM has explained that it is also attributable to "increased investment in existing resources, improved performance incentives, enhanced winterization measures and increased gas-electric coordination."[12]

FirstEnergy attempts to flip the positive experience of the 2018 Bomb Cyclone on its head by pointing to a single, flawed study claiming that the region would have suffered "interconnect-wide blackouts" had certain coal plants been unavailable.[13] The study based this alarmist claim on the observation that, during the cold weather, coal plants provided more incremental generation than did natural gas or nuclear plants. As PJM and others have noted, however, the study misunderstood why those coal plants were dispatched more frequently. PJM explained that, under its economic dispatch model, "PJM dispatched coal units because *their costs were lower* during certain hours of the cold snap. Natural gas and nuclear units were not unreliable or otherwise unavailable to

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[8] Across capacity auctions spanning the last ten years, PJM has added 50,792 MW of new generation capacity, 9,485 MW of demand resource capacity, and 2,062 MW of energy efficiency capacity, while retiring or derating 39,639 MW of existing generating capacity. PJM, *2020/2121 RPM Base Residual Auction Results*, https://www.pjm.com/~/media/markets-ops/rpm/rpm-auction-info/2020-2021-base-residual-auction-report.ashx.

[9] PJM, *Capacity Repricing or in the Alternative MOPR-Ex Proposal*, FERC Docket No. ER18-1314 (April 9, 2018) at 10 n.24 (citing *PJM Load Forecast Report, January 2018*).

[10] Dan Shingler, *FirstEnergy seeks federal government help for its struggling plants*, CRAIN'S CLEVELAND BUSINESS (March 29, 2018), http://www.crainscleveland.com/article/20180329/news/156551/firstenergy-seeks-federal-government-help-its-struggling-plants.

[11] PJM Interconnection, *PJM Cold Snap Performance Dec. 28, 2017 to Jan. 7, 2018* at 1 (Feb. 26, 2018), available at http://www.pjm.com/-/media/library/reports-notices/weather-related/20180226-january-2018-cold-weather-event-report.ashx.

[12] *Id*. at 2.

[13] National Energy Technology Laboratory, *Reliability, Resilience and the Oncoming Wave of Retiring Baseload Units, Volume I: The Critical Role of Thermal Units During Extreme Weather Events*, (March 27, 2018).

serve the increased customer demand, nor would PJM have faced 'interconnect-wide blackouts' without the particular generating units dispatched."[14]

III. The Department Must Reject FirstEnergy's Petition under Section 202(c)

Section 202(c) of the Federal Power Act authorizes the Department to order generators to run during times of war or other emergencies. Section 202(c) describes such emergencies as including "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."[15] The Department's definition of "emergency" in its regulations implementing Section 202(c) likewise captures a number of scenarios, all of which it describes as either "unexpected," "sudden," or "unforeseen." As explained above, the orderly retirement of power plants in PJM will unfold over a period of years and in the context of ample supply of generating capacity. There is no "emergency" that could serve as the basis for using the Department's authority under Section 202(c).

FirstEnergy's petition seeks to stretch Section 202(c) far beyond what its text can support. Section 202(c) is a "temporary" authority aimed at emergencies; it does not give the Department authority to set national energy policy or to advantage one type of fuel for electric generation over others. After the First Oil Embargo, the Federal Power Commission declined to use its authority under Section 202(c), despite its potential for reducing oil dependence in the electric power sector. The U.S. Court of Appeals for the D.C. Circuit upheld that decision, stating:

> We are fully mindful, of course, that current national policy is to discourage reliance on foreign oil, but we cannot fault the Commission for reading Section 202(c) as devoid of a solution. That section speaks of "temporary" emergencies, epitomized by wartime disturbances, and is aimed at situations in which demand for electricity exceeds supply and not at those in which supply is adequate but a means of fueling its production is in disfavor.[16]

FirstEnergy's true problem is not that there is an emergency on the grid, but that its power plants lose money at current market prices. Consequently, its application is a thinly veiled attempt to use Section 202(c) as a substitute for what it could not achieve at the Commission under Sections 205 and 206. It seeks rate assistance for four years, a period that would exceed any conceivable "emergency" time frame. It would apply its rate assistance proposal to *all* coal and nuclear plants, regardless of whether each one is needed to address the purported emergency. Indeed, the only limitation FirstEnergy would impose on the scope of its requested order relates to the type of

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[14] PJM, *Perspective and Response of PJM Interconnection to National Energy Technology Laboratories Report Issued March 13, 2018* (April 13, 2018), http://www.pjm.com/-/media/library/reports-notices/weather-related/20180413-pjm-response-to-netl-report.ashx?la=en.

[15] 16 U.S.C. § 824a(c).

[16] *Richmond Power & Light v. FERC*, 574 F.2d 610, 615 (D.C. Cir. 1978)(internal citations omitted).

compensation these generators receive, and not whether each generator is necessary to address the supposed emergency.[17]

But Section 202(c) is not intended to solve generators' economic problems. As the Assistant Secretary for the Office of Electricity Delivery and Energy Reliability put it recently, "we would never use a 202[c] to stave [off] an economic issue. It's not designed for that."[18] More specifically, Section 202(c) was not designed as a pretext to supersede the Commission's authority over wholesale rates. Where the parties affected by an order do not agree, Section 202(c) ensures that generators receive "just and reasonable" terms for their actions carrying out the order. But that language cannot fairly be read as an independent source of ratemaking authority apart from Sections 205 and 206, given that Section 202(c) was enacted at a time when the Federal Power Commission had authority over the Federal Power Act as a whole.

The Department acknowledged the Commission's exclusive authority over wholesale rates when it first promulgated regulations implementing Section 202(c). The Department stated that it would leave rate issues to the Commission because "this responsibility is vested in the Federal Energy Regulatory Commission (FERC) and must be addressed in its regulations."[19] The Department's regulations, therefore, encourage the use of existing rate schedules for service under Section 202(c) orders, and state that when parties do not agree, FERC, not the Department, has responsibility for resolving "rate issues . . . for determination by that agency in accordance with its standards and procedures."[20] DOE's regulations could not be clearer as to which agency bears responsibility for rates. Nonetheless, FirstEnergy requests that the Department, rather than FERC, "step in and determine the just and reasonable compensation."[21] Neither the Federal Power Act nor the Department's regulations authorize the Department to do so.

IV. The Defense Production Act Does Not Contain Authority to Provide Above-Market Pricing to Power Plants

The Defense Production Act was enacted in 1950, at the beginning of the Korean War. Its purpose was to ensure the availability of critical materials for the national defense, and it has been used that way for decades. As explained below, the Defense Production Act cannot be used to command favorable pricing for a favored class of power plants. Moreover, to invoke the concept of "national defense" for what is transparently a domestic effort to boost an uneconomic segment of industry would be an unprecedented abuse of the Act. The Defense Production Act has enjoyed bipartisan

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[17] *See* FirstEnergy Request at 31 (excluding from the scope of its request generators that "recover any of their capital or operating costs through rates regulated by a duly authorized state regulatory authority, municipal government, or energy cooperative").

[18] Gavin Bade, UTILITY DIVE, *DOE 'would never use' emergency order for uneconomic plants, Walker says* (Feb. 20, 2018), https://www.utilitydive.com/news/doe-would-never-use-emergency-order-for-uneconomic-plants-walker-says-1/517455/.

[19] *See* Economic Regulatory Administration, Energy, *Emergency Interconnection of Electric Facilities and the Transfer of Electricity to Alleviate an Emergency Shortage of Electric Power*, 46 Fed. Reg. 39,984, 39,985 (Aug. 6, 1981).

[20] 10 C.F.R. § 205.376.

[21] FirstEnergy Request at 32.

support for decades and must maintain that support if it is to be re-authorized next year.[22] Using this statute to favor a particular industry that is struggling in the competitive markets would threaten that support and risk the loss of an important tool that could be needed to ensure national security.

Because its purpose lies in the national defense, the authority conferred in the Defense Production Act allows certain types of market interventions that are rare in American law. Even so, as broad as it is, the Defense Production Act is not broad enough to do what the supporters of these uneconomic power plants would like. The Defense Production does not allow the government to set prices. Nor does it allow the government to force market participants to buy products or services they do not wish to buy.

Those urging the Executive branch to use the Defense Production Act to bail out power plants have not identified which provision of the Act they would use. But there are only two possibilities: the prioritization and allocation authorities contained in Sections 101(a) and (c), and the financial assistance provisions contained in Title III. Neither set of provisions can be used to force consumers to pay above-market prices for electricity.

a. The Authority to Prioritize Contract Performance and to Allocate Materials Does not Include the Authority to Force Purchases or to Set Prices

Section 101(a) of the Defense Production Act empowers the President to require priority performance of contracts or orders deemed "necessary or appropriate to promote the national defense" and to allocate materials, services, and facilities in a manner necessary to "promote the national defense." To apply Section 101(a) to products in the civilian market, the President must also find that the material being prioritized or allocated "(1) . . . is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship."[23] Section 101(c) of the Act authorizes prioritization and allocation specifically for materials, equipment, and services necessary to "maximize domestic energy supplies" upon a finding that such materials are "scarce, critical, and essential—(i) to maintain or expand exploration, production, refining, transportation; (ii) to conserve energy supplies; or (iii) to construct or maintain energy facilities."[24] With respect to all forms of energy, Sections 101(a) and (c) have been delegated by the President to the Secretary of Energy.[25]

Sections 101(a) and (c) are commonly used to prioritize the performance of defense contracts over civilian contracts. For example, if a factory has a contract to supply the military with a particular item and if the need for that item becomes urgent, the Department of Defense may invoke Section 101(a) and issue a "rated order" to accelerate performance of its own contract ahead of civilian

[22] 50 U.S.C. § 4564(a) (stating that the Defense Production Act "shall terminate on September 30, 2019").
[23] *Id*. § 4511(b).
[24] *Id.* § 4511(c).
[25] Exec. Order 13603, 77 Fed. Reg. 16651 (Mar. 22, 2012).

orders at the same factory. The Department of Energy and its predecessor agencies have used the Section 101 authorities sparingly. In 1974 and 1975, the Federal Energy Administration used Section 101(a) to ensure the availability of materials necessary for timely completion of the Trans-Alaska Pipeline,[26] a project that had strategic importance to the United States after the First Oil Embargo. And in 2001, during the California Energy Crisis, the Department of Energy used Sections 101(a) and (c) of the Defense Production Act alongside the Natural Gas Policy Act of 1978 to ensure performance of contracts to deliver natural gas to Pacific Gas & Electric, which needed the natural gas both to serve retail customers and for electric power generation.

Providing FirstEnergy with the relief it seeks would first require that the President declare that electricity supplies are scarce. As described above, such a declaration cannot be credibly made. But even assuming it could, two further discrete government actions would be necessary: (1) the government must force PJM (or load-serving entities directly) to buy electricity from the favored class of generators, and (2) the government must force PJM (or the load-serving entities) to make those purchases at above-market rates they have not agreed to. Neither of these actions lies within the authority of the Defense Production Act.[27]

Section 101 of the Defense Production Act gives the government the extraordinary power to force private actors to *sell* their products to the government (or its contractors) when those private actors are contractually committed to sell to other parties. But nothing in the Act would authorize the far greater intrusion of forcing private actors to make purchases against their will, even if such purchases were somehow shown to "promote the national defense" or to "maximize domestic energy supplies." Section 101 is directed at materials found to be "scarce." Nowhere does it contemplate that buyers would need any encouragement, much less compulsion, to buy the materials that have been prioritized or allocated.

Moreover, even were the Defense Production Act turned upside down to authorize the government to force private actors to make purchases against their will, the Act provides no authority to set the price for those purchases. The original Title IV to the Defense Production Act authorized the President to fix prices, but that authority expired in 1953.[28] Section 101 authorizes the President to prioritize performance of contracts,[29] but not to wield the far greater power of dictating the price or other terms of the contract it has prioritized. Indeed, other provisions in the Act foreclose the possibility that it may be used to set prices: Section 104 states that the authorities in Title I,

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[26] Trans-Alaska Pipeline Priorities Assistance for Construction, 39 Fed. Reg. 34608 (Sept. 26, 1974).

[27] There are numerous ways in which the use of the Defense Production Act for this purpose would stray from the language of the Act and its implementing regulations. We have chosen to highlight two of the most fundamental.

[28] Defense Production Act Amendments of 1953, Pub. L. No. 83-95, 67 Stat. 129.

[29] Section 101(a) also allows the President to "require acceptance" of contracts and orders. 50 U.S.C. § 4511(a). But that authority must be read in light of the statement that it has been included "for the purpose of assuring . . . priority." *See Hercules Inc. v. U.S.*, 24 F.3d 188, 203 (Fed. Cir 1994) *aff'd* 516 U.S. 417 (1996). The authority to require sellers of critical materials to accept government contracts for purposes of assuring priority delivery does not confer authority to require buyers to accept contracts for purposes of imposing above-market prices.

including Section 101, may not be used to impose price controls without prior authorization by Congress;[30] Section 707 states that the prices, terms, and conditions of sale under a prioritization or allocation order should not differ from those for "generally comparable orders or contracts;"[31] and Section 106, which designates energy as a "strategic and critical material," states that no provision of the Act, "by virtue of such designation," should be read to confer any authority to control the "pricing" of any form of energy, including electricity.[32]

The regulations implementing Section 101 of the Defense Production Act also show that the authority to prioritize contract performance does not confer the authority to set prices. Those regulations state that priority assistance may not be provided "when a person is attempting to . . . [s]ecure a price advantage."[33] They also prohibit persons working under allocation or prioritization orders from "charging higher prices or imposing different terms and conditions than for comparable unrated orders."[34] Finally, we note that after the Department of Energy issued its order to address the 2001 California Energy Crisis, it made clear that any changes to the price of natural gas supply contracts in California would have been authorized by the Natural Gas Policy Act, not by the Defense Production Act.[35]

b. The Defense Production Act's Loan and Subsidy Provisions May Not Be Used in these Circumstances

Title III of the Defense Production Act confers authority to make loans and loan guarantees in order to reduce "shortfalls of industrial resources, critical technology items, or materials essential for the national defense."[36] As we explain above, there is no such shortfall. But even if such a finding could be made, loans and loan guarantees would be unavailable for these generators for two reasons. First, loans and loan guarantees under the Defense Production Act must be supported by funds appropriated for that purpose to pay for the government's credit risk.[37] Because Congress has appropriated no funds to support these loans, the Department of Defense cannot issue them. Second, even if funds were appropriated, the loans and loan guarantees would be available only if "the prospective earning power of the loan applicant and the character and value of the security pledged provide a reasonable assurance of repayment of the loan in accordance with the terms of

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[30] 50 U.S.C. § 4514(a).
[31] *Id.* § 4557.
[32] *Id.* § 4516.
[33] 15 C.F.R § 700.55; 10 C.F.R. § 217.44.
[34] 15 C.F.R §§ 700.13(a)(2) and 700.35(b); 10 C.F.R. §§ 217.33(a)(2) and 217.55(b).
[35] *See The California Energy Crisis and Use of the Defense Production Act: Hearing before the S. Comm. on Banking, Housing, and Urban Affairs,* 107th Cong. 27 (2001) (Response to Written Questions of Senator Gramm from Eric J. Fygi: "Q.2a. Was the Natural Gas Policy Act or the Defense Production Act used to set prices under the Order? A.2a. To the extent that it might have proven necessary to 'set prices' under the emergency order, the authority to do so would have been the Natural Gas Policy Act.").
[36] *See* 50 U.S.C. §§ 4531- 32.
[37] *See id.* §§ 4531(a)(3)(A) and 4532(c)(1)(A) (incorporating provisions of the Federal Credit Reform Act).

the loan."[38] The central argument of FirstEnergy's application under Section 202(c), and of the Department's NOPR to FERC, is that coal-fired and nuclear generators are retiring because they lose money under current market conditions – a fact underscored by FirstEnergy's bankruptcy filing. Given this record, there could be no basis to conclude that loans to these generators come with a "reasonable assurance of repayment."

Title III also allows for purchase commitments and subsidy payments to address national defense needs.[39] But electricity produced from nuclear and coal-fired power plants would not qualify for this type of support. For one, subsidy payments are available only for "raw or nonprocessed material" (which electricity is not) or to address temporary increases in transportation costs affecting critical materials (which is not the reason why aging power plants in PJM are uneconomic).[40] But, even if these eligibility criteria were overlooked, any assistance under these provisions would be limited to the lesser of the amount of uncommitted appropriated funds available,[41] or $50 million, absent an Act of Congress specifically authorizing a greater amount.[42] Needless to say, $50 million would be insufficient to pay for the subsidy requested by FirstEnergy. In fact, FirstEnergy Solutions' recent bankruptcy filing reveals that $50 million would be insufficient to cover the losses of even *one* of its coal-fired power plants for *six months*.[43] Providing this "drop in the bucket" of FirstEnergy's losses would also drain almost completely the funds Congress has made available for *national defense*, not economic favoritism.

V. Section 215A of the Federal Power Act Authorizes Only Temporary Measures in Response to Grid Security Emergencies

In December 2015, Congress enacted the FAST Act, which added a new section, Section 215A, to the Federal Power Act. Section 215A authorizes the Department of Energy to issue "orders for emergency measures" in response to a "grid security emergency." A "grid security emergency" is

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[38] *Id.* §§ 4531(a)(2)(D) and 4532(b)(2)(D).
[39] *Id.* § 4533.
[40] *Id.* § 4533(c)(1)(a).
[41] In the most recent appropriations act, Congress appropriated $67 million for all Defense Production Act financial assistance activities. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 at 111.
[42] 50 U.S.C. § 4533(a)(6)(C). The $50 million limitation was added in the 2014 reauthorization of the Defense Production Act. *See also* 160 Cong. Rec. H7002-04 (daily ed. Jul. 29, 2014). (Statement of Rep. Campbell: "Title III authorizes the President to use loans, purchase commitments, and grants to encourage contractors to establish or expand industrial capacity and produce items that are essential to the national defense that must be domestically produced but are otherwise not economically attractive enough to have a domestic producer. These programs are usually small, typically less than $15 million, and in the history of the DPA, going back to the Korean war, only three have exceeded $50 million, each of which was specifically authorized by Congress.").
[43] Mot. of the Debtors for Entry of an Order Authorizing the Debtors to Reject Certain Lease Agreements at 10, *In re FirstEnergy Solutions Corp., et al.*, No. 18-50757 (Bankr. N. D. Ohio Apr. 1, 2018) (explaining that, even before the recent fire, the Mansfield Plant was expected to have a cash flow shortfall of $104 million in 2018).

defined as the occurrence or imminent danger of cyberattacks, electromagnetic pulse attacks, geomagnetic storms, and direct physical attacks that would have significant adverse effects on the reliability of critical electric infrastructure.

The retirement of coal and nuclear plants would not, of course, fit within any of these categories. Nevertheless, some have suggested the Administration use Section 215A on the idea that the potential for a successful cyberattack on natural gas operations makes the electric grid vulnerable due to its reliance on natural gas. As we explain below, Section 215A is not available to address cyber-intrusions into the natural gas supply chain and, in any case, would not support long-term cost of service rate recovery for coal and nuclear plants. But, even if the statute were available for this purpose, the potential for a successful cyber-attack on the natural gas supply chain could not credibly form the basis of any emergency finding any more than speculation of potential cyber-attacks on any other supply resource or energy-related operations. The natural gas industry takes cybersecurity seriously, and continues to be proactive in taking the necessary precautions to protect its operations. Moreover, there is no evidence to conclude that an attack would cause widespread loss of operational capability.

The physical operations of natural gas production, transmission, and distribution make the system inherently reliable and resilient. Disruptions to natural gas service are rare. When they do happen, a disruption of the system does not necessarily result in an interruption of scheduled deliveries of natural gas supply because the natural gas system has many ways of offsetting the impact of disruptions. As noted in a report from MIT:

> The natural gas network has few single points of failure that can lead to a system-wide propagating failure. There are a large number of wells, storage is relatively widespread, the transmission system can continue to operate at high pressure even with the failure of half of the compressors, and the distribution network can run unattended and without power. This is in contrast to the electricity grid, which has, by comparison, few generating points, requires oversight to balance load and demand on a tight timescale, and has a transmission and distribution network that is vulnerable to single point, cascading failures.[44]

Moreover, Section 215A does not empower the Department to take action in response to cyberattacks directed outside the electric system. Section 215A defines "grid security emergency" to include cyberattacks directed at "electronic devices or communications networks" that are "essential to the reliability of critical electric infrastructure." Critical electric infrastructure is defined as a subset of the "bulk-power system," which is itself defined in Section 215 to include electric transmission and generation, but not natural gas supply chain infrastructure.

Finally, the relief FirstEnergy sought in its Section 202(c) application, and that the Department proposed in its NOPR to FERC, far exceeds what is available under Section 215A. Once the requisite finding of a "grid security emergency" is made by the President, Section 215A authorizes

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[44] Massachusetts Institute of Technology, Lincoln Laboratory, *Interdependence of the Electricity Generation System and the Natural Gas System and Implications for Energy Security* (May 2013), https://www.ll.mit.edu/mission/engineering/Publications/TR-1173.pdf.

the Department to "issue such orders for emergency measures as are necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during such emergency." Orders providing for "emergency measures" may last only fifteen days before an additional emergency finding is required. The fifteen-day limitation shows clearly that when Congress used the words "emergency measures" it meant them in the ordinary sense that emergency measures are temporary and short-lived. FirstEnergy's request that certain favored power plants receive rate recovery for four years, or the Department's NOPR, which was of indefinite duration, would far exceed an authority limited to providing temporary, emergency relief.

V. Conclusion

For the foregoing reasons, the Department must reject FirstEnergy's petition under Section 202(c) of the Federal Power Act, as well as any other related action under the Defense Production Act, Section 215A of the Federal Power Act or any other authority that provides unwarranted "emergency" relief.

Sincerely,

Advanced Energy Economy

The American Petroleum Institute

The American Wind Energy Association

The Electric Power Supply Association

The Interstate Natural Gas Association of America

The Natural Gas Supply Association