CLIENT ALERTS & INSIGHTS

D.C. Circuit Rejects DOE's Use of Emergency Authority to Prevent Coal Plant Retirement

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Key Takeaways

- The D.C. Circuit vacated the Department of Energy's order compelling continued operation of Michigan's J.H. Campbell coal plant under DOE's emergency authority, finding that Section 202(c) is a narrow, last-resort power reserved for immediate grid-reliability emergencies, not longer-term resource planning.
- The decision could reach well beyond the Campbell plant. DOE has issued more than 40 Section 202(c) orders and extensions since May 2025 to delay plant retirements, and the court's ruling reinforces states' primary authority over generation decisions while potentially exposing similar federal orders to legal challenges.
- Utilities, generators and other energy-sector participants should watch how DOE responds and how courts apply the decision to other Section 202(c) orders. Under the post-*Chevron* framework established by *Loper Bright*, courts will independently assess whether circumstances constitute a genuine emergency, while questions surrounding cost recovery for facilities kept online under these orders remain unresolved.

Background: DOE's Use of Section 202(c) Authority

Section 202 of the Federal Power Act establishes a three-tiered framework for federal involvement in the nation's electricity supply, with each tier reflecting a progressively greater degree of federal intervention into an area traditionally regulated by the states:

- Section 202(a) facilitates voluntary coordination by directing the Federal Energy Regulatory Commission ("FERC") to organize regional districts for the interconnection and coordination of generation, transmission and sale of electric energy; this provision gave rise to the Regional Transmission Organizations ("RTOs") that today help states plan for resource adequacy.

- Section 202(b) authorizes a more coercive form of federal action, permitting FERC to order a generator to connect to and sell or exchange energy with other facilities, but only upon the application of a state commission or an entity engaged in the transmission or sale of electric energy.
- Section 202(c) occupies the final tier. It grants the Secretary of Energy authority to compel the generation or interconnection of electricity during emergencies. 16 U.S.C. § 824a(c)(1). Congress enacted this provision in 1935 in response to wartime power shortages and originally contemplated that its use would be focused on "wartime shocks" and "similar crises" like "[d]rought and other natural emergencies." S. Rep. No. 74-621, at 49 (1935).

For nearly a century, the federal government has used Section 202(c) sparingly, issuing stopgap generation orders in response to transitory emergencies caused by war, extreme weather events, market manipulation or short-term facility outages. The Department of Energy's ("DOE") regulations define a Section 202(c) "emergency" as "an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities." 10 C.F.R. § 205.371. When DOE adopted this rule, it expressly stated that Section 202(c) did not empower it to issue orders to "replace prudent utility planning and system expansion." (citing Department of 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)).

Beginning in 2025, however, DOE expanded its use of 202(c) authority. The Department issued emergency orders to prevent the retirement of coal-fired power plants across the country (Michigan, Pennsylvania, Maryland, Washington, Indiana and Colorado); these orders typically issued without a request from the relevant grid operator. Cong. Rsch. Serv., Federal Power Act: The Department of Energy's Emergency Authority (2026). Since May 2025, DOE has issued more than 40 such orders and extensions. *See* Dep't of Energy, 2025 DOE 202(c) Orders; Dep't of Energy, 2026 DOE 202(c) Orders. DOE stated that its rationale for these orders rested on generalized concerns about "tight reserve margins" and the "retirement of thermal generation capacity," asserting that "most regions" would "face unacceptable reliability risks within five years."

D.C. Circuit's Decision to Vacate DOE's 202(c) Order

Facts of the Case

The court found that Consumers Energy Company, a Michigan utility, developed an integrated resource plan to retire its coal-fired J.H. Campbell Generating Plant and replace it with new and expanded generation sources. The plan received comprehensive review and approval from the Michigan Public Service Commission through a year-long contested process with dozens of intervenors and was separately validated by the Midcontinent Independent System Operator ("MISO"). Both entities confirmed that Consumers Energy had secured sufficient replacement capacity and that the Campbell Plant's retirement would not impair grid reliability.

Days before Campbell's scheduled May 2025 retirement, DOE issued a Section 202(c) order declaring an "emergency" and compelling continued operation for 90 days. DOE relied upon two documents: it cited a NERC reliability assessment (which had concluded that MISO had "adequate

anticipated resources" for peak conditions) and MISO planning auction results (which demonstrated "sufficient capacity at the regional, subregional and zonal levels"). DOE extended the order four times, compelling Campbell's operation for a total of 450 days-all while finding the "emergency conditions" would "continue in the near term and are also likely to continue in subsequent years." Michigan, Illinois, Minnesota and a coalition of environmental organizations petitioned for review.

Holdings

The D.C. Circuit granted the petitions and vacated the order, holding that DOE exceeded its statutory authority. The court's analysis proceeded in two steps:

1. The court held that a Section 202(c) emergency requires "a grid-reliability risk that calls for an immediate response by DOE in particular."

- The court emphasized that Section 202(c) is a "narrow, last-resort backstop" that is "triggered only when there is a need for immediate, essentially last-resort action and the circumstances require action by DOE in particular, as opposed to action by the state or states responsible for resource adequacy."
- The court grounded this reading in the Federal Power Act's structure, which carefully preserves state primacy over electricity generation. Sections 202(a) and 202(b) establish a tiered system-first voluntary coordination, then state-requested federal intervention-that makes Section 202(c) the final resort. As the court explained, "[p]ermitting DOE to compel generation in a situation that can be resolved through the ordinary resource adequacy planning mechanisms or a request under section 202(b) would render meaningless the constraints on federal power that Congress imposed throughout the Act."

2. The court found DOE's emergency determination insufficient as a matter of law when applying its "emergency" standard to the facts at issue.

- The DOE made "indeterminate assertions of summer electricity shortfalls" without specifics about "potential severity, timing, location, or likelihood," which the court found did not constitute an emergency.
- The DOE's alternative rationale for its order, that "most regions" would face "unacceptable reliability risks within five years," fell even farther outside the meaning of emergency because "[l]ong-term resource adequacy risks generally do not necessitate immediate action by DOE" and "are routinely resolved through coordinated, forward-looking decision making within the ordinary resource adequacy system."

Practical Implications

The court vacated the order outright, finding remand futile because the DOE exceeded its jurisdiction. The decision leaves open the possibility that DOE may issue Section 202(c) orders in response to what the court would consider to be genuine emergencies-sudden, acute reliability threats that states and RTOs cannot or will not address-but forecloses the Department's use of Section 202(c) as a tool for long-term energy policy or to override states' resource adequacy planning. At the time of decision, petitions challenging DOE's four extension orders for the Campbell plant remained pending. DOE has until December 10, 2026 (90 days after September 11, 2026) to petition for a writ of certiorari from the Supreme Court of the United States.

As far as recoverability of expenses related to keeping facilities open, the practical implications are not yet clear. The recoverability of expenses incurred by Consumers Energy Company while keeping the Campbell Plant open is currently the subject of litigation, in FERC Docket ER26-1138. Meanwhile, on October 1, 2026, FERC rejected a plan for recoverability related to the Centralia Generation Facility, which had been subject to a similar 202(c) emergency order as the Campbell Plant.

Would DOE's Order Have Survived Under *Chevron*?

The *Michigan v. DOE* decision was decided under the *Loper Bright* framework. In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court overruled *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and held that "[t]he Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id.* at 400-01. Under *Loper Bright*, courts no longer defer to an agency's interpretation of an ambiguous statute simply because the interpretation is "reasonable." Under the old *Chevron* framework, would DOE's broad reading of Section 202(c) emergency authority have survived judicial review?

Under *Chevron*, courts applied a two-step framework to evaluate agency interpretations of the statutes they administer. At step one, the court asked whether Congress had directly spoken to the precise question at issue; if so, the inquiry ended and the court enforced the statute's clear meaning. If the statute was silent or ambiguous on the point, the court proceeded to step two and asked whether the agency's interpretation was based on a permissible construction of the statute. At step two, the court deferred to the agency's reading so long as it was reasonable, even if the court might have reached a different interpretation on its own. This framework gave agencies substantial interpretive latitude, particularly where statutory language was broad or undefined.

Step One: Ambiguity

The Federal Power Act does not define "emergency." Under *Chevron*, this gap may not have created the statutory ambiguity necessary to reach step two. The D.C. Circuit's analysis suggests the term is not genuinely ambiguous in context. The court found that the "ordinary definition" of emergency, "an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy," combined with the Act's structure and nearly a century of consistent executive practice, yields a clear meaning. A pre-*Loper Bright* court applying the traditional tools of statutory construction of *Chevron*'s first step may well have concluded that Congress spoke clearly enough to resolve the issue without deference, particularly given the Act's careful preservation of state authority and the "clear statement" principle that applies when an agency claims power to intrude on traditional state regulatory domains. *See Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (rejecting agency claim to "discover in a long-extant statute an unheralded power" of vast significance; finding statute not ambiguous under *Chevron*).

Step Two: Reasonableness

Even if a court reached the second *Chevron* step, DOE's interpretation would have faced serious headwinds. DOE's reading of "emergency" arguably converted a narrow, last-resort backstop into a roving authority to override state resource adequacy planning whenever the Secretary of Energy perceives a reliability risk. While DOE would likely argue the currently projected generation shortages justify its determination, the D.C. Circuit found this construction "would empower [DOE] to pick its preferred power sources in Michigan-or, presumably, any other state-and order them to operate without regard to the multiple procedural and substantive constraints built into state reliability planning processes." This kind of sweeping claim of authority, unsupported by the statute's text, structure or historical practice, would be difficult to defend even under *Chevron*'s permissive standard. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (finding agency's "expansive construction" unreasonable where it would effect a fundamental transformation of the statutory scheme).

Practical Implications

Under *Loper Bright*, courts interpret statutes *de novo* and apply "their own judgment" to determine the best reading of the law. This framework allowed the D.C. Circuit to definitively construe Section 202(c) without a thumb on the scale in DOE's favor. Going forward, DOE's exercise of Section 202(c) authority will face searching judicial review. Courts will independently assess whether a given set of circumstances constitutes an "emergency" within the statute's meaning, and DOE cannot rely on ambiguity in the statutory text as a shield against reversal. This heightened scrutiny is particularly significant given DOE's recent pattern of issuing dozens of emergency orders to delay power plant retirements. Each order is now subject to independent judicial review of whether the facts establish a genuine emergency necessitating immediate federal action outside the ordinary resource adequacy system.

Benesch is closely monitoring DOE's response to the decision and challenges to other Section 202(c) orders. Our Energy and Litigation teams regularly advise public utilities and energy

companies navigating the regulatory compliance and litigation arising from federal and state energy authority. Please contact us to discuss how this decision may affect your operations.