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Trump Administration Plans Novel Tactic to Save Coal, Nuclear Plants

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Trump administration officials, according to a draft memorandum, are readying a new strategy to boost the economic viability of US coal and nuclear power plants. The draft memorandum outlines a legal course of action in which regional grid operators would be required to purchase power from existing coal and nuclear generators. Further, the draft memorandum outlines the establishment of a Strategic Electric Generation Reserve ("SEGR") in order to strengthen national security and defense. In the days following the dissemination of the draft memorandum, many market participants and elected officials have voiced opposition, claiming such steps would mark a clear attempt to distort US power markets. This proposed federal action follows a recent attempt by the Department of Energy ("DOE") to instruct the Federal Energy Regulatory Commission ("FERC") to create new reliability rules that would ostensibly favor coal and nuclear generating units.

In September 2017, DOE proposed a rule—to be developed by FERC—to improve grid resilience by ascribing value to reliability characteristics of certain facilities. Under this framework, all qualifying generating units would have been either coal or nuclear power plants, many of which were subject to financial stress. DOE cited the trend of coal and nuclear retirements as a threat to fuel-secure generation. Since 2002, nearly 60 gigawatts of coal generation has been retired, along with the decommissioning of 15 nuclear power plants since 1990 (with 12 more expected, comprising 11 gigawatts of capacity). Following a truncated period in which FERC received many opposing comments, its five Commissioners voted unanimously to terminate the proposed rulemaking proceeding. As it currently stands, FERC is soliciting feedback from each of the US regional grid operators to better evaluate any resilience issues and then determine appropriate next steps, if necessary.

The underlying rationale of the initial DOE proposal was based on disruptive events, such as the Polar Vortex of 2014 or similar natural disasters. In the draft memorandum, the Trump administration is prioritizing national security: fuel-secure resources are vital to defense and the recovery from major disruptions. This angle highlights potential cybersecurity attacks and other interferences that are not exclusively weather-related. Distinguishing between "reliability" (the premise of the attempted DOE mandate sent to FERC) and "resilience" (the premise of the draft memorandum, invoking concerns related to terrorism and foreign intrusion) lays the groundwork for the options available to the administration to act on behalf of the national interest.

Unlike the previous DOE effort, creating the SEGR would implicate energy facilities across the country. Only a few of the regional grid operators would have been subject to the proposed rulemaking: PJM Interconnection and to a lesser extent ISO New England, New York ISO, and the Midcontinent Independent System Operator. The draft memorandum operates on a basis of the interconnected nature of the US electricity system, thereby requiring units spanning geographical areas to be designated as Subject Generation Facilities (SGFs). Grid operators will need to submit a list of SGFs—coal and nuclear power plants as well as oil-fired and dual-fuel units with on-site storage—that would be afforded 24 months of guaranteed selling arrangements. In effect, SGFs would be granted an extension (with a revenue stream) if currently on the path to retirement or decommissioning. After the 24-month period ends—referred to as a "stop-gap" measure in the draft memorandum—DOE asserts that it will have better identified the security-based vulnerabilities in the US grid.

The legal instrument at the heart of the draft memorandum is DOE authority granted by Section 202(c) of the Federal Power Act ("FPA"). Under this section, the Secretary of Energy may issue an order requiring temporary connections of facilities and the accompanying generation, delivery, interchange, or transmission of resources. The FPA does not delineate a complete list of "emergencies," thereby allowing the DOE to interpret external market conditions—through its own independent analysis. This qualitative approach lends itself to the national security perspective furnished in the draft memorandum. Further, the "emergency" need not be in existence; Section 202(c) enables DOE to identify potential scenarios and, if warranted, implement preventative measures.

Over the decades, DOE (and the Federal Power Commission, the predecessor to FERC) has issued orders pursuant to Section 202(c). However, the vast majority of actions have been short-term, limited in scope, and the direct response to natural disasters. The language of the FPA confers a broad range of factors to be considered: in the draft memorandum, DOE discusses domestic and international concerns.

FERC retains the jurisdiction over pricing under Section 202(c) of the FPA. Given that the designation of SGFs—along with the mandate to continue contractual arrangements by those facilities—is tantamount to subsidies, it remains to be seen how FERC will proceed. In terms of both reliability and resilience, FERC has not raised any concerns with the provision of just and reasonable rates. Following the release of the draft memorandum, FERC has yet to publicly comment on its potential role or the validity of this strategy.

As a formal directive has not been issued, industry participants and relevant stakeholders are awaiting final DOE action. After the draft memorandum was released, the Trump administration confirmed that DOE will indeed act to preserve fuel-secure generation. Many groups in the energy sector—particularly in natural gas and renewables—have offered condemnation for the proposed market intervention. As with FERC mentioned prior, the open question is how agencies, officials, and companies will react if the plan goes forward.

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